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I. CRÔNICAS DO DIREITO INTERNACIONAL

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Sarah Dayanna Lacerda Martins Lima

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A resolução 2272 (2016) do Conselho de Segurança das Nações Unidas – O posicionamento da ONU face às alegações de abuso e exploração sexual por suas tropas de paz*

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1. Introdução

As forças de manutenção da paz da ONU (*Peacekeeping Operations*), que tiveram origem em 1948 e ganharam o Prêmio Nobel da Paz em 1988, têm como finalidade proporcionar segurança e apoio político aos países que passam pela difícil transição entre conflito e paz. Os integrantes das forças de paz (conhecidos como *boinas azuis* ou *capacetes azuis*) são militares, policiais e civis, os quais trabalham com o objetivo de alcançar a consolidação da paz.

Atualmente, existem 15 missões de paz em andamento, dispersas em quatro continentes. As operações de manutenção da paz são utilizadas como meios de facilitar o processo político, proteger civis, auxiliar no desarmamento, desmobilização e reintegração de ex-combatentes, apoiar a organização de eleições, proteger e promover direitos humanos e ajudar a restaurar o estado de direito.

A manutenção da paz das Nações Unidas é guiada por três princípios básicos (*Holy Trinity*): consentimento das partes; imparcialidade; e proibição do uso da força, exceto em defesa própria ou defesa do mandato.[1]

Os pacificadores devem respeitar as leis, costumes e práticas locais; tratar os habitantes do país com respeito, cortesia e consideração; e agir com imparcialidade e integridade. No entanto, há diversas alegações de má conduta envolvendo o pessoal da manutenção da paz.

Dentre as várias acusações já feitas contra membros das forças de paz da ONU ao longo dos anos, as quais incluem homicídios e tortura, a mais recorrente, e que se apresenta como objeto desta pesquisa, é a de exploração e abuso sexual contra mulheres e meninas. Vale ressaltar, no entanto, que, de acordo com as regras da ONU, é proibido que os pacificadores mantenham relação sexual com prostitutas e com qualquer pessoa com menos de 18 anos de idade, assim como são desencorajadas quaisquer relações com beneficiários de assistência. O Código de Conduta Pessoal para Capacetes Azuis (conhecido como *Ten Rule*) estabelece que o pacificador não deve se entregar a "atos imorais de sexualidade, abuso ou exploração física ou psicológica da

1 FAGANELLO. Priscila Liane Fett. **Operações de manutenção da paz da ONU**: de que forma os direitos humanos revolucionaram a principal ferramenta internacional da paz. Brasília: Funag, 2013, p. 70-77.

população local ou de funcionários das Nações Unidas, especialmente mulheres e crianças."[2]

É de fato irônico, para não dizer lastimável, que as Nações Unidas, que tanto têm colaborado na elaboração de normas de proteção aos direitos humanos, igualdade de gênero e direitos sexuais e reprodutivos, seja vista com demérito graças aos abusos cometidos pelos membros de suas forças de paz. No entanto, após mostrar-se sem ação diante de tais crimes por décadas, a ONU parece estar tomando um novo posicionamento, a fim de limpar a imagem da organização, punir os responsáveis e proteger as possíveis vítimas de tais crimes.

2. A persistência dos crimes de abuso e exploração sexual por integrantes das forças de paz

É importante destacar que seria enganoso imaginar que a problemática a ser apresentada é recente. Na verdade, a prática desses crimes por integrantes de missões de paz da ONU já vem sendo relatada há décadas, e foi o Secretário-Geral anterior, Kofi Annan, quem se comprometeu em pôr um fim neste flagelo.[3] Ainda assim, os escândalos persistiram.

Siobhán Wills afirma que graves crimes cometidos por integrantes das tropas de paz da ONU contra população local, incluindo assassinato e tortura, vieram à tona durante as missões na Somália, no início de 1990. Desde então, tornou-se evidente que a conduta abusiva de alguns integrantes das forças de paz seria um problema a ser enfrentado pelas Nações Unidas, e que tem manchado a reputação de uma série de missões.[4]

Segundo Elizabeth Defeis, os primeiros casos de abuso e exploração sexual por integrantes de tropas de paz foram relatados no início da década de 1990, na Bósnia Herzegovina e em Kosovo, e, posteriormente, em Moçambique, Camboja, Timor Leste e Libéria. Tais abusos incluíam exploração sexual de crianças, pornografia e estupro.[5]

Raoul Jennar relata que, em 1992, um médico de uma ONG do Camboja afirmou que maioria das pessoas feridas no Hospital Prear Vihear eram jovens crianças, vítimas de abuso sexual pelos soldados da ONU.[6] Sobre a missão de paz no Camboja, Siobhán Wills afirma que várias unidades militares falharam em manter um mínimo de padrões de disciplina, de tal forma que, aos olhos de cidadãos cambojanos, os soldados da ONU pareciam estar passando mais tempo em bares e bordéis, ou dirigindo imprudentemente os veículos das Nações Unidas. Este autor afirma, ainda, que a infecção de HIV, em grande parte desconhecida até aquele momento, aumentou dramaticamente durante o tempo em que a missão foi implantada.[7]

No início dos anos 2000, a mídia relatou diversos casos chocantes de abuso sexual por membros das tropas de paz da ONU em Serra Leoa, Guiné e Libéria. Por exemplo, em 2002, no prazo de apenas um mês, a BBC News publicou cinco matérias sobre exploração sexual de crianças em condição de refúgio por membros das forças de paz na África ocidental.[8] Toda essa publicidade negativa impulsionou a ONU e seus Estados-Membros a buscar a responsabilização dos militares e civis envolvidos em tais violações de direitos humanos.[9]

2 ORGANIZAÇÃO DAS NAÇÕES UNIDAS. **Ten rule:** Code of Personal Conduct for blue Helmets. 1948. Disponível em: << http://www.un.org/en/peacekeeping/documents/ten_in.pdf>> Acesso em: 27 jul 2017.

3 De acordo com comunicado de imprensa da ONU de 19 de novembro de 2004, Kofi Annan, o então Secretário-Geral, se dizia "absolutamente ultrajado" e afirmou: "Há muito tempo deixo claro que a minha atitude em relação à exploração e abuso sexual é de tolerância zero, sem exceção, e estou determinado a implementar esta política de forma transparente". (Tradução do autor)

4 WILLS, Siobhán. Continuing impunity of peacekeepers: the need for a Convention. **Journal of International Humanitarian Legal Studies**. nº 4, 2003, p. 47-80.

5 DEFEIS, Elizabeth F. UN Peacekeepers and Sexual Abuse and Exploitation: Na end to impunity**. Washington University Global Studies Law Review.** V. 7, nº 2, 2008, p. 185-215.

6 JENNAR, Raoul M. UNTAC: International triumph in Cambodia? **Security Dialogue**. V. 25, nº 2, p. 145-156, 1994.

7 WILLS, Siobhán. **Protecting Civilians:** The obligations of peacekeepers. Oxford University Press, 2009, p. 27.

8 *Vide:* BBC NEWS**. Child Refugee Sex Scandal**. 26 fev. 2002. Disponível em: <http://news.bbc.co.uk/2/hi/africa/1842512.stm> Acesso em 27 mar. 2017; BBC NEWS. **Aid-for-sex Children speak out**. 27 fev. 2002. Disponível em: <http://news.bbc.co.uk/2/hi/africa/1843930.stm> Acesso em: 27 mar. 2016; PAYE-LAYLEH, Jonathan. **African Refugees Condemn Sex Abuses**. BBC News. 28 fev. 2002. Disponível em: <http://news.bbc.co.uk/2/hi/africa/1847483.stm> Acesso em: 27 mar. 2017; BBC NEWS. **Sex-for-aid under spotlight**. 8 mar. 2002. Disponível em: <http://news.bbc.co.uk/2/hi/africa/1861763.stm>; BBC NEWS. **Britons in sex-for-aid scandal**. 18 mar. 2002. Disponível em: <http://news.bbc.co.uk/2/hi/africa/1878063.stm> Acesso em: 27 mar. 2017;

9 DEFEIS, Elizabeth F. UN Peacekeepers and Sexual Abuse and Exploitation: Na end to impunity**. Washington University Global Studies Law Review.** V. 7, nº 2, 2008, p. 185-215.

No entanto, apenas em meados do ano de 2004, com base em numerosas alegações de abuso sexual na República Democrática do Congo, é que número considerável de funcionários de alto-nível responderam às acusações. Naquele ano, o Príncipe Zeid Ra'ad Al Hussein[10] foi escolhido pelo Secretário-Geral, Kofi Annan, para realizar investigação sobre as alegações e elaborar um relatório. Em março de 2005, o Príncipe Zeid apresentou o "Relatório Zeid" (como ficou conhecido seu relatório intitulado "A comprehensive strategy to eliminate future sexual exploitation and abuse in UN peacekeeping operations"), onde detalhou casos de abuso e exploração sexual de mulheres e meninas, muitas das quais trocavam serviços sexuais por dinheiro, comida ou empregos. Também foram apresentados casos de estupro onde as vítimas ganhavam presentes do ofensor, a fim de caracterizar aquele ato sexual como prostituição. No Relatório Zeid (2005), também constam os casos de vítimas que foram abandonadas com filhos sob seus cuidados (chamados de "peacekeeper babies"), sem contar com qualquer amparo familiar.

Mesmo depois do Relatório Zeid e do repatriamento de vários suspeitos por abuso e exploração sexual, as acusações contra as forças de paz da ONU não pararam de surgir.[11] Em 2007, mais alegações de abusos sexuais foram publicadas pela mídia, desta vez referentes à missão de paz no Sudão do Sul, e dentre as vítimas haveriam crianças de 12 anos de idade. Save the Children foi uma das organizações não governamentais que apresentou várias alegações de que as tropas de paz da ONU estariam envolvidas em abusos sexuais, prostituição e tráfico humano em várias áreas de conflito, como Haiti, Sudão e Costa do Marfim.[12]

Ao expressar profunda preocupação com as graves e contínuas acusações contra as operações de manutenção da paz da ONU, o Conselho de Segurança lançou a Resolução 2272(2016).

3. A Resolução 2272 (2016) do Conselho de Segurança e a política de "Tolerância Zero" das Nações Unidas

O Conselho de Segurança da ONU aprovou no dia 11 de março de 2016 a Resolução 2272 (2016) para aumentar a proteção contra o abuso e exploração sexual por parte das forças de manutenção da paz das Nações Unidas. A resolução foi proposta pelos Estados Unidos da América em apoio às recomendações do Secretário-Geral das Nações Unidas, o sul coreano Ban Ki-Moon. A problemática dos crimes de abuso e exploração sexual já tinha sido alvo de debate na reunião do Conselho de Segurança do dia anterior (10/03/2016), na qual o Secretário-Geral apresentou medidas especiais a serem tomadas para evitá-los e para pôr fim em sua impunidade, em resposta ao relatório de abuso sexual por forças de paz na República Centro Africana (CAR) recebido na semana anterior.

O abuso sexual tem configurado um sério problema na República Cento Africana, assim como em outras partes do mundo. De acordo com Steven Wildberger, o Secretário-Geral da ONU anunciou, em 22 de junho de 2015, a nomeação de uma comissão independente para avaliar o tratamento dado pela organização às alegações de que soldados de tropas francesas e africanas abusaram sexualmente de crianças na CAR de dezembro de 2013 a junho de 2014.[13] Segundo Joane Mariner, Conselheira Sênior de Resposta a Crises da Anistia Internacional, foram encontradas, no início do mês de março de 2016, evidências de que um indivíduo das forças de paz da ONU teria estuprado uma menina de 12 anos na CAR, enquanto era feita uma revista em sua casa. O depoimento da jovem teria sido embasado por laudo médico.[14]

O relatório do Secretário-Geral da ONU intitulado "Special measures for protection from sexual exploitation and sexual abuse", de 16 de fevereiro de 2016,

10 O Príncipe Zeid é o Representante Permanente da Jordânia na ONU e, desde setembro de 2014, é o Alto Comissário das Nações Unidas para os Direitos Humanos, sendo o primeiro árabe e muçulmano a ocupar este cargo.

11 A mídia continuou a mostrar-se ativa na publicação de críticas a respeito do escândalo das Nações Unidas, como no caso do editorial do New York Times de 24 de outubro de 2005, intitulado "The Worse UN Scandal". Disponível para visualização em:<< http://www.nytimes.com/2005/10/24/opinion/the-worse-un-scandal.html?_r=0>> Acesso em 27 mar. 2017.

12 CSÁKY, Corina. **No one to turn to:** The under reporting of child sexual exploitation and abuse by aid workers and peacekeepers. London: Save the Children, 2008.

13 WILDBERGER, Steven. UN panel to investigate sexual abuse claims against French soldiers. **Jurist.** 23 jun. 2015. Disponível em: << http://www.jurist.org/paperchase/2015/06/un-panel-to-investigate-sexual-abuse-claims-against-french-soldiers.php>> Acesso em: 27 jul. 2017.

14 MARINER, Joanne. Forças de Paz da ONU: "Tolerância Zero" significa não acobertar estupradores. **Anistia Internacional Brasil**, 2016. Disponível em: << https://anistia.org.br/forcas-de-paz-da-onu-tolerancia-zero-significa-nao-acobertar-estupradores/>> Acesso em: 27 mar. 2017.

afirma que houve um aumento no número de alegações desses crimes por parte dos integrantes de tropas de paz nos últimos anos:

> **II. Relatos de exploração e abuso sexual em 2015**
>
> 4. O número de novas alegações de exploração ou abuso sexual recebidas de departamentos e escritórios da Secretariado e agências, fundos e programas do sistema das Nações Unidas totalizaram 99 em 2015, em comparação com 80 alegações em 2014. Este aumento lamentável no número de novas alegações significa que mais precisa ser feito para reduzir o número de alegações e, o mais importante, o número de vítimas afetadas pela exploração e abuso sexual perpetrados pelo pessoal das Nações Unidas.
>
> [...]
>
> **Alegações relatadas contra o pessoal destacado em operações de paz e missões políticas especiais apoiadas pelo Departamento de Suporte de Campo**
>
> 6. Em 2015, 69 denúncias de exploração e abuso sexual foram relatadas em 9 missões de paz em andamento e 1 concluída. Destas alegações, 15 envolviam agentes ou voluntários das Nações Unidas; 38 envolviam membros de contingentes militares ou observadores militares das Nações Unidas; e 16 envolviam oficiais de polícia, membros de unidades policiais e pessoal fornecido pelo governo. De 17 investigações concluídas em 31 de janeiro de 2016, 7 alegações foram fundamentadas e 10 eram infundadas. [...] (Tradução do autor)

Tal resolução visa colocar fim à impunidade dos criminosos, exigindo que o país onde ocorreu o abuso lide com o problema por meio de seu próprio sistema criminal. Ademais, o Conselho solicitou ao Secretário-Geral que garantisse a substituição das unidades militares, policiais e civis de qualquer país que tenha falhado na prisão dos criminosos responsáveis. O objetivo é modificar um sistema ineficiente, estabelecendo consequências reais aos países que não respondam adequadamente às alegações dos crimes em questão, perpetrados por seu pessoal. As tropas substitutas, por sua vez, deverão seguir os padrões de conduta e disciplina, assim como tratar de alegações ou atos confirmados de exploração e abuso sexual por seus membros.

De acordo com o comunicado de imprensa referente a 7643ª reunião do Conselho de Segurança das Nações Unidas, a Resolução 2272 (2016) foi aprovada por quase unanimidade dos membros do Conselho, com 14 votos a favor e nenhum contra, e apenas uma abstenção[15], do Egito. Antes da adoção da resolução, o Conselho rejeitou uma proposta de alteração para o texto elaborada pelo Egito, com 9 votos contra (Espanha, Estados Unidos, França, Japão, Malásia, Nova Zelândia, Reino Unido, Ucrânia e Uruguai) e 5 a favor (Angola, China, Egito, Rússia e Venezuela), com a abstenção do Senegal. A proposta de alteração do Egito teria condicionado o repatriamento de efetivos das missões de manutenção da paz a três fatores: a investigação das alegações; a punição dos responsáveis e o comunicado ao Secretário-Geral acerca das medidas tomadas contra os infratores.

Pelos termos da resolução, o Conselho de Segurança solicita que o Secretário Geral avalie se um Estado-Membro tomou as medidas cabíveis para investigar as alegações, se manteve detidos os responsáveis, e se informou-o sobre o progresso das investigações para determinar a sua participação em operações de paz.

O Conselho solicitou, ainda, que o Secretário-Geral reúna e preserve as provas antes das investigações, a fim de garantir que a operação de manutenção da paz em causa tome medidas imediatas para prevenção de futuros incidentes de abuso e exploração sexual, reforçando a acessibilidade, a coordenação e a independência dos processos para recepção e gestão de reclamações, e às vítimas assistidas.

Ademais, ficou estabelecido que todas as tropas devem passar por um treinamento sobre crimes de exploração e abuso sexual, acolhendo a decisão do Secretário-Geral de exigir certificados de participação dos contribuidores.

Conforme o artigo 25 da Carta das Nações Unidas, os Estados-Membros da ONU concordam em aceitar e executar as decisões do Conselho de Segurança. No entanto, de acordo com Jónatas Machado (2014, p. 280), de modo geral, as decisões do Conselho não têm caráter vinculativo, podendo, porém, indiciar a presença

15 No âmbito de votação do Conselho de Segurança, cada membro tem direito a um voto. Conforme o art. 27 da Carta da ONU, as decisões sobre questões processuais necessitam de nove votos. Em todos os outros assuntos, as decisões serão tomadas pelo voto afirmativo de nove membros, incluindo os dos cinco membros permanentes. Segue-se a regra da "unanimidade das grandes potências", comumente conhecida como "veto". Assim, um voto negativo de um dos membros permanentes configura veto à resolução. A abstenção e a não participação, no entanto, não são considerados vetos. Dessa forma, um membro pode se abster de participar da votação ou declarar que não participará, caso não apoie a decisão, mas não queira vetá-la.

de direito consuetudinário[16] – se, no direito interno de muitos países, os costumes perderam parte de sua relevância, no Direito Internacional os mesmos continuam pujantes.

Com base no que foi apresentado, é possível constatar que a Resolução 2272 (2016) tem por objetivo enviar uma forte mensagem de "tolerância zero" para os responsáveis por crimes de abuso e exploração sexual, asseverando que as Nações Unidas não devem permitir que ações de alguns denigram a imagem de toda a organização e de seus colaboradores, não devendo, por isso, acobertar-se os criminosos.

16 Conforme afirma Amie Cahillane, o direito internacional consuetudinário pode ser um ótimo ponto de partida para Direito Internacional na proibição da violência sexual pelos membros de forças de paz da ONU. Segundo a autora, esses costumes incluiriam, além das resoluções do Conselho de Segurança, as regras de conduta da ONU ("Ten Rule" e "We are the UN Peacekeepers"), os boletins do Secretário-Geral, o Acordo dobre o Status da Força (Status of Force Agreement – SOFA) e as diretrizes disciplinares para militares e contingentes nacionais. *Vide*: CAHILLANE, Amie. International Law, sexual violence and peacekeepers. **Irish Student Law Review.** V. 17. nº 1, p. 1-17, 2010.

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Nadia de Araujo
Marcelo De Nardi
Gustavo Ribeiro
Fabrício Polido
Inez Lopes

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Crônicas de Direito Internacional Privado

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I. Atos e fatos internacionais

Crônica 1. Novidades de 2017 sobre circulação facilitada de sentenças estrangeiras

Nadia de Araujo

Marcelo De Nardi

1. Introdução

Na edição de 2016, esta crônica destacou a importância do Projeto de Sentenças Estrangeiras da Conferência da Haia para o Direito Internacional Privado[1] (Conferência da Haia), cuja Comissão Especial designada para as negociações da futura convenção internacional a respeito teve a primeira reunião em junho de 2016[2]. Agora se atualiza a situação das negociações e seus avanços em relação à primeira reunião, tendo em conta os desdobramentos da segunda reunião, de fevereiro de 2017. Com esses elementos busca-se descrever os passos necessários para a preparação brasileira para a terceira reunião, a se realizar em novembro de 2017.

O tema tem relevância para o incremento do comércio internacional e sua normatização promete trazer maior segurança para as partes com interesses em mais de um país. Quer-se garantir, a partir da adoção de regras uniformes, que uma sentença proferida em um Estado seja facilmente executada em outro, observadas as condições sobre as quais há consenso entre os Estados. Desta forma, dar-se-á à via judicial garantias semelhantes às hoje existentes para os laudos arbitrais estrangeiros, que têm sua circulação e execução facilitada pela Convenção de Nova Iorque[3].

Entre muitos casos que serão beneficiados pelo futuro documento destacam-se as decisões judiciais sobre responsabilidade civil, que hoje não contam com um diploma internacional a facilitar sua circulação. A posição

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1 Sobre a Conferência da Haia de Direito Internacional Privado, consultar http://www.hcch.net.

2 Os trabalhos da Comissão Especial podem ser acompanhados em https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission1.

3 Convenção de Nova Iorque sobre o Reconhecimento e a Execução de Sentenças Arbitrais Estrangeiras, internalizada no Brasil pelo Decreto 4.311, de 23 de julho de 2002.

de um indivíduo ou empresa que participa de negócios transnacionais caracteriza-se hoje por um alto nível de incerteza quanto à produção de efeitos de uma sentença estrangeira, acrescendo riscos, e, portanto, custos, à transação. Outro tema que também está na ordem do dia e será destacado nesta crônica é o da Propriedade Intelectual.

A Conferência da Haia para o Direito Internacional Privado conduz as negociações com o objetivo de elaborar regras que mitiguem as restrições pelos Estados ao reconhecimento e execução (à homologação) de sentenças estrangeiras, diminuindo a incerteza e, consequentemente, o risco associado ao comércio internacional e outras situações conectadas a mais de um ordenamento jurídico, por meio de um sistema facilitado e seguro de circulação internacional de sentenças.

Do ponto de vista do direito brasileiro, a novel convenção será aplicável tanto no que diz respeito às sentenças brasileiras a serem executadas no exterior, quanto para as proferidas no exterior e que devam ser executadas no território nacional. A primeira situação é classificada como uma modalidade de *circulação ativa, enquanto a segunda é a circulação passiva. Isso significa dizer que a convenção cria uma via de mão dupla, com regras internacionalmente uniformes aplicáveis à ida das sentenças nacionais para o exterior, e também à vinda das sentenças estrangeiras para o Brasil.*

A futura convenção está lastreada principalmente em um catálogo uniforme de situações que estabelecem contato suficiente do Juiz da causa na origem da sentença estrangeira com o caso que examinará. Tais regras constituem as bases indiretas de jurisdição, ou seja, os elementos mínimos de contato do Juiz da causa na origem com os fatos relevantes, e que serão reconhecidos uniformemente pelos Estados-parte na futura convenção como informando o razoável exercício de sua jurisdição. As hipóteses contendo as bases indiretas de jurisdição estão noartigo5º do anteprojeto, e as situações relativas à jurisdição exclusiva, no artigo 6º[4].

As regras brasileiras em vigor para a homologação de sentenças estrangeiras são extremamente abertas no que diz respeito à verificação de como se estabeleceu a jurisdição do tribunal alienígena, sem empecilho ao que for regulado no país da origem da decisão. Em contraposição, as regras de outros países são, em geral, mais restritivas. Para reconhecer e executar uma decisão estrangeira, a maior parte dos estados verifica se o juízo de origem exerceu jurisdição levando em conta certos elementos de contato do caso com foro, o que importa em um exame, ainda que indireto, de como foi determinada a jurisdição no Estado de origem. Daí denominar-se essa operação de averiguar a determinação da jurisdição de origem de controle das *bases indiretas de jurisdição, uma vez que ao estado requerido cabe somente aceitar ou não o que já foi estabelecido pelo Estado de origem.*

Do ponto de vista do Brasil, a vantagem em adotar a futura convenção está em obter maior aceitação no exterior das decisões brasileiras, que hoje dependem das regras de cada país de destino para serem lá executadas. O espírito das negociações é de criar um catálogo aceitável dessas normas, para se chegar a um mínimo denominador comum e permitir que a circulação não seja interrompida pela miríade de regras distintas em cada país a esse respeito. A conscientização das condições acima descritas e suas implicações para o Brasil nortearam as conclusões e sugestões deste documento.

A primeira reunião da Comissão Especial, ocorrida de 1º a 9 de junho de 2016, chegou ao fim com um projeto de convenção bastante maduro. No interregno da primeira para a segunda reuniões foram discutidos vários pontos polêmicos, sendo de se destacar a temática da Propriedade Intelectual, que contou com um grupo de trabalho especial dedicado ao tópico. Na segunda reunião foram consolidados vários outros temas que estavam em discussão, conduzindo a um anteprojeto mais completo, com ênfase para a inclusão dos artigos referentes às cláusulas gerais e finais típicas das convenções internacionais. Poucas são as áreas ainda de indefinição, que se espera sejam resolvidas na terceira reunião.

Esta crônica relata as discussões travadas no âmbito da Comissão Especial, o resultado obtido, e suas consequências para os interesses brasileiros (i); a questão da propriedade intelectual (ii); e temas que merecem a atenção do Brasil (iii). Novamente, a ideia é promover a reflexão integrada da comunidade acadêmica, em preparação para a terceira reunião da Comissão Especial, marcada para novembro de 2017.

2. Resultados da segunda reunião da comissão especial – fevereiro 2017

Nas Crônicas de 2016, cuja referência consta da nota de rodapé nº1 deste trabalho, historiou-se o Projeto de Sentenças Estrangeiras da Conferência da Haia, e dis-

4 O texto do anteprojeto após a segunda reunião da Comissão Especial está disponível em: https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission1.

cutiram-se os resultados da primeira reunião. Os desdobramentos da segunda reunião, especialmente no que se refere à consolidação de muitas discussões, são o mote destas Crônicas.

O resultado da segunda reunião da Comissão Especial foi um anteprojeto que contempla todos os dispositivos próprios de um tratado, com uma parte consagrada às questões de fundo, longamente discutidas durante os vinte e cinco anos que já duram as negociações, e outra parte para as cláusulas gerais e finais, próprias de documentos dessa natureza.

De notar que os temas relativos ao *consumidor* e *trabalhador*, objeto das instruções para a Delegação Brasileira para a Segunda Reunião, e sobre os quais foram elaboradas duas notas técnicas pelos autores, inclusive um *Information Document* que o Brasil apresentou na Conferência da Haia para a Primeira Reunião, já estão consolidados e não parece haver possibilidade de reabertura das discussões a respeito. O texto consagrado, embora algo divergente da posição sugerida pela Delegação, não apresenta maiores consequências para a futura adoção pelo Brasil da convenção.

Outro tópico sobre o qual o Brasil demonstrou grande preocupação tanto na primeira quanto na segunda reunião dizia respeito à *imunidade de jurisdição* do Estado (artigos 2.4 e 2.5). As dúvidas foram esclarecidas ao longo das negociações, e o texto consolidado não apresenta risco para a futura internalização da convenção no Brasil. Ainda na esteira dos resultados da segunda reunião, o tema da *proteção da jurisdição exclusiva*, objeto de instruções específicas para a Delegação Brasileira, ensejou iniciativas conjuntas da Rússia e do Brasil em mais de uma oportunidade no curso das negociações. As propostas foram sucessivamente rejeitadas pelo plenário da Comissão Especial, mas ainda há interesse da Rússia em inserir no anteprojeto um dispositivo que seja aceitável para o seu ordenamento jurídico. Por essa razão, o tema pode ainda voltar à discussão ou ser objeto de uma reserva ou declaração, com alteração das cláusulas gerais dedicadas ao tema. A possibilidade de sucesso dessa iniciativa se apresenta limitada, dada a rejeição pelos demais países (esse tema aparece em alguns incisos dos artigos 6, 7 e 21).

Os pontos ainda entre colchetes no anteprojeto não são muitos, e ocuparão as discussões na terceira reunião em novembro. Tais temas são objeto de estudos pelos envolvidos com a Delegação Brasileira, mas apontam para uma posição já consolidada com relação ao texto. Um comentário geral é de que não há incompatibilidades marcantes com o sistema brasileiro em vigor, em especial à vista das fórmulas empregadas pelo renovado Código de Processo Civil.

Uma exceção diz respeito à propriedade intelectual. Permanecem entre colchetes as questões relativas à exclusão total do tema na futura convenção (artigo 2, l); às bases de jurisdição aceitáveis do artigo 5, incisosk, l, e m (relacionado ao artigo 6, a); à possibilidade de recusa de reconhecimento ou execução (artigo7, g); e ordens judiciais que não sejam indenizações (artigo12).

Por fim, é importante ressaltar que na segunda reunião houve extensa articulação e atuação conjunta do Brasil com os demais países da América Latina e Caribe (GRULAC), cujo resultado foi a apresentação de propostas de modificação conjuntas, bem como apoio em uníssono das diversas delegações em prol de propostas de consenso.

3. Propriedade intelectual

O tema da propriedade intelectual está referido em quatro passagens do texto do atual anteprojeto, passagens essas acima referidas e a seguir relatadas.

Logo ao início, no artigo 2.1.*l*, no quadro de exclusões do âmbito de aplicação, estão registradas propostas formuladas pela China e pelos Estados Unidos da América. A proposta da China visa a excluir quase completamente o tema da propriedade intelectual do âmbito de aplicação da convenção, removendo praticamente todos os casos do sistema facilitado de circulação internacional de sentenças. A parte que restaria no escopo da convenção diz respeito às disputas contratuais, como por exemplo, as relativas a um contrato que tenha por objeto licença de produção de objeto protegido por um registro de propriedade intelectual. Não estão claras na proposta as adaptações ao restante dos dispositivos antes referidos, mas foram anunciadas oralmente em plenário da segunda reunião da Comissão Especial, sem muita elaboração.

Por seu turno, a proposta americana é no sentido de manter no âmbito de aplicação da futura convenção somente os casos de *copyright and related rights and registered and unregistered trademarks*, espécies jurídicas para as quais

o princípio da territorialidade do direito de propriedade intelectual não é tão marcante. As duas propostas não ganharam apoio intenso durante a segunda reunião, mas estão registradas devido à dificuldade de se alcançar um texto que seja satisfatório para todos e permita ultrapassar os problemas identificados no curso das negociações. Considerando que o Estatuto da Conferência da Haia prescreve decisões por consenso, a completa exclusão do tema do âmbito de aplicação da futura convenção pode ser um compromisso necessário entre as partes.

Na opinião dos autores a exclusão do tema do âmbito de aplicação da futura convenção contraria os interesses brasileiros, pois a valorização dos direitos de propriedade intelectual através da oportunidade de um grande número de sentenças circular internacionalmente corresponde a um anseio de eficácia desses direitos. A proteção patrimonial, respeitada a territorialidade como se verá, configura estímulo ao desenvolvimento científico e cultural, incentivando a produção desses conteúdos através de remuneração decorrente dos privilégios outorgados. A crescente importância do Brasil nessa seara indica a oportunidade de se buscar a circulação internacional das sentenças brasileiras na matéria, e ordenar a recepção no Brasil das que provenham do estrangeiro, efeito já obtido pela grande abertura do atual sistema nacional de homologação de sentenças estrangeiras, da competência do Superior Tribunal de Justiça.

Seguindo a estrutura de apresentação do texto do anteprojeto corrente, aparecem no artigo5.1, alíneas *k*, *l*, e *m*, certas bases indiretas de jurisdição, ou seja, os elementos de contato do caso com o Estado do Juízo de origem, para que a sentença possa circular internacionalmente. O *caput* do artigo estabelece a permissão para que a sentença seja considerada como passível de ser reconhecida se presente um dos elementos elencados nas hipóteses das alíneas.

Nos dispositivos relativos à propriedade intelectual são tratados os casos de validade e de infração a direitos não sujeitos a registro (alíneas*l* e *m*), como o caso paradigma do *copyright*, e também os casos de infração a direitos sujeitos a registro (alínea*k*), como o paradigma da patente. Nesses casos está estabelecido como base suficiente de jurisdição o fato de o direito ser reconhecido no Estado de origem da sentença que se pretende venha a circular; o princípio da territorialidade informa o conteúdo dessas deliberações.

As três hipóteses antes mencionadas são complementadas pelo artigo 6.*a*, que estabelece uma restrição severa à circulação de sentenças que tratem da validade de registros de direitos de propriedade intelectual. Novamente convém atentar para a declaração do *caput* para as hipóteses reguladas: "apesar do que consta no artigo5º..." e para a prescrição restritiva indicando o ponto de contato necessário com o Estado de registro, sem o qual não será reconhecida a decisão estrangeira. Ao revés do que está no artigo 5.1, alíneas *k*, *l*, e *m*, em que o Estado-parte de destino da sentença *pode* recusar o reconhecimento e a execução, nos termos do artigo6.*a* o Estado-parte *deve* recusar reconhecimento e execução se não provier a sentença do Estado-parte em que o direito de propriedade intelectual deveria ser outorgado pelo registro, depósito ou licença; aqui também o princípio da territorialidade informa o conteúdo da deliberação.

O Artigo 7 do anteprojeto expressa os fundamentos que um Estado-parte da futura convenção poderá aplicar para *não reconhecer* ou *não executar* uma sentença estrangeira proferida por Juízo de outro Estado-parte. No que interessa desse complexo dispositivo para o tema da propriedade intelectual, a análise da alíneag (*the judgment ruled on an infringement of an intellectual property right, applying to that right a law other than the law governing that right*), demonstra a existência de uma confusão entre as técnicas de deliberar sobre conflitos de jurisdição e conflitos de leis no espaço. A proposta corrente resulta em autorizar ao Estado-parte demandado a recusa de reconhecimento ou execução de sentença quando a lei aplicada, não a jurisdição exercida, estiver em desacordo com o princípio da territorialidade.

Em uma tradução possível do dispositivo, lê-se que *a sentença poderá ser recusada se a sentença deliberar sobre a violação de um direito de propriedade intelectual aplicando a esse direito uma lei diversa da que o constitui*.

O princípio da territorialidade ganha, pois, uma proteção suplementar. Não só as bases indiretas de jurisdição se limitam apenas ao fato de serem originadas do Estado-parte de registro ou sob cuja lei se constituíram os direitos de propriedade intelectual, como também a não observância da identidade territorial da lei aplicada está posta como um elemento a permitir legitimamente a recusa no contexto do regime simplificado de circulação de sentenças estrangeiras.

O artigo 12 dispõe sobre uma exclusão objetiva e

direta das sentenças relacionadas com propriedade intelectual, removendo do sistema facilitado de circulação as que não impõem obrigações de pagar quantia certa. As *non monetary judgments*, ou seja, as sentenças que conferem obrigações ao sucumbente diferentes da obrigação de pagar quantia certa revelam grandes dificuldades de harmonização, pois a extensão do poder jurisdicional em cada um dos países é peculiar. Em muitos casos ocorridos em outros estados estrangeiros, as obrigações de fazer ou não fazer, ou mesmo as buscas e apreensões, não são admitidas na extensão em que o são no Brasil, por exemplo. Ademais, uma intervenção tão direta sobre o comportamento das pessoas ou sobre bens tangíveis causa receio de uma invasão maior da jurisdição estrangeira. Embora tais restrições tenham evoluído no texto do anteprojeto para revelar maior confiança mútua, a importância do tema da propriedade intelectual eleva as restrições protetivas ao ponto de somente serem toleradas para plena circulação as sentenças que imponham obrigação de pagar quantia certa.

Todos esses pontos estão ainda em discussão, destacados entre colchetes no texto do anteprojeto, e serão certamente reapresentados em novembro de 2017. A circulação de sentenças sobre propriedade intelectual será o grande tema de conteúdo material a ser discutido durante a terceira reunião da Comissão Especial. Há, inclusive, previsão de reunião de especialistas na matéria ao longo de 2017 somente para discutir esse assunto.

A forma como o tema vem sendo tratado no curso das reuniões da Comissão Especial revela intenções protetivas por parte dos estados, marcadamente relacionadas com a preservação do princípio de territorialidade dos direitos de propriedade intelectual, muito embora se vislumbre valor na circulação facilitada dessas sentenças. A experiência de litigância internacional na área de propriedade intelectual relatada durante as reuniões parece indicar um pequeno número de casos em que haveria problemas na aplicação das regras de circulação projetadas. Percebe-se que muitos dos presentes se aferram a essas dificuldades para obstar a consolidação de um texto contendo normas que cobririam boa parte das hipóteses vislumbradas.

Base para compreensão das propostas sobre propriedade intelectual é observar que a futura convenção não tratará da difusão do poder de outorga dos direitos de propriedade intelectual entre países, tampouco introduzirá alguma forma de internacionalização desses direitos. Toda a modelagem atual da regulamentação está mantida, pois sobre ela não há deliberação. Está claramente preservado o princípio da territorialidade, que, aliás, é aplicado diretamente nos preceitos estabelecidos com o fito única e exclusivamente de autorizar a circulação de sentenças estrangeiras que outorguem indenizações de natureza privada.

Por outro lado, a imunidade de Estado protege os órgãos públicos dos efeitos de sentenças estrangeiras, que somente circularão pelo sistema da futura convenção se provenientes de Estados perante os quais os direitos de propriedade intelectual foram reconhecidos por ato de Estado, e respeitadas as limitações de influência política correspondentes ao alcance da soberania jurisdicional de cada Estado. O anteprojeto não traz qualquer objetivo de transnacionalidade dos direitos de propriedade intelectual, e não afeta o poder dos Estados de deliberar sobre as condições de outorga ou reconhecimento de direitos de propriedade intelectual. Somente as consequências do exercício desses direitos, desde que chanceladas pela jurisdição do território sobre o qual o direito foi reconhecido, é que circularão para outros Estados, e contanto que tenham natureza de indenização.

Para entender as estruturas das disposições sobre propriedade intelectual no anteprojeto, deve-se ter como pressuposto que elas estão separadas em dois gêneros, conforme sejam os direitos sujeitos a registro (ou depósito, licença, ou qualquer outro tipo de ato de Estado que represente outorga de direito), ou simplesmente emerjam de determinados fatos que independem de algum reconhecimento expresso pela autoridade competente no local de seu aparecimento. As diferenças entre o direito material dos diversos Estados com relação a esse tema, não se revelam no direito referente às patentes, razoavelmente uniforme na comparação dos diversos ordenamentos jurídicos, mas sim nas outras formas de propriedade intelectual (marcas, desenhos industriais, direitos de autor e *copyright*, obtenções vegetais).

Tomada essa primeira segmentação, uma outra que com ela convive em mesmo nível é a que distingue entre discussões sobre direitos de propriedade intelectual quanto a sua *validade* (propriedade, titularidade, regularidade de registro, depósito, outorga), e outras que buscam proteger tais direitos contra *violações*, como nos casos de pirataria de marcas, violação de privilégio de patente, de plágio, ou de questões contratuais sobre propriedade intelectual. A lógica envolvida nessa segmentação deriva

da percepção de que as discussões sobre validade estão intimamente ligadas ao reconhecimento por ato de Estado, de império vale dizer, expresso em ato individuado ou por previsão abstrata, caracterizando o exercício de poder soberano de Estado. Já as discussões sobre infração ou violação têm uma natureza muito mais privada, interpessoal. Esses são os caracteres que ensejam a diferença entre categorias, e consequentemente impactam o acordo dos Estados sobre a futura circulação de decisões judiciais.

Cotejando as duas categorias, que convivem em mesmo nível, obtêm-se quatro situações, a saber:

> Caso1. Direito sujeito a registro; discussão sobre validade (artigo 6.*a*)
>
> Caso2. Direito sujeito a registro; discussão sobre violação (artigo 5.1.*k*)
>
> Caso3. Direito emergente do fato; discussão sobre validade (artigo 5.1.*l*)
>
> Caso4. Direito emergente do fato; discussão sobre violação (artigo 5.1.*m*)

O artigo 6º cuida das bases exclusivas de jurisdição, cujas regras se superpõem às do artigo 5º. Delibera sobre questões que é reservada a competência exclusiva pelos Estados em geral, e são os únicos preceitos que estabelecem a obrigação dos membros da convenção de recusar reconhecimento e execução de qualquer sentença que não atenda à regra de contato estabelecida, que no tema da propriedade intelectual observa diretamente a territorialidade. A leitura mais aprofundada desse dispositivo revela que está a traduzir, de forma negativa, uma harmonização das normas sobre jurisdição, iniciando, pois, a uniformização das normas de jurisdição direta: os Estados que aderirem à futura convenção concordarão que para os assuntos tratados no artigo 6º as únicas bases jurisdicionais aceitáveis são aquelas ali declaradas.

Aplicando às categorias acima descritas as regras dos respectivos dispositivos do anteprojeto, teremos o seguinte:

> Caso1. **Registro+validade** (art.6.*a*) - somente circula a sentença proveniente do Estado de registro;
>
> Caso2. **Registro+infração** (art.5.1.*k*) - somente circula a sentença proveniente do Estado de registro;
>
> Caso3. **Fato+validade** (art.5.1.*l*) - somente circula a sentença proveniente do Estado sob cuja lei o direito se constitui (*is governed by the law of the State of origin*);
>
> Caso4. **Fato+infração** (art.5.1.*m*) - somente circula a sentença proveniente do Estado sob cuja lei o direito se constitui (*is governed by the law of the State of origin*);

Como se pode ver, em todos os casos o princípio da territorialidade está claramente respeitado. Não se constitui um sistema de jurisdição universal sobre direitos de propriedade intelectual ou de transnacionalidade de direitos dessa natureza independentes da tutela do Estado que os reconheceu.

Ao contrário, para que um beneficiário do sistema de proteção intelectual conferido por um Estado possa se valer do sistema facilitado de circulação de sentenças sobre direitos de propriedade intelectual, será necessário que tenha obtido seu provimento de acordo com o princípio da territorialidade. Especificamente quanto ao *Caso1,* acima referido, a valorização do princípio da territorialidade é ainda maior, pois estabelece a obrigação dos Estados-parte da futura convenção de *recusar* as sentenças que não tenham sido proferidas em conformidade com dito princípio.

Ainda dentro das hipóteses em discussão, é importante ressaltar que a controvérsia evidenciada nas negociações só é relevante quando se pretende a circulação de uma sentença oriunda de um país em que um determinado direito de propriedade intelectual não depende de registro para um país em que o registro é necessário. Isso porque a circulação de uma sentença de país no qual o direito em questão não está sujeito a registro para outro de sistema similar, ou mesmo a decisão oriunda de um país em que o dito direito necessita ser registrado para outro onde o registro também é necessário, não causam problema de aplicação da regra da convenção, e respeitam integralmente o princípio da territorialidade.

4. Temas que merecem a atenção do Brasil

Está claro o interesse do Brasil em engajar-se na futura convenção, pois as sentenças brasileiras historicamente encontram resistência para reconhecimento e execução no exterior, em função das regras de controle indireto de jurisdição presentes na legislação interna de diversos Estados (semelhantes às dos artigos 5º e 6º do anteprojeto). No fluxo reverso, o atual sistema brasileiro de reconhecimento e execução de sentenças estrangeiras, consubstanciado nas regras dos artigos 960 a 965 do Código de Processo Civil de 2015, permite a homolo-

gação da sentença estrangeira sem investigar os elementos de contato que vincularam o caso com a jurisdição estrangeira[5]. De ressaltar, como já dito na Crônica de 2016 e no início desta, que o Brasil participou ativamente do Projeto de Sentenças Estrangeiras da Conferência da Haia, desde a etapa dos Grupos de Trabalho e de Especialistas, às duas reuniões da Comissão Especial. Continua, ainda, a se preparar ativamente para a terceira reunião e subsequente Conferência Diplomática.

No que diz respeito a temas específicos, dois mereceram a atenção do país: a proteção do consumidor e a propriedade intelectual.

No que diz respeito ao primeiro, sobre a *proteção ao consumidor*, tema que o Brasil tentou influenciar nas primeira e segunda reuniões, é preciso ressaltar que a discussão já saiu da pauta. A definição adotada no anteprojeto (artigo 5.2: *[…]a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract*[…]) ainda que mais restritiva do que a do direito brasileiro, atende os interesses nacionais e dos demais Estados negociadores, pois no momento nada há a facilitar a circulação internacional de sentenças a favor do consumidor (que circularão segundo as regras gerais do artigo5.1). Em contrapartida, aquelas decisões contrárias ao consumidor somente circularão se produzidas em seu Estado de residência habitual ou em algum outro Estado a que tenha se submetido de forma expressa.

Com relação ao segundo tema, sobre a composição dos dispositivos relevantes para os *direitos de propriedade intelectual* contemplados no anteprojeto ainda em colchetes, pode-se dizer que os interesses brasileiros parecem adequadamente protegidos. A convenção favorece diretamente a possibilidade de circulação de sentenças brasileiras sobre o tema para outros países para o fim de execução de obrigações de pagar quantia certa, o que valoriza e qualifica a jurisdição brasileira. Isso permitirá que a jurisdição brasileira venha a ser utilizada como uma opção para os interessados em obter um resultado prático, ou seja, uma decisão brasileira terá sua execução em outro país facilitada.

A intenção de determinados países presentes na negociação de incluir algum dispositivo preservando genericamente sua jurisdição exclusiva os está conduzindo a considerar a questão fechada a novos desdobramentos, pelo menos no âmbito da Comissão Especial. Embora haja interesse da Rússia em contar com o apoio do Brasil para novas propostas nesse sentido, a perspectiva de sucesso da iniciativa é exígua, tendo em conta a posição já externada pelos demais países e a necessidade de que o texto final seja resultado do consenso dos presentes.

5. Considerações finais

Nestes comentários aos resultados da segunda reunião da Comissão Especial, e com vistas à preparação para a terceira reunião de novembro de 2017, é preciso repetir como um mantra os dois objetivos primordiais que devem constar da futura Convenção, elencados pela Conferência da Haia em seu comunicado sobre o trabalho realizado:

> a) melhorar o acesso prático à justiça, através do reconhecimento e execução de sentenças (o que é relevante para o objetivo nº16 das Nações Unidas para o Desenvolvimento Sustentável[6]); e
>
> b) facilitar o comércio e o investimento e contribuir para o crescimento econômico, através do aumento da segurança jurídica e da redução dos custos e incertezas associados com transações e com a resolução de litígios transfronteiriços.

É certo que a futura convenção servirá para promover a circulação de decisões judiciais, sob determinadas garantias adequadas, reduzindo a necessidade de duplicação de processos em dois ou mais Estados Contratantes. Como consequência, o aumento da previsibilidade de execução de decisões judiciais estrangeiras, hoje inexistente pela ausência de normas uniformes internacionais, diminuirá os custos e prazos para o reconhecimento e execução de sentenças estrangeiras, tornando-os mais adequados à padronização das práticas de comércio internacional. Pessoas físicas e jurídicas farão escolhas melhor informadas sobre o local da demanda (o foro), e terão clareza sobre ser possível a futura execução da decisão.

5 Veja-se que de acordo com o inciso I do artigo963 do CPC2015, o requisito é de que "a decisão tenha sido proferida por autoridade competente". A jurisprudência consolidada do STJ entende que esse conceito deve ser definido pela autoridade prolatora. A impossibilidade de homologação se dá somente quando se trata de hipótese de competência exclusiva da autoridade brasileira, nas três situações do artigo 23 do CPC de 2015 (correspondente ao artigo 89 do CPC de 1973).

6 *Goal 16 - Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels*. Disponível em: https://sustainabledevelopment.un.org/sdg16, acesso em: 22jul.2016.

A versão produzida na segunda reunião indica que as pontes construídas entre os diversos países para chegar ao projeto em discussão estão cada dia mais sólidas, e o desejo de cooperação começa a dar resultados.

Do ponto de vista da atuação do Brasil durante as negociações, merece destaque a articulação com os países da América Latina e Caribe (através do grupo chamado de GRULAC), que permitiu a formulação de propostas conjuntas. O apoio mútuo desses diversos países presentes na reunião, assegura maior sucesso de mudanças no texto, se comparado às tentativas isoladas. As demais delegações passaram a recorrer à brasileira para buscar apoio a propostas, esclarecer dúvidas e testar novas possibilidades de negociação.

O trabalho prosseguirá nos próximos meses em preparação para a terceira reunião da Comissão Especial, em novembro de 2017, com a elaboração de notas técnicas e reuniões de difusão de conhecimento, sondagem dos interesses de vários grupos no Brasil, e negociações preparatórias à reunião, tudo sob a supervisão do Ministério das Relações Exteriores e outros órgãos governamentais envolvidos. A expectativa é de finalização de um texto completo de convenção, com alto índice de apoio dos membros da Conferência da Haia, a ser levada para a Conferência Diplomática, provavelmente ao final de 2018, que chancelará, afinal, a nova convenção sobre sentenças estrangeiras.

Crônica 2: O Direito Transnacional e os episódios das carnes

Gustavo Ferreira Ribeiro

1. Introdução

Deflagrada em março de 2017, a operação *carne fraca* ocupou amplamente os noticiários. Nas análises empreendidas, três enfoques predominaram. Primeiramente, os aspectos penais da operação, como corrupção, crimes praticados por funcionários públicos e crimes contra o consumidor. Afinal, as acusações envolviam formação de organização criminosa, liberalização de comercialização de carnes sem a devida fiscalização sanitária, mistura do produto com papelão, entre outras. Em segundo lugar, sendo a carne, bovina e de frango, itens relevantes na pauta de exportação brasileira, as "suspensões comerciais" aplicadas ao caso mereceram análises sob a ótica das relações internacionais. Isso porque autoridades sanitárias estrangeiras anunciavam desde pedidos oficiais de informações (ex. Israel) até a suspensão total das importações (ex. México, Catar e Argélia). Por fim, e ligado ao enfoque anterior, a capacidade de gestão da crise (ou não) por parte do Governo brasileiro foi posta em xeque na esfera política.

Somando ao episódio, mais recentemente, no período em que esta crônica estava sendo finalizada, novas barreiras comerciais foram impostas à carne brasileira. Dessa vez, sobre a carne fresca, *in natura*. Alegava-se a existência de supostos riscos relacionados à vacinação do gado contra a febre aftosa. O procedimento de vacinação gerava, segue o argumento, abcessos nos animais, afetando a qualidade da carne e, por fim, a saúde humana.

Em um e outro caso (carne fraca ou aftosa), assiste-se ao périplo das delegações brasileiras, associações e empresários junto a governos estrangeiros, importadores e organizações internacionais a fim de se manter o fluxo comercial já estabelecido. A agenda tem como fim demonstrar um sistema robusto de controle e os baixos riscos do produto brasileiro, mantendo os mercados em operação.

Nesse contexto, pouca atenção foi direcionada à metodologia jurídica para a análise das situações descritas. O conceito de *direito transnacional*, propõe-se nessa crônica, pode ser útil para compreendê-las e demonstrar a incompletude de visões puramente publicistas ou privatistas do direito internacional.

O termo *direito transnacional*, cunhado por Phillip Jessup, em 1956, reconhece a dificuldade de se encontrar uma expressão apropriada para a análise de problemas internacionais que irradiam efeitos de forma difusa na comunidade internacional. Serve como crítica à separação clássica do direito internacional entre público e privado (e também entre direito internacional e interno), muito utilizada na compartimentalização da disciplina nas próprias universidades e entre seus praticantes. Para Jessup, o direito transnacional "incluiria todo direito que regula ações e eventos que transcendem as fronteiras nacionais. Tanto o direito internacional público como privado são incluídos, assim como outras regras que

ARAUJO, Nadia de; NARDI, Marcelo De; RIBEIRO, Gustavo; POLIDO, Fabrício; LOPES, Inez. Crônicas de Direito Internacional Privado. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 8-34

não totalmente se ajustam a essas categorias padrões"[7].

Ainda que pesem críticas acerca dessa definição, para efeitos desta crônica, extrairemos elementos que encontram suporte na proposta de Jessup e em elaboração doutrinária superveniente[8]. Isto é, o direito transnacional reflete a pluralidade de atores na produção normativa aplicável a fatos internacionais, evidenciando a ausência de delineamentos exatos entre o direito internacional público e privado.

Portanto, esta crônica retoma o transnacionalismo do direito como aporte metodológico para análise dos *episódios carnes*. Neles, a conexão internacional é óbvia, há multiplicidade de atores e, potencialmente, de *normas* (estatais e não-estatais) aplicáveis, interpolando-se ordens internacionais públicas e privadas.

Para fins expositivos, a análise é dividida, inicialmente, em um modelo mais tradicional. Embora o corte possa parecer paradoxal frente à metodologia proposta, ao a utilizarmos, expõe-se justamente sua fragilidade.

2. Transnacionalismo e Direito Internacional Público

Procuraremos ressaltar, nesta seção, os aspectos dos episódios das carnes que guardam maior relação com hipóteses de incidência, ou enunciados descritivos, pertencentes ao direito internacional público.

A possibilidade de governos adotarem suspensões de importação com base em medidas sanitárias visando a proteção de seus nacionais e residentes decorre do próprio exercício da soberania estatal. As regras de comércio internacional refletem naturalmente essa prerrogativa.

Se pensarmos no multilateralismo comercial pós-Guerra, já no *General Agreement on Tariffs and Trade* de 1947 (GATT-1947), a aplicação de medidas comerciais a fim de se garantir à proteção da saúde e da vida das pessoas e dos animais e à preservação dos vegetais estava prevista como *exceção geral* em seu artigo XX(b). A utilização da medida era – e ainda é – condicionada ao requisito de não se constituir a própria medida um meio de discriminação arbitrária ou injustificada.

Não diferentemente, no âmbito da Organização Mundial do Comércio (OMC), o recurso ao artigo XX(b), com a mesma redação dada ao atual GATT-1994, permite acomodar o uso de medidas governamentais com esses fins, havendo farta jurisprudência da OMC sobre o tema. A exceção geral, entretanto, é lida com dispositivos mais específicos aplicados a determinadas áreas do comércio internacional, como o Acordo sobre Medidas Sanitárias e Fitossanitárias (SPS). O último traz o arcabouço multilateral de regras para orientar a elaboração, adoção e aplicação de medidas sanitárias e fitossanitárias[9] pelos Membros da OMC, reduzindo ao mínimo seus efeitos negativos sobre o comércio.

O SPS segue a fórmula geral do GATT-1994. Permitem-se exceções ao livre comércio - consubstanciadas em suspensões, embargos ou medidas de restrição comercial - quando houver necessidade de proteger a vida e a saúde das pessoas, dos animais ou preservar vegetais. Tais medidas não devem, entretanto, constituir um meio de discriminação arbitrário ou em uma restrição encoberta ao comércio internacional.

Adicionalmente, face ao tipo de regulação coberta pelo SPS – medidas sanitárias e fitossanitárias - requer-se que estas sejam aplicadas na medida do necessário à proteção almejada e se baseiem em princípios e evidências científicas, não devendo ser mantidas sem que exista um mínimo de evidências[10].

Em se tratando de um caso de urgência visando a proteção à população, mecanismos comumente utilizados para prover transparência e intercâmbio de informação entre os Membros da OMC, como notificações, são, além disso, relativizados; não haveria, por decorrência lógica, a obrigação da publicação da medida co-

7 JESSUP, Phillip C. *Transnational law*. New Haven: Yale University Press, 1956, p. 2. Vejam-se as denominadas "Storr lectures" lecionadas por Jessup na Yale Law School.

8 Entre os diversos autores que se dedicaram ao tema, veja-se KOH e seu processualismo transnacional (KOH, Harold. Transnational legal process. *Nebraska Law Review*, v. 75, n. 1, p. 181-207, jan. 1996); igualmente, a recente pesquisa de Halliday e Shaffer acerca de ordens transnacionais (HALLIDAY, Terence; SHAFFER, Gregory. *Transnational legal orders*. Cambridge: Cambridge University Press, 2015).

9 Como uma hipótese potencialmente relacionado à carne, seriam medidas dessa natureza aquelas destinadas a "proteger, no território do Membro, a vida ou a saúde humana ou animal, dos riscos resultantes da presença de aditivos, contaminantes, toxinas ou organismos patogênicos em alimentos, bebidas ou ração animal." ORGANIZAÇÃO MUNDIAL DO COMÉRCIO. Acordo sobre as Medidas Sanitárias e Fitossanitárias (SPS). ANEXO A, art. 1(b).

10 SPS, art. 2.1 e 2.2.

mercial com antecedência, muito menos prazos para comentários para outros Membros, o que ocorreria em condições que não envolvam crises.[11] Na anormalidade, primeiramente, protege-se. Posteriormente, os demais Membros afetados pelas medidas poderão solicitar esclarecimentos sobre a legalidade e razoabilidade das medidas adotadas. As normas e a jurisprudência da OMC prestam deferência, assim, a situações de urgência, bem como aos critérios para distinguir quando, sob a justificativa de se promover à saúde, encobrem-se medidas puramente protecionistas.

Nessa seara, existem mecanismos próprios de consultas e, eventualmente, solução de controvérsias (painéis e Órgão de Apelação da OMC) que, certamente, se fundam em regras de direito internacional público e cujas decisões possuem efeito "estatocêntricos" diretos.

Por que insistir, então, pelo direito transnacional como uma opção metodológica mais adequada para a análise do caso? Vislumbramos pelo menos dois argumentos.

No que toca os atores envolvidos, os Membros da OMC são *meta* ou *proto dententores* dos direitos discutidos (como reclamante ou reclamado). Assumem a proteção diplomática dos afetados de acordo com sua conveniência, mas também como função direta do interesse comercial envolvido. Afinal, não são os Membros da OMC os exportadores ou importadores de carne, mas empresas que geram impostos, empregam e financiam campanhas. Na mesma linha, do ponto de vista dos procedimentos de consultas ou contenciosos, embora sejam os Membros a possuir *capacidade postulatória* no OSC da OMC, são igualmente conhecidos os arranjos feitos por associações empresariais, industrias e escritórios de advocacia no auxílio da defesa estatal.

Já em relação à normativa aplicável, poder-se-ia imaginar que as menções[12] do Entendimento de Solução de Controvérsias da OMC à preservação dos "direitos e obrigações dos Membros" dos "acordos abrangidos" em conformidade com "as normas correntes de interpretação do direito internacional públicos" isolam o OSC da OMC da incidência de produção normativa não-estatal. A percepção se reforça quando se tem em mente o incentivo dados aos Membros de adotarem, no campo do SPS, padrões internacionais de certas organizações de referência (em especial, o *Codex Alimentarius*, a Organização Mundial da Saúde Animal e a Convenção Internacional de Proteção Vegetal). A referência aos padrões internacionais serve como forma de harmonização de medidas e como presunção de que, uma vez baseados nesses padrões, são essas medidas necessárias à proteção da vida ou da saúde humana, animal e vegetal. São assim consideradas compatíveis com os acordos abrangidos até que se prove o contrário, impondo um ônus de prova elevado à parte reclamante.[13]

Porém, devemos observar a proliferação dos ditos "padrões privados" nas cadeias de produção global de alimentos. Tratam-se de padrões que emergem da dinâmica empresarial, integração de cadeias produtivas e da demanda de consumidores frente a produtores em mercados mais sofisticados. Afetando atacadistas, produtores, importadores, exportadores, para que se ilustre, esses padrões podem vir acompanhados de certificações de natureza privada e impõem requisitos de qualidade e segurança sobre alimentos. A não conformidade a esses padrões geram efeitos na esfera contratual privada, podendo gerar quebra de contrato. Ao mesmo tempo, vem de encontro a uma questão ainda em aberto na OMC: o alcance do SPS sobre os padrões privados.

Embora os episódios das carnes não derivem diretamente de uma medida oriunda de um padrão privado, mas que pode emergir a qualquer momento, seguramente esse é um tema no qual o liame entre direito internacional público e normativa não-estatal vem de encontro.

3. Transnacionalismo e Direito Internacional Privado

A adoção de suspensões de importação possui efeitos na relação contratual privada; isto é, os negócios jurídicos – contratos de compra e venda internacional - realizados entre as empresas brasileiras exportadoras de carne e importadores mundo afora sofrerão impactos. Nesta seção, de forma análoga à anterior, evidenciaremos a relação dos episódios carnes com o direito internacional privado. Ato contínuo, exporemos a análoga deficiência da visão eminentemente privatista acerca

11 SPS, Anexo B, para. 2; para 6.

12 ORGANIZAÇÃO MUNDIAL DO COMÉRCIO. Acordo geral sobre tarifas e comércio: anexo 2: entendimento relativo às normas e procedimentos sobre solução de controvérsias (ESC), arts. 2 e 3.

13 SPS, arts. 3.1 e 3.2.

dos episódios, se já não resta clara.

É comum, na compra e venda internacional de mercadorias, que as partes contratantes incorporam em seus instrumentos os conhecidos Incoterms - elaborados pela Câmara de Comércio Internacional (CCI), em 1936, e cuja última versão é de 2010. A CCI não é, em absoluto, e como se sabe, uma organização internacional. Trata-se de uma entidade privada referida como uma das principais expressões da *nova lex mercatoria* (conjunto de normas e foros para solução de controvérsias, de natureza privada). Tais normas desempenham função de uniformização, uma das técnicas do direito internacional privado, de cláusulas contratuais. Quando utilizadas, visam estabelecer direitos e obrigações que, definidos e especificados nos próprios Incoterms, descolam-se dos ordenamentos domésticos nas quais os atores privados se situam ou se conectam. Os procedimentos de criação e revisão das cláusulas da CCI, legitimando seu uso na comunidade empresarial, envolvem comitês nacionais compostos por empresas, escritórios de advocacia, associações e câmaras de comércio – todos de natureza privada.

Na exportação da carne brasileira, por exemplo, bastante comum é a utilização de contratos contendo os Incoterms *Free on Board* (FOB) e *Cost and Freigth* (CFR). No primeiro caso, o vendedor (frigorífico brasileiro) encerra suas obrigações e suas responsabilidades quando a mercadoria é entregue a bordo do navio no porto de embarque. No segundo caso, além dessa obrigação, o vendedor contrata e paga frete e custos necessários para levar a mercadoria até o porto de destino combinado. Em comum, e de importância, nos dois casos, os riscos de perda ou danos à carga são transferidos ao importador. Assim, as responsabilidades e os riscos entre vendedores e compradores são definidos à priori pelos Incoterms de forma independente do ordenamento estatal de origem e de destino do produto; por exemplo, das regras de cada Código Civil, ou de seu análogo, em cada jurisdição.

Estes contratos, em sua imensa maioria, contêm ainda menções a hipóteses de força maior ou fato do príncipe que podem estar relacionadas aos embargos à carne. Caso o contrato tenha seguido a redação proposta pela CCI, que também oferece um modelo de redação de força maior que pode ser utilizado por simples remissão a ela, entende-se que quando uma parte descumpre suas obrigações por um motivo razoavelmente fora de seu controle e imprevisto, ela resta exonerada, liberada de suas obrigações. A CCI indica, inclusive, uma listagem exemplificativa de eventos que incluem guerra, terrorismo e os denominados "atos governamentais" (ou "fatos do príncipe", do direito administrativo), que poderiam acomodar os episódios relativos às medidas sanitárias de suspensão comercial.

Se estamos diante então de questões privadas com ponto de conexão internacional, retomamos a pergunta: por que se insistir pelo direito transnacional como uma opção metodológica mais adequada para a análise do caso? Vislumbramos, outrossim, pelo menos dois argumentos, além da relação estado e atores privados já abordada na seção anterior.

Primeiramente, a percepção de que a produção da *nova lex mercatoria* emana apenas de entes privados merece ressalvas. Essa produção é difusa e toma curso em organizações internacionais, como o Instituto Internacional para a Unificação do Direito Privado (Unidroit). A origem da organização (1926) se situa no clássico sistema intergovernamental, então sob os auspícios da Sociedade das Nações, contando, atualmente, com 63 sujeitos tidos como tradicionais no direito internacional público: estados. E similarmente à CCI, a Unidroit oferece instrumentos, sob a forma de princípios gerais, aplicáveis aos contratos comerciais internacionais. Não é incomum que um mesmo contrato faça referência aos Incoterms da CCI e aos princípios do Unidroit[14].

No que concerne o direito aplicável a um determinado contrato nos episódios das carnes, quanto à responsabilização contratual e incidência de força maior, tudo dependerá, inicialmente, da opção das partes em negociar ou litigar. Se se opta pela última, deve-se proceder à apreciação caso-a-caso dos fatos, das inúmeras combinações de cláusulas nos contratos, bem como o subsistema de direito aplicável no foro competente (estatal ou arbitral).

O que se quer chamar atenção aqui é de que a visão estritamente privatista faz jus a ponderações. Mesmo que as normas não-estatais utilizadas tenham emana-

14 Não nos referimos ao modelo da Uncitral por se tratar de um modelo de produção normativa mais próximo a um modelo público, pela elaboração de tratados, por exemplo, da CISG. Veja-se BRASIL. *Decreto n. 8.327, 16 de outubro de 2014*. Promulga a Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias - Uncitral, firmada pela República Federativa do Brasil, em Viena, em 11 de abril de 1980. Disponível em: <http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2014/Decreto/D8327.htm>. Acesso em: 01 junho 2017.

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do de processos privados, como uma forma de melhor coordenação entre agentes econômicos, poderá ser necessário que sejam transpostas à comunidades formais[15]. É o caso por exemplo, das partes terem escolhido um foro estatal para a eventual solução do litígio contratual. Imaginemos, nesse caso, que as partes fizeram amplo uso da autonomia de vontade na redação do contrato e optaram pelo uso de Incoterms e princípios do Unidroit como seus elementos. Efetivamente, o foro concernente só dará deferência[16] à autonomia e a própria *lex mercatoria* casos sejam esses elementos reconhecidos como fontes de direito naquele foro sob alguma categoria (ex. princípios, costumes etc.). E mesmo se pensarmos que o litígio tenha sido levado à arbitragem internacional, mecanismo alternativo que dá ampla deferência à autonomia da vontade, como se supõe, não se pode descartar a eventual objeção da parte vencida ao cumprimento da sentença arbitral. Nessa última hipótese, caso seja necessário, a coercitividade da decisão, ou a força executiva da sentença arbitral, demandará a atuação do tradicional ator - estado – que, de acordo com as particularidades de seu sistema jurídico e convenções ratificadas sobre o tema, poderá reconhecer ou não aquela decisão.

4. Considerações finais

O termo transnacionalismo comporta suas próprias dificuldades. Tornando-se amplo demais, qualquer situação se torna apta a ser por ele estudada, caracterizando como um modelo não falseável.

Porém, se entendermos que a utilização do transnacionalismo serve para revelar a insuficiência da divisão metodológica do direito internacional entre público e privado, emerge sua utilidade. Expõe-se a partir daí as incoerências de visões maniqueístas do direito internacional em dois ramos. Visualiza-se a pluralidade normativa aplicável aos problemas internacionais, cujo emanação deixou de ser, a muito, monopólio estatal. Ainda, de relevância para esta crônica, apontam-se os pontos comunicantes entre os ramos.

Os episódios das carnes nos pareceram propícios ao exercício proposto. A análise de suspensões comerciais sob a ótica inteiramente pública, de um acordo internacional (SPS da OMC) e o OSC da OMC, mascara a multiplicidade dos atores envolvidos, bem como a complexidade do direito aplicável. Basta consideramos os padrões privados do comércio (embora os episódios da carne, como se disse, não tenham derivado desta última problemática - mas poderiam) como um desafio presente no sistema.

Igualmente, a visão privatista dissimula a complexa formação da "produção privada" do direito, como nos casos das cláusulas e princípios oferecidos pela CCI e Unidroit. Além disso, não podemos olvidar do papel do estado como detentor do monopólio coercitivo, caso necessite ser acionado, e seus próprios filtros interpretativos e categóricos ao transpor a produção de normas privada às comunidades formais.

Evidenciam-se assim, senão os ganhos do transnacionalismo para a análise do problema, a incompletude de uma divisão rígida entre o direito internacional público e privado.

II. Decisões

Crônica 3: A irresistível força da ordem pública e a homologação de sentenças estrangeiras pelo STJ

Fabrício Bertini Pasquot Polido

1. Introdução

Duas recentes decisões do Superior Tribunal de Justiça em ações de homologação de sentenças revelam as distintas percepções sobre a função e alcance dos regimes de reconhecimento e execução de decisões judiciais e arbitrais estrangeiras no Brasil e os limites estabelecidos pela ordem pública. Até aqui nada de novo em um

15 Processo descrito por Levit em duas fases: o da produção normativa privada ("bottom-up") e como a transposição à comunidade formal ("to embedded in national law"). Veja-se: LEVIT, Janet Koven. Bottom-up International Lawmaking: Reflections on the New Haven School of International Law. *Yale Journal of International Law,* v. 32, 2007. p. 393-420.

16 O que parece ser uma expectativa legítima, mas não necessariamente o é.

tema absolutamente clássico do Direito Internacional Privado. Nos casos *Abengoa/Dedini Agro* [17] e *Usinas Itamarati*[18], o STJ foi confrontado com a necessidade de examinar mais profundamente aspectos centrais que envolvem os mecanismos de reconhecimento e execução de sentenças no direito brasileiro.

Se o princípio da ordem pública foi a protagonista dessa vez, é certo que sua força irresistível marcou presença no controle jurisdicional promovido pelo STJ sobre as sentenças levadas à homologação. Ainda que chegando a resultados distintos, mas não menos significativos, o STJ demarcou sua posição como órgão que não pode ser confundido com, ou reduzido à, instância meramente cartorial no regime de reconhecimento e execução de sentenças. Nesse breve ensaio, discuto os desdobramentos dos casos para o direito internacional privado e questões de sua vertente processual em ações de homologação de sentenças estrangeiras.

2. O caso 'Abengoa/Dedini Agro'

O litígio no caso Abengoa concentra-se nas reclamações apresentadas por empresas do grupo controlado pela Asa Bioenergy Holding A.G., constituída e existente segundo as leis da Suíça ("Asa Bioenergy A.G.), contra Adriano Giannetti Dedini Ometto e Adriano Ometto Agrícola Ltda., em virtude do alegado inadimplemento de contrato de venda e compra de quotas sociais celebrado entre as partes, pelo qual a parte brasileira deveria transferir o controle do Grupo Denini Agro para a Abengoa. Vale destacar que o Grupo Dedini Agro representa um dos maiores conglomerados do segmento sucroalcooleiro no Brasil, tendo as partes estabelecido o preço de aquisição do controle em aproximadamente US$ 297 milhões. Com a conclusão da operação, a adquirente Abengoa assumiria uma dívida de US$ 387 milhões do grupo brasileiro.

Depois de firmado o contrato base, a Asa Bioenergy A.G. suscitou inúmeros questionamentos sobre violação de deveres de informação pela parte brasileira, em particular a alegada manipulação de dados relevantes para precificação e determinação dos riscos do negócio ainda na fase de auditoria ('due diligence') e inadimplemento das garantias contratuais estabelecidas. Segundo o acórdão em comento, o Grupo Dedini Agro teria afirmado "possuir capacidade para moer cerca de 7,1 milhões de toneladas de cana por ano-safra, com valor médio de US$ 100,00 por tonelada. Tais informações, sopesadas na fixação do preço total da operação, não se confirmaram, constatando-se déficit na capacidade de moer de 1 milhão de toneladas, o que levou ao pedido indenizatório".

Como resultado, a requerente na ação homologatória havia instaurado dois procedimentos arbitrais segundo as regras da Corte Internacional de Arbitragem da Câmara de Comércio Internacional (CCI), em Nova Iorque, EUA, nos termos da cláusula compromissória existente no contrato de venda e compra[19]. De acordo com as decisões arbitrais proferidas, a parte brasileira foi condenada ao pagamento de indenização no valor de R$ 389.214.361,18. Entre as questões mais relevantes, ainda no curso do contencioso arbitral nos Estados Unidos, destacava-se a impugnação do árbitro presidente do Tribunal, com fundamento em alegada violação à imparcialidade e à independência, considerando ser ele sócio sênior de renomada banca de advocacia em Nova Iorque e ter defendido interesses das requerentes Abengoa em outros procedimentos anteriores ou precedentes, incluindo o recebimento de honorários no curso das arbitragens. Sem êxito em seu pedido, a parte brasileira intentou ação anulatória dos laudos arbitrais perante o juízo estatal, especificamente o Tribunal Regional Federal dos Estados Unidos para o Distrito Sul de Nova York, que rejeitou as pretensões formuladas. Naquela ocasião, a justiça dos Estados Unidos considerou inexistirem provas suficientes sobre alegada parcialidade do árbitro, decisão que foi mantida pelo Tribunal de Apela-

17 STJ, *Abengoa e outros vs. Adriano Ometto e Adriano Ometto Agrícola Ltda.*, Sentença Estrangeira Contestada nº 9.412, Rel. Min. Felix Fischer, acórdão de 19 de abril de 2017, in DJE de 30 de maio de 2017.p.1-89.

18 STJ, *Merrill Lynch Capital Services Inc. vs. Usinas Itamarati S.A*, Sentença Estrangeira Contestada nº 12.143, Corte Especial, Rel. Min. Raul Araujo, acórdão de 29 de março de 2017, in DJE 19/04/2017, p.1-40.

19 Conforme relatoria do acórdão, de autoria do Min. Felix Fischer, os dois procedimentos arbitrais CCI n. 16.176 e CCI n. 16.513 ocorreram simultaneamente em Nova Iorque - Estados Unidos, conduzidos pelo Tribunal Arbitral constituído pelos seguintes árbitros: Guillhermo Aguiar Alvarez (sócio do escritório King & Spalding LLP), indicado pelas requerentes Abengoa; José Emílio Nunes Pinto, brasileiro, indicado pelos requeridos; e David Rivkin (sócio do escritório Debevoise & Plimpton LLP), indicado pelos co-árbitros como presidente do tribunal arbitral. Pelos termos de arbitragem, as partes escolheram a lei brasileira como aplicável e adotaram a Língua inglesa como idioma oficial, resultando em duas sentenças que foram objetos da ação homologatória junto ao STJ.

ARAUJO, Nadia de; NARDI, Marcelo De; RIBEIRO, Gustavo; POLIDO, Fabrício; LOPES, Inez. Crônicas de Direito Internacional Privado. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 8-34

ção do Segundo Circuito.

Em sequência, no Brasil, a Asa Bioenergy A.G ajuizou ação de homologação no STJ, com o objetivo de alcançar o reconhecimento e execução dos laudos arbitrais proferidos nos Estados Unidos. Em sua contestação, a parte requerida alegava que as sentenças estrangeiras não poderiam ser homologadas, visto que os procedimentos arbitrais estariam inquinados de vícios como a quebra da imparcialidade de árbitro, a despeito de essas mesmas alegações já terem sido afastadas pelo Tribunal Arbitral e pela Justiça Federal estadunidense, conformando mérito da decisão sobre a impugnação naquela jurisdição.

Como subsídios para contestação da sentença estrangeira perante o STJ, os requeridos sustentavam a parcialidade do árbitro indicado como presidente do Tribunal Arbitral - David Rivkin, sócio do escritório Debevoise & Plimpton LLP, em virtude de seus vínculos precedentes em defesa de procedimentos envolvendo a Abengoa e que não foram devidamente revelados na instituição da arbitragem, além da desconsideração de provas, materializadas por correspondências eletrônicas, essenciais para a defesa no contencioso levado a cabo em Nova Iorque. A parte requerida também alegava a violação de princípios da reparação legal e da legalidade e o desrespeito à lei brasileira – escolhidas como aplicável ao litígio pelas partes - na fixação do quantum indenizatório a ser pago pelo Grupo à Abegoa.

Com base nesses elementos, o Grupo Dedini Agro sustentava manifesta violação à ordem pública e aos princípios do contraditório, da ampla defesa e da igualdade, nos termos dos Arts.38 e 39 da Lei brasileira de Arbitragem (Lei nº 9.307 /1996) e Art.V.II(b) da Convenção de Nova Iorque de 1958 sobre Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras (incorporada ao ordenamento brasileiro pelo Decreto no 4.311/2002).

Em sua réplica, as requerentes do grupo Abengoa, buscando afastar os argumentos defendidos pela requerida, observavam que, em ações de homologação processadas perante o STJ, a análise do Tribunal deveria se restringir aos aspectos meramente formais, sendo proibido o reexame do mérito da causa. Nessa mesma linha manifestou-se o Ministério Público Federal, em parecer indicando ser de "contenciosidade limitada" o procedimento de homologação de sentença estrangeira, "restrito à análise de determinadas formalidades e da inexistência de incompatibilidade entre a decisão proferida pela autoridade estrangeira e o ordenamento jurídico pátrio".

Em seu Voto, o Ministro Relator Felix Fischer considerou que o STJ não poderia reapreciar questões de mérito como a do impedimento suscitada no curso do procedimento arbitral nos Estados, e examinada pelo Tribunal de Apelação para o Segundo Distrito, pois seria competência daqueles órgãos processar e julgar impugnações e demandas afetas à violação da parcialidade pelo árbitro presidente do tribunal arbitral[20]. Após colacionar uma série de ementas de acórdãos em ações homologatórias no STF e STJ, demonstrando o entendimento de que nesses procedimentos a autoridade judiciária brasileira estaria limitada a examinar aspectos formais da sentença estrangeira para fins de seu reconhecimento e execução no Brasil, concluiu inexistir qualquer ofensa à ordem pública e que a demanda original teria como "tema de fundo a responsabilidade das partes em ajuste de compra e venda, cujo regramento foi pactuado de acordo com a vontade de ambos os contratantes"[21]. Retomou ainda entendimento do Ministério Público Federal, segundo qual "a *análise da compatibilidade da sentença homologanda com a 'ordem pública' - conceito jurídico plurissignificante - deve ser apenas a atos e efeitos jurídicos absolutamente incompossíveis com o sistema jurídico brasileiro".*

Na divergência, o Voto de Vista do Ministro João Otávio de Noronha ressaltou que, de fato, o procedimento de homologação de sentença estrangeira não autoriza o reexame do mérito da decisão arbitral homologanda, exceto se a questão analisada violar frontalmente a soberania nacional ou a ordem pública[22]. Com base nesse entendimento, o Ministro Noronha prosseguiu em análise que resultou no confronto entre a matéria relativa à imparcialidade do árbitro, conforme questionada pela parte requerida tanto no contencioso arbitral quanto judicialmente nos Estados Unidos – e seus efeitos relativa à ordem pública do foro. Assim se manifestou:

> *"A prerrogativa da imparcialidade do julgador é uma das garantias que resultam do postulado do devido processo legal, aplicável à arbitragem, mercê de sua natureza jurisdicional. A inobservância dessa prerrogativa ofende, diretamente, a ordem pública nacional. Além disso, só se tem por válida a renúncia à garantia da inafastabilidade da jurisdição estatal*

20 STJ, *Abengoa/Ometto*, Sentença Estrangeira Contestada nº 9.412, cit. nota 1 supra, p.14.

21 Idem, p.20.

22 Idem, p. 29.

quando os árbitros gozam de independência e confiança das partes. Assim, a sentença proferida pela Justiça Federal americana à luz de sua própria legislação não tem o condão de obstar o exame do STJ quanto a possível ofensa à ordem pública nacional decorrente da alegada imparcialidade do árbitro presidente"

Da mesma forma, o Voto de Vista enfatiza o alcance da regra de impedimento contida no Art.14 da Lei brasileira de Arbitragem, que o estabelece como vedação positiva para funcionar como árbitro "as pessoas que tenham com as partes ou com o litígio que lhes for submetido alguma das relações que caracterizam os casos de impedimento ou suspeição de juízes, previstas, respectivamente, nos Arts. 134 e 135 do Código de Processo Civil. O desrespeito acarreta a nulidade da sentença arbitral, a teor do art. 32, II, da referida lei".

Após análise de fatos e circunstâncias que revelaram as relações profissional e comercial subjacentes entre a Abengoa e o árbitro presidente do Tribunal Arbitral que proferiu as decisões contestadas em sede de homologação, o Ministro Noronha deu-se por convencido pela impossibilidade de homologação das sentenças arbitrais. Considerou estarem evidenciados "elementos objetivos aptos a comprometer a imparcialidade e independência do árbitro presidente, que não foram revelados às partes como determina a lei (brasileira)", estando, portanto em violação aos Arts. 13, 14, caput e § 1º, 32, II e IV, 38, V, e 39, II, da Lei n. 9.307/1996 (Lei de Arbitragem)[23].

Ainda em seu Voto de Vista, opinou pela impossibilidade de homologação de parte de uma das sentenças arbitrais quanto à condenação do Grupo Dedini Agro ao pagamento de indenizações fixadas no montante de US$ 100 milhões. Segundo Noronha, a decisão homologanda teria resultado em violação do princípio da reparação integral e consequente julgamento fora dos limites da convenção de arbitragem, que determinava aplicação da lei brasileira. O Tribunal Arbitral, ao constatar a capacidade de moagem das empresas do Grupo Dedini Ometto inferior àquela declarada pela parte vendedora, teria reconhecido como caracterizado o dolo acidental e fixado indenização com base em avaliação financeira do negócio. Essa decisão, extrapolando os limites da convenção de arbitragem, seria contrária à lei brasileira, eleita pelas partes como aplicável à arbitragem, e que estabelece expressamente que a indenização se mede pela extensão do dano. Segundo Noronha, nos termos do Art. 944 do Código Civil, o dano deve ser efetivo e estar comprovado nos autos, "inexistindo previsão legal que ampare a obrigação de indenizar danos eventuais ou hipotéticos." Para o magistrado, a indenização fixada pelo Tribunal Arbitral com base no critério do preço do negócio representaria "distorção do sistema brasileiro de responsabilidade civil".[24]

Com o resultado da votação pela Corte Especial do STJ, registrou-se no acórdão a decisão pela denegação da homologação das sentenças, tendo a maioria dos membros acompanhado a divergência, vencido o Relator, Ministro Félix Fischer.

3. Caso 'Usinas Itamarati'

Em *Merill Lynch/Itamarati*[25], o STJ deferiu a homologação de sentença judicial estrangeira proferida pela Corte de Justiça do Distrito de Nova Iorque, EUA, considerando inexistir ofensa à ordem pública. A controvérsia subjacente referia-se ao contrato de derivativos (Swap) celebrado entre a Merrill Lynch Capital Services Inc. e a Uisa Finance, sociedade com sede nas Ilhas Cayman, e garantido pela parte brasileira, a Usinas Itamarati S.A. No tribunal de origem da decisão, a requerente Merrill Lynch sustentou o inadimplemento do contrato e indenização por perdas e danos, com base na ausência de pagamento de prestações de garantia para cobertura dos saldos negativos apurados na operação de swap, no modo e tempo estipulados pelas partes.

Em junho de 2012, a Corte de Nova Iorque proferiu a decisão condenando as partes UISA Finance e Usinas Itamarati S.A ao pagamento de US$ 167.805.494,07 como indenização pelo inadimplemento do contrato. Na contestação da ação de homologação ajuizada no STJ pela Merrill Lynch, a parte brasileira alegou ofensa à ordem pública, sustentando que a decisão homologanda conteria diversos vícios, dentre os quais a fundamentação inexistente, negativa de jurisdição, nulidade da garantia prestada (pela alegada ausência de aprovação do Conselho de Administração da companhia, em violação ao direito brasileiro, eleito como aplicável pelas partes).

No acórdão, os votos do Relator, Min. Raul Araujo, e de Vista, do Min. Napoleão Maia Filho convergiram no sentido de que não seria possível considerar as alega-

23 Idem, p.34.

24 Cf. *STJ, Abengoa/Ometto*, cit., nota 1 supra, p.36.

25 STJ, *Merrill Lynch/Usinas Itamarati S.A*, cit. nota 2 supra.

ções da requerida como fundamentos para ofensa à ordem pública. Se elas fossem apreciadas em concreto, o STJ estaria a examinar o mérito da sentença estrangeira, com a "abertura de rediscussão de questões já definitivamente julgadas pela justiça americana, procedimento incompatível com o juízo de delibação que é próprio do pedido de homologação de sentença estrangeira, conforme remansosa jurisprudência da Corte".[26]

4. Esforços interpretativos do STJ sobre a ordem pública

Nos acórdãos examinados, o STJ parece ter abandonado sua posição reiteradamente mais cômoda ou evasiva em casos precedentes – em certa medida herdada da orientação jurisprudencial do STF antes da Emenda 45/2004 – e arriscado seguir mais além, aprofundando certos esforços interpretativos em torno do princípio da ordem pública e da função dos regimes de reconhecimento e execução de sentenças estrangeiras. Ainda me parece cedo falar em formação de jurisprudência em sentido estrito.

Esse giro talvez represente, entretanto, oportunidade para sedimentar entendimentos sobre o caráter limitante-constritivo da ordem pública em procedimentos de homologação de decisões estrangeiras, nos horizontes da sistemática das regras processuais de direito interno[27] e de tratados e convenções de que o Brasil é parte, em particular a Convenção de Nova Iorque de 1958 sobre Sentenças Arbitrais Estrangeiras.

Não seria menos surpreendente o fato de que a discussão travada nos casos *Abengoa* e *Itamarati* tenha repercutido de modo mais intenso justamente em função das dinâmicas do comércio tão presentes na atualidade do contencioso transnacional privado. Empresas continuamente recorrem a tribunais judiciais ou tribunais arbitrais especializados em escala global para resolução de litígios emergentes de suas relações comerciais, societárias, de investimentos ou relacionadas às novas tecnologias - nos campos da propriedade intelectual e da Internet. E, gradualmente, aquelas sediadas no Brasil passam a compor ativamente esse perfil do contencioso, cujos resultados ecoam, em amplo espectro, em controvérsias discutindo elevados valores indenizatórios a serem pagos pelas partes, desconformidade de bens, serviços e pagamentos internacionais em mobilidade, e mesmo o alcance da responsabilidade contratual e extracontratual resultante das relações jurídicas privadas trasnfronteiriças.

Todos esses domínios se entrechocam com o terreno fértil dos autênticos conflitos entre a supremacia da autonomia da vontade (e.g. subjacente à validade e eficácia das cláusulas de lei aplicável, de eleição de foro e compromissórias de arbitragem), a efetividade dos mecanismos extrajudiciais de solução de litígios e a força irresistível da ordem pública como limitante dos efeitos do direito estrangeiro no ordenamento jurídico do foro. É um tema absolutamente clássico no Direito Internacional Privado.

Não seria necessário, nestas crônicas, revisitar as vertentes teóricas discutindo truncadas definições e o alcance do princípio da ordem pública (sobre seus níveis, relações sistêmicas e coexistência entre a ordem pública interna e a internacional) no contexto de aplicação do direito estrangeiro pelos tribunais nacionais. A questão permanece acesa, vívida, de um lado pela pretensão legítima, no DIP, de reconhecimento de fatos e situações jurídicas contendo elementos estrangeiros pelo "juiz do foro" (uma personagem invariavelmente caricata nas digressões doutrinárias e judiciais, a quem se atribui a prerrogativa de interpretar conceitos jurídicos abertos e indeterminados no momento da aplicação do direito estrangeiro ou de fixar a jurisdição para solução de litígios pluriconectados); de outro, especificamente, ela retoma os critérios interpretativos que definem os limites a esse reconhecimento de fatos, situações e decisões revestidas pelo elemento de 'estrangeria', tendo o juiz do foro um papel de protagonismo baseado em ampla discricionariedade.

Existe um jogo de equilíbrio, no direito internacional privado, que confere aos tribunais domésticos o poder de decidir não apenas sobre aspectos de mérito do litígio com conexão internacional, refletido na jurisdição do Estado (i.e. a partir de uma vertente processual), mas também o de atribuir efeitos a leis, fatos, atos e negócios

26 STJ, *Merrill Lynch/Usinas Itamarati S.A*, cit. nota 2 supra, Voto de Vista do Min. Napoleão Maia, p.38.

27 Cf., por exemplo, Arts. 105, I, "i", da Constituição da República; Arts. 960 e ss. do Código de Processo Civil de 2015, Arts.216-A e ss do Regimento Interno do STJ, com redação dada pela Emenda Regimental 18/2014, introduzindo especialmente o dispositivo contido no Art. 216-F do Regimento (*"Não será homologada a sentença estrangeira que ofender a soberania nacional, a dignidade da pessoa humana e/ou a ordem pública"*).

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jurídicos que apresentem conexão com sistema jurídico distinto daquele do foro por mecanismos de aplicação, reconhecimento e execução. Esse jogo dá-se em função de um objetivo sistêmico ulterior: assegurar a continuidade das relações jurídicas privadas (assim como a proteção de interesses a elas concernentes) em múltiplos espaços normativos e jurisdicionais.

Em regimes de reconhecimento de decisões arbitrais e judicias estrangeiras, esse objetivo assegura, por exemplo, que as partes façam valer suas pretensões subjetivas para além do Estado de prolação da sentença (e.g. cumprimento de obrigações; satisfação do crédito, recuperação de ativos, pagamento de indenizações); na arbitragem comercial internacional, esse debate também refere-se à efetividade dos laudos arbitrais para além do país em que o procedimento arbitral foi conduzido, ou do país cuja lei foi escolhida pelas partes como a lei da sede da arbitragem, em larga medida sedimentado pela prática da Convenção de Nova Iorque de 1958 sobre Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras.

A ordem pública, por seu turno, como princípio operativo que é, apresenta-se como espécie de filtro, anteparo, constituído de um conjunto de valores e macroprincípios fundantes do ordenamento jurídico, com força reflexa ou repelente dos efeitos do direito estrangeiro. Nos regimes de reconhecimento, ele opera justamente no momento de ingresso do direito estrangeiro no foro, escrutinado pelo controle judicial de atos e decisões estrangeiras. Dessa forma, ainda que atos, sentenças, negócios jurídicos tenham validamente sido produzidos no estrangeiro, seus efeitos podem ser rechaçados no foro em caso de violação da ordem pública. A tendência contemporânea de política legislativa, como bem estampada no Regulamento Bruxelas I, da União Europeia, reafirma a ideia de "manifesta violação" à ordem pública como pressuposto para denegação do reconhecimento de decisões estrangeiras[28]

Uma questão de direito internacional privado, portanto, seria a de se determinar, de modo casuístico, em quais situações a ordem pública é considerada como tal – em suas dimensões positiva e negativa - para efeitos denegatórios do reconhecimento de decisões estrangeiras, sejam elas judiciais e arbitrais.

Em Abengoa, o STJ empreendeu esforço interpretativo em torno do princípio da ordem pública como limitante ao reconhecimento e execução de sentenças arbitrais estrangeiras, e ali reconhecendo que o atributo da imparcialidade do juiz ou árbitro, na sistemática processual brasileira, seria fundamental, de suporte ao ordenamento jurídico doméstico. Ali, não se tratava de questão meramente a ser endereçada como concernente ao mérito da disputa submetida à arbitragem nos Estados Unidos, segundo as regras de procedimento da Corte Internacional de Arbitragem da CCI, e escrutinada segundo a Lei Federal de Arbitragem daquele país. Se por um lado, poder-se-ia afirmar que a decisão do Tribunal Arbitral e a decisões conexas da Corte Federal de Apelação para o Segundo Circuito convergiram por desconsiderar a alegação de parcialidade do árbitro presidente pelos requeridos (Grupo Dedini Agro), por outro, o juízo de delibação exercido pelo STJ não a tomou como questão que pudesse ser simplesmente segmentada no binômio procedimento-mérito ou reduzida a mérito intocável na decisão homologanda, de modo a afastar o escrutínio do Tribunal sobre a potencial violação da ordem pública do foro no momento de reconhecimento e execução.

Da forma como restaram articuladas opiniões dos magistrados na formação da divergência e as interpretações oferecidas para a decisão no caso Abengoa, a garantia de imparcialidade do juiz, acompanhada do dever conexo de revelação do árbitro de quaisquer vínculos de impedimento em relação às partes litigantes, foi erigida à valor indissociável aos fundamentos constitucionais e à própria higidez do ordenamento jurídico brasileiro, inclusive para fins da conformação de um elemento de 'ordem pública internacional'. Trata-se de uma mensagem transmitida ao funcionamento do contencioso internacional privado – arbitral e judicial – sobre qual a perspectiva ou ótica de análise o filtro da ordem pública é erigido nos casos de reconhecimento e execução.

Entre os excertos mais significativos do voto do Ministro Noronha no caso, destacaria o seguinte:

> "Neste juízo de valor acerca do respeito à soberania e à ordem pública nacional, o STJ possui ampla liberdade para realizar o efetivo controle da decisão estrangeira antes de reconhecer sua eficácia no território nacional. No dizer de Carlos Alberto Carmona "a jurisdição – seja qual for o órgão dela encarregado (arbitral ou judicial) – só pode ser exercida por julgador independente e imparcial" (Em torno do árbitro. In: Revista de Arbitragem e Mediação, ano 8, v. 28, jan./mar. 2011, p. 55). Com efeito, a prerrogativa da imparcialidade do julgador é uma das garantias que resultam do postulado

28 Cf. Art.45 do Regulamento (UE) n. ° 1215/2012 do Parlamento Europeu e do Conselho, de 12 de dezembro de 2012 , relativo à competência judiciária, ao reconhecimento e à execução de decisões em matéria civil e comercial.

ARAUJO, Nadia de; NARDI, Marcelo De; RIBEIRO, Gustavo; POLIDO, Fabrício; LOPES, Inez. Crônicas de Direito Internacional Privado. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 8-34

do devido processo legal, aplicável à arbitragem, mercê de sua natureza jurisdicional. A inobservância dessa prerrogativa ofende, diretamente, a ordem pública nacional. Além disso, só se tem por válida a renúncia à garantia da inafastabilidade da jurisdição estatal quando os árbitros gozam de independência e confiança das partes. Assim, a sentença proferida pela Justiça Federal americana à luz de sua própria legislação não tem o condão de obstar o exame do STJ quanto a possível ofensa à ordem pública nacional decorrente da alegada imparcialidade do árbitro presidente. O art. 14 da Lei de Arbitragem (Lei n. 9.307/1996) prevê o impedimento para funcionar como árbitro das pessoas que tenham com as partes ou com o litígio que lhes for submetido alguma das relações que caracterizam os casos de impedimento ou suspeição de juízes, previstas, respectivamente, nos arts. 134 e 135 do Código de Processo Civil. O desrespeito acarreta a nulidade da sentença arbitral, a teor do art. 32, II, da referida lei".

Segundo a interpretação dada, e seguida pela maioria da Corte Especial do STJ na divergência suscitada, a ordem pública brasileira, segundo a perspectiva dos "juízes do foro", teria sido manifestamente violada pelas decisões arbitrais estrangeiras levadas à homologação pela requerente. Em dupla medida, o STJ referendou posicionamento que articula interpretativamente dispositivos da Lei de Arbitragem de 1996, especificamente o âmbito de aplicação do Art. 14 (sobre o impedimento para funcionar como árbitro pessoas que tenham com as partes em disputa quaisquer relações que caracterizem casos de impedimento ou suspeição dos juízes nos termos dos Arts. 134 e 135 do Código de Processo Civil) e Art. 32, inciso II (relativo às nulidades da sentença arbitral), como nucleares para a constatação ou aferição de valores fundantes da ordem pública brasileira. Aqui ela é erigida para fins de rechaçar ou denegar reconhecimento de sentença arbitral, em linha com as regras abertas (mas não menos carentes de aplicação parcimoniosa pelo STJ) previstas no Art.V.II(b) da Convenção de Nova Iorque de 1958 e no Art.38 da Lei de Arbitragem. Segundo o voto de vista da Ministra Nancy Andrighi, a imparcialidade de qualquer julgador decorre de princípios e garantias constitucionais consideradas como "matéria de ordem pública não sujeita à preclusão", cognoscível a qualquer tempo e que pode também ser examinada no curso do procedimento de homologação de decisões estrangeiras em que a questão da parcialidade de membro do tribunal arbitral é suscitada como fundamento para contestação com base em potencial violação da ordem pública[29].

29 Cf. STJ, *Abengoa/Ometto*, Sentença Estrangeira Contestada nº 9.412, cit. nota 1 supra, pp.46-49.

No caso Usinas Itamarati, o STJ parece ter sido mais contido, recorrendo à uma técnica, à primeira vista, mais parcimoniosa da aplicação do princípio da ordem pública. A questão a causar potenciais irritações ao ordenamento jurídico brasileiro teria sido a alegada fundamentação inexistente na decisão homologada, e que qualquer exame pelo Tribunal, nesse sentido, representaria a reabertura de questões já apreciadas pela justiça estadunidense. Ou seja, uma ideia mais extramada do juízo de delibação. A força da ordem pública não operou da mesma forma irresistível que em Abengoa, ainda que se levasse ao absurdo a interpretação de que a fundamentação das decisões dos tribunais judiciais também sejam um pressuposto processual inafastável no ordenamento jurídico brasileiro, seguindo preceitos constitucionais, e, por conseguinte, integrantes da ordem pública do foro. No cotejo dos cenários, o STJ rendeu-se mesmo à sensível temática da conformação da jurisdição arbitral e os riscos recorrentes de quebra das garantias da independência e imparcialidade do árbitro no mundo hermético da arbitragem comercial internacional. Fundamentar ou não fundamentar uma decisão, por sua vez, permanecerá como habilidade do juiz estrangeiro.

III. Legislação Doméstica ou Comparada

Crônica 4 - Dignidade da pessoa humana e mudança de paradigma da Lei de Migração no Brasil

Inez Lopes

1. Introdução

A liberdade e a igualdade são direitos fundamentais inerentes a toda pessoa, consagrados nas ordens constitucionais dos Estados democráticos. No âmbito internacional, a migração constitui um direito basilar de locomoção de todo indivíduo, previsto em diversos tra-

ARAUJO, Nadia de; NARDI, Marcelo De; RIBEIRO, Gustavo; POLIDO, Fabrício; LOPES, Inez. Crônicas de Direito Internacional Privado. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 8-34

tados internacionais, globais e regionais, que reconhecem a liberdade de entrar e sair de um país, incluindo o de seu próprio território. Atualmente, 244 milhões de pessoas vivem fora de seus países de nascimento, o que representa 3,3 por cento da população mundial.[30] O principal motivo da migração é a busca por melhores oportunidades econômicas e sociais. Na sociedade globalizada, migrar é um direito.

A globalização é o fenômeno responsável pela promoção das quatro liberdades (livre circulação de mercadorias, serviços, capitais e pessoas) no desenvolvimento econômico e social, consequentemente diluindo as fronteiras entre os países e intensificando o comércio internacional. A mobilidade de pessoas no mundo alavanca a indústria de transportes em suas diversas modalidades. Só no setor aéreo, por exemplo, foram transportados 20,9 milhões de passageiros em voos internacionais com origem ou destino no Brasil em 2016.[31] Nesta seara, a migração é fator de desenvolvimento econômico e social.

Por outro lado, desastres ambientais, mudanças climáticas, epidemias, crises políticas e conflitos armados engendram o deslocamento forçado de pessoas e a busca por refúgio e asilo em outro país. A solidariedade entre os países é um dos pilares para o acolhimento dessas pessoas em seu território, como direito fundamental, e uma obrigação imposta aos Estados pelos tratados internacionais. As crises migratórias são problemas globais e geram problemas como o aumento da xenofobia e políticas nacionais populistas que criminalizam o migrante como "ameaça" às oportunidades de emprego. Uma das faces da sustentabilidade do desenvolvimento humano está no acolhimento e integração do migrante e de seus familiares.

Entretanto, no que tange aos direitos e deveres dos migrantes, este é um tema global e está na agenda de diversos países, que definem suas políticas migratórias nacionais. As legislações nacionais são bastante variadas, com maior ou menor grau de proteção da pessoa migrante. É neste cenário que o Brasil assume um papel de vanguarda em relação às políticas migratórias no mundo com a aprovação da Lei n. 13.445, de 24 de maio de 2017, que instituiu a Lei de Migração, alterou o Decreto-lei nº 2.848, de 1940, e revogou as Leis nº 818, de 1949 e 6.815, de 1980.

O vanguardismo se fundamenta na mudança de paradigma no tratamento atribuído ao migrante como pessoa de iguais direitos, deveres e oportunidades na sociedade brasileira, estendendo-se, também, a seus familiares. A vicissitude ocorre igualmente no escopo da lei, que tem por objeto a pessoa, seja ela migrante no Brasil ou brasileiro no exterior. Neste contexto, a dignidade da pessoa migrante é um dos pilares na nova lei, pois afasta o fundamento anterior que regulava apenas a condição jurídica do estrangeiro no Brasil, ainda sob uma perspectiva da segurança nacional.

O objetivo do presente artigo é apresentar o arquétipo da nova lei que dispõe sobre os direitos e os deveres do migrante e do visitante e regula a sua entrada e estada no país. Diametralmente oposta à legislação anterior, a lei estabelece um sistema de proteção não apenas ao estrangeiro, mas, igualmente, ao emigrante brasileiro, por meio de princípios e de diretrizes para proteger e assistir brasileiros estabelecidos no exterior, temporária ou definitivamente. O artigo avalia a adoção da nova lei, que estabeleceu uma mudança de paradigma ao reconhecer a dignidade da pessoa migrante, e critica vetos presidenciais aplicados à norma, que não afetariam a segurança e interesses nacionais.

2. Por que uma nova Lei de Migração?

A Lei de Migração teve início com o Projeto de Lei do Senado n. 288, de 2013 (PLS nº 288, de 2013), de autoria do senador Aloysio Nunes Ferreira, com o escopo de substituir o Estatuto do Estrangeiro, a Lei n. 6.815, de 19 de agosto de 1980, e de instituir uma nova política migratória nacional e de regular a entrada e estada de estrangeiros no Brasil. O Estatuto do Estrangeiro apresentava diversos dispositivos incompatíveis com a Constituição Federal de 1988 e com o Estado democrático de direito brasileiro.

O projeto de lei inicial apresentou uma mudança de paradigma no escopo das políticas migratórias no Brasil, adotando um viés humanista na circulação de imigrantes em território brasileiro. Objetivou, igualmente, afastar o âmbito de aplicação da lei precipuamente dirigida à segurança nacional, à organização institucional,

30 UNFPA (Fundo de População das Nações Unidas). Migration: Overview. Disponível em http://www.unfpa.org/migration, Acessado em 26/05/2017.

31 ANAC (Agência Nacional de Aviação Civil). Anuário do Transporte Aéreo 2016, volume único, 1ª edição, Agência Nacional de Aviação Civil, Brasília, 2017.

aos interesses políticos, socioeconômicos e culturais do Brasil, bem como à defesa do trabalhador nacional, contida no Estatuto do Estrangeiro.

Resumidamente, com relação à tramitação no Senado, o PLS nº 288/2013 foi submetido à Comissão de Assuntos Sociais (CAS) e à Comissão de Constituição, Justiça e Cidadania (CCJ), com pareceres favoráveis à aprovação. Na Comissão de Relações Exteriores e Defesa Nacional (CRE), foi aprovado com emendas o substitutivo, nos termos da Emenda nº 7. Após aprovação, o projeto de lei foi encaminhado para apreciação da Câmara dos Deputados, em conformidade com o Artigo 65 da Constituição Federal.

Na tramitação na Câmara dos Deputados, a mesa diretora recebeu o ofício do Senado Federal do PLS nº 288, que institui a Lei de Migração, para sua revisão. Na Câmara dos Deputados, a proposição tramitou como Projeto de Lei nº 2516, de 2015, e foi encaminhada para pareceres das Comissões de Trabalho, de Administração e Serviço Público, de Turismo, de Relações Exteriores e de Defesa Nacional, de Finanças e Tributação e de Constituição e Justiça e de Cidadania. Foi constituída uma Comissão Especial destinada a proferir parecer ao projeto. Foram apensados outros projetos relacionados ao assunto. Várias audiências públicas foram realizadas com representantes governamentais e não governamentais, que apresentaram várias sugestões de alterações, algumas delas acolhidas pelo relator da comissão, o deputado Orlando Silva. A comissão apresentou o projeto substitutivo PL nº 2516/2015, com o propósito de permitir que o tema da migração fosse analisado no Brasil "de acordo com o enfoque do respeito aos direitos humanos e da integração internacional, promovendo medidas garantistas aos imigrantes que aqui chegam e proteção aos brasileiros que buscam oportunidades no exterior".

Em 6 de dezembro de 2016, o Plenário da Câmara dos Deputados, em sessão deliberativa extraordinária, discutiu o projeto em turno único e aprovou a redação final assinada pelo relator da Comissão Especial. Apesar da aprovação por maioria, com 207 votos a favor (71,1%), houve resistência por parte de alguns parlamentares, que votaram contra a proposta (28,5%). Na votação, ainda houve uma abstenção. O discurso de alguns deputados contrários à aprovação do texto foi em sentido diametralmente oposto ao próprio texto da lei que estabelece repúdio à xenofobia e à discriminação contra migrante em suas declarações ao afirmar que "as portas do Brasil estão sendo escancaradas para tudo quanto é gente" e que "todo tipo de escória vai entrar aqui". No bom sentido da palavra, a qualificação do migrante como escória é o que se espera não ocorrer a partir da vigência da lei. O migrante não é objeto sem valor, mas tão-somente um ser humano igual a outro ser humano, que tem o direito de pertencer a uma comunidade, de forma voluntária ou involuntária.

A matéria retornou ao Senado como projeto substitutivo, em face das modificações feitas na Câmara, em 13/12/2016, em conformidade com o Parágrafo Único do Artigo 65 da Constituição Federal, que estabelece que sendo o projeto emendado, voltará à Casa iniciadora. Após a matéria ter sido lida em Plenário, foi encaminhada novamente à Comissão de Relações Exteriores e Defesa (CRE). O Parecer nº 7, de 2017-CRE, de relatoria do senador Tasso Jereissati, foi pela aprovação da matéria, com as alterações apresentadas. Enfatizou que o projeto apresenta visão contemporânea do fenômeno migratório, que não dissocia a imigração da emigração, daí o motivo em se instituir uma nova "Lei de Migração". Em 18/04/2017, foi discutido o substitutivo da Câmara dos Deputados em turno único. Encerrada a discussão da matéria, o projeto foi para votação dos dispositivos destacados do SCD nº 7, de 2016, pelo requerimento nº 256, de 2017, no Plenário do Senado. A proposição foi aprovada com 43 votos a favor dos 49 senadores presentes. O texto final do Projeto de Lei foi remetido para sanção presidencial, em conformidade com o Artigo 66 da Constituição Federal.

A lei foi sancionada com vetos parciais pelo presidente da República em 24/05/2017. Os vetos poderiam ter sido apreciados em sessão conjunta pela Câmara dos Deputados e Senado, conforme dispõe o § 4º do Artigo 66, mas não os foram, mantendo-se, assim, os aplicados pela Presidência. A norma entrará em vigor cento e oitenta dias depois da publicação ocorrida em 25/05/2017, prazo inclusive para a regulamentação de vários dispositivos.

Apesar dos vetos, a nova Lei de Migração é um marco substancial para afirmar o Brasil como Estado democrático de direito, que tem por fundamento a dignidade da pessoa migrante, voluntária ou involuntária. A lei é necessária para afirmar a mudança de paradigma, que afasta a ideia de que o estrangeiro é uma "ameaça" à segurança e à soberania nacional, e proteger a pessoa

humana em suas três vertentes (direitos humanos, direito humanitário e direito dos refugiados), em consonância com os tratados internacionais em que o Brasil firmou compromisso em matéria de direitos humanos. Ressalta-se que vários dispositivos do Estatuto do Estrangeiro foram derrogados a partir da Constituição Federal de 1988.

Além disso, a lei inovou ao inserir princípios e diretrizes para as políticas públicas migratórias focados na pessoa migrante, consagrando-a como sujeito de direitos e de garantias, seja ela pessoa imigrante em território brasileiro, seja pessoa emigrante brasileira em relação a seus direitos quando no exterior.

A mudança de paradigma para a proteção da pessoa migrante consagra o acolhimento humanitário para as pessoas oriundas de conflitos armados, desastres ambientais, mudanças climáticas, entre outros, e a concessão de asilo político, colocando o Brasil em posição de vanguarda como um país em que migrar é um direito na sociedade globalizada. A reciprocidade de tratamento permitirá avançar para relações de respeito aos brasileiros no exterior. Além disso, destaca-se que a política migratória brasileira deve se pautar pelo repúdio e prevenção à xenofobia, ao racismo e quaisquer outras formas de discriminação, em especial pela condição migratória. A liberdade de locomoção ou de circulação constitui um dos direitos fundamentais da dignidade da pessoa humana.

3. A dignidade da pessoa humana e a Lei de Migração: As três vertentes de Direitos Humanos

"A calamidade que se vem abatendo sobre um número cada vez maior de pessoas não é a perda de direitos específicos, mas a perda de uma comunidade disposta e capaz de garantir quaisquer direitos", segundo Arendt. Além disso, as pessoas não nascem iguais. "Tornamo-nos iguais como membros de um grupo por força de nossa decisão de nos garantirmos direitos reciprocamente iguais."[32] Desse modo, as pessoas têm o direito de pertencer a uma comunidade e também de mudar dessa comunidade. A migração como direito humano possibilita à pessoa o direito a ser inserida em uma outra comunidade que não a sua originária, seja voluntária ou involuntariamente.

A dignidade da pessoa migrante é um dos pilares da nova lei. A migração, deslocamento e mobilidade são cada vez mais frequentes na sociedade globalizada. A liberdade de locomoção inclui o direito de entrar e sair de seu país de residência habitual independentemente de sua nacionalidade. A dignidade da pessoa migrante também se pauta pela liberdade de circular entre os países. Economicamente, a migração contribui para o desenvolvimento econômico e social de todos os Estados, pela inserção do migrante no mercado de trabalho, o que gera renda e arrecadação.

O referencial de dignidade se refere a um atributo, a uma qualidade essencial pertencente a todo ser humano em sua condição de ser em relação a si mesmo e em relação ao meio social. Esse atributo possui um valor, que está acima de qualquer preço e não possui qualquer outra coisa equivalente, conforme os estudos de Kant, para quem, no reino dos fins, "tudo tem ou um preço ou uma dignidade".[33] Além do valor, esse atributo contém uma pluralidade de concepções que são definidas pelas diversas áreas do conhecimento, como, por exemplo, a Filosofia, a Ética, a Política, a Antropologia, a Psicologia, a Religião e o Direito. Cada uma dessas ciências apresenta seus fundamentos para a compreensão da dignidade humana, de maneira a construir conjuntamente a ideia de que todo ser humano possui a liberdade e a capacidade de decidir sobre a sua própria vida e de fazer escolhas, de traçar seu próprio destino, de ser feliz e de ser respeitado em todos os lugares enquanto ser dotado de vontade.

Desse contexto, nota-se uma aproximação entre os direitos fundamentais nas ordens constitucionais e os direitos humanos na ordem internacional, tendo como fundamento a dignidade da pessoa humana. Considerando a diversidade cultural e as diferentes evoluções na proteção do indivíduo em cada Estado, a dignidade da pessoa humana deve ser pensada como um "conceito aberto, plástico e plural no mundo contemporâneo".[34] Além disso, vale lembrar que a dignidade encontra-se

32 ARENDT, Hannah, *Origens do Totalitarismo*, São Paulo: Companhia das Letras, 2000, p. 335.

33 KANT, Immanuel. *Fundamentação da Metafísica dos Costumes*, Edições 70, p. 77.

34 BARROSO, Luís Roberto. *A Dignidade da Pessoa Humana no Direito Constitucional Contemporâneo*: Natureza Jurídica, Conteúdos Mínimos e Critérios de Aplicação, Versão provisória para debate público. Mimeografado, dezembro de 2010, p. 18.

em "construção permanente",[35] impedindo a adoção de medidas que retrocedam ou deem interpretação restritiva à compreensão do conceito.

Nesta seara, se a globalização promove as quatro liberdades precipuamente por meio da circulação de mercadorias, serviços e capitais, as pessoas também devem ser incluídas e não mitigadas por legislações nacionais. Importante salientar a dignidade é a qualidade que pertence a todo ser humano da comunidade internacional, independentemente de sua condição de nacional de um Estado. A dignidade da pessoa humana é um valor também reconhecido nos tratados internacionais, como fundamento da ordem internacional, assim como o direito de migrar.

No preâmbulo da Carta das Nações Unidas, de 1945, os Estados reafirmaram a fé nos direitos fundamentais do homem, na dignidade e no valor da pessoa humana, na igualdade de direitos dos homens e das mulheres, assim como das nações, grandes e pequenas. A Declaração Universal de Direitos Humanos, de 1948, reconhece que a dignidade é inerente a todos os membros da família humana e que eles gozam de direitos iguais e inalienáveis. No que tange à mobilidade de pessoas, o Artigo 13, parágrafo 2º afirma que toda pessoa tem o direito de livremente circular e escolher a sua residência no interior de um Estado, de sair do país em que se encontra, incluindo o seu, e o direito de regressar a ele. Além disso, estabelece que a pessoa sujeita a perseguição tem o direito de procurar e de beneficiar de asilo em outros países, conforme dispõe o Artigo 14. Na mesma direção se alinha o Pacto de Direitos Civis e Políticos (1966). O Pacto de Direitos Econômicos, Sociais e Culturais (1966) eleva a educação como forma de promover o desenvolvimento da personalidade humana e do sentido de sua dignidade. Observa-se uma noção de dignidade da pessoa em múltiplas dimensões, entre eles a política, econômica social e cultural. O direito de migrar garante o direito do desenvolvimento da pessoa humana em suas múltiplas dimensões.

No âmbito regional, a Convenção Americana de Direitos Humanos assegura à pessoa os direitos de circulação e de residência conforme dispõe os parágrafos do Artigo 22. Destaca-se, entre outros, que a nova Lei de Migração está em sintonia com a convenção no que se refere à vedação a expulsão coletiva de migrantes disposto no Artigo 61, bem como assegura que as políticas migratórias se fundamentam no repúdio às práticas de expulsão ou de deportação coletivas (Artigo 4º, XXII). Entende-se por repatriação, deportação ou expulsão coletiva aquelas que não individualizam a situação migratória irregular de cada pessoa. Por seu turno, o Protocolo nº 4, em que se reconhecem certos direitos e liberdades além dos que já figuram na Convenção Europeia de Direitos do Homem (1963), também assegura a liberdade de circulação, dando ênfase à condição migratória, ao reconhecer no Artigo 2º que qualquer pessoa que se encontra em situação regular em território de um Estado tem direito a nele circular livremente e a escolher livremente a sua residência. Na mesma direção, a Convenção Africana dos Direitos Humanos e dos Povos (1981) reconhece os direitos de liberdade de circulação nos termos do Artigo 12.

Destarte, a migração é um direito humano que deve ser respeitado por todos os Estados e não pode ser restringido senão em virtude de lei. Assim, os instrumentos internacionais, paralelamente, garantem aos países o direito de estabelecer restrições para proteger a segurança nacional, a ordem ou saúde públicas e o interesse público.

A inovação da Lei de Migração se refere à abordagem das três vertentes da proteção da pessoa humana; além dos direitos humanos, ela abrange o direito humanitário e o direito dos refugiados. A lei possibilita a concessão de visto temporário para acolhida humanitária em caso de o apátrida ou o nacional de qualquer país estiver em situação de grave ou iminente instabilidade institucional, de conflito armado, de calamidade de grande proporção, de desastre ambiental ou de grave violação de direitos humanos ou de direito internacional humanitário. No que tange ao direito dos refugiados, a Lei de Migração dialoga com a Lei nº 9.474, de 22 de julho de 1997, referente ao Estatuto dos Refugiados, na medida em que estabelece que na sua aplicação devem ser observadas as disposições do estatuto quando houver situações envolvendo refugiados e solicitantes de refúgio.

4. As principais mudanças de paradigma

A afirmação da migração como direitos humanos é uma das principais alterações de paradigma da nova lei de migração. A seguir apresentam-se

35 LEITE, Carlos Bezerra. *Direitos Humanos*, Lumen Juris, 2010, p. 45.

brevemente as principais mudanças trazidas pelo teor da norma jurídica, que estabelece uma nova política migratória com fundamento da universalidade, indivisibilidade e interdependência de direitos humanos, não excluindo as demais já mencionadas no presente artigo.

4.1. Proteção do apátrida e redução da apatridia

A nova lei dá proteção especial ao apátrida, aquela pessoa que não é considerada como nacional por nenhum Estado, segundo a sua legislação, nos termos da Convenção sobre o Estatuto dos Apátridas (1954). De acordo com a lei, durante a tramitação do processo de reconhecimento da condição de apátrida, o sujeito goza de iguais direitos e garantias atribuído aos migrantes no Artigo 4°. A norma, a partir de regulamento, estabelecerá um sistema especial de proteção ao apátrida, com a adoção de um processo simplificado de naturalização. Entre as garantias, ainda que o apátrida reconhecido não opte pela naturalização imediata, ele terá a autorização de residência outorgada em caráter definitivo. O apátrida ganha tratamento especial em caso de deportação, pois nos termos do Artigo 52, que dependerá de prévia autorização da autoridade competente.

4.2. Não discriminação e não criminalização

A nova lei afasta a criminalização do migrante em condição irregular, garantindo-lhe o direito à ampla defesa e ao contraditório, e prazo razoável para regularizar a sua situação migratória. A lei proíbe, também, a discriminação da pessoa pela sua condição migratória, cabendo ao Estado promover políticas para a inclusão do migrante nas atividades econômicas e sociais.

Destaca-se o Parecer (SF) nº 7, de 2017-CRE durante a tramitação no Senado, que fez uma breve retrospectiva da migração brasileira, asseverando que

Desde o Império, o tema da situação jurídica do estrangeiro foi sendo versado, de um lado, a partir do dirigismo migratório, muitas vezes contra a vontade das pessoas, com a promoção do tráfico de escravos, ou de tom discriminatório, com a preferência por pessoas de ascendência europeia. De outro lado, muitas vezes a legislação pátria dedicou-se a acentuar as suspeitas e as ameaças que poderiam representar os estrangeiros em solo nacional, o que implicou a criminalização da imigração e em hipóteses sumárias ou arbitrárias para deportar ou expulsar estrangeiros.

Nesse sentido, o Estatuto do Estrangeiro contém uma política de imigração cunhada na proteção do trabalhador nacional. Assim, "o mercado de trabalho não deve ser fechado e a migração é um fator de seu desenvolvimento." [36], mas

A imigração deve ser reconhecida como um imperativo moral e econômico tanto para os desenvolvidos como para o mundo subdesenvolvido. Isso não é apenas do interesse da humanidade, da justiça e da decência. É também no interesse público global - embora poucos ainda o reconheçam.[37]

Outro ponto importante se refere ao Estatuto do Estrangeiro, que proibia ao estrangeiro admitido no território nacional exercer atividade de natureza política. A nova lei de migração reconhece o direito de reunião para fins pacíficos; direito de associação, inclusive sindical, para fins lícitos; estabelecendo igualdade de direitos em relação aos nacionais. A pessoa migrante não poderá ser impedida de ingressar no país por motivo de raça, religião, nacionalidade, pertinência a grupo social ou opinião política.

A lei garante o acesso igualitário e livre do migrante a serviços, programas e benefícios sociais, bens públicos, educação, assistência jurídica integral pública, trabalho, moradia, serviço bancário e seguridade social, bem como acesso à justiça e à assistência jurídica integral gratuita aos que comprovarem insuficiência de recursos nos casos de deportação ou expulsão, podendo nessas situações atuar a Defensoria Pública da União. No caso da repatriação, somente nos casos em que ela não seja possível imediatamente, será assegurada a assistência judiciária pela Defensoria Pública da União.

4.3. Desburocratização

A Lei de Migração muda o tratamento dado ao imigrante em situação irregular. O Estatuto do Estrangeiro vedava a legalização da estada de clandestino e de irregular e previa a possibilidade de eles serem presos por ordem do ministro da Justiça enquanto não se efetivasse a sua deportação, por prazo de sessenta dias. A nova

36 Idem p. 3.

37 JUSS, Satvinder S. *International Migration and Global Justice*. Aldershot: Ashgate Publishing Limited, 2006, p. x.

política migratória assegura ao migrante o direito de ser notificado pessoalmente das irregularidades verificadas e concede prazo para regularização não inferior a sessenta dias, podendo ser prorrogado por igual período por despacho fundamentado e mediante compromisso de a pessoa manter atualizadas suas informações domiciliares. A notificação não impede a livre circulação em território nacional.

Outra mudança na política migratória brasileira é a promoção não só da entrada regular, mas também da regularização de documentos, com acesso a serviços públicos necessários à regularização do migrante indocumentado.

No que se refere à fiscalização marítima, a lei dispensa a verificação de passageiro, tripulante e estafe de navio em passagem inocente, a não ser quando houver necessidade de descida de pessoa à terra ou de subida a bordo do navio.

5. Críticas ao veto presidencial

A lei de migração foi sancionada pelo presidente da República com veto parcial a vinte e dois dispositivos do texto. Em comunicação direcionada ao presidente do Senado, os motivos que fundamentaram os vetos foram a contrariedade ao interesse público e a inconstitucionalidade dos artigos e parágrafos.

O conceito de migrante, nos termos do inciso I do § 1º do artigo 1o, como pessoa que se desloca de país ou região geográfica ao território de outro país ou região geográfica, incluindo o imigrante, o emigrante, o residente fronteiriço e o apátrida, foi vetado por ser considerado "demasiadamente amplo" e por abranger "inclusive o estrangeiro com residência em país fronteiriço, o que estende a todo e qualquer estrangeiro, qualquer que seja sua condição migratória, a igualdade com os nacionais, violando a Constituição em seu artigo 5o, que estabelece que aquela igualdade é limitada e tem como critério para sua efetividade a residência do estrangeiro no território nacional". Em sentido diametralmente oposto, o principal objetivo da inserção do vocábulo "migrante" no texto da lei era justamente afastar "a distinção indevida sobre a titularidade dos direitos humanos baseada na condição migratória".[38] A manutenção do conceito estabeleceria uma afirmação do migrante, independentemente de sua condição migratória, como sujeito de direitos e garantiria uma maior proteção à pessoa enquanto ser e não à sua condição de estar.

Com relação aos povos indígenas, o veto ao **§ 2**o do artigo 1o afastou a possibilidade de se reconhecer a autonomia dos povos originários de livremente circularem em suas terras. Aceitar o dispositivo vetado não seria uma ameaça à defesa da soberania territorial brasileira, mas apenas exigiria adotar políticas de maior controle das instituições brasileiras nos pontos de fronteiras.

Com relação aos princípios e garantias da política migratória, a vedação ao estrangeiro para o exercício de cargo, emprego ou função pública, nos termos do veto aos **§§ 2**o e 3o do artigo 4o **e alínea** *d* do inciso II do artigo 30, estabelece, na verdade, discriminação proibida pelo *caput* do artigo 5° entre brasileiros e estrangeiros domiciliados no Brasil, à exceção dos cargos destinados a brasileiros natos previstos na Constituição Federal. Desde a Emenda Constitucional nº 19, de 1998, os cargos, empregos e funções públicas passaram a estar acessíveis também aos estrangeiros, na forma da lei, como preceitua o Artigo 37, I. O Estado democrático de direito é aquele que promove a igualdade de direitos civis em respeito à *rule of law*. A vedação aos parágrafos mantém a mesma ideia do Artigo 2º da Lei nº 6.815/1980, de "defesa do trabalhador nacional", estabelecendo distinções entre os setores público e privado.

O Artigo 14 trata do visto temporário e estabelece as hipóteses para a sua concessão. O veto ao § 10 deste artigo foi justificado sob o fundamento de que "não se afigura adequado e recomendável permitir-se que o relevante instituto do visto temporário possa ter novas hipóteses, além das definidas nesta lei, criadas por regulamento, com risco de discricionariedade indevida e com potencial de gerar insegurança jurídica." Contudo, o inciso III do Artigo 14 estabelece "outras hipóteses definidas em regulamento", o que apresenta uma aparente incongruência normativa. Nota-se que o rol não é exaustivo, possibilitando outras hipóteses futuras, considerando o próprio dinamismo da sociedade.

No que tange à vedação ao Artigo 37 e inciso IV do artigo 40 que trata do visto ou autorização de residência

38 Câmara dos Deputados. Parecer da Comissão Especial destinada a proferir parecer ao Projeto de Lei nº 2516, de 2015, 2016, p. 13, Disponível em http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1474829&filename=Tramitacao-PL+2516/2015, Acessado em 20/06/2017.

para fins de reunião familiar foi justificado como "dispositivos que poderiam possibilitar a entrada de crianças sem visto, acompanhada de representantes por fatores de sociabilidade ou responsável legal residente e, com isso, facilitar ou permitir situações propícias ao sequestro internacional de menores". *Data venia,* a manutenção dos dispositivos afirmaria o direito à reunião familiar aos migrantes, sem prejuízo aos direitos e obrigações estabelecidos por tratados vigentes no Brasil e que sejam mais benéficos ao migrante e ao visitante, em particular os tratados firmados no âmbito do Mercosul, conforme dispõe o Artigo 111 da lei. Isso significa que esses dispositivos não afetam as obrigações internacionais assumidas pelo Brasil na Convenção da Haia de 1980 sobre Aspectos Civis sobre Sequestro Internacional de Crianças. Ademais, a mãe é a principal subtratora da criança nos casos de sequestro internacional de menores e não teria impacto considerável para justificar a vedação.

O Artigo 116 da Lei de Migração objetivava revogar as expulsões decretadas antes da vigência da Constituição Federal e, a partir da vigência, dependeria da adoção de critérios para revogação e escalonamento da validade das medidas expulsórias por órgão competente do Poder Executivo. As razões do veto foram de que "os atos materiais de expulsão e, consequentemente, de sua revogação, consubstanciam efetivo exercício de soberania nacional, competência material privativa do presidente da República, a teor dos incisos VII e VIII do artigo 84 da Constituição. Ademais, no mérito, o dispositivo poderia representar um passivo indenizatório à União, com efeitos negativos nas contas públicas e insegurança jurídica às decisões de instituições brasileiras a expulsões." Todavia, considerando o fator tempo de quase três décadas, o impacto desse dispositivo seria mínimo. Uma vez revogada a expulsão decretada, o imigrante, para retornar ao Brasil, deve atender às condições dos vistos previstos em lei e não se enquadrar nos impedimentos de ingresso. Além disso, a nova lei prevê a possibilidade de procedimentos para apresentação e processamento de pedidos de suspensão e de revogação dos efeitos das medidas de expulsão e de impedimento de ingresso e permanência em território nacional, que dependerá de regulamento, conforme o Artigo 56. Assim, a lei apresenta uma visão mais humanista em relação ao migrante, que atendendo a condições especiais, poderá ter autorização de residência, com o propósito de viabilizar medidas de ressocialização em cumprimento de penas aplicadas ou executadas em território nacional.

O artigo 118 previa a concessão de autorização de residência aos imigrantes que, tendo ingressado no território nacional até 6 de julho de 2016, independentemente de sua situação migratória prévia. O veto presidencial qualificou o dispositivo como "anistia indiscriminada a todos os imigrantes". Destaca-se que o § 4º do artigo era claro em afirmar que a autorização de residência não implicaria anistia penal e não impediria o processamento de medidas de expulsão do migrante. Isso não seria novidade, pois o Brasil já concedeu anistia a estrangeiros em governos passados.

No que tange à repatriação, que consiste em medida administrativa de devolução de pessoa em situação de impedimento ao país de procedência ou de nacionalidade, nos termos do Artigo 49, o § 5º foi revogado com acerto. O parágrafo previa que comprovado o dolo ou a culpa da empresa transportadora, serão de sua responsabilidade as despesas com a repatriação e os custos decorrentes da estada da pessoa sobre quem recaia medida de repatriação." O veto ao dispositivo foi favorável ao interesse público, na medida em que a Convenção sobre Aviação Civil Internacional assegura que as empresas recebam valores por intermédio de seguros obrigatórios para cobrir as despesas com repatriação, e seus custos decorrentes, de maneira objetiva, sem necessidade de comprovação de dolo ou culpa. Entendimento diverso representaria ônus indevido ao Estado brasileiro, além de poder representar uma procrastinação da estada do imigrante ou visitante impedido de entrar no País."

Com relação à transferência de condenado, o **§ 3º do artigo 105, que previa a competência do** Superior Tribunal de Justiça para a homologação da sentença estrangeira, foi vetado sob o fundamento de que "não há que se falar em sentença estrangeira a ser homologada, posto tratar-se de transferência, feita voluntariamente pelo condenado e em seu próprio benefício, e cujos tratados e convenções a respeito visam simplificar, e não burocratizar, a transferência internacional de presos". Ressalta-se que a jurisprudência é pacífica no sentido de que é dispensável a homologação de sentença estrangeira de decisão penal nos casos de transferência de pessoa condenada, uma vez que possuem uma tramitação específica previsto em tratados internacionais.[39]

39 Ver Sentenças Estrangeiras examinadas pelo Superior Tribunal de Justiça: SE 3521/PT; SE 4141/PT; SE 5237/US. e SE 5269/PT. A homologação de sentença condenatória não constitui requisito para a concessão de benefício de transferência de pessoa condenada.

ARAUJO, Nadia de; NARDI, Marcelo De; RIBEIRO, Gustavo; POLIDO, Fabrício; LOPES, Inez. Crônicas de Direito Internacional Privado. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 8-34

6. Considerações finais

A nova Lei de Migração é um marco na história das políticas migratórias no Brasil. Como Estado democrático de direito, a lei se fundamenta na dignidade da pessoa migrante, independentemente da sua condição migratória. Fortalece políticas públicas para o imigrante e emigrante, além de repudiar e prevenir a xenofobia, o racismo e quaisquer outras formas de discriminação, em especial pela condição migratória.

A liberdade de locomoção ou de circulação é um direito humano, sendo que toda pessoa tem o direito de migrar. O desenvolvimento sustentável nas políticas migratórias contribui para promover uma justiça social, rechaçar as políticas de criminalização da pessoa migrante e para assegurar a todas as pessoas o gozo de direitos de liberdade e de garantias constitucionais de direitos civis para alcançarem uma igualdade jurídica. O migrante em situação irregular passa a ser tratado com respeito, tendo direito à defesa, à regularização, podendo circular livremente durante a análise de sua regularização.

Na sociedade globalizada, a migração deve ser vista como fator de desenvolvimento econômico e social. O migrante não é objeto sem valor, mas tão-somente um ser humano igual a outro ser humano, que tem o direito de pertencer a uma comunidade.

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Non-adjudicatory State-State Mechanisms in Investment Dispute Prevention and Dispute Settlement: Joint Interpretations, Filters and Focal Points

Mecanismos não contenciosos de prevenção e de resolução de disputas referentes aos investimentos entre Estados: Interpretações conjuntas, filtros e pontos focais

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Non-adjudicatory State-State Mechanisms in Investment Dispute Prevention and Dispute Settlement: Joint Interpretations, Filters and Focal Points*

Mecanismos não contenciosos de prevenção e de resolução de disputas referentes aos investimentos entre Estados: Interpretações conjuntas, filtros e pontos focais

Catharine Titi**

Abstract

The last 30 years in the history of international investment law witnessed the emergence of investor-state dispute settlement (ISDS) as the definitive method for the resolution of investment disputes, and the expanding role of the investor in the same. Investment dispute settlement has become largely synonymous with a system that involves an investor, often private entity, in international arbitration against its host state. States, in this same setting, are relegated to the role of respondent. But despite the predominant role of the investor, some mechanisms involving both states (host state and home state of the investor) do exist. Some of these mechanisms, such as state-state dispute settlement and binding interpretations, have been used for years. Others, such as national contact points or ombudsmen, are newer. As investment law enters a new era of reflection with the functioning of the current ISDS machinery at its centre, some of the efforts at reforming international investment law focus on enhancing the role of the state in investment dispute settlement and add to the popularity of some of these mechanisms. The article critically explores three 'soft' non-adjudicatory approaches to the prevention or resolution of investment disputes that belong to the sphere of state-to-state procedures and have gained currency in recent years: joint interpretive statements, including subsequent agreement or practice under general public international law and clarifications through diplomatic notes and periodic review of treaty content; filter mechanisms; and focal points or ombudsmen.

Keywords: non-adjudicatory State-State mechanism; joint interpretations; filters; focal points

Resumo

Os últimos 30 anos na história do direito de investimento internacional testemunharam o surgimento da solução de conflito entre investidores e Estados como o método para a resolução de conflitos de investimento e o papel crescente do investidor no mesmo. A resolução de litígios de in-

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vestimento tornou-se em grande parte sinônimo de um sistema que envolve um investidor, muitas vezes entidade privada, num processo de arbitragem internacional contra o seu Estado anfitrião. Os Estados, neste mesmo cenário, são relegados ao papel do reu. Mas, apesar do papel predominante do investidor, alguns mecanismos envolvendo ambos os Estados (Estado anfitrião e Estado de origem do investidor) existem. Alguns desses mecanismos, como a resolução de litígios entre Estados e as interpretações vinculativas, foram usados há anos. Outros, como os Pontos de contato nacionais ou o Ombudsman, são mais novos. Como o direito dos investimentos entra em uma nova era de reflexão com o funcionamento do atual sistema de resolução de disputas no seu centro, alguns dos esforços de reforma internacional são visíveis, concentrando-se no papel crescente do Estado na resolução de disputa, aumentando assim a popularidade de alguns desses mecanismos. O artigo explora criticamente três abordagens 'não-contenciosas' para a prevenção ou a resolução de disputas de investimento que pertencem à esfera de procedimentos Estado-Estado que ganharam atenção nos últimos anos: as declarações interpretativas conjuntas, incluindo acordo ou prática subsequente regido pelo direito internacional público e esclarecimentos através de notas diplomáticas e revisão periódica do conteúdo dos tratados; mecanismos de filtragem; e pontos focais ou ombudsman.

Palavras-chave: resolução não contenciosa de disputas; interpretação conjunta; filtros; pontos focais

1. Introduction

The last 30 years in the history of international investment law witnessed the emergence of investor-state dispute settlement (ISDS) as the definitive method for the resolution of investment disputes, and the expanding role of the investor in the same. Investment dispute settlement has become largely synonymous with a system that involves an investor, often private entity, in international arbitration against its host state. States, in this same setting, are relegated to the role of respondent. But despite the predominant role of the investor, some mechanisms involving both states (host state and home state of the investor) do exist. Some of these mechanisms, such as state-state dispute settlement and binding interpretations, have been used for years. Others, such as national contact points or ombudsmen, are newer. As investment law enters a new era of reflection[1] with the functioning of the current ISDS machinery at its centre, some of the efforts at reforming international investment law focus on enhancing the role of the state in investment dispute settlement and add to the popularity of some of these mechanisms.

The purpose of the present article is to critically explore three of these complementary or alternative approaches to the prevention or resolution of investment disputes that belong to the sphere of state-to-state procedures and have gained currency in recent years. All three mechanisms are 'soft' non-adjudicatory means by which states parties to a treaty reserve for themselves a role in the interpretation or application of an investment treaty in investment dispute settlement or in dispute prevention. These means often require consultations between the parties, although consultations are not examined as a standalone mechanism in the present contribution. The article is structured as follows. The first part focuses on interpretive statements issued jointly by the contracting parties. These include subsequent agreement or practice under general public international law, binding interpretations provided for in the treaty text, other interpretations, and clarifications through diplomatic notes and periodic review of treaty content. The second part examines filter mechanisms. The third part turns to focal points or ombudsmen. A final section concludes.

2. Joint interpretive statements

'Masters' of their treaties,[2] the contracting parties are seen as the treaties' 'authoritative' interpreters or at least as capable of providing 'authentic' means of interpretation. This is true to some extent under general public international law and under certain investment treaty provisions that expressly allow the contracting parties to assume a concrete role in the interpretation of their treaties. Four of these mechanisms will be explored here: subsequent agreement or practice under general public international law, binding interpretive statements on the basis of treaty provisions, other interpretive statements not expressly provided for by the applicable investment

1 UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, 2015, New York and Geneva, UN, p. 120.

2 UNCTAD, *IIA Issues Note No. 3: Interpretation of IIAs: What States Can Do*, 2011, p. 4.

treaty as such, and clarifications through diplomatic notes and periodic review of treaty content.

2.1. Subsequent agreement or practice under general public international law

Under certain conditions, states can give authoritative interpretations of their treaties on the basis of general public international law. Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties (VCLT) provides that treaty interpretation shall take into account, together with the context '[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' and '[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[3] According to the International Law Commission (ILC), 'an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation'.[4] The Report of the International Law Commission on its sixty-fifth session in 2013 established:

> 'By describing subsequent agreements and subsequent practice under article 31(3)(a) and (b) as "authentic" means of interpretation the Commission recognizes that the common will of the parties, from which any treaty results, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty. The Vienna Convention thereby accords the parties to a treaty a role which may be uncommon for the interpretation of legal instruments in some domestic legal systems.'[5]

The ILC has warned that Article 31(3) of the VCLT requires that subsequent agreement and practice be taken into account, but that does not necessarily imply that these means 'possess a conclusive, or legally binding, effect'; in other words, they do not override all other means of interpretation.[6] By contrast, when 'the parties consider the interpretation to be binding upon them', subsequent agreements and practice regarding the interpretation of a treaty *must* be conclusive.[7] Such possibility for binding or conclusive effect is clear in cases, such as in Article 1131, paragraph 2, of the North American Free Trade Agreement (NAFTA), where the treaty itself provides for it.[8] Article 1131 of NAFTA will be discussed in the following section.

The contracting parties' ability to provide authoritative means of interpretation in relation to their treaties has also been addressed by the Permanent Court of International Justice (PCIJ) and by the International Court of Justice (ICJ). The PCIJ has held that '[i]t is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it'.[9] In its turn, the International Court of Justice (ICJ) has repeatedly made reference to or sought to establish the presence of the parties' subsequent agreement or practice as to the interpretation of a treaty.[10]

2.2. Binding joint interpretations on the basis of treaty provisions

Binding party interpretations on the basis of concrete investment treaty provisions, initially encountered in North American investment treaty practice but now becoming more widespread, allow for interpretive statements either by the parties or by a joint commission made up by representatives of the contracting parties that are binding on a tribunal. Probably the most famous of these provisions is Article 1131, paragraph 2, of NAFTA which has formed the basis of several joint statements by the NAFTA Free Trade Commission (FTC).[11] The most notable use of the article took place in 2001, when the NAFTA FTC issued an interpretive

3 On the distinction between 'subsequent agreement' and 'subsequent practice', see ILC, Report of the International Law Commission, Sixty-fifth session (6 May–7 June and 8 July–9 August 2013), UN Doc A/68/10 (2013), p. 21-24.

4 ILC, *Yearbook of the International Law Commission 1966*, Vol. II 221, [14], UN Doc A/CN.4/SER.A/1966/Add.l.

5 ILC, Report of the International Law Commission, Sixty-fifth session(6 May–7 June and 8 July–9 August 2013), UN Doc A/68/10 (2013), p. 21.

6 *Ibid.*, p. 21.

7 *Ibid.*, p. 22.

8 *Ibid.*, p. 22.

9 Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina), Advisory Opinion, (1923) PCIJ Series B no 8.

10 E.g. Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994, p. 6, para. 66; Kasikili/Sedudu Island (Botswana/Namibia), Judgment, ICJ Reports 1999, p. 1045, paras 48, 63; Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, ICJ Reports 2002, p. 625, paras 37, 61; Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, ICJ Reports 2014, p. 226, para. 83; Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, 2 February 2017, para. 64.

11 See http://www.sice.oas.org/TPD/NAFTA/NAFTA_e.ASP#Understanding.

statement that equated fair and equitable treatment, as enshrined in Article 1105 of NAFTA, with the minimum standard of the treatment of aliens under customary international law.[12] This interpretation is no less notorious because when it was issued, in an ongoing dispute, the *Pope & Talbot* tribunal had already determined that 'the requirement to accord NAFTA investors fair and equitable treatment was independent of, not subsumed by the requirement to accord them treatment required by international law'. As a consequence of the FTC interpretive statement, the tribunal was required to recant.

Article 1131, paragraph 2, of NAFTA has been emulated in subsequent US and Canadian treaty practice.[13] An equivalent provision exists in the new international investment treaties of the European Union, but also in investment treaties concluded outside these regions. For instance, the EU-Singapore free trade agreement (FTA) provides:

> 'Where serious concerns arise as regards issues of interpretation which may affect matters relating to this Chapter, the Trade Committee […] may adopt interpretations of provisions of this Agreement. An interpretation adopted by the Trade Committee shall be binding on a tribunal deciding on a claim […], and any award shall be consistent with that decision. The Trade Committee may decide that an interpretation shall have binding effect from a specific date.' [14]

Outside the EU, an example comes from the Korea-New Zealand FTA. This 2015 treaty provides that a tribunal, on the request of the respondent, shall 'request a joint interpretation of the Joint Commission of any provision of this Agreement that is in issue in a dispute'.[15] The Joint Commission shall submit to the tribunal any joint decision on the interpretation of the agreement within 60 days.[16] This joint decision will be binding on the tribunal and 'any award must be consistent with that joint decision'.[17] If the Joint Commission fails to make a decision within 60 days, the issue reverts to the tribunal for determination.[18] Similarly, Russia's recent Regulation on Entering into International Treaties on the Encouragement and Mutual Protection of Investments, which replaces the Russian Model BIT,[19] recommends that arbitration proceedings not be commenced or, if commenced, be suspended, pending consultations between the contracting parties in order to render a binding interpretation of investment treaty provisions raised in a dispute.[20] Provisions on binding interpretive statements sometimes allow a disputing party to request the tribunal to submit to the contracting parties its proposed decision or award for comments concerning any of its aspects.[21]

Binding 'interpretations' are also provided for in relation to specific measures, notably those relating to taxation and prudential measures. The relevant provisions typically apply when an exception or other defence is invoked by the host state, in which case the competent tax or financial authorities[22] or the contracting parties[23] need to determine whether the arguments of the host state constitute a valid defence. This type of procedure for binding determinations, called 'filter', could be considered as a joint interpretation mechanism. However, in contrast with joint interpretations discussed here, filters tend to concern concrete application of the law in a given situation. Filters are examined below in Section III.

2.3. Interpretive statements not expressly provided for as such in the treaty

Joint interpretations are also possible when not directly provided for in a treaty as such. The EU-Canada Comprehensive Economic and Trade Agreement (CETA) provides that a tribunal seised of a dispute shall accept or, following consultation with the disputing parties, may invite oral or written submissions from the non-disputing contracting party regarding the interpretation the agreement. Although this provision is focused on the

12 NAFTA, Free Trade Commission Clarifications Related to NAFTA Chapter 11, 31 July 2001, http://www.worldtradelaw.net/nafta/chap11interp.pdf.

13 E.g. Article 30(3) of the US Model BIT (2012) and Article 33(1) of the Canadian Model BIT (version of 2012).

14 Article 9.19(3) of the EU-Singapore free trade agreement (FTA). For another example, see Articles 8.31(3) and 26.3(2) of the EU-Canada Comprehensive Economic and Trade Agreement (CETA).

15 Article 10.25(1) of the Korea-Nez Zealand FTA (2015).

16 Article 10.25(1) of the Korea-Nez Zealand FTA (2015).

17 Articles 10.25(2) and 10.28 (2) of the Korea-Nez Zealand FTA (2015).

18 Article 10.25(2) of the Korea-Nez Zealand FTA (2015).

19 See Foreign direct investment after Yukos Shareholders v Russia, *Norton Rose Fulbright*, http://www.nortonrosefulbright.com/knowledge/publications/148974/russias-new-guidelines-on-future-bilateral-investment-treaties.

20 See http://globalarbitrationreview.com/jurisdiction/2000149/russia.

21 Article 28(9)(a) of the US Model BIT (2012). However, in this case, the comments are not binding but need only be considered.

22 E.g. Article 2103(6) of the NAFTA; Article 21(5)(b) of the Energy Charter Treaty (ECT); Article 21(2) of the US Model BIT (2012); Article 14(7) of the Canadian Model BIT (version of 2012).

23 Article 28.7 of CETA.

non-disputing party, when applied the result is that both contracting parties will have provided their opinion on the interpretation of the treaty. CETA further provides that its Committee on Services and Investment 'shall provide a forum for the Parties to consult' on issues related to the treaty's investment chapter.[24] Properly speaking, the latter provision concerns consultations between the parties. Consultations can end up in a joint statement that a tribunal takes into account.

Such an example is offered by the *CME v. the Czech Republic* case brought on the basis of the intra-EU BIT signed between the Czech Republic and the Netherlands in 1991.[25] This treaty establishes that a contracting party may propose to the other party consultations 'on any matter concerning the interpretation or application of the Agreement'.[26] The provision further enjoins the other contracting party to give 'sympathetic consideration' to the request and to afford 'adequate opportunity' for the consultation.[27] Pursuant to this provision, in *CME v. the Czech Republic*, the contracting parties adopted a 'common position', to which the tribunal referred in the final award.[28]

Another example is offered by the *Railroad Development v. Guatemala* dispute brought on the basis of the US-Dominican Republic-Central America FTA (US--DR-CAFTA).[29] Like CETA, this agreement allows a non-disputing contracting party to make oral and written submissions to a tribunal regarding the interpretation of the agreement.[30] In *Railroad Development v. Guatemala*, the tribunal had to decide on the content of fair and equitable treatment and the minimum standard of treatment, provided for in Article 10.5 of the US-DR--CAFTA. Three non-disputing contracting parties, the United States, El Salvador and Honduras, filed submissions on the matter arguing in favour of a restrictive interpretation of Article 10.5 of the US-DR-CAFTA.[31] While taking their submissions into account, the tribunal found that the minimum standard of treatment has evolved since the *Neer* formulation, and rejected the suggestion that it should be construed narrowly.[32]

Even outside the context of a dispute or after a dispute has been resolved, states can make their views known in order to influence future interpretations.[33] After the tribunal in *SGS v. Pakistan* had delivered its Decision on Objections to Jurisdiction,[34] the Swiss authorities addressed a letter to the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID) expressing their concern about the tribunal's interpretation of the investment treaty's umbrella clause in Article 11 of the applicable BIT. The Swiss authorities criticised the tribunal for not finding it necessary to enquire about the Swiss authorities' interpretation of Article 11 of the BIT, while Pakistan (the respondent) was indeed asked to provide its views. The Swiss authorities were particularly critical, especially since the tribunal had attached importance to the contracting parties' intentions.[35] The Swiss authorities further declared that they were 'alarmed' about the tribunal's interpretation of the treaty's umbrella clause, interpretation which run counter to Switzerland's intention when concluding the BIT.[36] The letter went on to explain the Swiss interpretation of the umbrella clause.[37] While this reaction in relation to *SGS v. Pakistan* does not reflect a state-state procedure, it could serve as guidance for future tribunals to invite the two contracting parties to

24 Article 8.44 of the CETA.

25 CME Czech Republic B.V. (The Netherlands) v the Czech Republic, UNCITRAL, Final Award, 14 March 2003, paras 87, 437.

26 Article 9 of the Czech Republic-Netherlands BIT.

27 *Ibid.*

28 CME Czech Republic B.V. (The Netherlands) v the Czech Republic, UNCITRAL, Final Award, 14 March 2003, paras 87, 437.

29 Railroad Development Corporation (RDC) v Guatemala, ICSID Case No ARB/07/23, Award, 29 June 2012.

30 Article 10.20(2) of the US-DR-CAFTA.

31 Railroad Development Corporation (RDC) v Guatemala, ICSID Case No ARB/07/23, Award, 29 June 2012, paras 207–211.

32 Lars Markert and Catharine Titi, States Strike Back – Old and New ways for Host States to Defend against Investment Arbitrations, in Andrea Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2013-2014*, 2015, OUP, p. 416.

33 Lars Markert and Catharine Titi, States Strike Back – Old and New ways for Host States to Defend against Investment Arbitrations, in Andrea Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2013-2014*, 2015, OUP, p. 417.

34 SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No ARB/01/13, Decision on Objection to Jurisdiction, 6 August 2003.

35 E.g. see the tribunal's statement on the need for '[c]lear and convincing evidence that such was indeed the shared intent of the Contracting Parties to the Swiss-Pakistan Investment Protection Treaty in incorporating Article 11 in the BIT' (SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No ARB/01/13, Decision on Objection to Jurisdiction, 6 August 2003, para. 167).

36 Note on the Interpretation of Article 11 of the BIT between Switzerland and Pakistan in the light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13 SGS Société Générale, attached to the Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy-Secretary General dated 1 October 2003, cited in Emmanuel Gaillard, Investment treaty arbitration and jurisdiction over contract claims—the SGS cases considered' in Todd Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, 2005, p. 341–342.

37 *Ibid.*

express their views when determining their original intentions.[38]

2.4. Clarifications through diplomatic notes and periodic reviews of treaty content

An authentic interpretation must not constitute a treaty amendment. International investment agreements include specific provisions on amendment, which are beyond the scope of the present to explore. However, the two types of interpretive statements examined in this section are related to treaty amendment either because they borrow means that can also be used for treaty amendment (diplomatic notes) or because they can lead to treaty amendment (regular reviews of treaty content).

The exchange of diplomatic notes to amend or clarify the content of an investment treaty is common practice. The United States exchanged diplomatic notes with eight new EU member states (Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Romania, Poland, and Slovakia) before their accession to the Union, in order to clarify some aspects of their respective treaties.[39] Through diplomatic notes to UK bilateral investment treaties the contracting parties agreed to extend the treaties' application to 'the Bailiwicks of Jersey and Guernsey and the Isle of Man'.[40] An often-discussed case concerns the exchange of diplomatic notes between Argentina and Panama to clarify the scope of the most-favoured-nation (MFN) clause in the Argentina-Panama BIT. Following the Decision on Jurisdiction in *Siemens v Argentina*,[41] in which the tribunal had allowed application of the MFN clause to the treaty's dispute settlement provisions, the contracting parties exchanged diplomatic notes which contained an 'interpretative declaration' to the effect that the BIT's MFN clause does not extend to dispute settlement clauses.[42] Subsequently, Argentina failed to unilaterally convince the tribunal in *National Grid v. Argentina*, that the interpretation adopted in the Argentina-Panama diplomatic notes should apply to the Argentina-UK BIT. The tribunal noted that Argentina had not adopted similar joint interpretations of the MFN clause in the more than 50 other bilateral investment treaties it has concluded with other states.[43] The tribunal further commented:

> 'While it is possible to conclude from the UK investment treaty practice *contemporaneous* with the conclusion of the Treaty that the UK understood the MFN clause to extend to dispute resolution, no definite conclusion can be reached regarding the Argentine Republic's position *at that time*. Therefore, the review of the treaty practice of the State parties to the Treaty with regard to their common intent is inconclusive.'[44]

Although it is standard UK treaty practice to render the MFN clause applicable to ISDS provisions,[45] *in casu* the tribunal's argument that the MFN clause was understood to apply to the treaty's dispute settlement clause *at the time* the treaty was concluded, is not relevant to the counterargument that that may have been contrary *subsequent* agreement or practice.

A final mechanism for joint treaty interpretations considered here is periodic review of treaty provisions by the parties, which is sometimes expressly included in investment treaties. Article 8.10, paragraph 3, of CETA establishes:

> 'The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.'

38 Lars Markert and Catharine Titi, States Strike Back – Old and New ways for Host States to Defend against Investment Arbitrations, in Andrea Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2013-2014*, 2015, OUP, p. 417.

39 See Lise Johnson and Merim Razbaeva, State Control over Interpretation of Investment Treaties, April 2014, http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf, p. 6.

40 See Investment Treaty Arbitration 2016: England and Wales – Overview of investment treaty programme, *Global Arbitration Review* http://globalarbitrationreview.com/jurisdiction/2000108/england-&-wales. For another example, see Exchange of Notes between the UK and Paraguay amending the 1981 UK-Uruguay BIT, http://www.sice.oas.org/Investment/BITSbyCountry/BITs/PAR_UK_1993.pdf.

41 Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.

42 For an account, see National Grid v. Argentina, UNCITRAL, Decision on Jurisdiction of 20 June 2006, para. 85.

43 *Ibid.*, para. 85.

44 *Ibid.*, para. 85, emphasis added.

45 E.g. Article 3(3) of the UK Model BIT (2008), see also Article 11. See also, for instance, respective Articles 3(3) and 11 of the BITs between the UK and Azerbaijan, Barbados, Belarus, Bosnia and Herzegovina, Burundi, Côte d'Ivoire, Cuba, Ethiopia, Georgia, Honduras, Kazakhstan, Laos, Pakistan, Slovenia, South Africa, Tonga, Turkmenistan and Uganda, and respective Articles 3(4) and 10 UK-Chile BIT and UK-Lebanon BIT; see also Articles 3(3) and 10A UK-Paraguay BIT (1981) as amended by the Exchange of Notes upon a proposal by Paraguay. Contrast Article III(2) UK-Colombia BIT (2010), which in all appearances follows extensively Colombia's Model BIT.

This provision is complemented by Article 8.44, paragraph 3, of CETA which provides among others that the Committee on Services and Investment may, upon agreement of the contracting parties, 'recommend to the CETA Joint Committee the adoption of any further elements of the fair and equitable treatment obligation'. In addition, the Committee on Services and Investment may 'adopt and amend rules supplementing the applicable dispute settlement rules, and amend the applicable rules on transparency'.[46] The relevant subparagraph adds that such rules and amendments are binding on a tribunal established under CETA's section on 'Resolution of investment disputes between investors and states'.[47] Similar provisions exist in other EU international investment agreements.[48]

3. Filter mechanisms

The 'filter' to ISDS is a mechanism which allows contracting parties to intervene in investment dispute settlement that involves sensitive measures and to determine whether these have been taken for the stated reasons.[49] In reality, where a filter exists, it is up to the parties to decide whether a treaty exception applies. With filters the investor-state tribunal seised of a dispute where the contested issue arises may not proceed until the parties, the parties' financial, tax, etc. authorities, or a state-state tribunal have delivered their report or decision. The filter mechanism resembles provisions on joint interpretations by the parties, insomuch as the decision on a particular question is remitted to the parties. Seen in this light, filter mechanisms could be deemed to form a subcategory of joint interpretations. However, filters concern the concrete application rather than interpretation of a given rule. With filters, what is needed is not interpretation of a treaty provision *in abstracto*, such as in order to determine whether fair and equitable treatment is equated to the minimum standard of treatment, but determination of whether a particular exception or defence applies. For this reason, in contrast with joint interpretations, such as interpretations by the NAFTA FTC, that are binding on tribunals for all subsequent cases,[50] the determination of an issue according to a filter mechanism applies in principle only to the case at hand and cannot bind future tribunals.

Filters have been interpreted as forming part of states' endeavours to increasingly narrow the scope for arbitral review of host state policies.[51] The European Commission's 2014 Public consultation on modalities for investment protection and ISDS in TTIP referred to the filter mechanism in the following terms (limited to prudential measures):

> '[S]ome investment agreements have introduced mechanisms which grant the regulators of the Parties to the agreement the possibility to intervene (through a so-called *"filter" to ISDS*) in particular ISDS cases that involve measures ostensibly taken for prudential reasons. The mechanism enables the Parties to decide whether a measure is indeed taken for prudential reasons, and thus if the impact on the investor concerned is justified. On this basis, the Parties may therefore agree that a claim should not proceed.'[52]

NAFTA provides an early example of a filter mechanism. Article 1415 (*Investment Disputes in Financial Services*) provides:

> '1. Where an investor of another Party submits a claim […] and the disputing Party invokes Article 1410 [exceptions for prudential reasons], on request of the disputing Party, the Tribunal shall refer the matter in writing to the Committee for a decision. The Tribunal may not proceed pending receipt of a decision or report under this Article.
>
> 2. In a referral pursuant to paragraph 1, the Committee shall decide the issue of whether and to what extent Article 1410 [exceptions for prudential reasons] is a valid defense to the claim of the investor. The Committee shall transmit a copy of its decision to the Tribunal and to the Commission. The decision shall be binding on the Tribunal.
>
> 3. Where the Committee has not decided the issue within 60 days […], the disputing Party or the Party of

46 Article 8.44(3) of CETA.

47 *Ibid.*

48 E.g. see Article 9.30(2) of the EU-Singapore FTA.

49 This is how the term is used in the present. Filters are sometimes also understood to involve joint binding interpretations of the parties and procedures that aim to divert claims from investor-state dispute settlement, such as a requirement to exhaust local remedies. See Lise Johnson, Lisa Sachs, and Jesse Coleman, International Investment Agreements, 2014: A Review of Trends and New Approaches, in Andrea Bjorklund (ed.) *Yearbook on International Investment Law & Policy 2014-2015*, 2016, p. 44-47.

50 E.g. see Article 1131(2) of NAFTA ('*An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section*').

51 Lise Johnson, Lisa Sachs, and Jesse Coleman, International Investment Agreements, 2014: A Review of Trends and New Approaches, in Andrea Bjorklund (ed.) *Yearbook on International Investment Law & Policy 2014-2015*, 2016, p. 44.

52 See http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

> the disputing investor may request the establishment of an arbitral panel under Article 2008 (Request for an Arbitral Panel). The panel […] shall transmit its final report to the Committee and to the Tribunal. The report shall be binding on the Tribunal. […]'

A similar provision exists in the US Model BIT,[53] in the Canadian Model BIT,[54] and more recently a filter mechanism in relation to financial services measures was inserted in CETA. CETA's Chapter 13 on *Financial services* applies to investment in financial institutions in the territory of the host state. Article 13.16 provides an exception for prudential measures. It states that the agreement 'does not prevent a Party from adopting or maintaining reasonable measures for prudential reasons', including for the protection of investors, the maintenance of the safety, soundness, integrity, or financial responsibility of a financial institution, and ensuring the integrity and stability of a contracting party's financial system.[55] Article 13.21 states that a respondent may refer the matter to the Financial Services Committee for a determination of whether, and if so to what extent, the exception is 'a valid defence to the claim'.[56] In case of such a referral, the Financial Services Committee or the CETA Joint Committee, as the case may be, may jointly determine the issue. If a tribunal has been constituted, the committee shall transmit to it a copy of the joint determination. If the joint determination concludes that the exception is 'a valid defence to all parts of the claim in their entirety, the investor is deemed to have withdrawn its claim and the proceedings are discontinued'.[57] The joint determination that the exception is a valid defence to part of the claim will be binding on the tribunal.[58] Application of these provisions is further clarified in Annex 13-B (*Understanding on the application of art 13.16.1 and 13.21*). Similar provisions are included in other recent Canadian IIAs. CETA's filter mechanism for prudential measures has been described as 'a significant development of the filter mechanism found in NAFTA'.[59]

UNCTAD's *2015 World Investment Report* focused its definition of filters on a more specific type of provision. It equated the filter mechanism with an option found in the bilateral investment treaty between Canada and China of 2012.[60] The BIT in question contains a curious provision. According to this, where an investor files a claim to dispute settlement and the respondent invokes an exception for prudential measures, the tribunal must seek a 'report' from the contracting parties on this issue. The tribunal cannot proceed 'pending receipt of such a report or of a decision of a State-State arbitral tribunal, should such a State-State arbitral tribunal be established'.[61] Following this request for a report, the contracting parties' financial services authorities engage in consultations, which may end in a joint report that the prudential exception is a valid defence to the investor's claim. Such a joint report shall be binding on the investment tribunal.[62] So far, there is nothing astonishing about this provision. Its particularity is introduced immediately afterwards. In the case where the parties' financial services authorities fail to reach a joint decision on the issue of whether the prudential exception is a valid defence to the investor's claim:

> 'the issue shall, within 30 days, be referred by either of the Contracting Parties to a *State-State arbitral tribunal* […]. The decision of the State-State arbitral tribunal shall be transmitted to the investor-State tribunal, and shall be binding on the investor-State tribunal.'[63]

This *renvoi* to state-to-state arbitration is remarkable, especially given the phrasing of the provision and the questions it leaves open. The issue *shall* be referred to a state-to-state tribunal by one of the contracting parties, but what if the contracting parties do *not* refer the issue? Would in that case the investor-state tribunal not be able to deal with the case, or, after the lapse of 30 days of inaction, would it consider that it is able to claim the case back? Another particularity is that this provision goes beyond a mere state-to-state mechanism for the resolution of the issue and invites the initiation of state-to-state dispute settlement on the question of application of an exception. UNCTAD has viewed state-state dispute settlement as more suitable for 'sensitive issues of systemic importance, such as those relating to the integrity and stability of the financial system, the global

53 Article 20 of the US Model BIT (2012).

54 Article 23(3) of the Canadian Model BIT (version of 2012).

55 Article 13.16(1) of CETA.

56 Article 13.21(3) of CETA.

57 Article 13.21(4) of CETA.

58 Article 13.21(4) of CETA.

59 Andrew Lang and Caitlin Conyers, Financial Services in EU Trade Agreements, Study for the European Parliament, 2014, http://www.europarl.europa.eu/RegData/etudes/STUD/2014/536300/IPOL_STU(2014)536300_EN.pdf.

60 See UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, 2015, New York and Geneva, UN, p. 149.

61 Article 20(2)(a) of the Canada-China BIT (2012).

62 Article 20(2)(b) of the Canada-China BIT (2012).

63 Article 20(2)(c) of the Canada-China BIT (2012), emphasis added.

system of international tax relations, or public health'.[64] Nonetheless, *investor*-state dispute settlement was introduced in order to depoliticise investment disputes,[65] and the provision in question encourages, essentially requires, the initiation of interstate arbitration.

Canada appears to have refined this type of filter since its 2012 BIT with China. Although in its newer treaties the issue is still to be submitted to state-state dispute settlement, provision is made in case that no decision shall be made. According to the 2016 Canada-Hong Kong BIT, at the request of a contracting party, where an investor submits a claim to arbitration and the respondent invokes certain treaty exceptions, the tribunal shall request a report from the parties 'on the issue of whether and to what extent the invoked paragraph is a valid defence to the claim of the investor'.[66] The tribunal cannot proceed, while receipt of this report is pending.[67] In the event that the parties cannot agree, they shall submit the issue to interstate arbitration, and the interstate tribunal shall prepare the report. The latter will be binding on the investor-state tribunal.[68] If no request for the constitution of an interstate tribunal has been made and no report has been received by the investor-state tribunal within 70 days of the referral, the investor-state tribunal may decide the matter.[69] Similar procedures are included in other recent Canadian BITs.[70]

Filter mechanisms are also common for taxation measures. The Canadian Model BIT (version of 2012) provides:

> '[…] An investor may not make a claim under paragraph 5 unless […] six months after receiving notification of the claim by the investor, the taxation authorities of the Parties fail to reach a joint determination that, in the case of subparagraph 5(a), the measure does not contravene that agreement, or in the case of subparagraph 5(b), the measure in question is not an expropriation.
>
> If, in connection with a claim by an investor of a Party or a dispute between the Parties, an issue arises as to whether a measure of a Party is a taxation measure, a Party may refer the issue to the taxation authorities of the Parties. A decision of the taxation authorities shall bind a Tribunal formed pursuant to Section C (Settlement of Disputes between an Investor and the Host Party) or arbitral panel formed pursuant to Section D (State-to-State Dispute Settlement Procedures). A Tribunal or arbitral panel seized of a claim or a dispute in which the issue arises may not proceed until it receives the decision of the taxation authorities. If the taxation authorities have not decided the issue within six months of the referral, the Tribunal or arbitral panel shall decide the issue. […]'[71]

Similar provisions exist in the US Model BIT,[72] in CETA,[73] and in a number of other recent IIAs.[74] It would also be possible to provide a filter mechanism with respect to other exceptions. The Korea-Vietnam FTA provides that '[i]f the disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I or II,[75] the Tribunal shall, upon request of that disputing Party, request the Joint Committee to interpret the issue.'[76] If after 60 days the Joint Committee has failed to produce an interpretation, the issue shall revert to the tribunal for determination.[77]

4. Dispute prevention: Focal points or ombudsmen

Dispute prevention policies (DPPs) aim to minimise the number of conflicts that escalate into formal disputes.[78] Dispute prevention can require the establishment of

64 UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, 2015, New York and Geneva, UN, p. 149.

65 Catharine Titi, Are Investment Tribunals Adjudicating Political Disputes? Some reflections on the repoliticization of investment disputes and (new) forms of diplomatic protection, *Journal of International Arbitration* 32 (3), 2015, p. 263, with citations.

66 Article 22(3) of the Canada-Hong Kong BIT (2016).

67 Article 22(3) of the Canada-Hong Kong BIT (2016).

68 Article 22(4) of the Canada-Hong Kong BIT (2016).

69 Article 22(5) of the Canada-Hong Kong BIT (2016).

70 E.g. Article 22(3) of the Canada-Côte d'Ivoire BIT (2015); Article 24(3) of the Burkina Faso-Canada BIT (2015); Article 23(3) of the Canada-Guinea BIT (2015); Article 22(3) of the Canada-Mongolia BIT (2016).

71 Article 14(6) and (7) of the Canadian Model BIT (version of 2012).

72 Article 21 of the US Model BIT (2012).

73 Article 28.7(7) of CETA.

74 E.g. Article 22 of the Japan-Kazakhstan BIT (2014); Article 25 of the Japan-Uruguay BIT (2015); Article 14 of the Burkina Faso-Canada BIT; Article 14 of the Canada-Hong Kong BIT; Article 21 of the Canada-Mongolia BIT.

75 It has not been possible to identify Annex I and II of the Korea-Vietnam FTA to identify the exceptions to which this provision makes reference. Chapters contain annexes numbered with Arabic (rather than Latin) numerals, e.g. at the end of the FTA's investment chapter (Chapter 9) annexes are numbered in the following manner: Annex 9-A, Annex 9-B, etc.

76 Art 9.24(2) of the Korea-Vietnam FTA.

77 Art 9.24(2) of the Korea-Vietnam FTA.

78 UNCTAD, Investor–State Disputes: Prevention and Alternatives to Arbitration, UNCTAD Series on International Investment

institutional structures,[79] it can be pursued unilaterally but also bilaterally, and it can involve cooperation between the contracting parties. The present section explores a particular dispute prevention method that has been inserted in the new Brazilian cooperation and facilitation investment agreements (CFIAs), ombudsmen or focal points.[80]

The Brazilian government, averse to investor-state arbitration, has focused on DPPs and alternative dispute resolution (ADR).[81] The Brazilian model favours mechanisms that aim to prevent disputes on the basis of dialogue and bilateral consultation; if these fail, the parties can submit the dispute to state-state arbitration.[82] Initially, dispute prevention was one of the model's three pillars.[83] In its current form, Part III of the model is dedicated to 'Institutional Governance and Dispute Prevention'. Article 22 is entirely focused on dispute prevention. Dispute prevention is made possible through two institutions: a joint committee and national focal points or ombudsmen.

National focal points are designated by each party.[84] In Brazil, they are established within the Chamber of Foreign Trade (CAMEX),[85] the Council of Ministers of the Brazilian Chamber of Commerce, an inter-ministerial body for foreign trade, presided by the Minister of Development, Industry and Foreign Trade.[86] Their main task is to assist investors from the other party in their territory.[87] Their role is then one of dispute prevention as it is one of investment promotion and facilitation. Concretely, their responsibilities include: endeavouring to follow the recommendations of the Joint Committee and interact with their counterpart in the other contracting party; following up on requests and enquiries of the other party or of investors of the other party with the competent authorities; assessing, in consultation with relevant public authorities, suggestions and complaints of the other party or investors of the other party and recommending actions to improve the investment environment; seeking to prevent disputes in investment matters, in collaboration with public authorities and relevant private entities; and providing information on regulatory issues.[88] The contracting parties shall use the focal points, and the Joint Committee, to exchange information on business opportunities, procedures and requirements for investment.[89] The focal points 'shall promptly reply to notifications and requests' by the other party or its investors,[90] and they 'shall act in coordination with each other and with the Joint Committee in order to prevent, manage and resolve any disputes between the Parties'.[91] Although the model CFIA provides for state-state dispute settlement,[92] this does not become available until the dispute has become 'the object of consultations and negotiations between the Parties' and has been examined by the Joint Committee.[93] The exact role of the focal points is not entirely clear in this description but in the procedure that follows the Joint Committee has the leading role.[94]

The Brazilian model's national focal points or ombudsmen are inspired by the Korean Office of the Foreign Investment Ombudsman. The Foreign Investment Ombudsman was first introduced in 1999 to resolve grievances of foreign investors operating in Korea.[95] The Office of the Foreign Investment Ombudsman collects information about the problems experienced by foreign investors, it liaises with relevant administrative agencies, it proposes policies to improve investment promotion and assist foreign investors in 'solving their grievances'.[96] Besides Korea's investment ombudsman system, other countries have established investment ombudsmen, including Georgia,[97] Greece,[98] Japan,[99] the Philippines,[100]

Policies for Development, 2010, New York, Geneva, UN, p. xiv.

79 *Ibid.*, p. xiv.

80 The terms 'ombudsman' and 'focal point' are used interchangeably in the article as synonymous.

81 The term ADR is used here to signify 'alternative to ISDS'. See in general on this issue Catharine Titi, International Investment Law and the Protection of Foreign Investment in Brazil, *Transnational Dispute Management* 2, 2016, Special Issue on Latin America vol. 1 (eds Ignacio Torterola and Quinn Smith).

82 *Ibid.*, p. 9.

83 *Ibid.*, p. 9.

84 Article 17(1) of the Brazilian Model CFIA of 3 March 2016 (version 2.3.1) (hereinafter Brazilian Model CFIA).

85 Article 17(2) of the Brazilian Model CFIA.

86 CAMEX's functions are established by Decree n. 4.732/2003.

87 Article 17(1) of the Brazilian Model CFIA.

88 Article 17(4) of the Brazilian Model CFIA.

89 Article 18(1) of the Brazilian Model CFIA.

90 Article 17(6) of the Brazilian Model CFIA.

91 Article 22(1) of the Brazilian Model CFIA.

92 Article 23 of the Brazilian Model CFIA. See further e.g. Article 15 of the Brazil-Mozambique CFIA; Article 15 the Brazil-Angola CFIA; Article 13(6) of the Brazil-Malawi CFIA.

93 Article 22(2) of the Brazilian Model CFIA.

94 Especially Article 22(3) of the Brazilian Model CFIA.

95 See http://ombudsman.kotra.or.kr/eng/au/poelb.do.

96 See http://ombudsman.kotra.or.kr/eng/au/poelb.do.

97 See http://businessombudsman.ge/en.

98 See http://www.enterprisegreece.gov.gr/en/about-us-/profile.

99 See http://www.invest-japan.go.jp/contact/en_index.html.

100 See http://www.ombudsman.gov.ph/docs/investmentOmbudsman/investmentomb.pdf.

and the United States.[101] These systems are generally to be distinguished from the focal points in the Brazilian model inasmuch as they are mechanisms established unilaterally by a country without reciprocity. At the same time, these mechanisms do not *replace* investor-state dispute settlement but are complementary to it.

The Brazilian model's national focal points are redolent of another mechanism, the national contact points (NCPs) for the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD). The OECD Guidelines for Multinational Enterprises contain recommendations for responsible business conduct that adhering governments encourage their enterprises to respect wherever they operate.[102] The national contact points are agencies established by the governments to facilitate implementation of the OECD Guidelines, and provide a mediation and conciliation platform for resolving related practical issues.[103] They are not established to protect or assist investors but to ensure that the latter observe the OECD Guidelines.

CETA has also set in place contact points, whose role is different yet. CETA contact points are established under Article 26.5. According to this article, their task comprises, among others, monitoring the work of CETA's institutional bodies, following up on the decisions made by the CETA Joint Committee, and facilitating communications between the contracting parties on any matter covered by the agreement.[104]

5. Conclusion

State-state procedures in investment dispute settlement and dispute prevention continue to attract attention. This short contribution has examined three specific 'soft' or non-adjudicatory state-to-state procedures in dispute prevention and dispute resolution. The article discussed interpretive statements issued jointly by the contracting parties and noted that general public international law recognises subsequent agreement or practice of the contracting parties as an authoritative means of treaty interpretation. Joint treaty interpretations are also possible on the basis of treaty articles that expressly establish procedures for binding interpretive statements, such as Article 1131 of NAFTA, but also on the basis of other means, such as through joint submissions in an ongoing dispute. The article also briefly considered clarifications through diplomatic notes and periodic review of treaty content. Subsequently, the discussion turned to filter mechanisms, that allow the relevant tax or financial authorities or the parties to determine jointly whether a contested measure falls within the scope of a defence that the respondent invokes. Filters appear to increase in popularity and have been refined in recent investment treatymaking. Finally, focal points or ombudsmen were considered on the basis of the Brazilian Model CFIA. Focal points or ombudsmen can function as an effective dispute prevention – but also investment promotion and facilitation – mechanism. A challenge that remains with respect to Brazilian CFIAs is that at the moment of writing these treaties have not yet been ratified.[105] The mechanism however is interesting and could be emulated in other investment treaties. But caution is also necessary. The mechanisms canvassed in this article entail, by definition, a partial politicisation of investment disputes. Such politicisation may be more obvious when the state parties have a direct involvement in a dispute, such as in the case of joint interpretive statements or in the case of filter mechanisms that route the dispute to state-state arbitration. But it is also present in other contexts. Notice for instance that the Brazilian model CFIA's focal points are established within CAMEX, itself a political body. This does not mean that the proposed mechanisms are not appropriate, but rather that a critical approach vis-à-vis their role and functioning and further study are necessary going forward.

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101 See https://www.selectusa.gov/welcome.

102 See http://www.oecd.org/corporate/mne/oecdguidelinesformultinationalenterprises.htm.

103 See http://www.oecd.org/investment/mne/ncps.htm.

104 Article 26.5(2) of CETA.

105 However, Brazil's CFIAs with Mexico and Peru are said to have obtained congressional approval. See José Henrique Vieira Martins, Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments, *Investment Treaty News*, 12 June 2017, https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/.

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Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, ICJ Reports 2014, p. 226

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CME Czech Republic B.V. (The Netherlands) v the Czech Republic, UNCITRAL, Final Award, 14 March 2003

Railroad Development Corporation (RDC) v Guatemala, ICSID Case No ARB/07/23, Award, 29 June 2012

SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No ARB/01/13, Decision on Objection to Jurisdiction, 6 August 2003

Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004

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Mapping the Duties of Private Companies in International Investment Law

Mapeando os deveres das empresas privadas no Direito Internacional dos Investmentos

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Mapping the Duties of Private Companies in International Investment Law*

Mapeando os deveres das empresas privadas no Direito Internacional dos Investmentos

Nitish Monebhurrun**

Abstract

On the basis of notorious evidence of corporate misconduct and of the legal difficulty to ascertain private companies' liability in international law, this article seeks to map such companies' duties in international investment law. This is undertaken by perusing how this law field makes provision and room for the issue of corporate social responsibility. As such, a trend exists in recent investment agreements and also in the arbitral jurisprudence which oversees investors' malpractices so as to, firstly, foster a culture of corporate social responsibility and to, secondly, evaluate their intrinsic legal protection. The present article maps this general direction of duly considering investors' duties while assessing their claims and discusses the legal purpose(s) of the new reference to corporate social responsibility in international investment law.

Keywords: investors' duties, corporate social responsibility, clean hands.

Resumo

Com base em notórios casos de irresponsabilidade social corporativa e considerando a dificuldade que se tem no Direito Internacional para responsabilizar empresas privadas, esse artigo propõe um mapeamento dos deveres das empresas-investidoras no Direito Internacional dos Investimentos. Examinar-se-á, para tanto, como esse ramo de Direito tem absorvido a questão da responsabilidade social corporativa. Há, dessa feita, uma tendência nos recentes acordos de investimentos e também na jurisprudência arbitral para não menosprezar o comportamento socialmente irresponsável dos investidores. O objetivo é, nesse sentido, duplo. Pela integração do comportamento das empresas no debate, postula-se, por um lado, a criação de uma cultura de responsabilidade social das empresas e, por outro lado, avalia-se o teor real da proteção legal devida aos investidores. Logo, o presente artigo mapeará essa tendência de considerar os deveres dos investidores ao avaliar os seus pedidos na arbitragem internacional e discutirá, outrossim, a razão de ser jurídica dessa nova referência à responsabilidade social corporativa no Direito Internacional dos Investimentos.

Palavras-chave : deveres dos investidores, responsabilidade social corporativa, mãos limpas.

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1. Introduction

On the 25th June 2014, a group of States — namely Ecuador, South Africa, Cuba, Venezuela and Bolivia —, championed the adoption of a binding treaty on Business and Human Rights[1]. Shortly after this initiative, the proposal was formalized in a resolution entitled "*Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*", adopted by the Human Rights Council[2]. The resolution kicked off (anew) the debate on this problematic which has, in itself, a rather long history and whose attempts of resolution have always been stillborn.

The discussions about the binding agreement are ongoing through the work of the Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights established by the Human Rights Council[3]. They take stock of the Guiding Principles on Business and Human Rights[4] — the Ruggie principles — with an aim to take matters forward towards an instrument having a mandatory power on transnational companies. Still in 2014, another group of States[5] proposed a draft resolution on the implementation of the Guiding Principles to the Human Rights Council; one paragraph of the draft's preamble expresses the principal entanglement lurking behind the current subject:

"*Concerned at legal and practical barriers to remedies for business-related human rights abuses, which may leave those aggrieved without opportunity for effective remedy, including through judicial and non-judicial avenues, and recognizing that it may be further considered whether relevant legal frameworks would provide more effective avenues of remedy for affected individuals and communities* […]"[6].

The main concern is the simple finding that economic activities of transnational companies may insidiously meander towards many non-economic components of the host States' society[7] thereby causing considerable damage to the local population, environment, values or culture. The Chevron/Texaco investment in Ecuador — with its socio-environmental upheavals — in itself tellingly expresses the thorny issue of a long term corporate malpractice in so-called developing countries[8]. Chevron/Texaco's investment in the oil exploration sector had deleterious consequences on the environment through deforestation, river and soil pollution, and toxic waste spills in the Ecuadorian Amazon forest. This consequently affected human health and the local population has been diagnosed with illnesses like cancers, respiratory problems and other serious health complications. For these same reasons, the companies' activities encroached on the population's food security and access to drinking water. Last but not least, indigenous communities were forcefully displaced from their lands for the investment's well-being[9].

1 Human Rights Council, "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights", Draft Resolution A/HRC/26/L.22/Rev.1 [25/06/2014].

2 Human Rights Council, "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights", Resolution A/HRC/RES/26/9 [14/07/2014].

3 Human Rights Council, "Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights", Resolution A/HRC/34/47 [04/01/2017] (Special rapporteur: María Fernanda Espinosa). See also: Olivier de Schutter, "Towards a New Treaty on Business and Human Rights", *Business and Human Rights Journal*, vol.1, no.1., 2015, pp. 41-67.

4 United Nations, "Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework", New York and Geneva, United Nations [2011], 35p. The Guiding Principles were endorsed by the Human Rights Council on the 6th July 2011 in its resolution A/HRC/RES/17/4 entitled "Human rights and transnational corporations and other business enterprises".

5 These countries are: Andorra, Argentina, Australia, Austria, Bulgaria, Colombia, France, Georgia, Ghana, Greece, Guatemala, Iceland, India, Lebanon, Liechtenstein, Mexico, New Zealand, Norway, Russian Federation, Serbia, Macedonia, and Turkey.

6 Human Rights Council, "Human rights and transnational corporations and other business enterprises", Draft resolution A/HRC/26/L.1 [23/06/2014].

7 Mireille Delmas-Marty, *Aux quatre vents du monde. Petit guide de navigation sur l'océan de la mondialisation*, Paris, Seuil, 2016, p.62; Muthucumaraswamy Sornarajah, "Mutations of Neo-Liberalism in International Investment Law », *Trade Law and Development*, vol.3, 2011, pp. 203-232.

8 See generally: Judith Kimerling, "Oil, Contact, and Conservation in the Amazon: Indigenous Huaorani, Chevron, and Yasuni", *Colorado Journal of International Environmental Law and Policy*, vol.24, no.1, 2013, pp. 43-115; Eric David, Gabrielle Lefèvre, *Juger les multinationales. Droits humains bafoués, ressources pillées, impunité organisée*, Bruxelles, Louvain, 2015, pp.28-30; Kate Miles, *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital*, Cambridge, Cambridge University Press, 2013, pp. 140-146.

9 Sucumbios Provincial Court of Justice [Sole Chamber], Lawsuit No. 2003-0002 [Reporting Judge: Nícolas Zambrano Lozada]. See also: Eric David, Gabrielle Lefèvre, *Juger les multinationales. Droits humains bafoués, ressources pillées, impunité organisée*, Bruxelles, Louvain, 2015, pp.28-29; Kate Miles, *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital*, Cambridge, Cambridge University Press, 2013, pp. 141-143; Maxi Lyons, "A Case

There is, likewise, notorious evidence bearing testimony of corporate misconduct. This said, the present article does not have as main purpose reviewing all the relevant cases. The Business and Human Rights Resource Centre monitors the corporate social responsibility of companies throughout the world and offers an extensive list of cases on its website to which the reader can have easy access[10]. There is also considerable evidence of such adverse corporate impact in the legal literature[11]. The matter develops into a conundrum because of the frequent difficulty faced to determine the companies' liability or to obtain effective reparation in such cases. This can be related to complex corporate structure[12] which sometimes makes it difficult for victims to climb up to the parent company to seek for reparation. The theory of separate corporate legal personality[13] is here normally invoked by companies. This was, for instance, what happened in the Bhopal case in which the Union Carbide Company — incorporated in the United States of America — successfully argued that its Indian subsidiary, Union Carbide of India, was a separate legal entity for whose actions the parent company could not be held liable[14]. The Bhopal disaster was due to a toxic gas leak from a pesticide manufacturing factory owned by Union Carbide and operated by Union Carbide of India. The victims of the Chevron/Texaco activities in Ecuador had to face this same difficulty of piercing the corporate veil in trying to enforce a decision of the Ecuadorian Supreme Court in Canada — a decision which condemned the company to a payment of damages of 9,51 billion dollars. The plaintiffs argued, amongst others, that the Chevron Corporation fully controlled its Canadian subsidiary, Chevron Canada Ltd. and that the global corporate structure had the same Board of Directors; the parent company could thus be "reached" through the subsidiary. Upholding the doctrine of corporate separateness, the Superior Court of Justice of Ontario declared that the Chevron Corporation and Chevron Canada Ltd. were, in law, two separate entities and that the latter could not be held liable for damages caused by the former[15].

A similar debate arises when parent companies consider that they do not bear responsibility for damages caused by service providers or by outsourced companies, contending that the latter's activities escapes from the main entity's sphere of influence[16]. This happened, for example, after the collapse of the Rana Plaza in Dacca, Bangladesh. The Rana Plaza was home to garment factories manufacturing clothes for renowned brands and the building, left to crumble, did not minimally respect construction security requirements[17]; it was, moreover, revealed that some of the factories were oblivious in terms of basic labour laws[18]. Concerned companies, like

Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress", Denver Journal of International Law and Policy, vol.32, 2004, pp. 701-732.

10 The Business and Human Rights Resource Centre profiles an extensive list of cases on its website: https://business-humanrights.org/en/corporate-legal-accountability/case-profiles/complete-list-of-cases-profiled

11 See for example: Jennifer Zerk, "Corporate Liability for Gross Human Rights Abuses. Towards a Fairer and More Effective System of Domestic Law Remedies", *Report prepared for the Office of the UN High Commissioner for Human Rights*, 2014, 123p; Eric David, Gabrielle Lefèvre, *Juger les multinationales. Droits humains bafoués, ressources pillées, impunité organisée*, Bruxelles, Louvain, 2015, 190p; Kate Miles, *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital*, Cambridge, Cambridge University Press, 2013, pp. 125-224; Delphine Couveinhes-Matsumoto, *Les droits des peoples autochtones et l'exploitation des ressoucres naturelles en Amérique latine*, Paris, L'Harmattan, 2016, pp. 49-61; Michael Wright, "Corporations and Human Rights. A Survey of the Scope and Patterns of Alleged Corporate Human Rights Abuse", *Corporate Social Responsibility Initiative*, working paper nº.44, Cambridge MA: John F. Kennedy School of Government, Harvard University, 2008, pp. 1-30; Lilian Aponte Miranda, "The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability under International Law", *Lewis & Clark Law Review*, vol.135, 2007, pp. 135-183; Maxi Lyons, "A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress", Denver Journal of International Law and Policy, vol.32, 2004, pp. 701-732; Maria Júlia Gomes de Andrade *et al.*, *Inside the Vale of Mud: A Report on the Tailings Dam Collapse in Brazil*, Rio de Janeiro, Justiça Global, 2016, 42p.; Manoela Carneiro Roland *et al.*, *Violation of Human Rights by Companies. The Case of the Açu Port*, Juiz de Fora, HOMA-Human Rights and Business Centre, 2016, 22p.

12 Anna Beckers, *Enforcing Corporate Social Responsiility Codes. On Global Self-Regulation and National Private Law*, Oxford, Hart Publishing, 2015, p.11.

13 Stephen Tully, *International Corporate Responsibility*, Alphen Aan Den Rijn, Kluwer Law International, 2012, p.8

14 *Union of India v. Union Carbide*, United States Court of Appeal, Second Circuit, 809 F.2d 195 [14/01/1987]; *Jagarnath Sahu, et al., v. Union Carbide Corporation and Madhya Pradesh State*, United States District Court – Southern District of New York, Case no. 07 Civ. 2156 [30/07/2014].

15 See: *Yaiguaje v. Chevron Corporation*, 2017 ONSC 135 (CanLII) [20/01/2017], paras.57-60 (available at: http://canlii.ca/t/gx2x6).

16 Generally, on the sphere of influence, see: Gilles Lhuilier, *Le droit transnational*, Paris, Dalloz, 2016, p. 231.

17 Eric David, Gabrielle Lefèvre, *Juger les multinationales. Droits humains bafoués, ressources pillées, impunité organisée*, Bruxelles, Louvain, 2015, pp. 42-43.

18 Sherpa, "Affaire Auchan/Rana Plaza : de nouvelles preuves de violations des droits des travailleurs dans les usines sous-traitantes du distributeur", Press Release (20/10/2015) [available at : https://

Auchan, retorted that their duty of diligence did not extend that far in the supply chain[19]. And it is namely after this case that France adopted its famous statute on the duty of diligence of parent companies[20].

The afore-described panorama dialectically bucks into the field of international investment law. Indeed, these same companies whose transnational activities allegedly or demonstrably have adverse socio-environmental impacts are potentially protected by a wide array of investment protection agreements. Said otherwise, in international law, the investor-company and its investment benefit from a consolidated legal bulwark to protect its activities but have, in international law, very few obligations vis-à-vis the host States and their population[21]: there is a power relationship in disequilibrium with a hyper-protected corporate world on one side, and sometimes vulnerable communities on the other[22]; moreover, the domestic legal systems are not always effective when it comes to dealing with private companies liability; besides the same State may sometimes have conflicting commitments in international law whereby the legal protection of foreign investors must be articulated with environmental, human rights or health protection[23]. Traditionally, investment agreements[24] have been solely moulded to protect transnational investments of private companies. Very often, investment agreements models were drafted by industrialised States and later on signed with developing ones with minimum or no negotiations[25]. The latter group of countries accepted the 'proposed' agreements under the belief that these would foster more investments in their territory, thereby enabling them to achieve their quest of development[26]. Foreign investment promotion was construed through the optic of investment protection and the investment agreements models reflected the perspective and interests of capital exporting countries in the context of a winning free market economy in which the market often makes the law[27]. The watchword was therefore a minimum restriction to the free circulation of capital and investments. And any kind of obligation, duty or performance imposed upon investors could eventually contradict the economic logic of free circulation, the political will of importing and exporting investments, and the legal protection offered by investment agreements.

Authors like Theodore Lewitt or Milton Friedman vehemently criticised the doctrine of corporate social responsibility, defending that it constituted an undesirable intrusion in business whose main purpose is to maximise profits and not to substitute the State in social matters and public policy[28]. Interestingly, however, in

www.asso-sherpa.org/affaire-auchan-rana-plaza-de-nouvelles-preuves-de-violations-des-droits-des-travailleurs-dans-les-usines-sous-traitantes-du-distributeur].

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21 Patrick Juillard, "Le système actuel est-il déséquilibré en faveur de l'investisseur privé étranger et au détriment de l'État d'accueil ? ", *in*, Charles Leben (org.), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux Développements*, Paris, L.G.D.J., 2006, pp. 190-191; Muthucumaraswamy Sornarajah, « Power and Justice: Third World Resistence in International Law », *Singapore Yearbook of International Law*, vol.10, 2006, p. 32; Patrick Dumbery, Gabrielle Dumas-Aubin, "How to Impose Human Rights Obligations on Corporations Under Investment Treaties?", *Yearbook of International Investment Law and Policy*, vol.4, 2012, p. 569; Kartsen Nowrot, "How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?", *Journal of World Investment and Trade*, vo.15, 2014, p. 619. for a more nuanced point of view, see: Jorge Viñuales, "Invest Diligence in Investment Arbitration: Sources and Arguments", *ICSID Review*, vol.32, nº.2, 2017, p. 367.

22 See: Working Group on the issue of human rights and transnational corporations and other business enterprises (Human Rights Council), *Report on Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms*, Document A/72/162 [18/07/2017], p. 9.

23 See, for instance, the debate in the Philip Morris case: *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (09/07/2016).

24 Most of the international investment agreements are available at: http://investmentpolicyhub.unctad.org/IIA

25 Patrick Juillard, "Le système actuel est-il déséquilibré en faveur de l'investisseur privé étranger et au détriment de l'État d'accueil ? ", *in*, Charles Leben (org.), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux Développements*, Paris, L.G.D.J., 2006, pp. 190-191; Nitish Monebhurrun, *La fonction du développement dans le droit international des investissements*, Paris, L'Harmattan, 2016, pp. 72-73.

26 For a critical view on this question, see : Nitish Monebhurrun, *La fonction du développement dans le droit international des investissements*, Paris, L'Harmattan, 2016, pp. 68-69.

27 William Bourdon, Yann Queinec, *Réguler les entreprises transnationales. 46 propositions*, Paris, Sherpa, Décembre 2010, p. 13 [available at : https://www.asso-sherpa.org/wp-content/uploads/2013/11/CDP-francais.pdf]

28 See : Theodore Lewitt, "The Dangers of Social Responsibility", *Harvard Business Review*, September-October 1958, pp. 41-50; Milton Friedman, "The Social Responsibility of Business is to Increase Its Profits", *The New York Times Magazine*, 16 septembre 1970 [available at: http://www-rohan.sdsu.edu/faculty/dunnweb/rprn-

the fifties, the concept of corporate social responsibility was used, namely in the United States of America, as an instrument of propaganda of positive capitalism… a doctrine of friendly and caring business — against the communist ideology[29]. From the sixties to the eighties, the very concept of corporate social responsibility, that of investors' duties, were very incipient, at least in international law. In international politics, concern was raised about the companies' social responsibility after a famous speech delivered by Chilean President Salvador Allende on the 4th December 1972 before the United Nations' General Assembly on the devastating consequences of transnational companies' activities [30]. But still today, on concrete terms, corporate social responsibility often amounts to a procrastinating debate[31].

Investors' duties, under the logic of corporate social responsibility, mean the measures imposed on or recommended to companies so as to mitigate the negative human, environmental and social impacts of their activities[32]; the idea is to transcend the inner corporate structure and the sole shareholder's interests, thereby setting up a business intelligence which is able to envisage and eventually prevent a company's adverse social impacts[33]. The duty consists of adopting a corporate behaviour to mitigate these impacts so as to attain a level of social responsibility which, when necessary, goes beyond that required by the host State and which must equally apply to all the companies of the same group independently of their business location[34]. These duties can be voluntarily set by the companies themselves in the sense of a self-regulation; and, as mentioned, there is also considerable effort being deployed for these to be provided for in binding legal instruments.

The United Nations tentatively worked on a draft code of conduct for transnational corporation through its Centre on Transnational Corporations in the seventies[35]. Such efforts have, for the moment, been vain within the ambit of the United Nations Organisation. Despite the adoption of the ten principles of a Global Compact in 2000[36], these remain very general in their formulation and are, furthermore, voluntary when it comes to their effective implementation by companies. The same comment applies to the Organisation for Economic Cooperation and Development's Guidelines for Multinational Enterprises[37] or the so-called Ruggie Principles[38]. These initiatives surely constitute small hesitant steps towards the long run construction of a consolidated corporate social responsibility legal regime. But the long run always appears as an eternity when the subject is private companies' responsibility in international law. The normativity in this field seems to become liquid, with dominant actors — transnational corporations — capitalizing on a system of self-regulation[39] in a sort of untouchable ivory tower, while being sometimes theatrically judged by Opinion Tribunals[40] with no real legal effects.

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29 Jean-Pascal Gond, Jacques Igalens, *La responsabilité sociale de l'entreprise*, Paris, PUF, 2008, p. 16.

30 Salvador Allende, "Speech before the United Nations' General Assembly", 4th December 1972 (excerpts available at: http://www.rrojasdatabank.info/foh12.htm).

31 Harwell Wells, « The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century", *Kansas Law Riew*, vol.51, 2002, p. 78.

32 United Nations Environmental Program, *Corporate Social Responsibility and Regional Trade and Investment* Agreements, UNEP, 2011, p. 13; Amiram Gill, "Corporate Governance as Social Responsibility: A Research Agenda", *Berkley Journal of International Law*, vol.26, no.2, 2008, pp. 453-454; Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility", *Yale Law Journal*, vol.111., 2001, pp. 443-545; Erik Assadourian, "Transforming Corporations", *in*, Linda Starke (org.), *The State of the World 2006. A Worldwatch Institute Report on Progress Toward a Sustainable Society*, London, WW. Norton and Company, 2006, p. 172; Kate Miles, *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital*, Cambridge, Cambridge University Press, 2013, p. 218; Stephen Tully, *International Corporate Responsibility*, Alphen Aan Den Rijn, Kluwer Law International, 2012, pp. 20-22.

33 Harwell Wells, « The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century", *Kansas Law Riew*, vol.51, 2002, p. 78.

34 Hervé Ascensio, "Le pacte mondial et l'apparition d'une responsabilité internationale des entreprises", *in*, Laurence Boisson de Chazournes, Emmanuelle Mazuyer, *Le Pacte mondial – 10 ans après. The Global Compact – 10 Years After*, Bruxelles, Bruylant, 2011, p. 169.

35 A 1983 version of the Code of conduct is available at: http://investmentpolicyhub.unctad.org/Download/TreatyFile/2891. For more information, see: Karl P. Sauvant, "The Negotiations of the United Nations Code of Conduct on Transnational Corporations Experience and Lessons Learned", *Journal of World Investment and Trade*, vol.16, 2015, pp. 11-87.

36 Global Compact, adopted on the 26th July 2000 (available at: https://www.unglobalcompact.org/what-is-gc/mission/principles).

37 The guidelines are available at: http://www.oecd.org/daf/inv/mne/48004323.pdf. See also: Jorge Viñuales, "Invest Diligence in Investment Arbitration: Sources and Arguments", *ICSID Review*, vol.32, no.2 2017, p. 349.

38 United Nations, "Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework", New York and Geneva, United Nations [2011], 35p.

39 In a similar sense: Zygmunt Bauman, *La cultura en el mundo de la modernidad líquida*, Mexico, FCE, 2013, p. 52.

40 See: International Monsanto Tribunal, Advisory Opinion (18/04/2017) [available at: http://en.monsantotribunal.org/upload/asset_cache/189791450.pdf].

This article will not indulge in a normative posture to postulate how the law should be on these questions. Having international investment law as a study background, it will instead examine if the generous protection granted to investors can be articulated with their duties. To this interrogation, the working and analysis method consist of scrutinising how and to what extent investment agreements and the arbitral jurisprudence provide for investors' duties. The objective of this article is therefore to critically map and categorise such duties as they appear in international investment law. Accordingly, the study shows that some recent investment agreements indeed provide for investors' social responsibility; as such, the latter potentially becomes a new yardstick against which to measure the legal protection due to companies (**Chapter 1**). Similarly, an analysis of the arbitral jurisprudence reveals a set of techniques to map the investors' corporate social behaviour which consequently act as a benchmark when it comes to evaluate the extent of their legal protection (**Chapter 2**).

2. Providing for Investor's Duties in Investment Agreements as a New Yardstick for their Protection

A small constellation of companies' duties has started to appear in investment agreements and even if they are normally presented as recommendations (2.1.), they can be construed as a parameter for investors' legal protection (2.2.).

2.1. Investors' Duties Entrenched in Investment Agreements as Recommendations

These recommendations are coined in a twofold manner. Firstly, they are formulated as per a top-down logic: this means that they are primarily addressed to signatory States which must encourage companies investing on their territory to adopt corporate social responsibility standards (2.1.1.). Secondly, the recommendations follow a — more recent — bottom-up pathway being addressed directly to the investors (2.1.2.).

2.1.1. Recommending duties to investors through States under a top-down logic

Some treaties address the issue of investors' corporate behaviour in the host States but leave to the latter the duty of adopting all necessary measures for such purposes. It is well-known that the great majority of investment agreements state that investments must be undertaken in conformity with the Host State's local law: in a nutshell, an illegally constituted investment cannot be protected by an investment agreements. This, as per some tribunals, can be considered as a non-written rule of international investment law[41]. This rule however generally refers to the company's establishment in the Host State.

On other grounds, provisions have started to appear in investment agreements that make room for corporate social responsibility during the investment's implementation. Their formulation varies according to the agreements with a language which can be mandatory or unbinding. For instance, the bilateral investment agreement signed between Canada and Mongolia on the 8th September 2016 states:

"*Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties should remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies.*"[42]

A similar provision exists in the recent investment or free-trade agreements signed by States like Canada,

41 *SAUR International S.A. v. Argentina*, ICSID n°04/4, Decision on Jurisdiction and Liability (6/06/2012), para. 308; *Gustav F W Hamester GmbH & Co KG v. Ghana*, ICSID n° ARB/07/24, Award (18/06/2010), paras.123-124; *Mamidoil Jetoil Greek Petroleum Products Société S.A.* v. *Albania*, ICSID n° ARB/11/24, Award (30/03/2015), para. 359.

42 Agreement Between Canada and Mongolia for the Promotion and Protection of Investments (08/09/2016), art.14.

Colombia, the Netherlands[43], Chile[44], Singapore[45] or by the European Union[46], some of which are still awaiting ratification. The signatory States are expected to foster a corporate social responsibility practice on their territory and can, as per these agreements, only encourage foreign investors to fine-tune their activities in order to mitigate impacts on the environment, on human rights, on local communities and to abstain from practices of corruption. The internationally recognised standards are, for example, the OECD guidelines, the International Labour Organization Declaration on Fundamental Principles and Rights at Work[47], the Global Compact and more recently, the Ruggie principles. As such, the corporate social responsibility initiative emanates from the State and, if successful, drips down to the companies. But even so, such practices by companies remain largely voluntary at this level. Investors, via their Host States, are invited to adopt a corporate social behaviour and can, needless to say, decline the invitation. Similarly, States might fear losing their appeal vis-à-vis foreign investors if they fanatically indulge in imposing duties to these companies. Resultantly, there might be more something of an appearance of corporate social responsibility than an intrinsic concern which would normally be displayed by binding rules or by an enforcement system. Consequently, their intrinsic value and utility can, to some extent, be questioned. This scepticism is exacerbated most of all when some investment agreements specifically highlight that issues related to the corporate social responsibility clause cannot be a contentious subject submitted to an arbitral tribunal[48]. This, of course, raises the question of their very *ratio legis*.

Some countries like Canada and Colombia coined a reporting mechanism in the sense of a Human Rights impact assessment. The idea, intellectually and methodologically interesting, is to measure the impact of business activities on Human Rights; such reporting could technically act as a barometer of corporate social behaviour and enable to identify eventual flaws in business practices. The two States thereby adopted an *Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia* with the objective of assessing the effects "*of the measures taken under the Free Trade Agreement between Canada and the Republic of Colombia on human rights in the territories of both Canada and the Republic of Colombia*"[49]. Until now, Canada submitted six reports to the House of Commons and to the Senate (from 2012 and 2016)[50]. These however remain globally vague and do not reveal a consolidated regime of corporate social responsibility within the ambit of business and human rights[51].

If from a cynical perspective the debate hence seems to boil down to an eternal recurrence, another com-

43 See for example for Canada: Bilateral Investment Agreement signed with: Guinea (27/05/2015), art.16; Burkina Faso (20/04/2015) art.16; Cameroon (03/03/2014) art.15; Ivory Coast (30/11/2014) art.15; Mali (28/11/2014) art.15; Nigeria (06/05/2014) art.16; Senegal (27/11/2014) art.16; Serbia (01/09/2014) art.16; Benin (09/01/2013) arts. 4, 16. Free-Trade Agreements signed with: The European Union (30/10/2016), arts. 24.12[1](c), 25.4 [2](c); the Trans-Pacific Partnership (04/02/2016), art.9.17; South Korea (22/05/2014) art.8.16; Honduras (05/11/2013) art.10.16; Panama (14/05/2010) art.9.17; Colombia (21/11/2008) art.816; Peru (29/05/2008) art. 810.

For Colombia, see: bilateral investment agreement signed with France (10/07/2014), art.11; with Brazil (09/10/2015), art.13; and free-trade agreements signed with Panama (20/09/2013), art.14; Costa Rica (22/05/2013) art.12.9; Canada (21/11/2008), art.816; with the European Union and Peru (26/06/2012), art.271/3.

For the Netherlands, see: bilateral investment agreement signed with the United Arab Emirates (26/11/2013), art.2 (3).

44 Investment Agreement between the Hong Kong Special Administrative Region of the People's Republic of China and Chile (18/11/2016), art.16; Free-Trade Agreement between Chile and Uruguay (04/10/2016), art.11.8, art.12.6.

45 Investment Agreement between Singapore and Nigeria (04/11/2016), art.11.

46 Free-Trade Agreement with the SADC (10/06/2016), art. 11 (3) [c] or with Canada (30/10/2016), art. 24.12[1](c), 25.4 [2](c); with Kazakhstan (21/12/2015), art. 148 (3); with Georgia (27/06/2014), art. 231 (e), art. 348, art. 349, art. 352; with Moldavia (27/06/2014), art. 35, art 367 (e); with South Korea (06/10/2010), art. 13 [6] (2); with Ukraine (27/06/2014), art. 422.

47 International Labour Organization Declaration on Fundamental Principles and Rights at Work [18/06/1998] [available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_467653.pdf]

48 Agreement Between Canada and Mongolia for the Promotion and Protection of Investments (08/09/2016), art.20 (1); Agreement Between Canada and Guinea for the Promotion and Protection of Investments Guinea (27/05/2015), art.21 (1); Brazil-Chile ACFI (24/11/2015), annex 1, art.1 (2); Brazil-Colombia ACFI (09/10/2015), art. 23 (3); Investment agreement between the Hong Kong Special Administrative Region of the People's Republic of China and Chile (18/11/2016), art. 21[1] (a) (i).

49 *Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia* (27/05/2010), [available at: http://www.treaty-accord.gc.ca/text-texte.aspx?id=105278], art. 1(1).

50 These reports are available at: http://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/hrftco_2012-dple.aspx?lang=eng

51 James Rochlin, "A golden opportunity lost: Canada's Human Rights Impact Assessment and the Free Trade Agreement with Colombia", *The International Journal of Human Rights*, vol.18, no.4/5, 2014, pp. 545-566.

prehension of the matter still remains possible. There is no doubt that corporate social responsibility in the abovementioned agreements enters the realm of soft law. Such *soft* formulation can however be the initial steps for the creation of corporate social responsibility and of investors' duties culture in international investment law. For many decades, investment law had the only vocation of protecting foreign investors — and, of course, this is not likely to change drastically. Yet, if this law field is to incorporate other priorities or other values, this process forcefully requires a period of adaptation to enable the cultural incorporation of corporate social responsibility. In other words, it is unlikely and highly unrealistic that a drastic conversion — of States and of companies — to corporate social responsibility would occur overnight under the aspect of a binding legal rule. There are many political, economic and social forces to be dealt with and conciliated in this debate. Any radical or pugnacious position would certainly be counterproductive. The soft law regime approach is certainly not the most immediately efficient but it can be argued that it constitutes a first stepping stone towards the construction and diffusion of corporate social responsibility practices under a policy of small steps. And in this sense, a new step has effectively been hurdled considering that provisions directly addressed to investors on their corporate duties characterise a small bundle of new investment agreements.

2.1.2. Recommending duties directly to investors under a bottom-up logic to foster the creation of a corporate social responsibility culture

Every internationalist jurist is acquainted to the classicism according to which legal persons, like private companies, are deprived of a legal personality in international law. This said, it cannot be ignored that many private companies are economically more powerful than a good number of States[52], without mentioning that their economic activities can sometimes be detrimental to the local population, as explained in the introduction of this article. It would therefore be a lure to (still) consider that private companies having transnational economic activities bear absolutely no international responsibility if they happen to cause a social, human or environmental damage. The status quo will prevail only if the legal doctrine maintains a complacent or an orthodox position. The legal conscience on this issue is undeniable. It is worth recalling that the present debate has been amplified, going beyond private companies, to include the social responsibility of non-governmental organisations. The National Contact Point of the OECD in Switzerland has, for instance, accepted a claim against the World Wild Fund for Nature International (WWF) for human rights — indigenous rights — violation in Cameroon. The claim was lodged by another NGO, Survival International, against WWF for violation of the OECD Guidelines for Multinational Enterprises; the WWF is allegedly suspected to have violated the land rights of the Baka 'Pygmy' People[53] and its size and influence rendered it tantamount to a multinational company.

In this context of great concern about the social impacts of transnational corporations, it is therefore not surprising to see the premises of investors' duties, via the institution of corporate social responsibility addressed directly to companies, in some investment agreements. And it can be claimed that this trend will be followed in future investment agreements. The Brazilian Agreements on Cooperation and on the Facilitation on Investments (ACFI)[54] are here topical. They contain very detailed recommendations in a specific chapter or in an annex entitled "Corporate Social Responsibility. The provisions relate to the following: environment protection and clean technology; respect of human rights; local development and cooperation with local communities; formation of human capital; respect of local law and regulations in the field of health, security, environment

52 Brian Roach, "Corporate Power in a Global World", *Global Development and Environment Institute Working Paper*, 2007, p. 5 [available at: http://www.ase.tufts.edu/gdae/education_materials/modules/Corporate_Power_in_a_Global_Economy.pdf]; Noreena Hertz, *The Silent Takeover. Global Capitalism and the Death of Democracy*, London, Arrow, 2002, p. 43.

53 Details about the pending case are available at: https://www.oecdwatch.org/cases-fr/Case_457.
Survival International submission file is available at: http://assets.survivalinternational.org/documents/1527/survival-internation-v-wwf-oecd-specific-instance.pdf

54 Generally, on the ACFIs see: Nitish Monebhurrun, "Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model", *Journal of International Dispute Settlement*, vol.8, 2017, pp. 77-100; Fabio Morosini and Michelle Ratton Sanchez Badin, 'The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?' Investment Treaty News (4 August 2015) https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/.

and labour laws; practices of self-regulation to make the companies' activities socially acceptable; training of employees to incorporate the culture and the practices of corporate social responsibility; non-discrimination of employees having reported the companies' socially irresponsible and illegal practices to the local authorities; the implementation of corporate social responsibility practices within the companies' sphere of influence; the respect of local political affairs[55]. There is a manifest will to extract companies from a close, clinically isolated circuit in order to make their investing activities socially acceptable[56] while tentatively building bridges between foreign investment and local population.

Such provisions do not characterise only the new Brazilian agreements. The Intra-Mercosur Investment Facilitation Protocol contains an article 13 entitled "Obligations of Investors" which States that companies must — the language is here mandatory — abide to local laws and regulations related to investment and taxation; it also states that investors must not indulge in acts of corruption during their activities[57]. Article 14 of the same protocol provides for corporate social responsibility in a way remindful of the Brazilian investment agreements, that is, with a list of recommendations which the investors can incorporate in their activities. The general logic and *ratio legis* of these recommendations can also be construed as per the proposed idea[58] of investors' duties culture creation: investing companies must conspicuously frame their economic activities following domestic legislation; however, when the latter is still incipient in terms of corporate social responsibility, it is expected that companies consider the recommendations set in the investment agreements so as to be more rigorous than the local laws. There is thus an additional effort expected from the investors. For instance, the Morocco-Nigeria bilateral investment agreement states that "[i]*n addition to the obligation to comply with all applicable laws and regulations of the Host State and the obligations in this Agreement, and in accordance with the size, capacities and nature of an investments, and taking into account the development plans and priorities of the Host State and the Sustainable Development Goals of the United Nations, investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices*"[59]. The same treaty further highlights that the International Labour Organisation's Tripartite Declaration on Multinational Investments and Social Policy must be applied and informs that the investors must always endeavour to maintain their corporate social responsibility standards at the same level as those generally in force[60]. The agreement moreover makes provision for a prior social and environmental impact assessment[61] whereby the investors must measure — and thus minimise — all negative social and environmental externalities potentially entrenched in the investments; concerning more specifically the environmental impact assessment, it is mentioned that the companies must apply the rules thereto related of either the host or the home State, whichever is the more protective. Direct obligations on corruption issues are also addressed to investors in the Morocco-Nigeria investment agreement[62]. The language of this agreement is interesting for being mandatory: article 18 is, for example, entitled "Post-Establishment Obligations" and article 20, "Investor liability". These are not mere recommendations on corporate social responsibility but binding obligations. Article 18 states that the foreign investing companies must adopt an environmental management system — certified by or tantamount to the ISO 14001 (on environmental management) when the activity is a high-risk one[63]. Investors must similarly make sure that their investments are respectful of human rights and labour laws and standards[64] and that a dialogical spirit exists between them and the local population[65]. When

55 Brazil-Anglo ACFI (01/04/2015), art. 10, annex II; Brazil-Mozambique ACFI (30/03/2015), art.10, annex II; Brazil-Mexico ACFI (26/05/2015), art.13; Brazil-Malawi ACFI (25/06/2015), art.9; Brazil-Chile ACFI (24/11/2015), art.15. See also the economic and commercial agreement between Brazil and Peru (29/04/2016), art. 2.13.

56 On social acceptability, see: Corinne Gendron, "Penser l'acceptabilité sociale : au-delà de l'intérêt, les valeurs » (2014), *Revue internationale Communication sociale et publique*, vol.11, 2014, pp. 117–29.

57 Intra-Mercosur Investment Facilitation Protocol (07/04/2017), art. 13. [The Protocol has not yet been ratified].

58 See 1.1.1. *supra*.

59 Bilateral Investment Agreement between Morocco and Nigeria (03/12/2016), art.24 (1).

60 Bilateral Investment Agreement between Morocco and Nigeria (03/12/2016), art.24 (2), (3).

61 Bilateral Investment Agreement between Morocco and Nigeria (03/12/2016), art.14.

62 Bilateral Investment Agreement between Morocco and Nigeria (03/12/2016), art.17.

63 Bilateral Investment Agreement between Morocco and Nigeria (03/12/2016), art.18(1).

64 Bilateral Investment Agreement between Morocco and Nigeria (03/12/2016), art.18 (2), (3), (4).

65 Bilateral Investment Agreement between Morocco and Nigeria (03/12/2016), art.19 (1) (b).

the standards for such a dialogue are inexistent or insufficient, the Joint Committees instituted by the agreement have the power to elaborate appropriate ones[66]. The introduction of this article pointed out some cases in which capturing multinational companies' liability for damages caused to the local population of the host States was utterly difficult. Article 20 of the Morocco-Nigeria investment agreement proposes an interesting tool to minimise the possibilities of escaping from civil responsibility in such cases. It specifies that a company can be sued before and held liable by the tribunals of its home State for a damage caused in the host State. This provision is a real innovation in the field of international investment law and in that of corporate social responsibility. If used, it might act as a bar to the oft-invoked *forum non conveniens* argument or that of the corporate veil. In the same line of innovations, the agreement also credits the host State with a right to information: it can, accordingly, ask potential investors (or their home States) relevant information on their practices of healthy corporate governance[67]. In other words, investors resultantly have here a duty of information towards the State: if solicited, they must inform the host State on the history of their corporate social behaviour. Provisions addressing direct recommendations or duties to investors also appear in the Iran-Slovakia investment agreement[68], in the Argentina-Qatar agreement[69], in the 2015 Indian investment agreement model[70] or in the new 2017 Colombian Investment Agreement model[71].

Even if the incorporation of investors' duties in investment agreements could obviously be drafted in a more rigorous way, the abovementioned examples remain useful to establish, even exploratorily, the grounds of a 'normality' of juxtaposing in the same agreement provisions on investors' protection and on their duties. The trend is, of course, new but it constitutes a clear message sent to transnational companies: that their corporate social conduct and eventually imposed obligations will potentially be considered so as to construe their due legal protection[72]. The duties are perhaps presented as voluntary ones, but the presence of corporate social responsibility in the mentioned agreements is not innocent and is not deprived of purpose. And it can be postulated that, if consolidated and repeated in future investment agreements, it will, in the longer run, act as a condition as per which the protection due to investors could be measured; this, it is argued, could contribute to build a minimum standard of corporate diligence.

2.2. Investors' Duties as a means to construe the extent of their legal protection: Postulating the construction of a minimum standard of corporate social diligence

As there once arose a debate on whether there exists a minimum standard of treatment[73], an analogy can be outlined on the existence of an expected minimum level of corporate social diligence on the part of transnational companies which are protected by a constellation of investment agreements. And the question which can here be asked is whether a company which has been neglectful or which has not shown any diligence in terms of an expected corporate social behaviour set in investment agreements can still use the latter as a legal shelter in case of disputes with their host States. Accordingly, the trend of including investors' commitments in investment agreements — or of framing treaties or guiding principles on business and human rights —, is not deprived of sense and purpose. It materialises a growing concern about corporate impunity and, in this sense, sketches a new, more nuanced, landscape of in-

66 Bilateral Investment Agreement between Morocco and Nigeria (03/12/2016), art.19 (1) (c).

67 Bilateral Investment Agreement between Morocco and Nigeria (03/12/2016), art.21 (1).

68 Bilateral Investment Agreement between Iran and Slovakia (19/01/2016), art.10 (3)

69 Bilateral Investment Agreement between Argentina and Qatar (06/11/2016), art.12.

70 2015 Indian investment agreement model, art. 9 (contains obligations addressed to investors in matters of corruption practices); art.12 (contains obligations addressed to investors to abide to local laws relating, amongst others, to human rights, environment and labour protection; the same article also obliges investors to adopt national and international recognised standards of corporate governance).

71 The author had access to the 2017 Colombian investment model which has not yet been published. One article — with no number yet — states: "*Claimant Investors shall respect the prohibitions established in international instruments, to which any Contracting Party is or becomes a party, pertaining to human rights and the environment. A Claimant Investor shall accept the aforementioned prohibitions as mandatory throughout the making of its investment and its operation in the Host Party's Territory in order to submit a claim to a Court or an Arbitral Tribunal pursuant to SECTION [DD]- INVESTOR-STATE DISPUTE SETTLEMENT.*"

72 This shall be explored *infra*.

73 On the minimum standard of treatment, see: OECD, "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing, pp.8 *et seq.*; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, New York, Oxford University Press, 2009, pp. 134 *et seq*.

ternational investment law whereby the applicable law does not unconditionally focus on investors' protection. The law thus strives to foresee investors and their activities and impacts in a broader social context. The inclusion of an expected corporate social responsibility of companies in investment agreements has arguably set the foundation and the first steps for the — surely slow — construction of a doctrine of a minimum standard of corporate social diligence: under this assumption, investors will have to be minimally (socially) diligent to claim the application of an investment agreement. If not, the provisions on the standards of corporate social responsibility would be of no use at all, they would be plainly ornamental and this, surely, is not the will of signatory States. Accordingly, the very legal purpose of these provisions can be examined.

A minima, such purpose is twofold. There is firstly the will, on the part of signatory States, that companies voluntarily incorporate such standards to articulate their activities with other values, may these be the respect of the environment, of human rights, of local communities and culture, of ethics and transparency. The first purpose is hence behavioural: companies are expected to adjust their corporate behaviour in a less egocentric fashion to mitigate the negative impacts of their activities. They are expected to be more diligent, more conscientious and to develop, over time, a culture of corporate social responsibility. Secondly, the reference to investors' duties and corporate social responsibility must not be excised from the other parts of the agreements. It is here claimed that such reference can be invoked to construe the provisions on the standards of treatment and of protection of investors. In other words, the legal protection due to foreign investors can be measured in the light of their corporate social behaviour. This implies giving a purposeful effect, a *raison d'être* to the articles on investors' duties. They are indeed inserted in a particular textual context and must, for this reason, be read in consonance with the standards of investment protection. Besides investment protection and promotion, the preambles of some of the abovementioned agreements put corporate social responsibility as an objective and as means of equilibrium between the distributions of rights and duties of the concerned stakeholders[74]. Resultantly, provisions on corporate social responsibility can be used as a means of contextual interpretation of substantial investment protection standards as per article 31 of the Vienna Convention on the Law of Treaties (1969). This would enable these provisions to deploy practical effects and thus, not become a dead letter; there is, generally speaking, reasonable jurisprudence on contextual interpretation in international law and this applies to international investment law[75].

As such, even if some investors' commitments are formulated as recommendations, it does not necessarily mean that they are deprived of legal effects. It is true that some of the investment agreements state that the provisions on corporate social responsibility cannot be the object of dispute resolution[76]. It can however be claimed that invoking corporate social responsibility clauses during an eventual dispute settlement procedure will not, in itself, be the object of the dispute. The latter will still be related to a violation of a substantial investment protection provision. In any case, the investor is in most cases — except in rare counterclaims — the claimant and thus largely determines the object of the dispute which clearly focuses on violations of substantial investment protection standards; the State does not and will not have a great leeway to permanently and solely move the spotlight on the question of the company's behaviour. As stated, the relevant articles on corporate social responsibility will merely act as a means of interpretation and will not dominate the main debate. It would be a means to contextually enlighten and measure the extent of investors' effective protection by not overlooking the nature of their corporate social behaviour. This would constitute an indirect manner to help build up a culture of investors' duties and awareness of the latter. And, from another perspective, the investors will also be able to invoke the corporate social respon-

74 See for instance: Bilateral Investment Agreement between Morocco and Nigeria (03/12/2016); Intra-Mercosur Investment Facilitation Protocol (07/04/2017); Bilateral Investment Agreement between Iran and Slovakia (19/01/2016).

75 *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, PCIJ, Advisory Opinion, Series B, no.13 (23/07/1926), p. 19; *Free Zones of Upper Savoy and the District of Gex*, PCIJ, Series A, no.22, p. 13; *Corfu Channel case*, I.C.J. (09/04/1949), p. 24. See also: *Japan – Taxation on alcoholic drinks*, Report of the WTO Appellate Body AB-1992-2, WT/DS8/AB/R,WT/DS10/AB/R & WT/DS11/AB/R [04/10/1996], p. 16; *European Union – Custom Classification of Frozen Boneless Chicken Cuts*, Report of the WTO Appellate Body AB-2005-5, WT/DS269/AB/R, WT/DS286/AB/R [12/09/2005], p. 92, para. 214.

76 See for example: Intra-Mercosur Investment Facilitation Protocol (07/04/2017), art. 24 (3); the 2015 Indian investment agreement model, art. 14.2.

sibility clauses as an indicator of their good faith. Such provisions will indeed be a measure of the investors' clean hands and act as a benchmark of their legal protection. This assumption has already been echoed in the arbitral jurisprudence as debated in the next chapter.

3. Investors' corporate social behaviour as a benchmark for their protection as per the arbitral jurisprudence

A mapping of the investment arbitral jurisprudence shows that investors' behaviour can be considered by arbitral tribunals to study the admissibility of their demand and the extent of their legal protection. This has been done even without the existence of specific provisions on investors' duties in investment agreements: some existing legal principles can be used to bring the issue of investors' duties in the debate. In that respect, investors' clean hands, in terms of corporate social behaviour, can act as a bar to their legal protection (3.1.) while their duty of transparency to the host State can help decide if they should be granted a legal protection (3.2.). If the investors' corporate social behaviour is ignored by arbitral tribunals, an unjust enrichment can then be arguably configured (3.3.).

3.1. Investors' unclean hands as a bar to their legal protection

According to the clean hands doctrine, a party to a dispute cannot ask for an equitable reparation to the other if it is itself in violation of a principle of equity[77]. The doctrine's existence has been recognised in international law[78] even if some doubts emerged as to its application in matters of diplomatic protection[79]. Moreover, one arbitral tribunal has already held that the clean hands doctrine is not a general principle of law[80].

In the *Nikos Resources v. Bangladesh* case, the arbitral tribunal considered that three conditions had to be fulfilled to support a 'clean hands' claim: (i) the violation justifying the invocation of the clean hands doctrine should still exist at the time of the claim; (ii) the solution requested by the claimant must put an end to such violation; (iii) there must exist a reciprocity in the obligations which constitute the object of the dispute[81]. These conditions are extracted from a Permanent Court of Arbitration award[82] and the latter is itself inspired from an individual opinion of Judge Hudson in the *Diversion of Water from the Meuse* case[83]. In both of these cases, however, the legal dispute opposed two States. The third condition of reciprocity was therefore relevant in these cases but cannot be purely transposed to the reality of international investment law: a reciprocity of rights and obligations might exist in a contract signed between investor and State but is traditionally inexistent when it comes to international investment agreements — signed between the home and the host State. In the *Meuse* case, for example, the Netherlands claimed that some Belgian constructions on the Meuse river were contrary to a treaty signed between the two States; however, Netherlands' clean hands gravitated into the debate because it had itself undertaken other constructions along the same river. In this case, the claimant and the respondent, both States, had reciprocal obligations. Therefore,

77 *Black's Law Dictionary*, 9th Edition, 2009, p.286; Sir G. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law", *Recueil des Cours*, vol.92, 1957, p. 119. See also: *Diversion of Water from the Meuse*, P.C.I.J., Decision (28/06/1937), Individual Opinion of Judge Hudson, p.77; *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, C.I.J., Decision (27/07/1986), Dissenting Opinion of Judge Schwebel, para. 269.

78 *Report of the International Law* Commission, Document A/60/10, 2005, p.108; Jean Salmon, "Des mains propres comme conditions de recevabilité des reclamations internationals", *Annuaire français de droit international*, vol.10, 1964, p. 232; Richard Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine", *in*, Kaj Hover, Annette Magnusson, Marie Ohrstrom (org.), *Between East and West : Essay in the Honour of Elf Franke*, Juris, 2010, pp. 317-318.

79 *Report of the International Law* Commission, Document A/60/10, 2005, pp.108-112; Patrick Dumbery, Gabrielle Dumas-Aubin, "How to Impose Human Rights Obligations on Corporations Under Investment Treaties?", *Yearbook of International Investment Law and Policy*, vol.4, 2012, pp. 589-591; Aleksandr Shapovalov, "Should a Requirement of "Clean Hands" be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission's Debate", *American University International Law Review*, vol.20, 2005, pp. 829-866; Eric de Bradandere, "Human Rights Considerations in International Investment Arbitration", *in*, Malgosia Fitzmaurice and Panos Merkouris, *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications*, Leiden/Boston, Martinus Nijhoff Publishers, 2012, pp. 183-215.

80 *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Award (18/07/2014), para. 1363.

81 *Niko Resources v. Bangladesh*, ICSID no. ARB/10/11, Decision on Jurisdiction (19/08/2013), para 481.

82 *Guyana v. Suriname*, PCA, Award (17/09/2007), paras.417-422.

83 *Diversion of Water from the Meuse*, P.C.I.J., Decision (28/06/1937), Individual Opinion of Judge Hudson, p. 77.

the conditions retrieved from the *Guyana v. Suriname* or from the *Meuse* case do not constitute an appropriate analogy. The first condition — the continuous violation — is similarly debatable. Indeed, in international investment law, an investor can have a socially irresponsible behaviour while constituting and establishing its activities but not necessarily afterwards; this means that such a behaviour might not prevail at the time of an arbitral procedure but it did exist upstream.

This said, even if a direct transposition of the aforementioned conditions in international investment law is not very convincing, it would be egregious to consider that a notorious social misconduct of an investor in no way affects his capacity to benefit from the shield of an investment agreement[84]. It will be argued hereinafter[85] that condoning such conducts might configure an unjust enrichment. Examining the investors' conduct prior to measure the extent of their due protection is an issue which is not disregarded by arbitral tribunals. In other words, the clean hands doctrine or its inflections are used as a measure of investors' corporate social behaviour. The latter can prove relevant for an analysis of the investors' claims at two levels, both of which will be discussed *infra*: **as a bar to jurisdiction** and as **bar to claims on the merits**[86]**.**

In the *Metal-Tech* case, the investment had been made on the basis of an original act of corruption: the company bribed members of the host State's — Uzbekistan — government. The arbitral tribunal had to examine the legality of a joint-venture liquidation under the Israel-Uzbekistan bilateral investment agreement. On the basis of how the company constituted its investment, the arbitral tribunal stated that it lacked jurisdiction over the matter, the claims being "*barred as a result of corruption*"[87]. The same tribunal further noted:

"*The Tribunal found that the rights of the investor against the host State, including the right of access to arbitration, could not be protected because the investment was tainted by illegal activities, specifically corruption. The law is clear – and rightly so – that in such a situation the investor is deprived of protection and, consequently, the host State avoids any potential liability*"[88].

Interestingly, the arbitral tribunal used the so-called "red flags" as indicators of acts of corruption[89]. "Red flags" are indicators of practices of corruption which are referred to in reports on business ethics. The *Metal-Tech* tribunal used the Woolf report called *Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in Bae Systems Plc — The Way Forward*[90] to help characterise the corruption practice. Such practice was also contrary to the domestic laws of Uzbekistan on bribery. Access to arbitration is, in this sense, not an open-door policy and the investor is accountable for its actions. In the *Inceysa v. El Salvador* case, a Spanish company had obtained a concession contract for a service of vehicle inspection by misrepresenting, amongst others, its financial status and its technical competences. A dispute between investor and State was brought before an ICSID tribunal. The latter acknowledged that any given investment had to be made in accordance with the prevailing local laws as well as with what it coined as international public policy. Consequently, in the tribunals words, if it declared "*itself competent to hear the disputes between the parties, it would completely ignore the fact that, above any claim of an investor, there is a meta-positive provision that prohibits attributing effects to an act done illegally*"[91]. In the direct line of what the clean hands doctrine commands, the tribunal pointed out that "[n]*o legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them*"[92]. In light of this principle, the tribunal declined its jurisdiction: the investor's claim was barred[93].

As per a similar logic, in other cases where the deba-

84 In a similar sense, see: *Inceysa Vallisoletaba v. El Salvador*, ICSID Case No. ARB/03/26, Award (02/08/2006), para. 248.

85 See section 2.3.

86 *Gustav F W Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24, Award (18/06/2010), para. 127; Zachary Douglas, "The Plea of Illegality in Investment Treaty Arbitration", *ICSID Review*, Vol. 29, No. 1, 2014, pp.166-167; Jorge Viñuales, "Invest Diligence in Investment Arbitration: Sources and Arguments", *ICSID Review*, vol.32, nº.2 2017, p. 355 *et eq.*

87 *Metal-Tech Ltd. v. Uzbekistan*, ICSDI No. ARB/10/3, Award (04/10/2013), para. 389.

88 *Metal-Tech Ltd. v. Uzbekistan*, ICSDI No. ARB/10/3, Award (04/10/2013), para. 422.

89 *Metal-Tech Ltd. v. Uzbekistan*, ICSDI No. ARB/10/3, Award (04/10/2013), para. 293.

90 Woolf Committee, *Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in Bae Systems Plc — The Way Forward*, May 2008, p.26 [available at: https://www.icaew.com/-/media/corporate/files/technical/ethics/woolf-report-2008.ashx].

91 *Inceysa Vallisoletaba v. El Salvador*, ICSID Case No. ARB/03/26, Award (02/08/2006), para. 248.

92 *Inceysa Vallisoletaba v. El Salvador*, ICSID Case No. ARB/03/26, Award (02/08/2006), para. 244.

93 *Inceysa Vallisoletaba v. El Salvador*, ICSID Case No. ARB/03/26, Award (02/08/2006), para. 339. In a similar sense, see: *Europe Cement Investment and Trade S.A. v. Republic of Turkey*, ICSID Case Nº. ARB(AF)/07/2, Award (13/08/2009).

te was on the merits and no longer on jurisdiction, the investors were not granted legal protection when there was enough evidence of corporate social misbehaviour. In the *World Duty Free v. Kenya case*, a British company was charged of building and operating duty-free shops of the airports of Nairobi and Mombasa. However, the contract with the host State was made possible only in counterpart of a bribe of two million dollars paid to the Kenyan President. Hence, the company's activity started with an act of corruption. The latter had infringed Kenyan law and characterised a socially irresponsible conduct. The case was brought to arbitration on a claim of expropriation made by the investor. The arbitral tribunal stated that an illegal conduct of a company barred the latter in lodging a claim against an illegal action of the other contracting party[94]. The tribunal referred to the *ex turpi causa non oritur actio* principle[95], that is, 'from a dishonourable cause an action will not arise'. Admitting the claimants request would be contrary to what the tribunal coined as transnational public policy[96]. Analysing an investor's fraudulent conduct in the *Plama* case, the arbitral tribunal highlighted:

"*The Tribunal is of the view that granting the ECT's*[97] *protections to Claimants investments would be contrary to the principle* nemo auditor propriam allegans [...]. *It would also be contrary to the basic notion of international public policy — that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal.*[98]"

That a fraudulent[99] activity or investment cannot be protected by an investment agreement is a general principle that has built into international investment law and arbitration[100]; investors have the duty to be aware of this principle[101]. Consequently, even a proven violation of an investment agreement by State might bar an investor's claim in case of corporate social misconduct. For instance, in the *Hesham Talaat M. Al-Warraq* case, the arbitral tribunal found that the Host State, Indonesia, had infringed the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference's provision on fair and equitable treatment. However, this was matched with the Saudi investor's acts related to corruption and money laundering in the banking sector. The tribunal perpended the company's behaviour and concluded that the clean hands doctrine applied to the case. The doctrine was used to uphold the content of article 9 of the agreement which provides that the investors must "*refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest*" and that "[h]*e is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means*"[102]. Resultantly, despite the agreement's violation by Indonesia, the investor's claim was barred[103].

The distribution of rights and duties between investors and States does not abide to a Manichean logic; the Host States are not completely exonerated of their responsibility because of the corporate social misconduct of investors. In matters of corruption, for example, the illegal act is necessarily materialised by the participation of a State's representative. The latter — President, members of the Government — was clearly identified in the abovementioned cases; thus, a claim's dismissal by an arbitral tribunal often implies that there has been a reprehensible conduct of both parties, investor and State. If so, one tribunal has already decided that the Parties should share the costs of the arbitral procedure[104]. If not, that is in the absence of State collusion, another tribunal considered that the costs had to be supported by the sole investor[105].

The applicability of the clean hands hypothesis is,

94 *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award (04/10/2006), para. 179.

95 *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award (04/10/2006), para. 179.

96 *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award (04/10/2006), para. 157. See also: R. Zachary Torres-Fowler, "Undermining ICSDI: How the Global Antibribery Regime Impairs Investor-State Arbitration", *Virginia Journal of International Law*, vol.52, no.4, 2012, p. 988.

97 Energy Charter Treaty.

98 *Plama Consortium Ltd. v. Bulgaria*, ICSID Case Nº. ARB/03/24, Award (27/08/2008), para. 143.

99 The fraud must conspicuously be duly evidenced. See: *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (06/05/2013), paras. 182.

100 *David Minnotte and Robert Lewis v. Poland*, ICSID Case Nº. ARB(AF)/10/1, Award (16/05/2014), para. 131; *Abaclat and others v. Argentine Republic*, (ICSID Case Nº. ARB/07/5, Decision on Jurisdiction and Admissibility (04/08/2011), para. 648.

101 *Fraport AG Frankfurt Airport Services Worldwide v. The Philippines*, ICSID Case Nº. ARB/03/25, Award (16/08/2007), para. 402.

102 Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (05/06/1981), art.9.

103 *Hesham Talaat M. Al-Warraq v. Indonesia*, UNCITRAL, Award (15/12/2014), paras. 647-648. For a critical analysis of this case, see Hervé Ascensio's article in this same issue.

104 *Metal-Tech Ltd. v. Uzbekistan*, ICSDI Nº. ARB/10/3, Award (04/10/2013), paras. 422-423.

105 *Inceysa Vallisoletaba v. El Salvador*, ICSID Case Nº. ARB/03/26, Award (02/08/2006), para. 338.

as such, at least tested in the arbitral jurisprudence. It is possible to postulate a legal articulation between investors' duties and the clean hands doctrine in the sense that corporate misconduct implies unclean hands and the latter acts as a bar to investors' protection. If companies have a legitimate expectation that the State will act coherently, consistently and in full transparency[106], it can conversely be legitimately expected that investors demonstrate practices of corporate social responsibility or the inexistence of corporate social misconduct in order to plead the applicability of a given investment agreement.

Besides the clean hands doctrine, the arbitral jurisprudence also reveals that investors have a duty of transparency vis-à-vis their host States: infringing this duty might boil down to a fraudulent manoeuvre.

3.2. Investors' duty of transparency as a measure of their legal protection

Before establishing their activities, investors normally have to provide basic information to the host State, namely on their financial situation or on their technical capacities. In this sense, there is an expectation that they act transparently towards the State. Some new agreements provide that the investors have a duty to inform the host State about their corporate governance history and agenda[107]. Nevertheless, some investments have sometimes been successfully established on the basis of erroneous information communicated to the host State. This is even more abusive when done in the context of developing States which do not always have all the technical means to double-check the communicated information[108], without mentioning that the companies' good faith is, in any case, presumed.

In the *Azinian v. Mexico* case, the arbitral tribunal noted that the investment had been made possible only because the (American) investor had voluntarily exaggerated its intrinsic technical experience and financial means in the waste management sector[109]; there was a will to impress but at the same time to mislead the State through false representations and unfeasible promises[110]. The investor invoked a curious argument as a means of defence: it argued that the host State should not have believed its overtly optimistic and unreasonable promises; the argument did not convince the tribunal[111]. A similar situation arose in the already mentioned *Inceysa* case: the investment was accepted by the host State, El Salvador, after having received fraudulent information from the investor, erroneous information on financial and budgetary matters, on the competence of employees, dissimulation of technical competences and of the content of its real experience in the field of vehicle inspection[112]. The arbitral tribunal found that such dissimulation and that the deceptive information constituted a forgery which removed the applicable investment agreement's protective umbrella from above the investor. True, the host State must not passively believe all the fabulous promises made by the investor and must deploy all reasonable means to ascertain the representations' veracity; however, the State's diligence may vary as per their available resources, which in turn depends on their level of development.

These cases can inductively trace the contours of a duty of transparency, the latter acting as a means to construe investment agreements so as to assess the outreach of the standards of treatment and protection. The investors' duty of transparency covers a wider spectrum of concern as it has an indirect impact on the host State's population. The investor is paid by the State as there is an expectation that the financed activity be beneficial to its society and population. There is therefore an opportunity cost embedded in such investment as the value paid to the investor excludes other potential investments which could have been made to benefit the

106 See generally: Michele Potestà, "Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept", *ICSID Review*, vol. 28, 2014, pp. 88-122; Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contour", *Santa Clara Journal of International Law*, vol.12, 2014, p. 7-33; Elizabeth Snodgrass, "Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle", *ICSID Review*, vol.21, 2006, pp. 1-58; Nitish Monebhurrun, "Gold Reserve Inc. v. Bolivarian Republic of Venezuela - Enshrining Legitimate Expectations as a General Principle of International Law?", *Journal of International Arbitration* vol.32, nº. 5, 2015, pp. 551-562.

107 Bilateral Investment Agreement between Morocco and Nigeria (03/12/2016), art.21 (1).

108 Peter Muchlinski, "Caveat Investor? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard", *International and Comparative Law Quarterly*, vol.55, 2006, p. 538.

109 *Robert Azinian, Kenneth Davitian and Ellen Bacca v. Mexico*, ICSID Case Nº. ARB (AF)/97/2, Award (01/11/1999), paras. 29-33.

110 *Robert Azinian, Kenneth Davitian and Ellen Bacca v. Mexico*, ICSID Case Nº. ARB (AF)/97/2, Award (01/11/1999), para. 107.

111 *Robert Azinian, Kenneth Davitian and Ellen Bacca v. Mexico*, ICSID Case Nº. ARB (AF)/97/2, Award (01/11/1999), para. 108.

112 *Inceysa Vallisoletaba v. El Salvador*, ICSID Case Nº. ARB/03/26, Award (02/08/2006), para. 236.

same population. When an investment is fraudulently constituted through misrepresentations of the investor, the opportunity cost is materialised given that there is an inefficient allocation of resources to the detriment of the local population. For this reason, the duty of information goes beyond the small sphere of the arbitral procedure and relate, more widely to the investor's corporate social responsibility.

If this duty of transparency is not legally considered and if, similarly, the investors' unclean hands are ignored, they would, in other words, be deriving a benefit — its investment and profits — from fraudulent acts or from practices of corruption. Said sardonically, their corporate social misconduct would in a certain way be rewarded. To ignore investors' duties would be tantamount to an unjust enrichment[113].

3.3. The Constitution of an Unjust Enrichment in case of the non-recognition of investors' duties

Unjust enrichment has been considered as a general principle of law[114]. An undue enrichment to the detriment of a party must be restored from the perspective of commutative justice[115]. The Iran-USA Claims tribunal enlightened the principle's content and its case law often inspires modern arbitral tribunals[116]. In the *Sea--land Services v. Iran* case, unjust enrichment was defined as such:

> "*There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched*[117]".

Five conditions must be fulfilled: 1) the enrichment of one party; 2) the impoverishment of the other party; 3) a causal relationship between the enrichment and the impoverishment; 4) an unjustified enrichment; 5) the absence of a means of redress for the impoverished party[118].

The enrichment could be realised in two ways. Firstly, the profits made by a company having won a bid or a contract through fraud or acts of corruption could be tantamount to an unjust enrichment; these profits would never have never been made without the original illegality. Secondly, reparations ordered by a tribunal and paid by a State to a company having had a corporate social misconduct during its investment could also be equivalent to an unjust enrichment. In a *Repsol v. Ecuador* case, the defendant State argued before an Annulment Committee that it had a moral duty to annul an award rendered by an arbitral tribunal so as not to unjustly enrich the foreign company[119]. The principle of unjust enrichment appears as an objective means of balance

113 *American Manufacturing and Trading v. Zaire*, ICSID Case Nº. ARB/93/1, Award (21/02/1997), para. 7.15.

114 *Benjamin R. Isaiah v. Bank Mella*, Iran-USA Claims Tribunal, Case Nº. 219, Award Nº. 35-219-2 (30/03/1983), *Iran-USA Claims Tribunal Reports*, vol.2, p. 236; *Sea-Land Services Inc. v. Iran*, Iran-USA Claims Tribunal, Case no.33, Award nº. 135-33-1 (20/06/1984), *Iran-USA Claims Tribunal Reports*, vol.6, 1984, p. 169; *Saluka Investments v. Czech Republic*, UNICITRAL, Partial Award (17/03/2006), para. 449; *Inceysa Vallisoletaba v. El Salvador*, ICSID Case Nº. ARB/03/26, Award (02/08/2006), para. 254; *Ambatielos Case (Greece v. United Kingdom and Northern Ireland)*, Dissenting Opinion of Professor Spiropoulos (06/03/1956), *Recueil des sentences arbitrales des Nations Unies*, vol. XII, p. 129. See also: *Lena Goldfields Ltd. v. USSR*, Award (03/09/1930), para. 25.
For the legal literature, see: Kit Barker, « Understanding the Unjust Enrichment Principle in Private Law : A Study of the Concept and its Reasons », *in*, J.W. Neyers, M. Mcinnes, S.G.A. Pittel [org.], *Understanding Unjust Enrichment*, Portland, Hart Publishing, 2004, p. 82; Detlev C. Dicke, "Unjust enrichment and compensation", *in*, Detlev C. Dicke [dir.], *Foreign Investment in the Present and a New International Economic Order*, Fribourg, University Press Fribourg Switzerland, 1987, p. 269; Brice Dickson, « Unjust Enrichment Claims : A Comparative Overview », *Cambridge Law Journal*, vol. 54, no.1, 1995, pp. 100-126; Christoph Schreuer, Christina Binder, « Unjust Enrichment », *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2007, para. 10, online edition [available at : www.mpepil.com]; Lord Mcnair, « The General Principles of Law Recognised by Civilised Nations », *British Yearbook of International Law*, vol.33, 1957, p. 11; Ana Vohryzek, « Unjust Enrichment Unjustly Ignored: Opportunities and Pitfalls in Bringing Unjust Enrichment Claims under ICSID », *Loyola of Los Angeles International and Comparative Law Review*, vol.3, 2009, p. 503.

115 Kit Barker, « Understanding the Unjust Enrichment Principle in Private Law : A Study of the Concept and its Reasons », *in*, J.W. Neyers, M. Mcinnes, S.G.A. Pittel [org.], *Understanding Unjust Enrichment*, Portland, Hart Publishing, 2004, p. 97; Daniel Patrick O'Connell, "Unjust Enrichment", *The American Journal of Comparative Law*, vol.V, 1956, p. 4.

116 *Saluka Investments v. Czech Republic*, UNICITRAL, Partial Award (17/03/2006), para. 449; *Azurix v. Argentina*, ICSID Case Nº. ARB/01/12, Award (14/07/2006), para.437.

117 *Sea-Land Services Inc. v. Iran*, Iran-USA Claims Tribunal, Case nº.33, Award nº. 135-33-1 (20/06/1984), *Iran-USA Claims Tribunal Reports*, vol.6, 1984, p. 169.

118 Christoph Schreuer, Christina Binder, « Unjust Enrichment », *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2007, paras. 1-2, online edition [available at : www.mpepil.com]

119 *Repsol YPF Ecuador S.A. v. Ecuador*, ICSID Case No. ARB/01/10, Decision on Annulment (28/01/2007) para. 25.

between the distribution of rights and duties of investors and States[120]: it helps grasp the big picture of their relationship.

The unjust enrichment argument was accepted by the arbitral tribunal in *Inceysa*. It is worth recalling that the investor's establishment in El Salvador had been successful only because of various misinformation and misrepresentations. The arbitral tribunal decided that the activity, by way of its constitution, was not an investment and refused to hear the claims on the merits. Accepting the investor's request would, for the tribunal, imply creating favourable conditions for an unjust enrichment:

"*Applying the principle* [of unjust enrichment] *to the case at hand, we note that Inceysa resorted to fraud to obtain a benefit that it would not have otherwise obtained. Thus, through actions that violate the legal principles* [of unjust enrichment]*, Inceysa tried to enrich itself, signing an administrative contract with MARN, which, without any doubt, would produce considerable profit for it.* (…). *The clear evidence that proves the violations listed in chapter IV of this award leads this Tribunal to decide that an interpretation that would grant BIT protection to Inceysa's illegal investment would favor its unlawful enrichment, which no tribunal constituted according to the Agreement can do.*[121]"

Tentatively, the five conditions mentioned above find application here. The enrichment is related to the profits derived from an illegally constituted activity. This enrichment is due to payments made by the State and by its population; the latter is consequently impoverished. The causal relationship is crystalized given that the enrichment of one party results from the impoverishment of the other (the State and one of the component of the State, its population). The enrichment is unjust because of the illegality and corporate misconduct characterising the investor's activity. The impoverished State does not really have a means of redress against the investor in international law.

Just like the company's clean hands or duty of transparency, the principle of unjust enrichment appears as another legal strategy to block investor's abusive claims. Most importantly, the combination of these duties is useful to raise investors' awareness about the legal consequences of corporate social misconduct, that is, to inform that their legal protection under investment agreements depends on their corporate social responsibility.

4. Concluding Remarks

This article had for main aim tracing, while categorising, a trend of investors' duties in international investment law. If the legal landscape is still patchy on this question, perusing the spheres of investment agreements and of the arbitral jurisprudence has shown permeability for corporate social responsibility in a manner that is conducive to its articulation with the traditional standards of treatment and protection of investments. This articulation revealed that investors' duties are gradually acquiring a legal purpose, if not a consensual acceptance. The inclusion of these duties in this law field plays a double role: that of an adjuvant to champion the creation of a corporate social responsibility culture and that of an interpretative instrument used to objectively assess the extent of investors' protection under investment agreements.

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La légalité de l'investissement devant l'arbitre international: à la recherche d'un point d'équilibre

The legality of Investment before the International Arbitrator : Looking for an Equilibrium

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La légalité de l'investissement devant l'arbitre international: à la recherche d'un point d'équilibre*

The legality of Investment before the International Arbitrator : Looking for an Equilibrium

Hervé Ascensio**

Résumé

L'idée que la protection offerte à l'investisseur étranger par le droit international est conditionnée par le respect de la légalité est apparue dans la pratique de l'arbitrage d'investissement en raison de certaines dispositions conventionnelles et de l'application de principes généraux du droit international. L'effet de cette condition de légalité est cependant complexe, car elle est invoquée tantôt comme une cause d'incompétence, tantôt comme une cause d'irrecevabilité, tantôt au fond. L'article soutient que les décisions arbitrales sont devenues au fil du temps de plus en plus cohérentes à cet égard et que les différentes qualifications juridiques s'expliquent par l'existence de différentes bases juridiques, par les séquences de la procédurale arbitrale et par la diversité des figures de la légalité. Une approche équilibrée de la condition de légalité consisterait dès lors à la fonder tant sur le droit international que sur le droit interne et à la concentrer sur le moment de réalisation de l'investissement ; à l'inverse, une approche plus extensive soulève des difficultés conceptuelles et pratiques.

Mots-clés: légalité; investissement ; équilibre; arbitrage

Abstract

The idea that the protection offered to foreign investors under international law is conditioned upon the respect of legality has emerged in the practice of investment arbitration, on the basis of some treaty provisions and on the basis of general principles of international law. The effect of such legality condition is however intricate, because an argument on illegality is raised sometimes as a jurisdictional objection, sometimes as an admissibility issue, and sometimes on the merits. This article argues that arbitral decisions have become more consistent over time, and that different legal characterizations are understandable, taking into account the different legal basis for a legality condition, the timing of proceedings, and the multifaceted aspects of legality. A balanced approach of the legality condition would be to ground it in international as well as national law, and to focus on the moment of the making of the investment; conversely, an expansive approa-

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ch would create conceptual and practical difficulties.

Keywords : legality ; investment ; equilibrium ; arbitration

Bien évidemment, les investisseurs étrangers doivent respecter le droit de l'Etat d'accueil de leur investissement en vertu du droit même de cet Etat. Mais s'ils ne l'ont pas fait – un peu, beaucoup –, à un moment donné du cycle de vie de l'investissement, cela emporte-t-il des conséquences dans l'ordre international ? Plus précisément, un investisseur ne respectant pas le droit de l'Etat d'accueil, voire la légalité internationale, doit-il être privé de la protection conférée par les traités relatifs à l'investissement, y compris l'accès à l'arbitrage international ? Cette question pourra surprendre le lecteur à plusieurs égards ; elle est désormais régulièrement soulevée dans la pratique de l'arbitrage d'investissement.

La surprise est souvent une question de point de vue. Si l'on prend celui de l'investisseur, il pensera peut-être que l'illégalité reprochée n'est pas forcément importante ou, du moins, qu'il incombait à l'Etat d'y remédier dans le cadre de son propre système juridique. Cela concerne-t-il vraiment le droit international de manière générale, et les traités d'investissement en particulier, ceux-ci ayant pour seule fonction de le protéger contre l'aléa de souveraineté ? Quant à l'Etat, il estimera choquant qu'un investissement réalisé illégalement ou qu'un investisseur ayant violé avec constance son ordre juridique puisse obtenir satisfaction en portant le litige devant un tribunal international. Imaginerait-on qu'un étranger installe illégalement une usine de production de cocaïne sur le territoire d'un Etat et se plaigne ensuite devant un tribunal arbitral de l'expropriation résultant de la confiscation de son bien par la police ? L'imaginerait-on même si le traité ne faisait aucune mention du respect du droit par l'investisseur ou de la légalité de l'investissement ?

Ces points de vue et intérêts divergents sont à la recherche d'un point d'équilibre dans le droit international de l'investissement. Ce point se trouve dans l'apparition de ce qu'il est désormais convenu d'appeler la « condition de légalité » de l'investissement[1]. Pourtant, la discussion est complexe et il existe des différences d'approche notables selon les tribunaux arbitraux. La légalité sera abordée parfois comme une question de compétence, parfois comme une condition de recevabilité, parfois encore comme une question de fond ou comme une cause d'atténuation de la responsabilité. Cela ne contribue sans doute pas à rendre l'arbitrage d'investissement compréhensible au non-initié, alors que le questionnement est, lui, aisément compréhensible. Il nous semble malgré tout que ces variations sont explicables et ne portent pas atteinte à l'objectif de cohérence d'une discipline. Elles résultent en effet principalement de différences dans la rédaction des traités et des caractéristiques propres à chaque affaire. Il est dès lors possible de présenter une vision ordonnée du sujet, à la lumière des décisions des tribunaux arbitraux, même si, il faut aussi en convenir, des zones d'ombre subsistent. Ceci vaut tant pour l'existence d'une condition de légalité et de ses effets dans le contentieux (I) que pour l'étendue de l'examen incombant au tribunal arbitral (II).

1. L'existence d'une condition de légalité

La condition de légalité apparaît de manière expresse dans un certain nombre de traités, sous une forme qui la limite généralement – mais pas toujours – à la période de réalisation de l'investissement. Par ailleurs, certains tribunaux arbitraux ont admis que la légalité de l'investissement devait être prise en considération même en l'absence de mention expresse dans le traité. La présence de deux fondements juridiques distincts soulève évidemment des interrogations, y compris sous l'angle contentieux. Les deux hypothèses seront examinées successivement.

1.1. La condition de légalité conventionnelle

De nombreux traités d'investissement contiennent une condition de légalité portant sur la réalisation de l'investissement, le plus souvent dans la disposition définissant la notion d'investissement. Il est alors précisé que l'investissement doit avoir été réalisé ou établi « conformément au droit » ou « conformément aux lois et règlements en vigueur », soit dans le chapeau introductif, soit après la liste exemplative. Une illustration du premier genre est le traité conclu entre l'Inde et

1 Zachary Douglas recourt à une autre expression, celle de « plea of illegality », *in* « The Plea of Illegality in Investment Treaty Arbitration », *ICSID Review*, vol. 29, Issue 1, 2014, pp. 155-186. L'expression nous paraît cependant moins claire et comporte un risque de confusion avec des techniques contentieuses sans aucun rapport – on songe à l'exception d'illégalité.

le Sénégal le 3 juillet 2008, dont l'article 1 (a) définit l'investissement comme « tout type d'avoir établi ou acquis (…) conformément aux lois nationales (…) » de l'Etat d'accueil. Pour le second, on citera l'article 1er, paragraphe 1, du traité conclu le 10 juillet 2014 entre la Colombie et la France :

> « Il est entendu que les avoirs susmentionnés et couverts par le présent Accord doivent avoir été investis par un investisseur d'une Partie Contractante sur le territoire de l'autre Partie Contractante conformément aux lois et règlements de la Partie Contractante sur le territoire de laquelle l'investissement a été réalisé »

La condition peut être renforcée par d'autres mentions du droit interne dans la définition de l'investissement : dans certaines rubriques de la liste exemplative de l'investissement, dans une disposition sur la mutation de l'investissement. Elle peut aussi apparaître dans une définition, distincte, de l'« investissement couvert » ou de l'« investissement visé », comme à l'article 4 (a) de l'Accord global sur l'investissement de l'ASEAN du 26 février 2009, ou à l'article 8.1 de l'Accord économique et commercial global conclu le 26 octobre 2016 entre le Canada d'un côté et l'Union européenne et ses Etats membres de l'autre.

Dans ce cas de figure, l'effet juridique est simple au moins à première lecture. Un investissement n'ayant pas été réalisé conformément à la légalité se situe hors du champ d'application du traité. Dès lors, si le traité ne lui est pas applicable, la clause d'arbitrage ne l'est pas davantage et un tribunal arbitral saisi sur le fondement dudit traité à propos d'un tel investissement sera matériellement incompétent. Plusieurs tribunaux arbitraux ont tenu semblable raisonnement, qui relève désormais d'une jurisprudence constante[2].

En revanche, d'autres références expresses à la légalité dans les traités d'investissement doivent être analysées avec plus de circonspection. Il est ainsi extrêmement courant que la clause relative à l'admission des investissements étrangers, c'est-à-dire aux flux entrants, ou encore à la phase dite « pré-investissement », comporte l'expression « conformément au droit national ». Il s'agit là d'un simple renvoi au droit de l'Etat accueillant l'investissement comme droit applicable à la question de l'entrée des investissements étrangers, de manière à préserver entièrement le pouvoir de l'Etat de réglementer comme il l'entend l'accès des investisseurs étrangers au marché national. L'effet est limité à l'admission ; la clause n'étend pas ses effets à l'applicabilité des autres dispositions du traité. Il est donc difficile d'assimiler une telle disposition à une condition de légalité expresse limitant le champ d'application du traité[3] ; tout au plus offre-t-elle un argument contextuel renforçant le raisonnement relatif à cette condition lorsqu'elle figure dans la définition de l'investissement[4].

Il faut également se pencher sur le cas, encore rare, d'une clause générale relative aux obligations des investisseurs. A cet égard, un traité plurilatéral assez ancien, l'Accord sur la promotion, la protection et la garantie des investissements entre les Etats membres de l'Organisation de la Conférence islamique (1981), mérite attention[5]. Aux termes de son article 9 :

> « L'investisseur s'engage à respecter les lois et règlements en vigueur dans le Pays Hôte et devra s'abstenir de tout ce qui est de nature à perturber l'ordre public et les mœurs et à porter atteinte à l'intérêt public. Il devra s'abstenir aussi d'entreprendre des activités contraignantes ou de réaliser des gains par des moyens illicites. »

L'affaire *Al Warraq c. Indonésie*, portée devant un tribunal arbitral sur le fondement de ce traité, a révélé les difficultés d'une telle généralisation[6]. Le tribunal, après avoir examiné l'intégralité de l'affaire, a estimé qu'en raison de violations du droit financier indonésien le requérant était « empêché de soutenir son grief » de violation du traitement juste et équitable (« *prevented from pursuing his claim* »), alors même que la violation du traité par l'Etat était avérée. Cette conclusion inattendue, qui évoque l'irrecevabilité[7], est liée à un rapprochement entre le contenu de la clause et la doctrine des « mains propres » – elle-même peu assurée en droit international. Un tel raisonnement est donc fort différent d'une condition de légalité visant à restreindre le champ d'application maté-

2 *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB /02/18, Decision on Jurisdiction, 29 April 2004, §§ 73 et 83 s. ; *Inceysa Valliosoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, § 183 ; *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, § 334 ; *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, § 115.

3 *SAUR International S.A. c. Argentine*, Affaire CIRDI No. ARB/04/4, décision sur la compétence et sur la responsabilité, 6 juin 2012, § 307.

4 *Inceysa*, *op. cit.* note (2), § 206.

5 Accord du 5 juin 1981, entré en vigueur le 23 septembre 1986, 27 Etats parties.

6 *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Final Award, 15 December 2014.

7 *Ibid*., § 648.

riel du traité. Il implique un examen approfondi des faits de l'affaire et du comportement de l'investisseur sur une longue durée qui cadre assez mal avec la fonction de la recevabilité dans tout système contentieux. Il peut également surprendre compte tenu de la rédaction de la clause elle-même, qui pose des obligations de fond. A ce titre, elle devrait plutôt servir pour des demandes reconventionnelles – celles formulées en l'espèce par l'Indonésie ont été rejetées au fond – ou pour atténuer la responsabilité de l'Etat.

Un autre genre de clause générale figure dans le modèle indien de traité bilatéral d'investissement de 2015, à l'article 1.4. Celui-ci définit l'investissement comme « *an enterprise constituted, organised and operated in good faith by the investor in accordance with the law of a Party in whose territory the investment is made* ». En raison du « *operated* », la condition de légalité pourrait s'étendre ici à l'ensemble de la vie de l'investissement et affecter, bien plus clairement que dans l'exemple précédent, le champ d'application du traité, puisqu'elle figure dans la définition de l'investissement. Pour autant, sa mise en œuvre pour la partie allant au-delà de la phase de réalisation de l'investissement risque de soulever des difficultés analogues à celles décrites ci-dessus à propos de l'affaire *Al-Warraq*. Est-il vraiment judicieux sous l'angle procédural, conforme à l'objet et au but du traité et équitable au fond d'examiner l'intégralité du comportement de l'investisseur durant toute la vie de l'investissement pour aboutir à un choix binaire entre compétence et incompétence, le tout indépendamment des violations éventuelles du traité commises au détriment de l'investisseur ? Quoi qu'il en soit, pour l'heure, aucun traité n'a encore été conclu selon ce modèle.

1.2. La légalité en l'absence de disposition conventionnelle

D'autres traités d'investissement, en grand nombre également, ne comportent aucune référence au respect du droit par l'investisseur comme condition de son applicabilité. Il n'existe par exemple pas de disposition sur la légalité de l'investissement dans le traité bilatéral d'investissement conclu entre l'Allemagne et la Chine le 1er décembre 2003, pas plus que dans le modèle de 2008 de traité bilatéral de l'Allemagne. Ni le Traité sur la Charte de l'Energie, fondement d'un nombre très élevé d'arbitrages en cours, ni même la Convention de Washington de 1965 créant le CIRDI n'en comportent.

Malgré cela, quelques tribunaux arbitraux ont estimé qu'une condition équivalente existait de manière implicite[8]. Plusieurs raisonnements ont été conduits à cet égard. Dans l'affaire *Phoenix c. République tchèque*, le tribunal a estimé que la légalité était un élément objectif de définition de tout investissement, recourant à l'expression d'« investissement *bone fide* ». Ceci étant, l'idée était soutenue au titre de l'article 25 de la Convention de Washington instituant le CIRDI[9], prolongeant une série de décisions arbitrales s'efforçant de définir objectivement l'investissement faute de définition dans la Convention. Sur ce point précis, la sentence *Phoenix* est restée isolée, même si elle a ensuite été citée par d'autres tribunaux arbitraux favorables à l'existence d'une condition de légalité tacite. Ces derniers ont préféré invoquer un autre fondement, celui du droit international général, s'appuyant sur des principes généraux comme la bonne foi, l'interdiction de l'abus de droit, le principe *ex injuria jus non oritur*, le principe *nemo auditur propriam turpitudinem allegans*, l'interdiction de l'enrichissement sans cause, voire la souveraineté. L'idée de contrariété à l'ordre public international a aussi été invoquée, notamment à propos de la corruption et de la fraude.

Si l'on admet que le droit international général contient effectivement une obligation de respecter le droit interne[10], obligation conditionnant la protection accordée par un traité d'investissement, l'effet contentieux est sans doute différent de la condition de légalité conventionnelle – à tout le moins telle qu'habituellement formulée dans la clause définissant l'investissement. En effet, en l'absence de mention expresse de la légalité, le traité est à l'évidence applicable ; par conséquent, le tribunal arbitral est matériellement compétent. L'illégalité ne peut donc être invoquée qu'à un autre titre, soit comme cause d'irrecevabilité des demandes, soit au fond. C'est la raison pour laquelle la plupart des tribunaux arbitraux admettant l'existence d'une condition tacite de légalité en ont fait une cause d'irrecevabilité, et ce de plus en plus clairement au fil du temps. Seul le tribunal arbitral dans l'affaire *Phoenix* en a fait une question de com-

8 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, §§ 138-139 ; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, §§ 123-124 ; *SAUR*, *op. cit.* note (3), § 308.

9 *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/05, Award, 15 April 2009, § 114.

10 En ce sens, Arnaud de Nanteuil, *Droit international de l'investissement*, Pedone, Paris, 2017, p. 187.

pétence, de manière cohérente avec sa compréhension de la légalité comme élément objectif de la définition de l'investissement dans la Convention de Washington, compréhension dont on a déjà dit qu'elle n'avait pas été reprise ultérieurement. La qualification comme condition de recevabilité est devenue parfaitement claire avec les affaires *Churchill Mining et Planet Mining c. Indonésie*, car le tribunal s'était, dans un premier temps déclaré compétent pour connaître des deux affaires[11], puis a déclaré les demandes irrecevables en raison de la fraude ayant présidée à la réalisation de l'investissement[12].

Cette solution semble tout à fait appropriée car on ne saurait admettre aisément que le droit international protège un objet dont l'existence légale est entachée d'une illégalité majeure. Et il s'agit alors bien d'une cause d'irrecevabilité de la demande, car il est fait obstacle à l'exercice du pouvoir juridictionnel en raisons des caractéristiques de l'affaire et du droit applicable[13].

2. L'étendue de l'examen de la légalité

Si donc l'on tient la condition de légalité pour acquise dans son principe, soit en raison d'une disposition conventionnelle expresse soit en raison du droit international général, il faut cependant en préciser l'étendue. L'effet de l'illégalité est lourd, qu'il s'agisse d'incompétence ou d'irrecevabilité, et il entre potentiellement en conflit avec le but – ou l'un des buts – des traités d'investissement, à savoir la protection de l'investissement. A être trop sourcilleux sur la légalité, on offrirait une échappatoire commode à tout Etat défendeur, tant il serait facile d'invoquer des défauts mineurs lors de la phase de réalisation de l'investissement, d'ouvrir brusquement les yeux sur un comportement illicite qui n'avait dérangé personne jusque là ou correspondait à une pratique courante, voire de reconstruire *ex post* un scénario de comportement illicite. Par ailleurs, il faut rappeler que la condition de légalité vient du droit international – soit du traité, soit du droit international général – même lorsqu'elle a pour objet le respect du droit interne. Ceci introduit un décalage de sens par rapport au droit interne lui-même, ne serait-ce qu'en raison des méthodes d'interprétation qui doivent être celles du droit international. L'on étudiera ici deux aspects de l'examen de la légalité : sa temporalité et son contenu.

2.1. La temporalité de l'examen

La question de la temporalité est réglée par la plupart des traités contenant une disposition sur la légalité de l'investissement d'une manière identique : l'examen porte sur la phase de réalisation de l'investissement. Ceci résulte de la rédaction des clauses relatives à la définition de l'investissement ou à l'« investissement visé ». Par ailleurs, lorsque la question de la légalité n'est pas mentionnée mais résulte du droit international général, les tribunaux ont semblablement limité la période à observer à cette même phase. Sans doute ont-ils été influencés par la pratique des tribunaux qui s'appuyaient sur une disposition conventionnelle le précisant ; mais on peut aussi penser que cette restriction est raisonnable. Aller au-delà reviendrait à s'engager dans une analyse si complète des circonstances de l'affaire qu'elle rendrait assez artificielle l'hypothèse d'une condition de recevabilité de la demande. N'oublions pas que les questions de légalité peuvent parfaitement être examinées par le tribunal arbitral au fond. Au demeurant, même ainsi restreint, l'examen risque déjà d'empiéter en partie sur le fond, car une connaissance approfondie de certains faits peut être nécessaire. Ce risque sera encore plus marqué si l'allégation d'illégalité constitue un aspect de l'objet même du litige entre l'Etat et l'investisseur. Dans ces conditions, on conçoit que certains tribunaux arbitraux aient préféré, en cas de bifurcation de la procédure arbitrale, joindre l'examen de la légalité au fond[14].

Ceci explique aussi que les tribunaux arbitraux aient, dans leur très grande majorité, considéré que les allégations d'illégalité survenues plus tard dans la vie de l'investissement ne relevaient pas de la condition de

11 *Churchill Mining PLC v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014 ; *Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014.

12 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 décembre 2016, §§ 508, 528, 557 (point 3).

13 En ce sens Andrew Newcombe, « The Question of Admissibility of Claims in Investment Treaty Arbitration », *Kluwer Arbitration Blog*, 3 février 2010 (http://kluwerarbitrationblog.com/blog/2010/02/03/the-question-of-admissibility-of-claims-in-investment-treaty-arbitration/) ; Francisco-Xavier Paredes, « La conformité de l'investissement au droit national, condition de sa protection internationale », *ICSID Review*, vol. 29, n°2, 2014, pp. 487-488.

14 *Plama*, *op. cit.* note (8), §§ 126-130 et 228-230 ; voir aussi *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, § 119.

légalité de l'investissement[15]. La seule décision en sens contraire est la sentence *Al-Warraq v. Indonésie*, dont on a vu qu'elle reposait sur une interprétation discutable d'une clause tout à fait originale, l'article 9 de l'Accord sur les investissements de l'Organisation de la Conférence islamique. Hormis ce cas, un éventuel comportement illicite de l'investisseur survenu dans la phase post-investissement ne soulève habituellement pas de question de compétence du tribunal arbitral, ni de recevabilité des demandes. Il est justiciable d'un examen au fond[16]. Un acte illicite survenu durant la phase d'exploitation de l'investissement pourra notamment être appréhendé comme contribution de l'investisseur au dommage, limitant d'autant les conséquences de la responsabilité de l'Etat en cas de violation du traité. Ou alors, bien plus simplement, le droit interne y aura remédié et seuls les éventuels abus du pouvoir étatique seront en cause devant un tribunal international – ce qui correspond à la logique habituelle du rapport entre droit interne et droit international, avec la figure de l'Etat comme pivot.

La discussion n'est cependant pas entièrement close lorsqu'on s'en tient à l'illégalité originelle de l'investissement. Que signifie exactement la notion de « constitution » ou « réalisation » de l'investissement et jusqu'à quand remonter ? L'analyse des décisions arbitrales montre que, généralement, cette phase correspond aux opérations ayant permis de nouer le lien entre l'investisseur au sens du traité et l'investissement au sens du traité. Il s'agit alors d'apprécier les actes du requérant au moment d'investir, rien de moins ni rien de plus[17]. On citera en ce sens l'affaire *Kardassopoulos c. Georgie*, dans laquelle l'Etat défendeur invoquait la nullité *ab initio* de l'investissement en raison d'illégalités survenues durant le processus de privatisation d'une entreprise d'Etat, antérieurement à l'acquisition des actions de la société par le requérant. Le tribunal arbitral a alors précisé que le contrôle au titre de la condition de légalité – expresse dans ce cas – devait porter seulement sur la légalité de l'acquisition de l'investissement par le requérant lui-même[18]. L'affaire *Vestley Group*, est également instructive, car le Venezuela soutenait, au titre de la condition de légalité, que la validité du titre sur un bien foncier requiert de retracer la chaîne des propriétaires depuis le moment de sa première acquisition par une personne privée – en l'occurrence au milieu du XIXème siècle ! Le tribunal a rejeté l'objection car elle ne portait pas sur la légalité de l'opération d'investissement elle-même, c'est-à-dire l'achat d'actions d'une société agricole par le requérant, qui s'était déroulée de manière tout à fait légale ; il a renvoyé au fond l'examen de la validité des titres de propriété[19]. Cette dernière affaire illustre assez bien les dangers d'une conception expansive de l'examen de la légalité.

2.2. Le contenu de l'examen

Evoquer le contenu de l'examen signifie ici rechercher les normes à l'aune desquelles l'examen de la légalité doit être mené. S'agit-il de la légalité interne ou faut-il ajouter la légalité internationale ? Et, dans les deux cas, s'agit-il de l'ensemble des normes ou d'une partie d'entre elles, ou encore de violations importantes et pas de violations mineures ?

Les références expresses à la légalité dans les traités d'investissement révèlent une vision large de cette légalité : la « *loi* », ou les « *lois* » ou les « *lois et règlements* » ou encore la « *législation* » en français ; « *law* » ou « *laws* » ou « *laws and regulations* » en anglais. Il ne s'agit à l'évidence pas seulement des actes adoptés par le pouvoir législatif mais de l'ensemble des règles à portée générale. Dès lors, il n'est pas contesté que cela inclue le droit interne de l'Etat d'accueil de l'investissement. Faut-il pour autant en déduire que tout le droit interne est concerné ? La plupart des tribunaux arbitraux admettent certaines limites, en s'appuyant, conformément à l'article 31 § 1 de la Convention de Vienne sur le droit des traités, sur l'objet et le but du traité. L'interprétation téléologique de la condition de légalité est ainsi dominante et met l'accent sur l'objectif de protection des investissements étrangers[20].

15 *Hamester*, *op. cit.* note (8), § 127 ; *Vannessa Ventures Ltd. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, § 164 ; *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, § 193 ; *Vestley Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, § 204 ; *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, § 214.

16 *Hamester*, *op. cit.* note (8), § 127 ; *MNSS*, *op. cit.* note (15), § 214.

17 *Hamester*, *op. cit.* note (8), §§ 129-139 ; *Vanessa Venture*, *op. cit.* note (15), § 167 ; *Plama*, *op. cit.* note (8), § 116 ; *Inceysa*, *op. cit.* note (2), §§ 234, 244 ; *Tokios Tokeles*, *op. cit.* note (2), § 86 ; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/02, Decision on Jurisdiction, 27 September 2012, § 268 ; SAUR, *op. cit.* note (3), § 312.

18 *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, § 182.

19 *Vestley Group*, *op. cit.* note (15), §§ 206 et 252s.

20 *Tokios Tokeles*, *op. cit.* note (2), § 86 ; *Desert Line Projects LLC v. The Republic of Yemen*, Affaire CIRDI No. ARB/05/17, Sentence,

C'est ensuite que des variations apparaissent. Certains tribunaux considèrent que l'examen ne doit porter que sur la violation de principes fondamentaux du droit interne[21]. D'autres tribunaux estiment que la légalité n'inclut pas les violations mineures du droit interne, telles que des erreurs dans certains documents présentés lors de l'enregistrement d'une société[22], une erreur involontaire dans les bilans financiers d'une société[23], l'absence d'une signature dans le registre des actionnaires[24]. Un autre tribunal dira que la légalité ne concerne pas les règles du droit interne sans rapport avec le régime de l'investissement[25]. Un autre encore suggère que le contrôle doit être modulé en fonction de particularités de rédaction de la clause conventionnelle contenant la condition de légalité[26]. Enfin, un tribunal arbitral a tenté une synthèse, celui saisi de l'affaire *Quiborax c. Bolivie*, évoquant trois catégories de violations : les violations non mineures (« *non-trivial violations* ») de l'ordre juridique de l'Etat d'accueil de l'investissement ; les violations du régime de l'investissement étranger ; la fraude[27].

Quant à la légalité internationale, elle n'est jamais mentionnée expressément; mais rien n'interdit de comprendre une expression aussi générale que « conformément au droit » comme incluant le droit international. Surtout, et indépendamment du vocabulaire retenu dans les traités, plusieurs tribunaux arbitraux n'ont pas hésité à invoquer, au titre de la légalité, les principes généraux de droit au sens de l'article 38 du Statut de la Cour internationale de Justice, de même que l'ordre public (véritablement) international[28]. La sentence *Inceysa c. El Salvador* en constitue une bonne illustration. Y sont mentionnés le principe de bonne foi, le principe *nemo auditur propriam turpitudinem allegans*, le respect de l'ordre public international et l'interdiction de l'enrichissement illicite[29]. Le tribunal arbitral conclut sur ce fondement à son incompétence en raison d'actes frauduleux commis durant la procédure d'appel d'offre à l'origine de l'investissement[30].

* * *

En conclusion, il est aujourd'hui possible d'affirmer que le respect de la légalité conditionne la protection par le droit international des investissements étrangers. Lorsque une illégalité non mineure a entaché l'opération d'investissement réalisée par l'investisseur, cette condition se traduit, selon son fondement juridique expresse ou tacite, en cause d'incompétence du tribunal arbitral ou en cause d'irrecevabilité des demandes portées devant lui. Pour le reste, il est plus naturel d'examiner les allégations d'illégalité du comportement de l'investisseur comme un aspect du fond de l'affaire. Cette approche mesurée se reflète dans une série concordante de décisions arbitrales, ce qui permet de parler de jurisprudence constante.

Sans doute quelques incertitudes perdurent-elles à propos de la temporalité et du contenu de l'examen mené au titre de la légalité. D'autres questions auraient également méritées d'être soulevées, telles que la possibilité d'un acquiescement de l'Etat, exprès ou tacite, couvrant l'illégalité initiale de l'investissement, ou encore l'administration de la preuve d'une illégalité. Nonobstant ces difficultés, la légalité de l'investissement est aujourd'hui mieux appréhendée par l'arbitre d'investissement.

6 février 2008, § 107 ; *Saba Fakes*, *op. cit.* note (2), § 119 ; *Quiborax*, *op. cit.* note (17), §§ 263-264.

21 *L.E.S.I S.p.A et ASTALDI S.p.A c. République algérienne*, ICSID Case No. ARB/05/3, décision sur la compétence, 12 juillet 2006, § 83 (iii) ; *Desert Line*, *op. cit.* note (20), § 104 ; *SAUR*, *op. cit.* note (3), § 308.

22 *Tokios Tokeles*, *op. cit.* note (2), § 86.

23 *Quiborax*, *op. cit.* note (17), § 280.

24 *Ibid.*, § 281.

25 *Saba Fakes*, *op. cit.* note (2), § 119.

26 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, §§ 47-48. La disposition spécifique du traité était la suivante : « *les éléments cités en (c), (d) et (e) ci-dessus doivent faire l'objet de contrats approuvés par l'autorité compétente* » (art. 1 § 1 (g) du traité).

27 *Quiborax*, *op. cit.* note (17), § 266.

28 *Plama*, *op. cit.* note (8), §§ 135, 144 ; *Phoenix*, *op. cit.* note (9), §§ 100-112 ; *Quiborax*, *op. cit.* note (17), § 226.

29 *Inceysa*, *op. cit.* note (2), §§ 229-257.

30 *Inceysa*, *op. cit.* note (2), § 257. L'investissement est ensuite considéré comme également contraire au droit interne salvadorien (§§ 258-262).

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Host States and State-State Investment Arbitration: Strategies and Challenges

Estado anftriões e arbitragem Estado-Estado: Estrategias e desafios

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Host states and state-state investment arbitration: strategies and challenges*

Estado anftriões e arbitragem Estado-Estado: Estrategias e desafios

Murilo Otávio Lubamdo de Melo**

Abstract

The article aims at discussing whether State-State arbitration in foreign investments is an available strategy to host States. It revises the language of investment treaty provisions and inter-state arbitral awards and then analyses cases and treaty-making practice. This article concludes that the possibility of State-State arbitration is not a backlash. It constitutes an additional opportunity for host States to advance their understanding of the treaties and to provide balance to investment treaty commitments. While State-State arbitration may be a viable strategy, there are some challenges that need to be overcome. The definition of the term dispute, the obligation to consult on the meaning of provisions and the establishment of a clear hierarchy between State-State awards in relation to investor-State awards are some of the ways forward.

Keywords: International Investment Law; State-State Arbitration; Investment Treaties; Host States; BITs.

Resumo

O artigo pretende discutir se a arbitragem Estado-Estado em matéria de investimentos internacionais é uma estratégia para os Estados anfitriões. Examina-se para tanto as provisões dos tratados de investimento e as sentenças arbitrais entre Estados e analisa-se casos e práticas de elaboração de tratados. Este artigo conclui que a possibilidade de arbitragem Estado-Estado não é uma adversidade. Constitui uma oportunidade adicional para os Estados anfitriões avançarem a sua compreensão dos tratados e proporcionarem mais equilíbrio aos compromissos dos tratados de investimento. Enquanto a arbitragem Estado-Estado pode ser uma estratégia viável, há alguns desafios que precisam ser superados. A definição do termo conflito, a obrigação de consultar sobre o significado das disposições e o estabelecimento de uma hierarquia clara entre as sentenças arbitrais Estado-Estado em relação às sentenças Estado-investidor são alguns dos os caminhos a seguir

Palavras-chave: Arbitragem Estado-Estado; Tratados dos investimentos; Estados anfitriões

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1. Introduction

The treatment of foreign investments and investors by host States may lead to conflicts of different nature. These conflicts may give rise to claims against regulations and individual decisions of the administrative entities of the government of the host State in domestic courts. The disputes may come up as claims related to the terms of investment contracts and agreements, brought by both the host State or the investor.

It is also widely recognised that international arbitration is an alternative for the resolution of these conflicts, provided there is consent expressed in any instrument. Bilateral investment treaties (BITs) have been the traditional way to provide such a consent, which is generally conferred by the treaty parties in relation to certain disputes arising under the terms of the treaty.[1] An investor is then entitled to bring a claim against the host state, the so-called investor-state arbitration (ISA), based on BITs or, more generally, on international investment agreements, including trade agreements with an investment chapter (IIAs).

It is known that most part of the obligations in IIAs refer to the host States. They are responsible to guarantee the standards of treatment, with relation to foreign investors and their home States. Because of that, they are generally the respondents in the claims.[2] On the other hand, the host state is not given the right to bring a claim against the investor based solely on the content of treaty, since it was the home State of the investor that signed up for the treaty obligations.

To understand this imbalance, the article analyses another type of mechanism to deal with this issue. It is the so-called State-State[3] arbitration in foreign investments (SSIA). States, as repeat players in the international arena, have long-term relationship concerns; thus, when systemic interests come into play, the State-State path may be more attractive. The article discusses if it is an available strategy to host States under the current practice of international law. The chosen methodology is the description and analysis of treaty provisions, cases decided in international arbitrations and some hypothetical situations in order to conclude what are the available options for host States.

The theoretical and practical development of ISA meant that the debate around SSIA had been gradually forgotten. However, both the well-known shortcomings of ISA and the recurrent critiques against it [4] suggest that a fresh analysis of the mechanism is required. Some State-State cases involving host States point out to a resurgence of the practice in the area. These are: *Peru v Chile*[5] and *Ecuador v United States*.[6] These cases sparked interest and were followed by a new range of academic contributors in this field.[7] While these contributions

1 For the classic argument, see Jan Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Review - Foreign Investment Law Journal 232.

2 See generally Giorgio Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (CUP 2014).

3 State-to-State or inter-state are also expressions related to the same concept.

4 See, for example, UNCTAD, 'World Investment Report' (United Nations 2015) UNCTAD/WIR/2015 120–173.

5 *Peru v Chile* arbitration related to the preliminary objections in the *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v The Republic of Peru*, ICSID Case No. ARB/03/4

6 *Republic of Ecuador v United States of America,* PCA Case No 2012-5, Award, 29 September 2012, Available at http://www.italaw.com/sites/default/files/case-documents/italaw7940.pdf

7 accessed 15 May 2017

Chang-fa Lo, 'Relations and Possible Interactions between State-State Dispute Settlement and Investor-State Arbitration under Bits' (2013) 6 Contemporary Asia Arbitration Journal 1; Michele Potestà, 'State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law* (T M C Asser Press 2013); Michele Potestà, 'Towards a Greater Role for State-to-State Arbitration in the Architecture of Investment Treaties?' in Shaheeza Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Brill 2014); Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55 Harvard International Law Journal 1; Clovis J Trevino, 'State-to-State Investment Treaty Arbitration and the Interplay with Investor–State Arbitration Under the Same Treaty' (2014) 5 Journal of International Dispute Settlement 199; Jarrod Wong, 'The Subversion of State-to-State Investment Treaty Arbitration' (2014) 53 Columbia Journal of Transnational Law 6; Nathalie Bernasconi-Osterwalder, 'State–State Dispute Settlement in Investment Treaties' (International Institute for Sustainable Development 2014) <http://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf> accessed 23 July 2015; Anthea Roberts, 'Opinio Juris » Blog Archive HILJ Online Symposium: Anthea Roberts Responds to Martins Paparinskis - Opinio Juris' <http://opiniojuris.org/2014/03/31/hilj-online-symposium-anthea-roberts-responds-martins-paparinskis/> accessed 16 May 2016; Martins Paparinskis, 'Opinio Juris » Blog Archive HILJ Online Symposium: On the Love of Hybrids and Technicalities - Opinio Juris' <http://opiniojuris.org/2014/03/31/hilj-online-symposium-love-hybrids-technicalities/> accessed 16 May 2016; Matilde Recanati, 'Diplomatic Intervention and State-to-State Arbitration as Alternative Means for the Protection of Foreign Investments and Host States' General Interests: The Italian Experience' in Giorgio Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (CUP 2014); Giorgio Sacerdoti and Matilde Re-

recognised the importance of SSIA, they have not yet analysed more carefully the strategies and challenges for the use of the mechanism from the point of view of the host States.

The article is structured in two parts, followed by a conclusion. The first part deals with concepts related to State-State arbitration and the general ways that host States could use this mechanism. The second part analyses the strategies and new approaches and explore further developments in the area.

2. State-State investment arbitration

2.1. Jurisdictional Clauses

It is widely recognised that the introduction of ISA has substituted to a large extent the recourse to diplomatic protection.[8] This means that host States have been directly challenged by investors and home States have seen their role in arbitration progressively diminished. However, State-State dispute settlement mechanisms are still present in BITs and IIAs, though the recourse to this kind of arbitration has remained rare.[9]

In the current practice, a typical State-State clause in an IIA reads:

> **Argentina-Quatar BIT (2016)**[10]
>
> **ARTICLE 15 - Settlement of Disputes between the Contracting Parties**
>
> 1. The two Contracting Parties shall strive with good faith and mutual cooperation to reach a fair and quick settlement of *any dispute arising between them concerning interpretation or application of this Treaty.* In this connection the two Contracting Parties hereby *agree to enter into direct objective negotiations to reach such settlement.*
>
> lf the disagreement has not been settled within a period of six months from the date on which the matter was raised by either Contracting Party, it may be submitted at the request of either Contracting Party to an Arbitral Tribunal composed of three members and under the UNCITRAL Arbitration Rules (2013), which shall apply except as otherwise mutually agreed by the disputing parties.
>
> 2. Within a period of two months from the date of receiving the said request each Contracting Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint within a period of three months and with the approval of both Contracting Parties the third arbitrator from a third country as Chairman of the Tribunal.
>
> …
>
> 6. It shall not be permitted to submit a dispute to an Arbitral Tribunal pursuant to the provisions of this Article, *if the same dispute was submitted to another Arbitral Tribunal.*
>
> 7. The Arbitral Tribunal shall rule on the basis of the provisions of this Treaty and of the rules and principles of International Law. The ruling of the Tribunal shall be by majority of votes. *Such award shall be final and binding on both Contracting Parties.* [emphasis added].

Therefore, in the terms of the provision, both treaty parties can submit the request for arbitration when an issue related to the interpretation or application of their treaty arises. This may arguably take place even if there is a pending arbitration brought by an investor against a host State. It will be submitted that a SSIA dispute will indeed have a different nature, and thus, will not be the *same dispute*.

Some comments can be made. First of all, if these clauses have persisted, they should not be considered as dysfunctional remainders of the old Friendship,

canati, 'Approaches to Investment Protection outside of Specific International Investment Agreements and Investor-State Settlement' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos ; Hart 2015); Theodore R Posner and Marguerite C Walter, 'The Abiding Role of State-State Engagement in the Resolution of Investor-State Disputes' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015); María José Luque Macías, 'Looking Backwards to Inter-State Investment Dispute Settlement: Is There Space for Transparency?' (2016) forthcoming The Journal of World Investment & Trade - Special Issue - The Latin American Challenge to the Current System of Investor-State Dispute Settlement; Murilo Lubambo, 'Is State-State Investment Arbitration an Old Option to Latin America?' (2016) 34(2) Conflict Resolution Quarterly 225; David Gaukrodger, 'State-to-State Dispute Settlement and the Interpretation of Investment Treaties' (Organisation for Economic Co-operation and Development 2016) OECD Working Papers on International Investment <http://www.oecd-ilibrary.org/content/workingpaper/5jlr71rq1j30-en> accessed 1 October 2017.

8 *Ahmadou Sadio Diallo. (Republic of Guinea v Democratic Republic of the Congo)* Preliminary Objections, Judgment 24 May 2007, ICJ Reports (2010) p. 36 para 88; CMS Gas Transmission Company (Claimant) and The Republic of Argentina (Respondent) Case No. ARB/01/8 Decision of the Tribunal on Objections to Jurisdiction para 45

9 Rudolf Dolzer and Christoph H Schreuer, *Principles of International Investment Law* (2nd ed, OUP 2012) 13.

10 Signed on 06 November 2016. All IIAs and model BITs and all the investment decisions mentioned here are available at the UNCTAD database and Italaw respectively <http://investmentpolicyhub.unctad.org/IIA > and < http://www.italaw.com > accessed 15 May 2017

Commerce and Navigation treaties.[11] They should be given meaning and purpose, for their very existence; otherwise they "would be rendered almost completely ineffective (an unacceptable result as a matter of treaty interpretation)."[12]

Second, it could be argued that apparently there is a narrower scope in an SSIA clause, which generally refers to the interpretation and/or application of the treaty, in comparison to the investor-State clause, which generally encompasses *any dispute* concerning an investment.[13] However, it should be recognised that the clauses have generally an all-encompassing broad language,[14] with expression such as "any" or "a" *dispute*, with no specific qualifications. Therefore, it is to be accepted that text, object and purpose and history of BITs reveal that State-to-State arbitration should not be restricted in any way.[15]

Finally, it is to be stressed that the involvement of States in the correct interpretation of their investment treaties can always take place apart from State-State arbitration. However, these mechanisms will not be dealt here.[16] Also, it is recognised that home States could also use SSIA as an alternative litigation strategy.[17] As emphasised elsewhere:

> This is not a contention that SSIA is always a good substitute to ISA in terms of effectiveness to enforce investors' rights or in terms of protection of the sovereign right of host States. From a practical perspective, one could argue that if a treaty includes only the option of SSIA, the politically connected or economically robust companies would probably be the only ones able to convince the States to endorse their claims. The greater risk is for small and medium enterprises, which are less connected. Since they are the ones that should be benefiting from the investor-state system, a change to SSIA would not be more efficient for them.[18]

Nevertheless, the focus of this article is on how host States could effectively resort to SSIA as a defensive strategy and on what challenges they would face.

2.2. Host States: SSIA as a "Shield"

2.2.1. State-State and Interpretative Claims

It is time now to explore the possibility that host States resort to interpretive claims in the form of declaratory decisions. State-State arbitration under the jurisdictional clause in an IIA seems to be an adequate avenue for that. One could suggest that the request for a declaratory decision would be within the mandate of most SSIA jurisdiction clauses since this would involve elements of interpretation or application of the treaty. If an SSIA claim is brought by the host State, it will be a dispute between the host and home State related to the interpretation of a treaty provision and not a decision on whether the specific investor suffered a breach and should be entitled compensation.

International courts can be called upon to resolve merely interpretive questions, without claims of treaty violations and can recognise jurisdiction to make declaratory awards on the right interpretation of a provision.[19] One might recall "the fundamental purpose of a declaratory judgment which is designed, in contentious proceedings involving a genuine dispute, to *clarify and stabilize the legal relations* of the parties",[20] which would be the practical result of the issue. Thus, declaratory claims seem to be admissible for host States, so that

11 For the historical use of SSIA and the development of jurisdiction clauses, see Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (OUP 2010) 24–25; 504.

12 Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2009) 79 British Yearbook of International Law 264, 296.

13 Vandevelde (n 11) 499. See, for example, the United States BIT Model (2012)

14 Roberts, 'State-to-State Investment Treaty Arbitration' (n 7) 6–7; 11–12.

15 ibid 5.

16 See, in this regard, Wolfgang Alschner, 'The Return of the Home State and the Rise of "Embedded" Investor-State Arbitration' in Shaheeza Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Brill 2014) 309–324; Tomoko Ishikawa, 'Keeping Interpretation In Investment Treaty Arbitration "on Track": The Role of State Parties' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015).

17 That was the issue in *Italy v Cuba, Italian Republic v Republic of Cuba*, ad hoc State-State arbitration, Award 1 Jan 2008. Because it involved a claim by the home State in its use of diplomatic protection, this case is not analysed further. For details, see Michele Potestà, 'Republic of Italy v. Republic of Cuba' (2012) 106 AJIL 341.

18 Lubambo (n 7) 229.

19 See Expert Opinion of Prof. Alain Pellet, Memorial, n 6 p. 15-18, para 26-36 Citing among others ICJ Judgement , 27 August 1952, *Rights of the National of the United States of American in Morocco (France v United States of America), ICJ Reports* 1952, p. 179 and ICJ Judgement 13 July 2009, Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua), ICJ Report 2009, p. 270-271 par. 156.

20 *Nuclear Tests (Australia v France)*, Joint Dissenting Opinion of Judges Oneyama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, 20 December 1974, ICJ, ICJ Reports 1974, 321 (para 21).

tribunals could be asked to adjudicate on interpretative issues.[21]

But why would host States be interested in doing so? It is suggested that this could ensure that specific provisions are not given an interpretation that is divergent with the parties' intentions. This is especially relevant in face of the controversial interpretations by investor-State tribunals. Depending on how the consent to SSIA is framed and on whether there is a "dispute" with the other treaty party (the home State), this avenue may be promising. This is what one can draw from the Ecuador-United States litigation in the Permanent Court of Arbitration, to be commented later.

Of course, interpretive claims can also be used by home States. To illustrate, the conflict that resulted in the arbitration between *BCB v Belize*[22] could have involved a State-State arbitration pursuant to the United Kingdom (UK)-Belize BIT. The mechanism was an extra tool to make the investor State arbitration effective, with a declaratory decision on the meaning of a BIT provision.[23] In the specific case, an interpretative claim was cogitated by the UK to check the interpretation of a specific BIT provision. Both Belize and the UK would have had already expressed their views, so the existence of a "dispute" would not be a problem. [24] Anyway, a broad definition by the parties in their treaties of the term "dispute" would be the natural solution to enlarge the role of SSIA[25], especially for host States.

2.2.2. Relation between SSIA and ISA

These types of claims bring the issue of the relation between State-State arbitration and investor-State, especially the possible binding effect of the former on the latter. It is important to recall that international law does not exclude conflict of rules nor does it prohibit States from undertaking conflicting obligations, but courts have applied techniques of general international law to dismiss conflict.[26] The answer would naturally depend on several aspects, such as whether the SSIA takes place after, parallely or before an ISA proceeding and obviously on the subject matter of the proceedings.

In this regard, the academic literature varies. One might argue that there is binding effect with regard to the interpretation of treaty provisions from SSIA in relation to future investor-State tribunals.[27] Another contention would be to accept this last conclusion, unless the "interstate interpretation is manifestly incompatible or irreconcilable with the treaty text and/or the treaty parties' intended meaning".[28] Some suggest that the effects of *res judicata* would be a better approach to the matter.[29] Others propose relying on the good faith principle to solve conflicts between parallel or successive arbitration proceedings, especially for the last tribunal to be called upon;[30] this seems to suggest the "priority of the court first seised" or an adoption of "the principle of priority in time".[31]

Finally, one takes note of the controversial claim that SSIA should be always precluded whenever there is an investment treaty *containing* an investor-State clause with jurisdiction to deal with the issue, regardless of whether consent to it has been perfected.[32] This would

21 See Gaukrodger (n 7) 28–31. which brings the example of Kyrgyzstan's request for the interpretation of the Moscow Convention, in the context several ISA claims against that host State.

22 British Caribbean Bank Limited v. The Government of Belize, UNCITRAL, Award (19 December 2014), PCA Case No. 2010-18,

23 Posner and Walter (n 7) 387–388. See also Luke Eric Peterson, "Spectre of State-to-State claim recedes as Belize makes peace with investor-State proceeding (and some transparency)" Sep 30, 2013 | by <http://www.iareporter.com/articles/spectre-of-state-to-state-claim-recedes-as-belize-makes-peace-with-investor-state-proceeding-and-some-transparency/ > accessed 1 October 2017

24 Peterson ibid "… [i]t might have fallen to the United Kingdom *to determine whether it took a different view* as to the interpretation to be given to the investor-state arbitration mechanism of the UK-Belize BIT. If the UK wished to push such an alternative interpretation, it would have enjoyed the ability to initiate a state-to-state arbitration with Belize, pursuant to Article 9 of the BIT, in order to seek a determination of a dispute over the 'interpretation or application' of the BIT…. [t]he UK-Belize controversy might have presented *a more clear-cut dispute given that both sides would have presumably weighed in with differing views* as to whether the investor-state provisions of the treaty are subject to a ripeness or even an exhaustion requirement." emphasis added

25 Bernasconi-Osterwalder (n 7) 21.

26 James Crawford and Penelope Nevill, 'Relations between International Courts and Tribunals: The "Regime Problem"', *Regime Interaction in International Law* (CUP 2012) 236–237.

27 Potestà, 'Towards a Greater Role for State-to-State Arbitration in the Architecture of Investment Treaties?' (n 7) 270–272. Cf. Potestà, 'State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties' (n 7) 762. See also Broches opinion in ICSID, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (International Centre for Settlement of Investment Disputes 1968) 350. "[T]he Tribunal constituted under the Convention would regard itself as *bound by the decision under the bilateral agreement,* to the extent that the interpretation of that agreement had a bearing on the case before it."

28 Trevino (n 7) 232.

29 Paparinskis (n 7).

30 Lo (n 7) 15–21.

31 Crawford and Nevill (n 26) 244.

32 Wong (n 7) 31–37.

go against the principle of effectiveness of the jurisdiction clause. In this regard, Berman comments that “the idea of there being a parallel State-to-State forum for sorting out problems, which as foreseen from the outset alongside the investor-to-State system is something which is available, should be available, *might be more available in the future*…”[33] Thus, one should conclude that SSIA is not merely subsidiary to ISA.

This contribution does not aim to give definite answers. But, considering an express delegation of interpretive powers by the parties to the State-State tribunals,[34] few would deny that a previous State-State arbitration decision, which interprets a specific provision in a treaty, should be, at least, highly persuasive to future investor-State tribunals dealing with the same subject matter. This is because it would be very difficult to ignore the interpretation made by a tribunal, the adjudicatory authority of which is based exactly on a jurisdictional clause to *interpret* the treaty. This enhances the value of a State-State arbitration ignited by the host State, as an effective litigation strategy.

2.2.3. Declaratory Claims of Non-Breach

Another option one could think for the host State is to resort to declaratory claims of non-breach or of limited breach. This means seeking a declaration that a host State measure is fully or partially consistent with its obligations under a treaty. In this regard, Roberts ponders whether a host State could ask for a declaration of non-violation of the treaty and, by pre-emption, avoid investor-State claims or force them to be solved on a class-wide basis. [35] Imagine that a state desires to edit a new law establishing an obligation for companies to keep a substantially larger area of native forests along the river margins and the coastal areas. They may desire to make sure that this will not be considered indirect expropriation of foreign investment developments in those areas, which would be in breach of an IIA clause.

Due to the lack of case law regarding this type of claims, some have expressed concerns especially questioning the scope of the SSIA provision.[36] But there seems to be some room to the contention that the host State is entitled to make such a request for a declaratory award of non-breach. Some arguments are presented, without intending to close the issue.

First of all, this would be indeed an *application* of treaty provisions to a set of facts, therefore, generally included in the jurisdiction of State-State tribunals. The request is for the tribunal to analyse whether or not facts or conducts fall under treaty rules. Of course, the host State will run the risk of receiving a non-wanted response.

Second, a declaratory judgment is not always to be considered a form of satisfaction, therefore, requiring an international wrongful act.[37] Its nature is more linked to the judicial act itself, in order to solve a wide variety of disputes.[38] In several cases, the World Court had to declare rights without referring to a breach or violation, thus, not ruling on issues of responsibility. [39]

Third, both host and home States would be bound by the non-breach decision rendered by a SSIA tribunal. At least, the home State would be under an obligation of good faith not to frustrate the declaratory decision. This possibly makes it incapable of offering diplomatic protection based on the measure or prohibited to actively encourage its nationals to seek international treaty-based arbitration.

Finally, the request for a declaration of non-breach, with its resulting consequences, is what respondent States would seek by using counterclaims. Judicial economy and guarantee of consistency are among the *rationale* for recognising counterclaims.[40] Provided that some criteria are fulfilled (jurisdiction of the court and direct

33 Berman (n 19) 72 emphasis added.”page”:”67-72; 82”,”source”:”catalogue.ulrls.lon.ac.uk Library Catalog”,”event-place”:”London”,”ISBN”:”978-1-905221-08-0”,”call-number”:”TCD PL-471-275”,”collection-editor”:[{“family”:”Ortino”,”given”:”Federico”}],”editor”:[{“literal”:”British Institute of International and Comparative Law”}],”author”:[{“family”:”Berman”,”given”:”Frank”}],”issued”:{“date-parts”:[[“2007”]]}},”locator”:”72”,”suffix”:”added emphasis”}],”schema”:”https://github.com/citation-style-language/schema/raw/master/csl-citation.json”}

34 Anthea Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 AJIL 179, 225.

35 Roberts, ‘State-to-State Investment Treaty Arbitration’ (n 7) 10.

36 Bernasconi-Osterwalder (n 7) 14.

37 Eric Wyler and Alan Papaux, ‘The Different Forms of Reparation: Satisfaction’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The law of international responsibility* (OUP 2010).

38 Juliette McIntyre, ‘Declaratory Judgments of the International Court of Justice’, *Hague Yearbook of International Law* (Martinus Nijhoff 2012) 156.

39 *Right of Passage over Indian Territory (Portugal v India),* 12 April 1960, ICJ, Merits, ICJ Reports 1960; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, 13 July 2009, ICJ, Judgment, ICJ Reports 2009, 269-272, para 156.

40 Constantine Antonopoulos, *Counterclaims before the International Court of Justice* (TMC Asser Press 2011) 57–59.

connection to the subject of the main claim),[41] courts have been entertaining counterclaims.[42] Thus, why not accept them as claims at the beginning? It is true that a counterclaim is not a defence on the merit, but requires something "more" in the form of a judgement against the applicant, but it is an alternative to deprive a main claim of force and mitigate its adverse character.[43]

Anyway, it is in the binding effect of the declaration on future investor-State tribunals where the problem lies. While it is difficult to accept that it would pre-empt future tribunals, it is submitted that the decision should certainly be highly persuasive on them.

3. New strategies and approaches

3.1. Strategies for Host States

There are State-State provisions in virtually all of BITs and other agreements with investment provisions.[44] As seen above, these clauses are more than present and need to be given meaning and purpose. This is not a contention that SSIA is a good substitute to a competent defence in an ISA in terms of effectiveness to the protection of the sovereign right of host States. SSIA can be useful to the host State on its own or as complement to ISA.

As an example, the first attempt of coordination between ISA and SSIA proceedings took place in *Empresa Luchetti v Peru* referred to *Peru v Chile*.[45] It was, for some time, the only State-State dispute under a BIT. The underlying rationale of the case seemed to accept the principle of an exclusive mandate for each constituted tribunal, where no coordination at all is attempted. [46] The investor's tribunal denied the request for suspension made by the host State (Peru), which had submitted an arbitration against the home State (Chile) regarding the interpretation of the BIT; but, in the end, the investor's tribunal dismissed the claim for lack of jurisdiction.[47] An opposite approach would be the option for coordination, which would be the result of the application of the general principle of cooperation, by showing jurisdictional deference to the SSIA, which did not happen.[48]

To illustrate the strategies for host States, one could reflect on the outcome of litigations such as those related to Argentinian crisis. Several of those cases affected US investors and suffered from a lack of consistency.[49] The question is how it would be different in the case of the existence of a binding interpretation made by an SSIA tribunal, previous to the ISA tribunals. The interpretation could relate to controversial BIT provisions or to the interplay between customary international and treaty law, for example.

In the context of the Argentina-US BIT, it is worth exploring how both home and host States could have used the State-State arbitration. The relevant clauses are the following:

> ARTICLE VI
>
> The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.
>
> ...
>
> ARTICLE VIII
>
> 1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.
>
> ...

41 According to Rule 80(1) of the ICJ Rules of the Court.

42 Antonopoulos (n 40) 73–134.

43 ibid 60; 63.

44 See < http://investmentpolicyhub.unctad.org/IIA > accessed 15 May 2017

45 See n 5

46 Crawford and Nevill (n 26) 237–239.

47 See *Empresas Luchetti* n 5 362: "Respondent filed a request for suspension of the proceedings, in view of the fact that 'Claimants' Request for Arbitration [was] (...) the subject of a concurrent State-to-State dispute between the Republic of Peru and the Republic of Chile.' ... [T]he Tribunal found that the conditions for a suspension of the proceedings were not met and confirmed the schedule for the submission of pleadings on the objections to jurisdiction."

48 Crawford and Nevill (n 26) 242–243.

49 For an analysis on the lack of consistency and its consequences on legitimacy, see William W Burke-White, 'Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System, The' (2008) 3 Asian Journal of WTO and International Health Law and Policy 199.

It seems legally possible that Argentina, as a host State, could have initiated an interpretative claim against the United States to provide legal certainty to its defence. The objective would be to obtain a clearer interpretation of a contentious provision, most probably to its own benefit. This would have ensured more consistent results in the investor-State claims. There seems to be compelling arguments to sustain this position.

In this regard, the *Ecuador v US* case[50] is illustrative. Ecuador brought a claim against the United States for the interpretation of Article II(7) of the US-Ecuador BIT, which dealt the 'effective means' obligation. The same provision was one the contested issues of a pending investor-State arbitration brought by an American investor against Ecuador. The United States had not responded to Ecuador's initiative to discuss the content of the provision. It seems that the silence of the United States with the regard to Ecuador`s request for interpretation of the article and the communication that it would not manifest at all on the matter[51] could be interpreted as inaction. This would amount to holding "opposing views", thereby creating a *dispute*.[52]

However, the majority of the tribunal was not fully convinced and denied jurisdiction for the inexistence of a *dispute*. Claiming that the recourse to SSIA was void of practical consequences and could jeopardise the effectiveness of ISA, the majority argued that:

> … the United States could directly allege a breach of the 'effective means' obligation in Article II(7) against Ecuador, in which case there would be clear 'practical consequences' for both Parties. … [S] ome commentators consider that recourse to State-to-State dispute resolution for breaches of a BIT may be possible, in particular where the investment dispute in question has not already been submitted to investor-State arbitration under Article VI. The Tribunal makes no finding on this point, but *is not persuaded to exclude this possibility outright*.

One interpretation was that the award was a conscious application of a technique described as a restrictive interpretation of a 'dispute' for the purposes of a treaty.[53] Therefore, a broader definition of dispute in the SSIA context within the treaty could be useful, as suggested above. Note, though, that the majority did not exclude the possibility of recourse to SSIA for BIT breaches. The dissenter considered that silence represents a dispute in the following terms:

> The myth of judicializing diplomacy in resorting to arbitration in order to settle a dispute underestimates the dispute settlement system which, in this case, is activated by the *reluctance of one of the Parties to acknowledge a dispute and the frustration of prospective negotiations as the primary method to reach an agreement acceptable to both Parties*. Therefore, the interpretation made by an arbitral tribunal constituted under Article VII will neither jeopardise nor undermine the arbitration mechanism between investors and States set forth in Article VI. On the other hand, it is difficult to understand how recourse to arbitration will politicise investment disputes between investors and States, where the *purpose of arbitration is to interpret a treaty rule according to what the parties regarded is its content and scope, thus ensuring the necessary credibility of the system by clarifying the law in force*, as the Parties stated at the time of expressing their consent to be bound.[54]

Since the decision has been extensively discussed and commented elsewhere,[55] the focus is on one argument raised by Ecuador, which deserves attention. Considering that most IIAs have provisions on the obligation to consult (art. VI in the US-Argentina BIT), the refusal to do so is a breach of the treaty. It is submitted that an interpretation of the tribunal of the provision that was the aim of the consultations can be considered proper satisfaction, a form of reparation under international law, appropriate to put an end to the violation.[56] This path can be explored, provided that the parties show evidence that the claimant made every effort to consult. A clearer language in this line can be noticed in article 15.1 of the recent Argentina-Qatar BIT reproduced above: parties are obliged to engage in good faith direct negotiations regarding the interpretation of provisions of the treaty.

50 See n 6

51 See n 6 Witness Statement of Mr. Luis Benigno Gallegos

52 See n 6 Expert Opinion Pellet, McCaffrey and Amerasinghe generally citing *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 315, para 89 and *Application of the Convention on the Elimination of All forms of Racial Discrimination (Georgia v Russia),* Preliminary Objections, ICJ Judgement, 1 Paril 2011, ICJ Reports 2011, p. 16, para 30

53 Crawford and Nevill (n 26) 241.

54 *Republic of Ecuador v United States of America*, PCA Case No 2012-5, Dissenting Opinion of Prof. Raúl Emilio Vinuesa, 29 September 2012 Available at < http://www.italaw.com/sites/default/files/case-documents/italaw7942_0.pdf > accessed 15 May 2017

55 See, for example, Marcin Orecki, 'State-to-State Arbitration pursuant to Bilateral Investment Treaties: The Ecuador–US Dispute.' <http://www.youngicca-blog.com/state-to-state-arbitration-pursuant-to-bilateral-investment-treaties-the-ecuador-us-dispute/> accessed 16 May 2015; Bernasconi-Osterwalder (n 7) 11–14; Roberts, 'State-to-State Investment Treaty Arbitration' (n 7) 10–16.

56 Pellet, Expert Report (n 19) 18

Thus, it is convincing to think that Argentina could have initiated consultations with the United States to provide a binding interpretation of treaty provisions. In case of disagreement, it could bring a State-State interpretive claim.[57] Anyway, it has been reported that the country at least envisaged such possibility to bring clarity and coherence to divergent interpretation of its cases.[58] As sustained elsewhere:

> In fact, the criteria for using the state-state jurisdictional clause as a *defense are not clear*. This may explain why it has not been used more extensively. The unsuccessful attempts appear to be due *more to the specificities of the cases* than to an impossibility of using the clause that way.[59]

Moreover, there are reasonable arguments for another possibility. Argentina, as a host State, could have brought a declaratory claim that it was not liable, claiming there had been no treaty violations. For example, Argentina could have requested a State-State arbitration asking for the court for a declaration that the measures taken after the Argentinian crisis were taken in accordance with art. XI of the BIT with the United States; therefore, they were necessary to protect its essential security interests. On the other hand, one might doubt that Argentina could have prevented all the investor-State claims with this initiative.

Finally, as to the enforcement pressure against Argentina due to the non-payment of its awards, measures characterised as retorsion were carried out, but none reached a State-State phase.[60] In the aftermath of the discussion, Argentina`s position was in favour of the use of State-State arbitration. In the ICSID context, this means using art. 64 of the Convention, which fulfils the consent to grant jurisdiction to the International Court of Justice – ICJ. The result would be a decision of the ICJ, ruling that the State has or has not violated its obligations under art. 53 of the ICSID Convention. Argentina recalled art. 64, indicating that the ICJ was the appropriate forum to discuss non-enforcement of awards.[61] Nevertheless, to date, though, this option has not been used.[62] As another example, it could be mentioned that in a demand related to its sovereign debts, Argentina tried to sue the US in the ICJ claiming violations of its sovereignty and immunities in relation to decisions of US Courts. The US refused to accept jurisdiction.[63]

3.2. New Approaches for Host States

Coming to the end of the article, it is worth commenting on new treaty-making approaches. It is important to emphasise that a reaction against ISA or a traditional stance against it does not mean disengagement with international investment law. As an illustrative point, South American States have reached an advanced level of the negotiations towards the constitution of a centre for the settlement of disputes, a process initiated in 2008, under the umbrella of UNASUR.[64] UNASUR regional initiative came in line with withdrawals from ICSID and as a political reaction against the outcomes of the system.[65] This may bring a new arena to decide on or settle disputes involving investors or States of the region and outside it. In this regard, one might notice the likelihood of the inclusion of SSIA in the UNASUR Centre.[66] However, the potential of the UNASUR Centre will only be real if it is given jurisdiction progressively,[67] by means of consent in investment agreements

57 Cf Roberts, 'State-to-State Investment Treaty Arbitration' (n 7) 4.

58 "Argentine Republic officials have deliberated for some time as to whether to seek state-to-state arbitration … it would seem unlikely that the Republic would be dissuaded from pursuing state-to-state arbitration merely on the basis of the failure of Ecuador's efforts. …." As reported inn Luke Eric Peterson, 'United States defeats Ecuador's state-to-state arbitration; will outcome dissuade Argentine copycat case?' (IAReporter, 2 September 2012) <http://www.iareporter.com/articles/united-States-defeats-ecuadors-state-to-state-arbitration-will-outcome-dissuade-argentine-copycat-case/ > accessed 15 May 2017.

59 Lubambo (n 7) 239.

60 Brooks E Allen and Tommaso Soave, 'Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration' in Jorge A Huerta-Goldman, Antoine Romanetti and Franz X Stirnimann (eds), *WTO Litigation, Investment Arbitration and Commercial Arbitration* (Kluwer Law International 2013) 379–381; Catharine Titi, 'Investment Arbitration in Latin America' (2014) 30 Arbitration International 357, 369–377.

61 Posner and Walter (n 7) 388; Titi (n 60) 374.

62 Allen and Soave (n 60) 380.

63 See <http://www.icj-cij.org/presscom/files/4/18354.pdf >

64 For details about the BIT practice of South American countries, see Magdalena Bas, 'América do Sul em face dos tratados bilaterais de investimento: rumo ao retorno do Estado na solução de controvérsias?' (2016) 13 Revista de Direito Internacional (Brazilian Journal of International Law) <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/3944> accessed 1 October 2017.

65 Omar E García-Bolívar, 'Permanent Investment Tribunals: The Momentum Is Building Up' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015) 396; 399.

66 Available at < http://www.andes.info.ec/es/noticias/expertos-unasur-ultiman-detalles-creacion-tribunal-o-comision-solucion-controversias.html > accessed 15 May 2017.

67 García-Bolívar (n 65) 402.

or contracts, for subsequent disputes.

The dispute settlement mechanism of the new investment treaty model of Brazil merits discussion. The model resulted in treaties signed with Angola, Mozambique and Malawi in Africa and Mexico, Chile, Colombia and Peru in Latin America.[68] Most recently, MERCOSUR members signed an intra-bloc treaty, the Protocol of Cooperation and Facilitation of Investments.[69] The new treaties have constituted a political compromise that seek to maintain coherence with the traditional policy discourse in Brazil against ISA.[70] The treaties have been the focus of some academic analysis, especially in relation to its standards and novelties.[71] However, what interests most here are the mechanisms for dispute settlement.

Unlike the treaties signed with the African States, which refer only to the possibility of future development of SSIA, the treaties signed by Brazil with the Latin American States contain consent by the parties to SSIA. In this regard, the provisions of the Brazil-Mexico BIT are the following:

> Artículo 19
>
> Solución de Controversias entre las Partes
>
> 1. *Cualquiera de las Partes podrá recurrir al arbitraje entre los Estados,* una vez que se haya agotado el procedimiento previsto en el párrafo 3 del Artículo 18 sin que la disputa haya sido resuelta.
>
> 2. El objetivo del arbitraje es *poner en conformidad con el presente Acuerdo la medida eventualmente declarada como disconforme al mismo por el laudo arbitral.* Las Partes, sin embargo, podrán acordar que los árbitros examinen la existencia de perjuicios causados por la medida cuestionada y establezcan por medio del laudo, una indemnización por dichos perjuicios. Si el laudo arbitral establece una compensación monetaria, la Parte que recibe tal indemnización deberá transferirla a los titulares de los derechos de la inversión en cuestión, una vez deducidos los costos de la controversia, de conformidad con los procedimientos internos de cada Parte.
>
> 3. Este Artículo no se aplicará a ninguna controversia que haya surgido ni a ninguna medida que haya sido adoptada antes de la fecha de entrada en vigor del presente Acuerdo.
>
> 4. Las Partes podrán constituir un tribunal arbitral específico para la controversia de conformidad con el párrafo 5 de este Artículo, u optar, conjuntamente, por someter la controversia a otro mecanismo para solución de controversias entre Estados en materia de inversiones.
>
> ...
>
> 8. El tribunal arbitral determinará su propio procedimiento y tomará su decisión por mayoría de votos. Tal decisión será obligatoria para ambas Partes. A menos que se acuerde de otra manera, la decisión del tribunal arbitral deberá dictarse dentro de los seis (6) meses siguientes a la designación del Presidente, de conformidad con los párrafos 4 y 5 de este Artículo.

In the same line, it is worth transcribing below some parts of the respective provision in the Investment Chapter of the Brazil-Peru Economic and Trade Expansion Agreement, signed in April 2016:

> Artigo 2.21: Solução de Controvérsias entre as Partes
>
> 1. Qualquer uma das Partes poderá recorrer a mecanismos de arbitragem entre os Estados, desde que tenha esgotado o procedimento previsto no artigo 2.20.3 (Consultas e Negociações Diretas) sem que a controvérsia tenha sido resolvida.
>
> 2. O objetivo da arbitragem entre os Estados é colocar em conformidade com o Capítulo a *medida declarada incompatível com o Capítulo pelo laudo arbitral.*
>
> 3. Não poderão ser objeto de arbitragem os artigos 2.12 (Investimento e Medidas sobre Saúde, Meio Ambiente e outros Objetivos Regulatórios em Matéria Social); 2.13 (Responsabilidade Social Corporativa); e 2.14 (Medidas sobre Investimento e Luta contra a Corrupção e a Ilegalidade).
>
> 4. Nenhuma reclamação poderá ser submetida ao mecanismo previsto neste Artigo, se tiver transcorrido um prazo maior que cinco anos contados a partir da data em que o investidor teve pela primeira vez ou deveria ter tido conhecimento pela primeira vez de uma alegada violação deste Acordo.
>
> 5. O Tribunal Arbitral será constituído em conformidade com o parágrafo 6 deste artigo. Não obstante, as Partes poderão decidir conjuntamente submeter a controvérsia a uma instituição arbitral

68 See <http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=9890:acordo-brasil-mexico-de-cooperacao-e-facilitacao-de-investimentos-cidade-do-mexico-26-de-maio-de-2015&catid=42&Itemid=280&lang=pt-BR > accessed 15 May 2017.

69 See <http://www.itamaraty.gov.br/pt-BR/notas-a-imprensa/16067-protocolo-de-cooperacao-e-facilitacao-de-investimentos-do-mercosul-pcfi > accessed 15 May 2017.

70 For a general description of the Brazilian policy, see Daniel de Andrade Levy, Ana Gerdau de Borja and Adriana Pucci (eds), *Investment Protection in Brazil* (Kluwer Law International 2014).

71 Nitish Monebhurrun, 'Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model' [2016] Journal of International Dispute Settlement; Catharine Titi, 'International Investment Law and the Protection of Foreign Investment in Brazil' Transnational Dispute Management <http://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=592> accessed 15 May 2015.

permanente para a solução de controvérsias entre Estados relativas a investimentos.

...

10. O tribunal arbitral determinará seu próprio procedimento. O tribunal arbitral tomará sua decisão por maioria de votos. Tal decisão será obrigatória para ambas as Partes. A menos que as Partes decidam algo distinto, o laudo do tribunal arbitral deverá ser prolatado dentro dos seis meses seguintes à designação do Presidente de acordo com os parágrafos (6) e (7).

First of all, it is to be noted that the dispute settlement provisions of the treaties focus primarily on dispute prevention (Brazil-Mexico BIT, art. 18 and Brazil-Peru Chapter, art. 2.20).[72] This was highlighted in the context of revision of treaty-making practice as an alternative model.[73] A traditional system of consultations between the parties is available with regard to the interpretation and application of the treaty in relation to specific measure affecting an investor. The difference is that the investor will take part in the proceedings, providing information and attending the consultation meetings. A final opinion on the dispute by each of the parties is to be issued at the end of the consultation proceedings.

Secondly, the result of the consultations will base the SSIA claim, which can take the form of declaratory claims in relation to the compatibility of a general or more concrete measure affecting an investor (Brazil-Mexico BIT, art. 19(2) and Brazil-Peru, art. 2.21(2)).[74] In this regard, the available remedy within the mandate of the tribunal will be the declaration of the conformity of the measure with the treaty. But this is not equivalent to an order for withdrawal or change of the measure. On the other hand, it is not clear whether questions of mere interpretation of the treaties will be under the jurisdiction of the SSIA clause, absent a concrete affected investor. However, one can presume that they are included, based on the reading of some provisions (Brazil-Mexico BIT, art. 14(4)f and Brazil-Peru Chapter, art. 2.15(4)g)[75], provided that the respective Joint Committees have previously addressed the matter or agreed on the request.

Finally, there are effective mechanisms to ensure that the constitution of the State-State tribunal is not impaired by inaction of the parties.[76] The decision will be mandatory to the parties (Brazil-Mexico BIT, Art. 19.8 and Brazil-Peru Chapter, art. 2.21(10)).[77] Moreover, the treaties most probably refer to the UNASUR Centre of Dispute Settlement, if it allows for SSIA in the future, which would replace some provisions on the constitution of arbitral tribunals ((Brazil-Mexico BIT Art. 19.4 and Brazil-Peru Chapter, art. 2.21(5)).[78]

To conclude, the SSIA provisions in the Brazilian treaties with Latin American States provide for the possibility of declaratory awards in relation to a measure, by request of both home and host States. The treaties could have been clearer on the conferral of jurisdiction to State-State arbitration in relation to the interpretation and application of general provisions. When it comes to the possibility of a declaration of non-breach, this would be of less use here, given the absence of subsequent investor-state arbitration. There is some room for the consultations and negotiations and the SSIA is available to solve all pending issues, but the recourse to it is currently unrealistic. While host States are safe against the risks of investor-state arbitration, the lack of ISA provisions puts much pressure on internal domestic legal systems. Only time will reveal how reliable and effective the mechanism is.

4. Final conclusions

To sum up, the article concludes that the possibility of SSIA is neither a backlash nor a more effective strategy compared to ISA. Jurisdiction clauses are generally broad enough to encompass all types of disputes of SSIA, including those brought by host States. It constitutes an additional opportunity for host States to advance their understanding of the treaties and balance the investment treaty commitments. In several situations, SSIA would be the only possible mechanism and in others, SSIA will be a complement to ISA. This adds important inputs to the interpretation process, enabling alternative litigation strategies for host States.

72 See also Art. 22 of the Brazil-Colombia IIA and Art. 24 of the Brazil-Chile IIA.

73 UNCTAD (n 4) 108; 152.

74 See also Art. 23[2[of the Brazil-Colombia IIA and Annex 1, Art. 3 of the Brazil-Chile IIA.

75 See also Art. 16[4]f of Brazil-Colombia IIA and Art. 1[1] of the Annex of the Brasil-Chile IIA.

76 Cf. United States reluctance to appoint Chapter 20 panels in NAFTA State-State Arbitration.

77 See also Art. 23[12], Brazil-Colombia IIA; and Annex 1 Art. 7[4], Brazil-Chile IIA.

78 See also Art. 23[1], Brazil-Colombia IIA; and Annex 1 Art. 2[1], Brazil-Chile IIA.

These developments have translated into alternative settlement mechanisms, into different BIT models or into more light-touch approaches. They are not necessarily more effective compared to classic ISA, but may be especially fit for host States. Anyway, SSIA may serve to remediate some of the shortcomings of international arbitration and to re-engage some States, which have opted out or remained at the margins of the legal development in the area.

While State-State arbitration may be a viable strategy, there are some challenges that need to be overcome. The definition of the term dispute, the obligation to consult on the meaning of provisions and the establishment of a clear hierarchy between State-State awards in relation to investor-State awards are some of the ways forward. Each of these aspects should be developed in treaty-making initiatives that wish bring new alternatives for host States.

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Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of *Philip Morris v. Uruguay*

Direito de regular, margem de apreciação e proporcionalidade: estado atual na arbitragem de investimentos à luz do caso *Philip Morris c. Uruguai.*

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Abstract

Starting from the recent *Philip Morris v. Uruguay* award, this article tries to analyse the current status in investment arbitration of certain doctrines (and/or principles) which are adopted by arbitral tribunals in order to give due weight to state interests. The reference applies to the concepts of the right to regulate and of the margin of appreciation as well as to the principle of proportionality. It will be argued that the right to regulate, which is today receiving growing attention by arbitrators, scholars and treaty drafters, still does not have the customary status which would entitle tribunals to apply it in the absence of a normative basis. Also the margin of appreciation, as technically developed by the European Court of Human Rights, cannot find a place in investor-State disputes due to the very different framework in which arbitral tribunals operate if compared to the ECtHR. However, the principle of proportionality can offer a valuable legal tool to arbitrators entitling them to pay due deference with regard to state sovereignty.

Keywords: Investment arbitration. Indirect expropriation. Fair and equitable treatment. Proportionality. Police powers. Right to regulate (or power to regulate). Margin of appreciation. Deference. Sovereignty of the States.

Resumo

A partir da recente sentença arbitral Philip Morris v. Uruguai, este artigo analisa o estado atual de certas doutrinas (e / ou princípios) que são adotados pelos tribunais arbitrais para dar devido peso dos interesses do Estado na arbitragem de investimento. A referência aplica-se aos conceitos de direito de regular e à margem de apreciação, bem como ao princípio de proporcionalidade. Argumenta-se que o direito de regular, que está hoje recebendo crescente atenção dos árbitros, estudiosos do direito dos investimentos e redatores de tratados, ainda assim não tem o valor consuetudinário que permitiria a sua aplicação pelos tribunais na ausência de uma base normativa. Também a margem de apreciação, como tem sido tecnicamente de-

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senvolvida pela Corte Europeia de Direitos Humanos, não pode encontrar um papel em disputas entre investidores e Estados devido ao quadro muito diferente em que os tribunais arbitrais operam. No entanto, o princípio de proporcionalidade pode oferecer uma valiosa ferramenta legal aos árbitros, permitindo-os considerar devidamente a soberania do Estado.

Palavras-chave: arbitragem; investimentos; proporcionalidade; poder de polícia; direito de regular.

1. Introduction

International investment arbitration has been strongly criticized for not being adequately protective of the general interests of States and for being overly protective of investors' rights.[1] Arbitrators have been accused of interpreting and applying the standards of treatment set forth in Bilateral Investment Treaties (BITs) in a pro-investor manner only.[2] Not by mere coincidence, indeed, there is a large body of literature[3] regarding the ways in which arbitral tribunals could properly balance the interests at stake in investment disputes and ensure that States' concerns are duly taken into account in final decisions. The main issue faced by these scholarly works regards the fact that several existing BITs have concise wordings which often do not seem to outwardly justify such a balanced reading.

Recent arbitral practice, however, shows a willingness to react to criticisms. Various awards[4] contain several references to the necessity of applying standards of treatment in a way that protects the so-called non--commercial values (*i.e.* values not pertaining to the protection of property but relating to the safeguard of other essential interests such as environment and human health).[5] Tribunals have started giving due weight to States' reasons for the enactment of measures that can cause damage to foreign investors.[6] Particular importance appears to have been given, in this regard, to some concepts that are only recently taking shape in arbitral practice, such as the right to regulate, the margin of appreciation and the principle of proportionali-

1 See, inter alia, HOBER, Kay. Does Investment Arbitration Have a Future?. In: BUNGENBERG Marc et al. (Ed.). *International Investment Law.* Munich: C.H. Beck, 2015; VAN HARTEN, Gus. *Investment Treaty Arbitration and Public Law.* Oxford: Oxford University Press, 2007. p. 1; GIARDINA, Andrea. L'arbitrato internazionale in materia di investimenti: impetuosi sviluppi e qualche problema. In: BOSCHIERO, Nerina; LUZZATTO, Riccardo. (Ed.). *I rapporti economici internazionali e l'evoluzione del loro regime giuridico*. Napoli: Editoriale Scientifica, 2008. p. 319; FRANCK, Susan. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconstistent Decisions. *Fordham Law Review*, p. 1521, 2005; MARKERT, Lars. The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States. *European Yearbook of International Economic Law*, p. 145, 2011; EL BOUDOUHI, Saida. L'intéret general et les règles substantielles de protection des investissements. *Annuaire français de droit international*, v. 51, p. 542, 2005; COLLINS, David. The line of equilibrium: improving the legitimacy of investment treaty arbitration through the application of the WTO's general exceptions. *Arbitration International*, v. 32, p. 575, 2016; PAVONI, Riccardo. Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal. In: DUPUY, Pierre-Marie; PETERSMANN, Ernst-Ulrich; FRANCIONI, Francesco. (Ed.). *Human Rights in International Investment Law and Arbitration.* Oxford University Press, 2009. p. 525.

2 See the debate and the related analysis contained in SCHULTZ, Thomas; DUPONT, Cédric. Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study. *European Journal of International Law*, v. 25, p. 1147, 2014. See also KOSKENNIEMI, Martti. It's not the Cases, It's the System. *The Journal of World Investment & Trade*, v. 18, p. 343, 2017.

3 See, *inter alia*, ACCONCI, Pia. The integration of non-investment concerns as an opportunity for the modernization of international investment law: is a multilateral approach desirable?. In: SACERDOTI, Giorgio et al. (Ed.). *General Interests of Host States in International Investment Law.* Cambridge University Press, 2014. p. 165; TANZI, Attila. On Balancing Foreign Investment Treaties with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector. *The Law and Practice of International Courts and Tribunals*, v. 11, p. 47, 2012; WAGNER, Markus. Regulatory Space in International Trade Law and International Investment Law. *University of Pennsylvania Journal of International Law*, v. 36, p. 1, 2015; PUMA, Giuseppe. Human Rights and Investment Law: Attempts at Harmonization Through a Difficult Dialogue Between Arbitrators and Human Rights Tribunals. In: ARCARI, Maurizio; BALMOND, Louis. (Ed.). *Judicial Dialogue in the International Legal Order.* Editoriale Scientifica, 2014. p. 193; VADI, Valentina; GRUSZCZYNSKI, Lukasz. Sandards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonweal. *Journal of International Economic Law*, v. 16, p. 613, 2013.

4 See, e.g., *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Parzerguoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award. 02/12/2016, paras. 618-625; *Chemtura Corporation v. Government of Canada*, NAFTA/UNCITRAL, Award, 02/08/2010; *Methanex Corporation v. United States of America*, NAFTA/UNCITRAL, Award, 03/08/2005.

5 DI BENEDETTO, Saverio. *International Investment Law and the Environment.* Edward Elgar, 2013. p. 16-17; MONHEBURRUN, Nitish. Is investment arbitration an appropriate venue for environmental issues? A Latin American perspective. *Brazilian Journal of International Law*, v. 10, p. 196, 2013; FOOTER, Mary. BITS and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment. *Michigan State Journal of International Law*, v. 18, p. 33, 2009.

6 See BERNARDINI, Piero. Reforming Investor-State Dispute Settlement: The Need to Balance Both Parties' Interests. *ICSID Review – FILJ*, v. 32, p. 38, 2017.

ty. While varying in their content, all of these concepts allow arbitrators to interpret standards of treatment of foreign investors in a way that grants a certain degree of deference to State actions. The right to regulate (also referred to as the "power to regulate" or the "State police powers doctrine") has been defined as "the legal right exceptionally permitting the host [S]tate to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate"[7] in the presence of State interests that are of vital importance for the population involved. The margin of appreciation is a doctrine developed by the European Court of Human Rights (ECtHR). It consists in the recognition – in the presence of specific requirements – of a certain degree of discretion to Contracting Parties by the Court when evaluating the legitimacy of limitations to rights set forth in the European Convention of Human Rights (ECHR) imposed by States for reasons of public interest.[8] Finally, in the context of investment arbitration, the principle of proportionality (which, as we will see below, is recognized as a general principle of international law by a large number of authors) consists in the search for a balance between the State's interests protected through a governmental action and the degree of damage to investors' rights which are going to be affected by such a measure.[9]

The purpose of the present article is to understand whether and to what extent the above-mentioned doctrines, which are all tools employed by international arbitrators in order to show deference towards States' sovereignty, apply in international investment arbitration and which one among them as a consequence can be applied by arbitrators in order to pay due respect to choices made by States in matters of public interest. Such an analysis will start (*second Section*) from the award and the appended dissenting opinion recently issued in the *Philip Morris v. Uruguay* case. This dispute dealt with all the above concepts and is thus a good starting point to describe the state of art of the application of such concepts in investment arbitration. On the basis of the case study offered by the *Philip Morris* award,[10] the article then proceeds to analyse in greater detail the applicability of the power to regulate to cases of indirect expropriation (*third Section*) and of the margin of appreciation doctrine in cases involving the fair and equitable treatment standard (*fourth Section*). It will be demonstrated that the analysis made by arbitral tribunals turns out to be mainly based on the principle of proportionality – which, as it has been demonstrated in scholarship, is almost certainly a primary source of international law. Hence, most attention should be paid to such a principle in arbitrators' reasoning in order to reach the goal of being deferent towards State practice instead of relying, as the *Philip Morris* Tribunal did, on doctrines the legal status of which is still uncertain in international law.

2. *Philip Morris v. Uruguay* and the Recent Deferential Approach Endorsed by Arbitral Tribunals

7 TITI, Aikaterini. The Right to Regulate in International Investment Law. Oxford: Hart, Nomos, Dike, 2014. p. 33. In this regard, it is to be noted that it is questionable whether the police powers doctrine applies to all standards under an investment treaty, or only the expropriation standard. Howerver, in this article the doctrine is discussed only in relation to expropriation (which is the standard in relation to which the *Philip Morris* Tribunal made recourse to the right to regulate).

8 PALOMBINO, Fulvio Maria. Laicità dello Stato ed esposizione del crocifisso nella sentenza della Corte europea dei diritti dell'uomo nel caso Lautsi. Rivista di diritto internazionale, v. 93, p. 137-138, 2010. See also BENVENISTI, Eyal. Margin of Appreciation, Consensus and Universal Standards. *New York University Journal of International Law and Politics*, v. 31, p. 843, 1999; GREER, Steven. *The margin of appreciation: interpretation and discretion under the European Convention on Human Rights*. Strasbourg: Council of Europe Publishing, 2000; FEINGOLD, Cora. Doctrine of Margin of Appreciation and the European Convention on Human Rights. *Notre Dame Law Review*, v. 53, p. 90, 1977; HUTCHINSON, Michael. The Margin of Appreciation Doctrine in the European Court of Human Rights. *The Internatinoal and Comparative Law Quarterly*, v. 48, p. 638, 1999; SAUL, Matthew. The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments. *Human Rights Law Review*, v. 15, p. 745, 2015.

9 For an in-depth analysis of the legal foundation and of the content of the principle of proportionality see PALOMBINO, Fulvio Maria. Il trattamento giusto ed equo degli investimenti stranieri, Il Mulino. 2012 (an English edition of the book, Fair and Equitable Treatment and the Fabric of General Principles, Asser – Springer, 2017, is forthcoming). Other relevant texts analysing the principle and its possible legal foundation are HENCKELS, Caroline. *Proportionality and Deference in Investor-State Arbitration*. Cambridge University Press, 2015; BUCHELER, Gebhard. *Proportionality in Investor-State Arbitration*. Oxford University Press, 2015; CANNIZZARO, Enzo. *Il principio di proporzionalità nell'ordinamento Internazionale*. Giuffrè, 2000.

10 *Philip Morris Brands SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. Arb/10/7, Award, 08/07/2016. The Tribunal was composed of Prof. Piero Bernardini (President), Judge James Crawford and Mr. Gary Born.

2.1. The Dispute and the Claims

The award issued on 8 July 2016 in the well-known *Philip Morris v. Uruguay* dispute is one of the clearest examples of the recent tendency to give particular weight to State reasons.[11] The dispute was brought under the terms of the Switzerland – Uruguay BIT[12] and concerned two measures enacted by Uruguay which negatively affected tobacco industries operating in that Country. The first of them, named "single presentation requirement" precluded tobacco manufacturers from marketing more than one variant of cigarettes per brand family.[13] The second measure, entitled "80/80 regulation", increased the size of graphic health warnings appearing on cigarettes packages from 50% to 80%.[14] As a consequence, only 20% of cigarettes packs remained available for trademarks, logos and other information.

According to the Claimants, the challenged measures – *inter alia* – violated the obligations not to indirectly expropriate foreign investments (Art. 5 of the BIT)[15] and to grant fair and equitable treatment to such investments (Art. 3(2) of the BIT).[16] With regard to the former violation, the Claimants stated that the measures substantially deprived the investment of its value rendering it a non-profitable business, something that is considered to be tantamount to expropriation (so-called indirect expropriation) and falls under the protection of the BIT.[17] Concerning the latter violation, Philip Morris averred that: (i) there is no proof that the measures served a public purpose and, as a consequence, they are arbitrary; (ii) the measures undermined the Claimants' legitimate expectation to use and enjoy their investment; and (iii) the measures destroyed the legal stability that Uruguay pledged in the BIT and on which the Claimants relied.

Uruguay replied claiming that the measures were enacted with the aim of protecting human health, in accordance with the Uruguayan Constitution and the international commitments assumed by Uruguay within the framework of the World Health Organization (WHO).[18] Moreover, both regulations were applied in a non-discriminatory manner to all tobacco companies and they amounted to a reasonable, good faith exercise of Uruguay's sovereign prerogatives.[19] The single presentation requirement was enacted with the purpose of avoiding that consumers could think that certain variants of cigarettes are safer than others, while the 80/80 regulation was adopted to increase consumer awareness of the health risks related to tobacco consumption.[20] Both the measures being legitimate exercises of sovereign power, in the Respondent's view they cannot amount to a violation of the investment treaty's standards.[21]

2.2. The Tribunal's Decision and the Dissenting Opinion Regarding the FET Violation

Both of the claims were rejected by the Tribunal. With regard to the indirect expropriation claim, the Tribunal firstly noted that the Claimants' investment was not substantially deprived of its value. In the Tribunal's view, this factor, alone, would have been sufficient to dismiss the claim. However, the arbitrators introduced

11 For earlier comments to the decision see VOON, Tania. Philip Morris v. Uruguay: Implications for Public Health. *Journal of World Investment and Trade*, v. 18, p. 320, 2017; MITCHELL, Kate. *Philip Morris v. Uruguay*: An Affirmation of 'Police Powers' and 'Regulatory Power in the Public Interest' in International Investment Law. EJIL: Talk, 2016.

12 Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, signed on 07/10/1988 and in force since 22/04/1991.

13 Prior to the measure, Philip Morris (through its subsidiary Abal) sold in Uruguay various variants of cigarettes, such as Marlboro Gold, Marlboro Red, Marlboro Silver etc. Pursuant to the measures only one variant can be sold. See *Philip Morris* award, n. 10 above, para. 10.

14 See *Philip Morris* award, para. 9 and

15 Art. 5 of the Switzerland – Uruguay BIT: "Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments belonging to investors of the other Contracting Party, unless the measures are taken for the public benefit as established by law, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation".

16 Art. 3(2) of the Switzerland – Uruguay BIT: "Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party".

17 On the concept of indirect expropriation see, *inter alia*, DOLZER, Rudolf. Indirect Expropriation: New Developments?. *NYU Environmental Law Journal*, v. 64, p. 64, 2002-2003; DE LUCA, Anna. Indirect expropriations and regulatory takings: what role for the "legitimate expectations" of foreign investors?. In: SACERDOTI, Giorgio et al. (Ed.). *General Interests of Host States in International Investment Law*. Cambridge University Press, 2014.

18 See para. 361

19 See para. 355.

20 Para. 357 and

21 See paras. 216-217.

"an additional reason in support of the same conclusion [...]. In the Tribunal's view, the adoption of the [c]hallenged [m]easures by Uruguay was a valid exercise of the State's police powers, with the consequence of defeating the claim for expropriation under Article 5(1) of the BIT".[22] According to the Panel, the power to regulate is a customary rule of international law and the BIT should be interpreted in accordance with it, pursuant to the provision of Art. 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT), which sets forth that treaty provisions shall be interpreted in the light of any relevant rules of international law applicable to the relations between the parties, including public international law. In the Tribunal's view, the customary nature of the police powers doctrine is proved by various factors. The first of them is Article 10(5) of the 1961 Harvard Draft Convention on the International Responsibility of States for Injury to Aliens, which states that "[a]n uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from [...] the action of the competent authorities of the State in the maintenance of public order, health, or morality, shall not be considered wrongful" (provided that it is non-discriminatory).[23] According to the Tribunal, the doctrine has been endorsed also in the Third Restatement of the Foreign Relations Law of the United States of 1987, which provides that "[a] State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police powers of states, if it is not discriminatory".[24] Third, the Tribunal mentioned the OECD working paper on "Indirect Expropriation and the Right to Regulate", stating that "it is an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulation within the police power of the State, compensation is not required".[25] Finally, the customary status of the doctrine would be proven by various investment awards, including *Tecmed*,[26] *Saluka*,[27] *Methanex*[28] and *Chemtura*,[29] as well as by various provisions of recent investment treaties (the content of which will be better described below), including the 2004 and 2012 US Model BITs,[30] the 2004 Canada Model BIT,[31] the EU-Canada Comprehensive Economic and Trade Agreement (CETA)[32] and the EU-Singapore Free Trade Agreement (FTA).[33]

The Tribunal concluded that Uruguay's measures had been adopted *bona fide* for the purpose of protecting public welfare, were non-discriminatory and were proportionate. They were not to be considered as an expropriation and, hence, did not give to the Claimants any right to be compensated, despite the existence of a negative impact on their business.[34]

As to the alleged violation of the fair and equitable treatment, the Tribunal recalled that both measures had been implemented for the protection of public health and explained that, in making public policy determinations, Uruguay enjoyed a certain margin of appreciation, as it happens in the ECHR context for States which, in order to protect a public interest, depart from the protection of a conventional right.[35] According to the

22 *Philip Morris* award, n. 10 above, para. 287.

23 Convention on the international responsibility of states for injuries to aliens; draft no. 12, drafted by Louis B Sohn and Richard Baxter of the Harvard Law School in 1961.

24 American Law Institute, Restatement (Third) Foreign Relations of the United States, v. 1, para. 712, comment (g), 1987.

25 *Philip Morris* award, n. 10 above, para. 294, mentioning YANNACA-SMALL, Catherine, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, *OECD Working Papers on International Investment Number 2004/4*, p. 5, 2004.

26 *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, UNCITRAL, Award, 29/05/2003, para. 119.

27 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17/03/2006, para. 255, 260, 262.

28 See n. 4 above, Part IV, Ch. D, para. 7.

29 See n. 4 above, para. 366.

30 See Art. 12(3), which states that, in matters regarding the protection of the environment, "[t]he Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with paragraph 2 where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources".

31 See Annex B.13(1)(c), which states that "[e]xcept in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation".

32 See CETA, Annex 8-A (Expropriation), Art. 3. The CETA consolidated text is available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

33 See EU-Singapore FTA, Annex 9-A (expropriation), Art. 2. The EU-Singapore FTA authentic text as of May 2015 is available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=961.

34 See *Philip Morris* award, n. 10 above, para. 305

35 See *Philip Morris* award para. 398

Tribunal "[t]he responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health. In such cases respect is due to the discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith [...] involving many complex factors" (citations omitted).[36] In light of this approach, the majority of the Tribunal did not find it necessary to decide whether the measures were actually able to reach the goals that were originally intended by the State, being sufficient that they were a good faith attempt to address a real public health concern.[37] In the majority's view "[h]ow a government requires the acknowledged health risks of products, such as tobacco, to be communicated to the persons at risk is a matter of public policy to be left to the appreciation of the regulatory authority".[38]

In addition, the exercise of the State's normal regulatory power in the pursuance of a public interest should not be seen as a violation of legitimate expectations, as long as there is no violation of *specific* undertakings assumed by the State. "Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed, and certainly no commitments of any kind were given by Uruguay to the Claimants".[39]

As regards the alleged violation of the fair and equitable treatment standard, however, Arbitrator Gary Born issued a strongly dissenting opinion, stating that – notwithstanding the undisputed sovereign regulatory authority of Uruguay[40] – the measures lacked proportionality, *i.e.* they are extremely burdensome for investors in light of the goals for which they have been enacted. This consideration is mainly based on the fact that there is no evidence of any prior study by Uruguay as to the adequacy of the measures to reach their objectives. Moreover, Born argued that the recourse to the margin of appreciation doctrine developed in the ECtHR jurisprudence is ill-suited for investment disputes.[41] With respect to the protection of propriety (as protected by Art. 1 of Protocol 1 of the ECHR),[42] the margin of appreciation gives the Court the possibility of broadly interpreting what constitutes a "public interest" that can allow a limitation of the right of propriety. However, in Born's view, there was no provision in the text of the BIT that is equivalent to the text of Art. 1 Protocol 1 of the ECtHR. The BIT just set forth an obligation and an appropriate standard of review. As a result the Tribunal should focus simply on the text of the BIT. Such a text, of course, involves a certain degree of deference towards State sovereignty, but this "is not a substitute for reasoned analysis [...]: deference to sovereign measures is the starting point, but not the ending point, of evaluation of fair and equitable treatment claims. Rather, a sensitive and nuanced consideration of the nature of the governmental measure, the character and context of the governmental judgment, the relationship between the measure and its stated purpose, and the measure's impact on protected investments is necessary".[43] In sum, what Born seems to suggest is to look at deference as a part of a broader proportionality analysis and not as the end of the story when assessing a potential violation of the FET standard. Indeed, the necessity of being deferent towards States' sovereignty is certainly an element to be taken into account when evaluating whether a state measure is proportional to its goals, but it is not the only element. Born's criticism to the award is therefore related to the fact that it seems only based on deference, without taking into account the other prongs of the proportionality analysis.

3. The Relationship Between Indirect Expropriation and the Power to Regulate

3.1. The Customary Nature of the Police Powers Doctrine and Its Applicability in Investment Arbitration Cases

36 See *Philip Morris* award para. 399.

37 See *Philip Morris* award para. 409.

38 See *Philip Morris* award para. 419

39 See *Philip Morris* award para. 429. This approach to legitimate expectations reflects the theory of legitimate expectations by induction, perfectly explained by PALOMBINO, n. 9 above, p. 139 See, in this regard, Section 4 below.

40 See, in this regard, Born's Dissenting Opinion appended to the *Philip Morris* award, para. 90.

41 See, in this regard, Born's Dissenting Opinion appended to the *Philip Morris* award, para. 181

42 See with regard to this article, PADELLETTI, Maria Luisa. Art. 1 Prot. 1. In: BARTOLE, Sergio; DE SENA, Pasquale; ZAGREBELSKY, Vladimiro. *Commentario Breve alla Convenzione europea dei diritti dell'uomo.* CEDAM, 2012. p. 791.

43 See Born's Dissenting Opinion, n. 40 above, para. 142.

The decision in *Philip Morris*, in its part concerning the indirect expropriation claim, suggests that – in the cases where certain State measures which investors may consider to be a deprivation of property take place in the pursuance of public interests and provided that such measures are proportional to their goals – the State's measure cannot be considered tantamount to expropriation and compensation is not due.[44] It is worth recalling here that, according to the arbitrators, such a result may be reached by means of recourse to the rule of systemic interpretation set forth by Art. 31(3)(c) VCLT.

However, while in this author's opinion the objective that the Tribunal wanted to achieve (*i.e.* deference towards Uruguay's sovereignty in matters of essential public interest) deserves praise, because it could improve the perception of legitimacy of investment arbitration both from the perspective of States and from the perspective of the public opinion, the legal path followed by the Arbitrators does not seem entirely convincing. The reason for this puzzlement regarding the Tribunal's legal reasoning stays in the fact that, in order to say that a government may substantially affect the value of a property by means of a general regulation without incurring a duty to compensate investors, an in-depth analysis on the customary nature of the police powers doctrine and on the ways in which it may derogate from treaty obligations is required. Such an analysis should have been made, first, from a historical perspective and, second, on the basis of a conflict of norms approach. We will try to carry out this task in the present Section, in order to understand whether the *Philip Morris* Tribunal's approach may find a legal justification.

From the historical point of view, it is undisputable that an afterthought concerning the goals and scope of investment treaty protections is taking place. In their early age investment treaties contained "broad protection for foreign investors, with little or no reference to the need to balance investor protections against public policy goals".[45] Arbitrators looked at investment claims as ordinary commercial disputes. One of the consequences of this approach was the application of the "sole effects doctrine" to expropriation claims. According to this doctrine the mere fact that a deprivation of propriety (either direct or indirect) had taken place entitled investors to compensation, regardless of the State reasons behind the regulatory measures.[46] Such a doctrine, originally grounded in the jurisprudence of the Iran-US Claims Tribunal,[47] is perfectly explained in the *Santa Elena* award, where the Tribunal said that "expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation

44 For an analysis of the concepts and differences between direct and indirect expropriation see KNAHR, Christina. Indirect Expropriation in Recent Investment Arbitration. *Austrian Review of International and European Law*, v. 12, p. 85, 2007; ISAKOFF, Peter. Defining the Scope of Indirect Expropriation for International Investments. *Global Business Law Review*, v. 3, p. 189, 2013; FORTIER, Yves; DRYMER, Stephen. Indirect Expropriation in the Law of International Investment: I Know It When I See It, or *Caveat Investor. ICSID Review – FILJ*, v. 19, p. 293, 2004; KUNOY, Bjørn. Developments in Indirect Expropriation Case Law in ICSID Transnational Arbitration. *Journal of World Investment & Trade*, v. 6, p. 467, 2005; HEISKANEN, Veijo. The Doctrine of Indirect Expropriation in Light of the Practice of the Iran - United States Claims Tribunal. *Journal of World Investment & Trade*, v. 8, p. 215, 2007; PUPOLIZIO, Ivan. The Right to an Unchanging World – Indirect Expropriation in International Investment Agreement and State Sovereignty. *Vienna Journal of International Constitutional Law*, v. 10, p. 143, 2016.

45 ROBERTS, Anthea, Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System, *American Journal of International Law*, v. 107, p. 76, 2013. This attitude extremely favourable to investors has been described as a reaction to the extremely unprotective regime regarding foreign investments which took place at the period of decolonization. Indeed, during that period, capital importing States accepted burdensome obligations towards foreign investors with the aim of attracting foreign capital. See SACERDOTI, Giorgio, The Proliferation of BITs: Conflicts of Treaties, Proceedings and Awards, in SAUVANT, Karl, et al. (eds.), Appeals Mechanism in International Investment Disputes, Oxford: Oxford University Press, p. 133, 2008. On the other hand, it could be said that capital importing States did not understood how burdensome the obligations they were assuming would have revealed to be. See, in this regard, the policy paper issued by the South African government in 2009, mentioned in MARKERT, n. 1 above, p. 146, footnote 5, where it is said that "the impact of BITs on future policies [was] not critically evaluated. As a result the Executive entered into agreements that were heavily staked in favour of investors without the necessary safeguards to preserve flexibility in a number of policy areas."

46 See, also for the case law mentioned therein, MOSTAFA, Bem. The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law. *Australian International Law Journal*, v. 15, p. 279, 2008; YANNACA-SMALL, n. 25 above, p. 14-16; see also DOLZER, n. 17 above, p. 79 TITI, Aikaterini. *Refining the Expropriation Clause: What Role for Proportionality?*. 2017. p. 1. Disponível em: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2978530>. p. 12 discussed about the sole effects as a doctrine which is "agnostic about the purpose of the host state measure and only examines the effect it has on the investor".

47 See *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, Iran-US Claims Tribunal, Decision, 22 June 1985, available at Iran-U.S. Claims Tribunal Report, v. 6, p. 219 , 1985; *Starrett Housing Corp. v. Iran*, Iran-U.S. Claims Tribunal Report, v. 16, p. 112, 1987.

to pay compensation remains".[48]

Today, however, the situation has dramatically changed. This is probably related to the fact that developed countries such as USA, Canada and Australia have started to be involved in investment arbitration cases as respondents.[49] These countries, who allegedly have a bigger bargaining power when negotiating BITs, originally accepted treaty wordings very favourable to investors, probably because they did not foresee that they could have become respondents in future investment arbitrations. This scenario, however, recently materialized. Hence, also from the side of these countries, there is a new emphasis on the necessity to duly take into account the States' sovereign functions in the evaluation of the legitimacy of regulatory measures[50] enacted with the aim of protecting essential public services and/or protecting human rights.[51] We are thus facing "a return of the State" in international investment law.[52]

The power to regulate, traces of which can be found also in the practice of the Iran-US Claims Tribunal,[53] emerged as a part of this trend. The doctrine's relevance in the reasoning of arbitral tribunals and in the text of modern investment treaties is today a matter of fact.[54] Indeed, as already briefly mentioned, there are several decisions that have recognized the right to regulate as an essential attribute of States. Among those, it is worth recalling the reasoning of the Tribunal in *Chemtura*, a dispute regarding the ban enacted by Canada with regard to a dangerous pesticide called lindane, which negatively affected the Claimant's business. Arbitrators said that "[i]rrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers [...]. The [State] took measures within its mandate, in a non-discriminatory manner, motivated by the awareness of the dangers presented by lindane for human health and environment".[55] A very similar wording was used in *Methanex*,[56] where the Tribunal again recognized the customary nature of the State police powers doctrine, *Saluka*[57] and *Marvin Feldman*.[58] In this last decision, the Tribunal expressly made reference to the impossibility for States to pay compensation in cases involving the exercise of police powers. It said that "governments must be free to act in the broader public interest through the protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. *Reasonable*

48 *Compania del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, para. 72. Similarly see *Pope and Talbot Inc. v. Canada*, UNCITRAL, Interim Award, 26/06/2000, para. 102; *Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Annulment Decision, 01/11/2996, para. 53.

49 REISMAN, W Michael. *The Empire Strikes Back*: The Struggle to Reshape ISDS. 2017. p. 12. Disponível em: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943514>; see also ROBERTS, n. 45 above, p. 78.

50 See SCHREUER, Christoph; KRIEBAUM, Ursula. From Individual to Community Interest in International Investment Law. In: FASTENRATH, Ulrich et al. (Ed.). *From Bilateralism to Community Interest*: Essays in Honour of Judge Bruno Simma. Oxford University Press, 2011. p. 1079 (arguing that investment law is by no means exclusively governed by individual interests but is also receptive to community interest).

51 Essential public interests are those which are perceived as extremely important for the achievement of a public goals and are usually aimed at ensuring the protection of essential human rights. See, in this regard, RUBINI, Luca, L'impatto del GATS sulla regolazione nazionale dei servizi di interesse generale, *Diritto del commercio internazionale*, v. 21, p. 376, 2007.

52 ALVAREZ, Jose E. The Return of the State. *Minnesota Journal of International Law*, v. 20, p. 223, 2011.

53 *SEDCO Inc. v. National Iranian Oil Co.*, Iran – United States Claims Tribunal, Decision, 27/03/1986, available at Iran-US Claims Tribunal Report, v. 9, p. 248. At 275 the Tribunal stated that it is "an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide 'regulation' within the accepted police powers of the State". See in this regard, ALDRICH, George, What Constitutes a Compensable Taking of Property? The Decisions of the Iran United States Claims Tribunal. *American Journal of International Law*, v. 88, p. 609, 1994.

54 See WÄLDE, Thomas; KOLO, Abba. Environmental Regulation, Investment Protection and 'Regulatory Taking in International Law. *The International and Comparative Law Quarterly*, v. 50, p. 811, 2001; RATNER, Steven. Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law. *American Journal of International Law*, v. 102, p. 475, 2008; MARLLES, Justin. Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law. *Journal of Transnational Law and Policy*, v. 16, p. 275, 2006-2007.

55 *Chemtura* award, n. 4 above, paras. 265-266.

56 *Methanex* award, n. 4 above, Part. 4, Chapter D, Para 7, stating that "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation".

57 See n. 27 above, para. 255, where it is said that "[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare". See also paras. 260 and 262

58 See *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16/12/2002, para. 103.

governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation" (emphasis added).

Provisions excluding the expropriatory nature (and therefore the descending necessity of compensation) of regulatory measures may also be found in recent investment treaties. It is worth mentioning, in this regard, Art. 3 of Annex 8-A of the CETA, which states that "except in the rare circumstances when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment do not constitute indirect expropriation". Another very significant provision pointing in this direction is set forth in Art. 23 of the Morocco – Nigeria BIT of 3 December 2016, entitled "Right to Regulate" and stating, in its first paragraph, that "the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives". Similar rules can be found in several other recently drafted treaties, including the 2012 BIT between Canada and China,[59] the 2012 US Model BIT,[60] the new Indian Model BIT of 2015,[61] among many others.[62]

Is the above sufficient to reach the same conclusion of the *Philip Morris* Tribunal, i.e. that the power to regulate is a customary international law rule? In order to say that the right to regulate is a rule of customary international law, it is necessary to first verify the existence of the two elements of custom, namely *diuturnitas* and *opinio juris sive necessitatis*.[63] The former consists in the uniform repetition by the community of States of a certain conduct, while the latter corresponds to the perception (*rectius*, the conviction) of the necessity and of the binding nature of such a conduct. From a reading of the *Philip Morris* award, it seems that the mere reference to the 1961 Harvard Draft Convention, to the Third Restatement of the Foreign Relations Law of the United States of 1987, to the works of the OECD, to the wording of a limited number of investment treaties and to certain arbitral awards would be sufficient to prove the existence of a custom, but the Tribunal avoided any kind of discussion on the requirements of *diuturnitas* and *opinio juris sive necessitatis*, probably considering that their meeting was *in re ipsa*.

However, contrary to the Tribunal's approach, it is first of all to be noted that the presence of wordings recognizing the power to regulate in a number of BITs and other non-binding legal texts – as well as in the text of certain arbitral awards – is probably still insufficient to demonstrate that the requirement of *diuturnitas* has been met. Indeed, such BITs still constitute a very limited percentage of existing investment treaties, usually estimated as more than 3000.[64]

In light of the above, it seems that there are still few tangible elements which may prove helpful in demonstrating that the community of States considers the police powers doctrine as necessary and binding. It is not by chance, indeed, that still a limited number of Tribunals have recognized and applied the doctrine[65] and that there is still disagreement among authors on the necessity of awarding compensation to investors in cases of State measures that, on the one hand, are enacted with the aim of protecting public interests, but, on the other hand, actually deprive investors' properties of their va-

59 See Art. 33.

60 See Art. 12.

61 See the Indian Model Text for the Bilateral Investment Treaty, Art. 16 (General Exceptions). See in this regard HANESSIAN, Grand; DUGGAL, Kabir. The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?. *ICSID Review – FILJ*, v. 32, p. 218, 2017.

62 See the meaningful analysis carried out by TITI, n. 7 above, p. 53 ; see also references contained in COLLINS, n. 1 above, pp. 579-580.

63 CONFORTI, Benedetto. *Diritto Internazionale*. 10. ed. Editoriale Scientifica, 2015. See also TREVES, Tullio. *Customary International Law, Max Planck Enciclopedia of Public International Law*. 2010. Disponível em: <www.mpepil.com>.

64 It is also worth noting that – among the newest investment treaties – the recent Brazilians Cooperation and Investment Facilitation Agreements are silent on the matter and this could be seen as a confirmation of the fact that not all governments feel it necessary to put a provision on the power to regulate in their recent draft of investment treaties. See, e.g., the 2015 treaties signed by Brazil and Angola and Brazil and Mozambique. For comments to Brazilian investment treaties see MONEBHURRUN, Nitish. Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as Different International Investment Agreement Model. *Journal of International Dispute Settlement*, v. 8, p. 79, 2017.

65 See TITI, n. 7 above, p. 289, stating that "the wide cast of existing interpretations does not permit the deduction that tribunals accommodate host state policy space". See also ACCONCI, n. 2 above, p. 179, who adds that the application of the doctrine "has not happened in a systematic way as only a few arbitral tribunals have allowed this kind of derogation".

lue.[66] Scholarly articles dealing with this question look at the power to regulate as something that is correct and desirable but still to be achieved.[67]

It can be said that there is an emerging trend towards the affirmation of the police powers doctrine in international investment law, within which the *Philip Morris* award is perfectly integrated. Whether this trend will convert into a customary rule, however, it is too early to say. In this regard, therefore, the conclusion reached in the *Philip Morris* award seems rushed. Indeed, the traditional wording of BITs (including Art. 5 of the Swiss-Uruguayan BIT which was applied in *Philip Morris*) concerning expropriation, both direct and indirect, is usually very clear in stating that compensation is due in all the cases where an expropriation takes place.[68] In this regard, it is to be noted that – in the presence of this kind of wording in expropriation clauses – States are not free to disregard an obligation that they previously freely assumed. A derogation[69] to the obligation to pay compensation in cases of expropriation is not allowed unless in the presence of another rule of international law (either conventional or customary) providing otherwise.[70]

It comes as a direct consequence of the above that, contrary to the approach in *Philip Morris*, even if one admits that a customary rule on the right to regulate exists (something that is here denied), such a rule is not to be applied in investment arbitration by means of a systemic integration according to Art. 31(3)(c) VCLT. Indeed, for the reasons outlined above, in the cases where BITs expressly set forth an obligation of compensation, the possibility to deny compensation may not be affirmed by way of systemic interpretation (and, instead, a conflict of norms approach is required). As explained by Simma and Kill, "[w]hen interpreting a treaty, the adjudicator draws out the specific norms memorialized in a treaty; when modifying a treaty, the adjudicator replaces these treaty norms with others".[71] Art. 31(3)(c) requires interpreters to take into account rules of international law applicable between the parties; it does not, however, authorize them to arbitrarily substitute the text of a treaty with another rule of international law. Art. 31(3)(c) is "a tool of interpretation not explicitly vested with the power to modify".[72] In conclusion, systemic interpretation does not seem the proper legal tool to introduce in investment arbitration a concept, such as the right to regulate, which requires a clear normative basis in order to be applied and to justify the absence of compensation in presence of measures which substantially affect the value of investors' property.

3.2. Proportionality as a Possible Tool to Take into Account State Interests in Indirect Expropriation Cases

66 DE LUCA, n. 17 above, p. 71 uphold the idea that compensation is always due, even in cases of regulatory takings; similarly, see LEVESQUE, Céline. The inclusion of GATT Article XX exceptions in IIAs: a potentially risky policy. In: ECHANDI, Roberto; SAUVE', Pierre. *Prospects in International Investment Law and Policy*. Cambridge University Press, 2013. p. 367-368. A different approach, however, seems to be sustained by other authors. *Inter alia*, see TESAURO, Giuseppe. *Nazionalizzazioni e diritto Internazionale*. Edizioni Scientifiche Italiane, 1976. p. 165-166, stating that customary international law does not impose compensation in cases of general, non-discriminatory regulatory takings aimed at safeguarding public interest. Also FRIGO, Manlio. *Le limitazioni dei diritti dei privati nel diritto Internazionale*. Milan: Giuffrè Editore, 2000. p. 120.

67 TITI, n. 7 above, p. 298-303; DOLZER, Rudolf; BLOCH, Felix. Indirect Expropriation: Conceptual Realignments?. *International Law FORUM du droit international*, v. 5, p. 163-165, 2003.

68 This is, indeed, the thesis sustained by DE LUCA, n. 17 above, p. 58 The question of the amount of compensation to be paid by host States in cases of expropriation has been analysed in-depth in a recent article by RATNER, Steven R. Compensation for Expropriation in a World of Investment Treaties: Beyond the Lawful/Unlawful Distinction. 2017. Disponível em: <https://ssrn.com/abstract=2954146>.

69 PAULSSON, Jan. The Power of States to Make Meaningful Promises to Foreigners. *Journal of International Dispute Settlement*, v. 1, p. 341, 2010.

70 VILLIGER, Mark. *Customary International Law and Treaties*. The Hague: Martinus Nijhoff Publishers, 1985. p. 215.

71 SIMMA, Bruno; KILL, Theodore. Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology. In: BINDER, Christina (et al.). *International Investment Law for the 21st Century*: Essays in Honour of Christoph Schreuer. Oxford University Press, 2009. p. 692.

72 SIMMA, Bruno; KILL, Theodore. Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology. In: BINDER, Christina (et al.). *International Investment Law for the 21st Century*: Essays in Honour of Christoph Schreuer. Oxford University Press, 2009. p. 694. Similarly, see GRECO, Roberta. The Impact of the Human Right to Water on Investment Disputes. *Rivista di Diritto Internazionale*, v. 98, p. 484, 2015. The usefulness of art. 31(3)(c) has been defined as overestimated by PUMA, n. 3 above, p. 221. With regard to Art. 31 VCLT in investment arbitration see, in general terms, ASCENSIO, Hervé. Article 31 of the Vienna Convention on the Law of Treaties and International Investment Law. *ICSID Review – FILJ*, v. 31, p. 366, 2016; Art. 31(3)(c) is analysed in-depth by MCLACHLAN, Campbell. The Principle of Systemic Integration and Art. 31(3)(c) of the Vienna Convention. *International and Comparative Law Quarterly*, v. 54, p. 279, 2005; FOCARELLI, Carlo. *Trattato di diritto Internazionale*. Torino: UTET, 2015. p. 407.

The above considerations, however, cannot lead us to exclude the possibility that State interests are duly taken into account by arbitrators when evaluating the existence of an indirect expropriation. As we have seen above, it seems that if the sovereign prerogatives of States are not duly taken into account in investment arbitration, this circumstance would lead the entire dispute settlement mechanism to lose its legitimacy.[73] The *Philip Morris* award shows that arbitrators were perfectly conscious of this risk and this seems to have been the implied reason behind their very favourable approach toward the power to regulate doctrine. This effort, as well as the final conclusions reached by the Tribunal, as already said, deserves praise. It appears therefore necessary to try to find a different legal justification aimed at reaching the same conclusion.

A possible solution to this problem has been identified in the application of the principle of proportionality,[74] which is only briefly mentioned in the part of the *Philip Morris* award dealing with the indirect expropriation claim.[75] As previously outlined, following several authoritative scholars, it seems possible to identify the principle of proportionality as a general principle of international law[76] which has "permutations according to the specific area in which it operates".[77] Being a primary source of international law, such a principle is potentially able to interact on a paritarian level with treaty provisions on expropriation (which, of course, are a primary source of international law too) and, as a consequence, to induce a certain reading of such clauses .

In the context of international investment law, proportionality imposes a balancing of interests aimed at understanding whether the sacrifice requested to investors is commensurate with the relevance of the ob-

73 See BROWER, Charles H. II, Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes. *Yearbook of International Investment Law and Policy*, p. 347, 2008-2009.

74 The recourse to the principle of proportionality to resolve this kind of conflicts has been already proposed by SCHILL, Stephan; KINGSBURY, Benedict. Public Law Concepts to Balance Investors' Rights with State Regulatory Actions In the Public Interest: The Concept of Proportionality, in SCHILL, Stephan (Ed.), *International Investment Law and Comparative Public Law*. Oxford: Oxford University Press, 2010. p. 75; PELLET, Alain. Police Powers or the State's Right to Regulate. In: KINNEAR, Meg et al. (Ed.). *Building International Investment Law*: The First 50 Years of ICSID, Kluwer Law International. 2015. p. 458; STONE SWEET, Alex, DELLA CANANEA, Giacinto. Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez. *NYU Journal of International Law and Politics*, v. 46, p. 914, 2014; similarly see HENCKELS, Caroline. Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration. *Journal of International Economic Law*, v. 15, p. 223, 2012. For an analysis of proportionality in international investment law see HAN, Xiuli. The Application of the Principle of Proportionality in *Tecmed v. Mexico*. *Chinese Journal of International Law*, v. 6, p. 635, 2007. An approach based on the concept of "reasonableness", which per se involves also a proportionality analysis has been sometimes endorsed also by the ICJ. See, in this regard, RUSSO, Deborah. Sull'uso della ragionevolezza da parte della Corte internazionale di giustizia nel controllo sull'esercizio dei poteri discrezionali degli stati. *Rivista di diritto internazionale*, v. 98, p. 487, 2015. A balancing is, however, required in all cases where there is a contrast between two valid and existing rights. See, in this regard, PINO, Giorgio. Conflitto e bilanciamento tra diritti fondamentali: Una mappa dei problemi. *Etica e politica*, v. 8, p. 1, 2006.

75 See *Philip Morris* award, n. 10 above, para. 305, where the proportionality of the State measures is considered as one of the requirements for the application for the police powers doctrine.

76 See, also for reference to several other authorities pointing in the same direction, PALOMBINO, n. 9 above, p. 152 ; similarly see BEHARRY, Christina; KURITZKY, Melinda. Going Green: Managing the Environment Through International Investment Arbitration. *American University International Law Review*, v. 30, p. 426, 2015. This is not the place to carry out a meaningful analysis of proportionality in international law. However, suffice it to say that Palombino's approach seems very convincing in light of the fact that the balancing exercise based (explicitly or impliedly) on the three-pronged test of proportionality, as the same Author demonstrates, appears present in the vast majority of the domestic system of law, in EU law and in international law. A meaningful analysis of the legal status of proportionality has been recently carried out by TITI, n. 46 above, p. 3 , who explained that proportionality has been seen in scholarship either as a general principle of law (something that seems questionable to that author due to the facts that, as she explains at 18, she sees proportionality as absent from some domestic legal systems and that at the international level proportionality does not seem to her as universally accepted) or as an element of material law, applicable only if incorporated in a particular set of rules. Other authors, however, talked about different legal basis for the principle. See, *inter alia*, COHEN, Abby; SHANY, Yuval. A Development of Modest Proportions. The Application of the Principle of Proportionality in the Targeted Killing Case. *Journal of International Criminal Justice*, v. 5, p. 310, 2007, who talked about a customary rule; and CANNIZZARO, n. 9 above, p. 429 , who excludes the existence of a general rule of international law and discusses proportionality as a balancing technique that is functional to the application of other rules of international law; BUCHELER, n. 9 above, p. 28, talks of proportionality as a general principle of law recognized by civilized nations in the sense of Art. 38(1)(c) of the Statute of the International Court of Justice. Some authors criticize proportionality because it allegedly involves a law-making function by judges that should be avoided. See, inter alia, COTTIER, Thomas et al. *The Principle of Proportionality in International Law*. NCCR Trade Working Paper No. 2012/38, 2012. p. 19. Finally, a strong critic to proportionality has been made by SORNARAHAH, Mutucumaraswamy. *Resistance and Change in the International Law of Foreign Investment*. Cambridge: Cambridge University Press, 2015. p. 365.

77 See PALOMBINO, n. 9 above, p. 152; CRAWFORD, Emily. Proportionality. In: WOLFRUM, Rudiger (Ed.). *Max Planck Encyclopaedia of Public International Law*. 2013. Online version.

jectives of the host State. Such a balancing exercise is to be carried out on the basis of the satisfaction of a three-pronged test: first, the State measure shall be considered suitable for reaching its goals (suitability); second, the measure shall be necessary, *i.e.* less restrictive of investors' interests (necessity); and, finally, it shall be proportional *stricto sensu*, i.e. – *in concreto* – it shall not have too restrictive effects on investors' rights in comparison with the State interests that it seeks to protect.[78] As a matter of principle, this means that if the sacrifice imposed on the investor is disproportionate to the State's objectives, compensation is due. Instead, if there is a reasonable balance between the State's goals and the sacrifices required from the investors (i.e. if the objectives of the State's measures are considered by the adjudicating authority so important as to justify a certain degree of prejudice to investors' rights), compensation is not due.

According to existing authorities, there are two ways in which the principle of proportionality may be applied in relation to indirect expropriation. The first of them has been drawn in the well-known *Tecmed* award,[79] according to which "[a]fter establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such an impact has a key role upon deciding the proportionality [...]. There must be a reasonable relationship of proportionality between the charge or weight imposed on the foreign investor and the aim sought to be realized by any expropriatory measure". This award seems to imply that, as stated above, if the State's general (and non-discriminatory) measures are not disproportionate, they could be classified as non-expropriatory and, hence, compensation is not warranted.

The second way in which the proportionality principle could be applied in the present context has been proposed by Ursula Kriebaum.[80] This author starts from the assumption that the approach endorsed in the *Tecmed* award would lead us to an "all or nothing paradigm", in virtue of which an expropriation takes place if the State measure is disproportionate (and, therefore, compensation is due) and vice-versa. However, in Kriebaum's opinion, there are several cases which might be defined as borderline and in which – while a full compensation is inappropriate – the exclusion of any reimbursement for the investor is too burdensome a grievance for him. Hence, Kriebaum proposes the application of the proportionality test not to the existence of an indirect expropriation but to the amount of compensation. In Kriebaum's view, four elements ought to be taken into account in this evaluation.[81] First one should look at the necessity and suitability of the measure to reach the public purpose. Second, the genuineness of the public purpose should be evaluated. Third, arbitrators should take into account the legitimate expectations of the investor generated by inducements of the host State. Finally, adjudicators should verify whether a special public interest to pay less than full compensation exists. After having carried out the above analysis, Tribunals should evaluate the amount of compensation. In Kriebaum's words: "[t]he maximum would be full compensation. Conversely, if an expropriation is the least invasive suitable means to achieve the public purpose, compensation will be lower depending on how urgent and genuine the public interest to expropriate is. In addition, an exceptional public interest to expropriate with less than full compensation will also affect the amount of compensation".[82]

With regard to the above approaches, it should be noted that Prof. Kriebaum's view – even if theoretically stimulating – seems to be difficult to apply in practice. In the absence of objective parameters, arbitrators would decide the amount of compensation to be paid on the basis of a merely subjective perception of the case at hand. Compensation, which by definition consists in a certain amount of money to be anchored to the violation of specific legal parameters, would turn out to be determined by an equitable decision of arbitrators with the risk of undermining the acceptability of

78 See TITI, n. 46 above, p. 3.

79 *Tecmed* award, n. 26 above, para. 122.

80 KRIEBAUM, Ursula. Regulatory Takings: Balancing the Interests of the Investor and the State. *Journal of World Investment & Trade*, v. 8, p. 717, 2007.

81 KRIEBAUM, Ursula. Regulatory Takings: Balancing the Interests of the Investor and the State. *Journal of World Investment & Trade*, v. 8, p. 732, 2007.

82 KRIEBAUM, Ursula. Regulatory Takings: Balancing the Interests of the Investor and the State. *Journal of World Investment & Trade*, v. 8, p. 743, 2007.

the resulting award. A proportionality analysis concerning the amount of compensation has been sometimes carried out by the ECtHR, which in some cases justified a graduation of the amount to be compensated on the basis of the circumstances of the case at hand.[83] In this regard, it is to be noted that, as reported by various scholars, a uniform criterion emerging from the Court's jurisprudence did not emerge, and that is why the same ECtHR is applying a more rigid approach (*i.e.* mainly anchored to the full economic value of the expropriated asset) in the evaluation of the amount of compensation to be paid.[84] It is not surprising, therefore, that such an approach did not find application in the practice of investment tribunals.

The *Tecmed* Tribunal's approach, instead, seems to be the most suitable for indirect expropriation cases.[85] Such an approach has found approval also in other decisions, such as *LG&E*, where the Tribunal stated that "[w]ith respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed".[86] A similar position has been taken in *Azurix*[87] and recently also the German Constitutional Court in *Vattenfall* seems to have affirmed that disproportionate expropriations need to be compensated.[88] This means that, on the basis of the aforementioned three-step structure of proportionality, and starting from the necessary assumption that States supposedly operate with the sole goal of safeguarding public interest, tribunals should be able to evaluate whether an investor suffered a too onerous prejudice[89] with respect to the host State's goals. If investors have suffered an unproportionate damage, the regulatory measures shall be classified as expropriatory (and vice-versa). This kind of approach could have been also applied by the *Philip Morris* Tribunal in order to obtain an identical result to the one that it gained by applying the power to regulate doctrine and, in this author's opinion, this would have rendered the decision more legitimate. Indeed, it is arguable that the sacrifice imposed to Philip Morris was proportionate to the objectives of the measures enacted by Uruguay, i.e. the protection of the health of the population, and that, therefore, the measures were not expropriatory and no compensation was due to the Claimants. Indeed, Uruguay was, in its quality of the ultimate guarantor of the health of its population, fully entitled to enact measures that – in the name of the protection of the right to health – generated a certain degree of prejudice to tobacco producers. Such a prejudice, as recognized by the same arbitral Tribunal, could have been expected by investors acting in a sensitive area such as the sale of tobacco products and is therefore not unreasonable in light of the importance of the goals pursued by the State.

4. The State Margin of Appreciation Regarding Violations of the Fair and Equitable Treatment Standard: A Different Name for the Proportionality Analysis?

The police powers doctrine, examined in the previous Section, is not the only legal tool employed in the *Philip Morris* award in order to show deference towards Uruguay's sovereignty.

Indeed, in the second relevant part of the *Philip Morris* award, which concerns the possible violation of the fair and equitable treatment standard[90] (in par-

83 See, *inter alia*, ECtHR *Kozacioglu v. Turquie*, No. 2334/03, 19/02/2009, para. 64. See also the *Case of the Holy Monastries v. Greece*, No. 13092/87 and 13984/88, 09/12/1994, paras. 70-71 (in which the Court has also recognized the possibility of expropriation without compensation in exceptional circumstances).

84 See, *inter alia* and also for other references, PADELLETTI, n. 42 above, pp. 800-801; ECtHR, Grand Chamber, *Scordino v. Italie*, N. 36813/97, 21/03/2006, para. 96.

85 The diffusion of this approach, also known as "all or nothing approach" is recognized also by TITI, n. 46 above, p. 14.

86 *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 03/10/2006, para. 195.

87 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14/07/2006, paras. 311-312 and 322.

88 See *Vattenfall v. Germany*, Judgment of the German Constitutional Court, 06/12/2016. Available at: http://www.italaw.com/sites/default/files/case-documents/italaw7894.pdf. For a comment see LAVRANOS, Nikos. *The German Constitutional Court in the Vattenfall Case*: Lessons for the ECT Vattenfall Tribunal. 2016. Available at: www.kluwerarbitrationblog.com.

89 See, also with regard to the degree of prejudice that investors might sustain, PALOMBINO, n. 9 above, p. 169-171.

90 The content and the legal status of the fair and equitable treatment standard is subject to huge debate in international investment law scholarship. See, inter alia, PALOMBINO, n. 9 above, p. 1., TUDOR. *The Fair and Equitable Treatment Standard in International Investment Law*. Oxford: Oxford University Press, 2008. p. 1; KLÄGER, Roland. *'Fair and Equitable Treatment' in International Investment Law*.

ticular with regard to the alleged arbitrariness of the measures and the investors' legitimate expectations that the legal framework existing in Uruguay regulating the commerce of cigarettes would not have changed), the majority of the *Philip Morris* Tribunal considered that Uruguay enjoyed a margin of appreciation in determining whether the single presentation requirement and the 80/80 regulation were necessary for safeguarding public health. In the majority's view, the mere existence of this margin of appreciation is sufficient to render licit Uruguay's choices and conducts. For this reason, the majority considered it unnecessary to evaluate whether the measures were actually proportional with respect to their goal: it was sufficient that the host State considered that they were so. In this regard, as per the recourse to the police powers doctrine, the majority's decision on the FET claim, based on the recourse to the concept of margin of appreciation, appears to be driven by the same rationale which inspired the expropriation decision: being deferent towards Uruguayan sovereignty.

However, as already said with regard to the power to regulate, it is the opinion of the present author that while the deferential approach assumed by the Tribunal with regard to Uruguayan policy choices is admirable, the legal arguments employed by the arbitrators are controversial. In this Section, therefore, we will try to demonstrate that recourse to the margin of appreciation doctrine as developed in the ECtHR is probably inappropriate in the context of arbitrations arising from the violation of BIT standards. Such a recourse is, moreover, arguably useless, due to the fact that – as for the abovementioned expropriation claim – the goal of being deferent towards State policy choices may be equally reached by applying the principle of proportionality, the applicability of which in investment disputes is undisputed.

In order to assess the decision of the *Philip Morris* Tribunal on the fair and equitable treatment violation, we will therefore need to make a careful analysis on the margin of appreciation doctrine and on the ways in which it has been developed by the ECtHR and applied in different context.

In this Section we try to demonstrate that the thesis supporting the applicability of the margin of appreciation in investment arbitration probably refers to such a doctrine in an a-technical way, *i.e.* as a mere balancing technique involving a certain degree of deference towards State sovereignty, and not as it has been technically developed by the ECtHR. We will therefore give evidence of the circumstance that, in the investment arbitration context, the concept seems to turn out to be equal to the proportionality analysis which already takes place in the evaluation of FET violations and which already involves a deferential approach towards States' policy choices. As a consequence, the reference to the label "margin of appreciation" in international investment seems to be misleading.

4.1. The Meaning(s) of the Margin of Appreciation Doctrine

Notwithstanding the fact that the Tribunal based its decision on the alleged FET violation on the application of this doctrine, there is no definition of the margin of appreciation in the *Philip Morris* award. Indeed, defining the margin of appreciation doctrine is not an easy task. While the ECtHR case law and the related literature are rich in references to this concept, very few of these sources have attempted to offer a definition of it. The following survey of the existing authorities, however, seems to suggest that reference to the margin of appreciation has not taken place in one way only.

As it is noted in Gary Born's dissenting opinion,[91] whoever has referred to the margin of appreciation in a rigorous way states that it consists in the recognition of a certain degree of discretion to ECtHR Contracting Parties by the ECtHR when evaluating the legitimacy of limitations to conventional rights imposed by States for reasons of public interest.[92] This doctrine has been

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Cambridge: Cambridge University Press, 2011. p. 1; PAPARINSKIS, Martins. *The International Minimum Standard and Fair and Equitable Treatmen.* Oxford: Oxford University Press, 2013. p. 1.

91 Para. 181 In particular, at para. 183, with regard to Art. 1 of Protocol 1 of the ECHR, Mr. Born explains that such a rule "has been interpreted by the ECtHR to afford a very wide margin of appreciation to governmental authorities with respect to what constitutes 'public interest'. Among other things, the ECtHR has held that 'it should respect the legislature's judgment as to what is in the public interest unless that judgment is manifestly without reasonable foundation'. This interpretation of the Convention and its Protocols is supported by the traveaux preparatoires of the Convention, which indicate that the drafters intended to incorporate a 'very wide' margin of appreciation". The Dissenting Arbitrator, in this statement, referred to *James and others v. United Kingdom*, ECtHR, Series A No. 98, 21 February 1986, para. 46. It is possible to refer, in this regard, also to *Broniovski v. Poland*, ECtHR, Application No. 31443/96, Judgment, 22 June 2005, para. 149.

92 See, *inter alia*, YOUROW, Howard Charles. The Margin of

applied by the ECtHR in well-defined circumstances, *i.e.* where the limiting measure is enshrined in a law, where it is necessary to realize a certain scope and where it is proportionate to its goal.[93] Moreover, in order to grant a margin of appreciation to Contracting Parties, the Court requires that Contracting States do not have consistent views on the content of a certain right and the level of protection that States shall grant in relation to it. The different ways in which States conceive the same right justify different levels of interference with the enjoyment of such a right by people.[94] If interpreted in this way, the margin of appreciation reveals itself to be a direct consequence of the principle of subsidiarity, one of the cornerstones of the ECHR system, according to which the ECtHR shall be deferential towards State authorities, which are better suited to regulate matters of public interest within their territory. As it has been explained by Prof. Samantha Besson, "States have the primary responsibility to secure human rights under jurisdiction; and international human rights institutions have a complementary review power in cases where international minimal human rights standards are not protected effectively domestically".[95] The margin of appreciation, therefore, "address[es] the limits or intensity of the review of the European Court of Human Rights in view of its status as an international tribunal".[96] This conception of the margin of appreciation has been defined as "structural"[97] and we could also describe it as "technical", in light of the fact that it is based on the rationale behind the development of the doctrine by the ECtHR.

However, as it has been noted by Prof. George Letsas, this is not the only meaning that has been given to the margin of appreciation.[98] According to the "substantive" conception of the doctrine, it "address[es] the relationship between individual freedoms and collective goals".[99] When applying this conception of the doctrine, the Court recognizes a violation of a right, but allows it in light of the necessity to protect public interests. This understanding of the doctrine requires "a fair balance between individual rights and collective standards"[100] and the most important step in its application consists in the evaluation of the proportionality of the measure.[101] In Letsas's words "[t]he principle of proportiona-

Appreciation Doctrine in the Dynamics of European Rights Jurisprudence. *Connecticut Journal of International Law*, v. 3, p. 118, 2011, who defined the doctrine as the "breadth of deference" which the ECtHR gives to domestic decision-makers. See also the references contained in footnote 94 below.

93 There are plenty of examples in which the margin of appreciation doctrine has been used by the ECtHR. One of them concerns the possibility to limit the right to wear the islamic veil. In this regard see NIGRO, Raffaella. The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil. *Human Rights Review*, v. 11, p. 531, 2010. Other cases concerns, e.g., the possibility to display crucifixes in public places, on which see the decision of the European Court of Human Rights, Grand Chamber, *Lautsi and Others v. Italy*, Application No. 30814/06, Judgment of 18 March 2011.

94 See, *inter alia*, PALOMBINO, n. 8 above, pp. 137-138. For the history and development of the margin of appreciation see MACDONALD, Ronald St. John. *The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights, in International Law at the Times of Its Codification*: Essays in Honour of Roberto Ago. Giuffré, 1987. p. 187; BJORGE, Eirik. Been There, Done That: The Margin of Appreciation and International Law. *Cambridge Journal of International and Comparative Law*, v. 4, p. 181, 2015. In order to understand how the Court has applied the doctrine, see, *inter alia*, STAIANO, Fulvia. *(In)Comparable Situations*: Same-Sex Couples' Right to Marriage in European Case Law. 2017. p. 1. Disponível em: <diwww.federalismi.it>.

95 BESSON, Samantha. Subsidiarity in International Human Rights Law – What is Subsidiarity about Human Rights. *The American Journal of Jurisprudence*, v. 61, p. 69, 2016. See, in this regard, also NIGRO, Raffaella. Il margine di apprezzamento e la giurisprudenza della Corte europea dei diritti umani sul velo islâmico. *Diritti umani e diritto internazionale*, v. 2, p. 71, 2008. The margin of appreciation has been therefore correctly related to the concept of public policy in private international law; see SALERNO, Francesco. Il vincolo al rispetto dei diritti dell'uomo nel sistema delle fonti del diritto internazionale privato. *Diritti umani e diritto internazionale*, v. 8, p. 556, 2014. It is worth noting that this is not the only possible meaning of the subsidiarity principle, which has also a so-called "horizontal function" (opposed to the one we discuss in the present article, named "vertical subsidiarity"), aimed at regulating States' intervention in relation (and in substitution) of private parties' initiative. See, in this regard, BOCCHINI, Francesco. *Contributo allo studio del diritto sussidiario.* Rome: Aracne Editrice, 2012. p. 1.

96 LETSAS, George. Two Concepts of the Margin of Appreciation". *Oxford Journal of Legal Studies*, v. 26, p. 706, 2006.

97 LETSAS, George. Two Concepts of the Margin of Appreciation". *Oxford Journal of Legal Studies*, v. 26, p. 706, 2006.

98 See also EL BOUDOUHI, Saïda. A comparative approach of the national margin of appreciation doctrine before the ECtHR, investment tribunals and WTO dispute settlement bodies. EUI Working Papers RSCAS 2015/27, 2015. p. 1. Similarly to Letsas, this Author recognize that the margin of appreciation can be understood "as a concept" referring to the "idea of leeway, discretion or space for manoeuvre that is granted by the normative structure of the law" or "as a doctrine" or "*stricto sensu*", i.e. as the ECtHR has technically developed it.

99 EL BOUDOUHI, Saïda. A comparative approach of the national margin of appreciation doctrine before the ECtHR, investment tribunals and WTO dispute settlement bodies. EUI Working Papers RSCAS 2015/27, 2015. p. 706.

100 EL BOUDOUHI, Saïda. A comparative approach of the national margin of appreciation doctrine before the ECtHR, investment tribunals and WTO dispute settlement bodies. EUI Working Papers RSCAS 2015/27, 2015. p. 711.

101 For a similar approach it is possible to mention BURKE-

lity is by far the most important and most demanding criterion for whether the limitation of a right was permissible under the Convention. If the interference is found to be proportionate or 'necessary in a democratic society' the Convention right has not been violated".[102] This understanding of the margin of appreciation doctrine could also be defined, in this author's opinion, as "a-technical", because – on the one hand – it is not anchored to strict requirements as it happens for the technical conception of the doctrine, and – on the other hand – it essentially seems to be an application of the autonomous principle of proportionality.[103]

4.2. The Applicability of the Two Meanings of Margin of Appreciation in Investment Arbitration

It is the present author's opinion that, as stated by Mr. Born's Dissenting Opinion in *Philip Morris*,[104] the technical (or structural) conception of the margin of appreciation is completely unsuitable for the investment arbitration context with particular regard to the evaluation of FET violations.[105] The reasons for this opinion are easy to elucidate.

The ECHR is a multilateral convention aimed at ensuring the protection of human rights in 47 States where, as obvious, there are substantial cultural differences in the perception of such rights. This, in turn, determines very different understandings of the reasons for which the rights protected by the Convention could be limited. It suffices here to mention questions such as the possibility to wear the Islamic veil in relation to the freedom of religion protected by Art. 9 of the ECHR. Each State has – based on its own policy choices – a different understanding of the ways in which such a right can be limited.[106] The ECtHR, therefore, has been almost obliged in recognizing, through the margin of appreciation doctrine, a degree of flexibility in the application of conventional rights with respect to which uniformity among States is very difficult to be found. This approach finds support also in the consideration that, according to the above-mentioned principle of subsidiarity, the Court is to be considered in a worse situation (with respect to State authorities) in making evaluations involving substantial domestic policy considerations.[107] Finally, it is to be noted that the rights of the ECHR in relation to which the application of the margin of appreciation has been recognized (*i.e.* Art. 8, 9, 10, 11 and 15) all present a similar structure: the first paragraph draws the protected right and the second explains the conditions in presence of which a State may limit the enjoyment of such a right.

Contrariwise, BITs are bilateral treaties for the promotion and protection of investments made by nationals of one of the Contracting Parties in the other Contracting Party. Bilateral investment treaties involve certain limitations to State sovereignty that have been spontaneously accepted by States with the aim of attracting foreign capitals. They are not even comparable to a bill of rights such as the ECHR. Furthermore, considering that they do not involve rights in relation to which there are different cultural perceptions among States, they do not involve problems such as the lack of uniformity in the application of human rights. BITs do

WHITE, William; VON STADEN, Andreas. Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitration. *Yale Journal of International Law*, v. 35, p. 307-308, 2010, who said that "practice suggests a relationship between the margin of appreciation and proportionality that we found both compelling and jurisprudentially useful. In practice, the Court uses the margin of appreciation to inform its proportionality analysis. In other words, when the Court grants a wide margin of appreciation to states in a given issue area, it then transforms that wide margin into a greater degree of deference to the national government in the proportionality balancing process which follows. A wide margin results in a less stringent proportionality test. A narrow margin leads to stricter review in the proportionality test".

102 LETSAS, George. Two Concepts of the Margin of Appreciation". *Oxford Journal of Legal Studies*, v. 26, p. 711, 2006.

103 Instead, the difference between the "technical" margin of appreciation and proportionality is clearly explained in DONATI, Filippo; MILAZZO, Pietro. La dottrina del margine di apprezzamento nella giurisprudenza della Corte europea dei diritti dell'uomo. In: FALZEA, Paolo; SPADARO, Antonino; VENTURA, Luigi. (Ed.). *La Corte costituzionale e le corti d'Europa*. Giappichelli, 2003. p. 110-111.

104 See para. 184.

105 The difficult applicability of the margin of appreciation has been analysed also with regard to the International Court of Justice. See RAGNI, Chiara. Standard of Review and the Margin of Appreciation Before the International Court of Justice. In: GRUSZCZYNSKI, Lukasz; WERNER, Wouter. *Deference in International Courts and Tribunals*. Oxford: Oxford University Press, 2014. p. 319.

106 See NIGRO, n. 95 above, p. 82.

107 For a meaningful discussion of the conditions behind the growth of the margin of appreciation doctrine in the ECHR framework, see SAPIENZA, Rosario. Sul margine di apprezzamento statale nel sistema della Convenzione europea dei diritti dell'uomo. *Rivista di diritto internazionale*, v. 64, p. 589, 1991. See also TOMASI, Laura, Art. 8, in BARTOLE, Sergio; DE SENA, Pasquale; ZAGREBELSKY, Vladimiro. (Ed.), n. 42 above, p. 307; TANZARELLA, Palmina. Il margine di apprezzamento. In: CARTABIA, Marta (Ed.). *I diritti in azione*. Bologna: il Mulino, 2007. p. 145.

not involve problems of subsidiarity, because there is not a permanent Court, such as the ECtHR, which – for its superordinate hierarchical position – has the constant power to strongly limit the policy choices which can be made by States. The standards of treatment for foreign investors contained in BITs do not present the structure of the rights contained in the ECHR: in principle, when States violate such standards, they should compensate foreign investors. In conclusion, it does not seem possible to even imagine a way in which the structural conception of the margin of appreciation can find a place in investment arbitration.[108] Hence, it is no surprise that when arbitral tribunals had the opportunity to evaluate the applicability of the margin of appreciation in international investment law they usually refused that option.[109] In conclusion, borrowing Gary Born's words in *Philip Morris*, it is possible to say that the ECHR "was drafted and accepted in a specific geographical and historical context, in relation to a particular human rights instrument. The reasons that led to the acceptance of the "margin of appreciation" in the context of the ECHR are not necessarily transferable to other contexts, including specifically to a BIT".[110] Confirmation of this approach may be found also in other arbitral awards. In *Siemens* the Tribunal stated that "article 1 of the First Protocol to the ECHR permits a margin of appreciation not found in customary international law or the [applicable] BIT".[111] Similarly, in *von Pezold*, the Tribunal said that "[d]ue caution should be exercised in importing concepts from other legal regimes (in this case European human rights law) without a solid basis for doing so. Balancing competing (and non-absolute) human rights and the need to grant States a margin of appreciation when making those balancing decisions is well established in human rights law, but the Tribunal is not aware that the concept has found much support in international investment law".[112]

The discourse is different with regard to the applicability of the a-technical (or substantial) margin of appreciation, which – as we have seen – *de facto* corresponds to a proportionality analysis of state measures. As it has been correctly stated,[113] proportionality is an integral part of the fair and equitable treatment standard, which is functional to the ascertainment of the violation of such a standard. Proportionality operates particularly in the cases where it is necessary to balance the legitimate expectations of investors with the sovereign functions of host States.[114] In this regard, it has

108 A similar conclusion, but partially based on different reasons, has been reached by ARATO, Julian. The Margin of Appreciation in International Investment Law. *Virginia Journal of International Law*, v. 54, p. 545, 2014. See also TALLENT, Kassi. The Tractor in the Jungle: Why Investment Arbitration Tribunals Should Reject a Margin of Appreciation Doctrine. In: LAIRD, Ian; WEILER, Todd (Ed.). *Investment Treaty Arbitration and International Law.* Huntington – NY: Juris Net, 2010. v. 3. p. 111; VASANI, Sarah. Bowing to the Queen: Rejecting the Margin of Appreciation Doctrine in International Investment Law. In: LAIRD, WEILER, p. 137. For other critics to the possible applicability of the doctrine in international investment law see ALVAREZ, Jose E; KHAMSI, Kathryn. The Argentine Crisis and Foreign Investors. In: SAUVANT, Karl (Ed.) *The Yearbook on International Law and Policy 2008/2009*. 2009.p. 440.

109 See *Quasar de Valores SICAV S.A. (et al.) v. The Russian Federation*, SCC Case No. 24/2007, Award, 20/07/2012, para. 22.

110 Para. 185.

111 *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, 06/02/2007, para. 354.

112 *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28/07/2015, paras. 465-466. See also KASTSELAS, Anna. Do Investment Treaties Prescribe a Deferential Standard of Review?. *Michigan Journal of International Law*, v. 34, p. 139, 2012. The proposed approach finds indirect confirmation also in the scholarship who apparently recognized the applicability of the margin of appreciation in investment arbitration. It is possible to mention, in this regard, BURKE-WHITE, VON STADEN, n. 101 above, p. 324, who said that often "tribunals invoked [the discussed standard] in potentially contradictory ways. In particular, more recent ICSID tribunals have made explicit reference to the least restrictive alternative test, the margin of appreciation and good faith review. The result has been a melding or, perhaps, a confusing of approaches, rather than the emergence of a clear standard of review for public law arbitration". The same Authors, at 328, recognize that "ICSID jurisprudence urgently needs a well-considered analysis of the available standards of review in public law arbitrations and the reasons why a particular standard are appropriate to the public law subject matter of these arbitrations and the text of the treaty being interpreted". These Authors, however, in the end say at 336 that the application proportionality is not the correct way of solving this issue because arbitrators are allegedly ill-suited to carry out this balancing process. The present author disagrees with this statement: first, all deferential doctrines recognize a certain degree of subjectivism to arbitrators and there is no reason to prefer one instead of another. Second, the reason why the parties choose certain arbitrators is exactly their competence and sensibility in solving the specific issues and there is apparently no reason to believe that they would badly carry out their task.

113 PALOMBINO, n. 9 above, p. 164-165. Contrariwise, see XIULI, n. 74 above, p. 639. Palombino's approach as to the inclusion of proportionality as a functional element necessary to verify whether a violation of the fair and equitable treatment took place seems reinforced, *inter alia*, by the *Glamis Gold* decision, where the proportionality test was used in order to evaluate whether the investor's legitimate expectations have been violated. See *Glamis Gold Ltd. v. United States*, UNCITRAL, Award, 08/06/2009, para. 803 Other references are contained in Palombino's book, at 167 f.

114 See STONE-SWEET, Alec; MATTHEWS, Jud. Proportionality Balancing and Global Constitutionalism. *Columbia Journal of Transnational Law*, v. 47, p. 73, 2008, stating that proportionality analysis has become "the preferred procedure [...] for managing [...]

been correctly noted that the FET itself has a balancing nature and that BITs do not contain absolute rights.[115] It is possible to mention, in this regard, the *Suez* award, where – while discussing about the fair and equitable treatment standard – the Tribunal expressly mentioned the balancing process which is typical of the proportionality analysis which is made in domestic constitutional law: "[i]n interpreting the meaning of 'just' or 'fair and equitable treatment' to be accorded to investors, the Tribunal must balance the legitimate and reasonable expectations of the Claimants with [...] (the) right to regulate the provision of a vital public service".[116] Similarly, in *Occidental*, the Tribunal determined that "the test [for ascertaining a FET violation] at the end of the day will remain one of overall judgment, balancing the interests of the State against those of the individual, to assess whether the particular sanction is a proportionate response in the particular circumstances".[117]

Obviously, in such a balancing process due weight shall be given to the sovereign functions of the State (requesting Tribunals to be deferential towards States' policy choices) due to the hybrid (public/private) nature of investment arbitration, in which the principle of equality of the parties shall be mitigated by the presence of a sovereign entity.[118] Deference, therefore, is part of the proportionality analysis carried out by arbitrators. Borrowing Saïda El Boudouhi's terminology,[119] this means that the margin of appreciation "as a concept", i.e. the general recognition of a space of manoeuvre for State authorities, is an implied assumption of the proportionality analysis which finds place in investment arbitration (contrary, as we have seen, to the margin of appreciation "as a doctrine" technically developed by the ECtHR and applicable only in the presence of certain well-defined circumstances).

This has finally led to the emergence of the concept of legitimate expectations by induction, which means that investors can legitimately expect that a State may not amend a particular legal framework without incurring in responsibility only in presence of *specific commitments* towards them.[120] Indeed, taking into account the three-pronged structure of proportionality, and in particular the proportionality *stricto sensu* requirement,[121] it is possible to say that an investor's legitimate expectations on the stability of a certain legal framework are justified only if and when a State has assumed specific commitments towards such an investor. Indeed, in this latter case a measure violating such commitments is likely to result in a disproportionate violation of the investor's rights, due to the very high level of reliance that the investor put in good faith on the circumstance that the host State legal framework was not going to vary.[122] In this author's opinion, such a balancing exercise is exactly what the *Philip Morris* Majority intended

an alleged conflict between two rights claims, or between a right provision and a legitimate state [...] interest."

115 See HAYNES, Jason. The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns – The Case for Regulatory Rebalancing. *Journal of World Investment & Trade*, v. 14, p. 114, 2013; VANDEVELDE, Kenneth. A Unified Theory of Fair and Equitable Treatment. *New York University Journal of International Law and Politics*, v. 43, p. 43, 2010; DOLZER, Rudolf. Fair and Equitable Treatment: Today's Contours. *Santa Clara Journal of International Law*, v. 12, p. 7, 2014.

116 Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina, ICSID Case No. ARB/03/17, Decision on Liability 30/07/2010, para. 216.

117 Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 05/10/2012, para. 417.

118 See HENCKELS, n. 74 above, p. 223; VALENTI, Mara, The protection of general interests of host States in the application of the fair and equitable treatment standard. In: SACERDOTI, Giorgio. The Proliferation of BITs: Conflicts of Treaties, Proceedings and Awards. In: SAUVANT, Karl et al. (Ed.). *Appeals Mechanism in International Investment Disputes*. Oxford University Press, 2008. p. 35. Analogous considerations on the non-absolute nature of rights conferred to individuals has been made in the ECHR context by CANNIZZARO, n. 9 above, p. 76. Cannizzaro has noted that in the human rights context, as it happens for the FET, the lack of a precise normative definition of certain human rights leaves discretion to States in applying implicit limitations of such rights. In these cases, obviously, the ECtHR has recognized the States' freedom and has not condemned those limitations. With regard to the concept of deference in investment arbitration see SCHILL, Stephan W. Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review. *Journal of International Dispute Settlement*, v. 3, p. 577, 2012; CHEYNE, Ilona. Deference and the Use of Public Policy Exceptions in International Courts and Tribunals. In: GRUSZCZYNSKI, Lukasz; WERNER, Wouter. *Deference in International Courts and Tribunals*. Oxford: Oxford University Press, 2014. p. 38; HENCKELS, Caroline. The Role of Standard of Review and the Importance of Deference in Investor – State Arbitration. In: GRUSZCZYNSKI, Lukasz; WERNER, Wouter. *Deference in International Courts and Tribunals*. Oxford: Oxford University Press, 2014. p. 113.

119 EL BOUDOUHI, n. 98 above, p. 1-5.

120 See, for a meaningful explanation of the concept of legitimate expectations by induction, as well as for the development of this idea, PALOMBINO, n. 9 above, p. 139 See also PUMA, n. 3 above, p. 232-233.

121 It is worth here recalling that the proportionality *stricto sensu* analysis requires a concrete evaluation of the proportionality of the goals of the host State in relation to the legal means it has adopted for reaching such goals.

122 See, inter alia, EL BOUDOUHI, n. 98 above, p. 14. for an analysis of the balancing approach of investment tribunals.

when referring to "margin of appreciation":[123] Firstly, the Majority recognized that Uruguay's regulations were enacted in the pursuance of the State's public function and, therefore, deserved a certain degree of deference, and, secondly, the Majority stated that, *in concreto*, they were "reasonable" and not disproportionate when they were adopted and therefore justified a violation of the investors' legitimate expectations.[124] As better discussed below in this Section, however, the Majority refused to make a careful analysis of the satisfactions of the three prongs of proportionality and this renders the legal path followed in the decision not convincing.

It is also to be noted that Authors who defend the applicability of the margin of appreciation outside the ECHR context never discussed the possibility of applying the features of the doctrine as technically developed by the ECtHR. This seems to be confirmed by the words used by Yuval Shany, who talks about the applicability of "*margin of appreciation like* doctrines"[125] or "'*margin of appreciation type*' decision making methodology" (emphasis added) outside the ECtHR, thus implictly recognizing that the technical conception of the doctrine cannot find place outside the ECHR framework.[126] Similarly Burke-White and von Staden merely refer to the margin of appreciation as a theory of deference against State actions, not taking into account all the other elements that compose the technical conception of the doctrine.[127] These authors expressly acknowledge that "arbitral tribunals have, if less frequently and prominently, applied standards of review *similar to the margin of appreciation*, often using the term explicitly" (emphasis added).[128] Finally, El Boudouhi explained that the reference in investment arbitration always occurs to the margin of appreciation "as a concept" (i.e. as a synonymous of deference) and not "as a doctrine" (i.e. as technically developed by the ECtHR).[129] As the latter mentioned Author explains "it must be stressed again that the mere use of the words 'margin of appreciation' or 'margin of discretion' does not, in itself, amount to the use of the doctrine".[130] The same happens in the case law. We could start from quoting the *Philip Morris* decision, where the Tribunal, when referring to the margin of appreciation, merely said that "[t]he responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health".[131] In some other cases Tribunals discussed a margin of appreciation to be granted to host States, but – as noted by Mr. Born in his Dissenting Opinion – a careful reading of the awards reveals that arbitrators were simply saying that it is a duty of Tribunals to apply a deferential standard of review of States' actions.[132] This is expressly said in *Lemire*, where the Tribunal made reference to the high level of deference which international law generally extends to the rights of domestic authorities in regulating matters within their own borders, especially in cases where the State's cultural identity is at stake.[133] Similarly, in *Electrabel*, the Tribunal had to evaluate whether the introduction of a pricing regulation by Hungary was to be considered as a violation of the fair and equitable treatment standard; Arbitrators recognized the sovereign role of the State in taking this kind of measures and the deference which tribunals owe to sovereign decisions, but avoided any kind of discussion regarding the margin of appreciation.[134] Finally, in *Loewen*, Sir Christopher Greenwood stated that "international law allows a broad margin of discretion to each State in the way it organizes its legal system".[135] As for the other cases, this is a mere reference to States' discretion and not to the

123 See para. 401.

124 With this particular regard, see paras. 409-410 and 418-420.

125 SHANY, Yuval. All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee. 2017. p. 30. Disponível em: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2925652>.

126 SHANY, Yuval. Toward a General Margin of Appreciation Doctrine in International Law?. *European Journal of International Law*, v. 16, p. 928, 2005.

127 BURKE-WHITE, William; VON STADEN, Andreas. Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties. *Virginia Journal of International Law*, v. 48, p. 370, 2008.

128 BURKE-WHITE, William; VON STADEN, Andreas. Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties. *Virginia Journal of International Law*, v. 48, p. 310, 2008.

129 EL BOUDOUHI, n. 98 above, p. 15.

130 EL BOUDOUHI, n. 98 above, p. 16.

131 Para. 399.

132 Born's Dissenting Opinion appended to the *Philip Morris* award, para. 189.

133 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/8, Decision on Jurisdiction and Liability, 14/01/2010, para 505.

134 *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicability and Liability, 30/11/2012, para. 8.35.

135 *Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Opinion of Sir Christopher Greenwood appended to the Award, 26/06/2003, para. 65.

ECtHR doctrine.

However, as we have tried to demonstrate above, deference is to be considered as a part of the broader proportionality analysis to be carried out in the evaluation of the investors' legitimate expectations. Obviously, the broader will be the wording of the standard of treatment to be applied, the bigger will be the space of manoeuvre for State authorities and the related deference that international arbitrators should pay to State actions in their proportionality analysis.[136] Indeed, such a deference has been manifested by arbitral tribunals in particular when they had to evaluate violations of broad standards, such as the fair and equitable treatment, alleged caused by States' regulations concerning public services, i.e. those "services which are provided and regulated based on non-commercial public interests and on the need for the provision of such services in a way the market cannot achieve".[137]

Finally, it is worth mentioning the *Continental Casualty Company v. Argentina* award,[138] where the Tribunal mentioned the margin of appreciation when referring to the discretion that States enjoy in deciding the contours of their "own security interest". In this regard, it is to be noted that the Tribunal was here applying a BIT provision which expressly authorized Argentina to take measures to protect "its own security interest" and, of course, the same provision allowed the Respondent State to discretionally identify what kind of interests were involved in that category. No reference to the doctrine as developed by the ECtHR is present in the *Continental Casualty Company* award.

In light of the above, it is worth concluding the present analysis with some final remarks regarding the approach endorsed by the *Philip Morris* Tribunal. As discussed above, it appears that the Majority of Arbitrators made recourse to the margin of appreciation as a way for paying deference to the measures enacted by the host State. In doing so, it seems that the *Philip Morris* majority did not apply the technical meaning of the margin of appreciation doctrine. However, as explained by Born's Dissenting Opinion,[139] by refusing to evaluate the concrete suitability of Uruguayans' measures to reach their scope and to carry out a meaningful analysis of the three prongs of proportionality in the present case, the Tribunal seems not to have correctly applied the proportionality analysis which is required in the evaluation of a FET violation. This approach is somewhat confusing and, for this reason, the opinion of the dissenting arbitrator – who suggests the necessity to carry out a meaningful proportionality analysis with respect to the disputed Uruguayan measures - is certainly more shareable.

5. Final conclusions

The analysis carried out in this article started from the recent decision in the *Philip Morris v. Uruguay* dispute, where the Tribunal unanimously recognized the existence, the customary status and the applicability by way of systemic interpretation of the so-called police powers (or power to regulate) doctrine and, by majority, recognized that the margin of appreciation doctrine – as developed in the ECtHR context – applied in BIT arbitrations. While this decision is certainly to be welcomed for its attempt to take into due consideration the sovereign prerogatives of respondent States in investment arbitration, it does not seem entirely convincing from the point of view of the legal path that Arbitrators decided to follow. Hence, this article has tried to analyze the current status regarding the applicability of the power to regulate, the margin of appreciation and the proportionality principle in investment arbitration.

Concerning the doctrine of the power to regulate we have demonstrated that, as of today, it cannot be considered as a rule of customary international law which can find autonomous application in investment arbitration. It is surely possible to say that existing treaty practice and arbitral case law are establishing a trend towards a broader recognition of this doctrine, but it does not appear equally possible to say that the two requirements of custom, i.e. *diuturnitas* and *opinio juris sive necessitatis*, have been met by the police powers doctrine. However, the present paper has tried to show that the sovereign prerogatives of host States can be taken

136 SHANY, Yuval. Toward a General Margin of Appreciation Doctrine in International Law?. *European Journal of International Law*, v. 16, p. 914, 2005.

137 See KRAJEWSKI, Markus. Investment Law and Public Services. In: BUNGENBERG Marc et al. (Ed.). *International Investment Law*. Munich: C.H. Beck, 2015. p. 1629. The importance which arbitral tribunals are giving to public services is particularly evident in the above-mentioned *Urbaser* award, n. 4 above, para. 603.

138 ICSID Case No. ARB/03/9, Award, 05/09/2008, para. 181.

139 See para. 172.

into due account by arbitral tribunals when evaluating indirect expropriations through an application of the principle of proportionality, to which the concept of deference towards State authority is inherent.

On the other hand, as to the margin of appreciation doctrine, we have tried to demonstrate that it can be understood both technically, i.e. "as a doctrine" developed by the ECtHR, and "a-technically", i.e. as a synonymous of deference, and that its applicability in investment arbitration depends on how adjudicators understand the concept. The first meaning of margin of appreciation, typical in the ECtHR context, is in direct relationship with the principle of subsidiarity and anchors the applicability of the doctrine to certain specific requirements established by the ECtHR which do not exist in the BIT context. However, the argument has been put forward whereby arbitral tribunals may resort to the margin of appreciation in a substantial (or a-technical) sense, *i.e.* regarding this doctrine as a balancing technique which involves a deferential approach towards State sovereignty and ends up overlapping with the proportionality analysis.

In conclusion, while the applicability of the police powers and of the margin of appreciation doctrines still appear to be doubtful in investment arbitration, it seems that a deeper analysis of the potential applications of the proportionality principle could lead arbitral tribunals to resolve balancing issues and recognize a due level of deference towards States without making recourse to judicial borrowing operations that sometimes turn out to be misleading.

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Investments on Disputed Territory: Indispensable Parties and Indispensable Issues

Investimentos nos Territórios disputados: Partes e assuntos indispensáveis

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Investments on Disputed Territory: Indispensable Parties and Indispensable Issues*

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Peter Tzeng**

Abstract

International investment agreements generally only protect investments in the 'territory' of the respondent State. As a result, an investment tribunal seized of a dispute concerning an investment on disputed territory may have to determine whether the respondent State has sovereignty over the territory in question. This should create some discomfort for two reasons. First, the tribunal may be exceeding its jurisdiction ratione personae, as it would be ruling on the sovereignty dispute with only one of the disputing States at the table. Second, the tribunal may be exceeding its jurisdiction ratione materiae, as it generally only has the power to rule on investment disputes, not sovereignty disputes. This Article explores the merits of two preliminary objections—corresponding to these two jurisdictional problems—to claims concerning investments on disputed territory: the doctrine of indispensable parties and the doctrine of indispensable issues.

Keywords: investment, arbitration, dispute, territory, indispensable, Monetary Gold, Crimea

Resumo

Os acordos internacionais de investimento geralmente protegem apenas os investimentos no "território" do Estado anfitrião. Como resultado, um tribunal de investimento constituído após uma disputa poder ter que determinar se o Estado respondente tem soberania sobre o território em questão. Isso deve criar algum desconforto por dois motivos. Primeiramente, o tribunal pode exceder a sua jurisdição ratione personae, como seria julgando a disputa referente à soberania com apenas o Estado anfitrião, sem o Estado de origem. Em segundo lugar, o tribunal pode exceder a sua jurisdição ratione materiae, uma vez que geralmente só tem o poder de julgar disputas atinentes aos investimentos e não questões de soberania. Este artigo explora os méritos de duas objeções preliminares - correspondentes a estes dois problemas jurisdicionais - às reivindicações sobre investimentos em território em disputa: a doutrina de indispensável partidos e a doutrina de questões indispensáveis.

Palavras-chave: arbitragem; disputas; território; indispensável; Crimeia

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1. Introduction

International investment agreements (IIAs) generally only protect investments in the 'territory' of the respondent State.[1] As a result, an investment tribunal seized of a dispute concerning an investment on disputed territory may have to determine whether the respondent State has sovereignty over the territory in question.[2] This should create some discomfort for two reasons. First, the tribunal may be exceeding its jurisdiction *ratione personae*, as it would be ruling on the sovereignty dispute with only one of the disputing States at the table. Second, the tribunal may be exceeding its jurisdiction *ratione materiae*, as it generally only has the power to rule on investment disputes, not sovereignty disputes.

This Article explores the merits of two preliminary objections—corresponding to these two jurisdictional problems—to claims concerning investments on disputed territory: the doctrine of indispensable parties and the doctrine of indispensable issues. The doctrine of indispensable parties, also called the *Monetary Gold* principle, is an objection based on the limited jurisdiction *ratione personae* of international courts and tribunals. The doctrine is widely recognized in public international law, though it has never been successfully applied in investment arbitration.[3] The doctrine of indispensable issues, on the other hand, is a hypothetical objection considered by the present author in an attempt to fill a conceptual gap—that is, the lack of an equivalent of the doctrine of indispensable parties for jurisdiction *ratione materiae*. The doctrine of indispensable issues is thus directly analogous to the doctrine of indispensable parties, but it arises from the limited jurisdiction *ratione materiae* of international courts and tribunals, rather than their limited jurisdiction *ratione personae*. It should be emphasized that the present author is not necessarily of the opinion that such a 'doctrine of indispensable issues' exists or should exist in international law.[4] Nevertheless, the author wishes to explore the merits of this doctrine in light of its potential applicability to disputes concerning investments on disputed territory.

This Article is organized as follows. Section II explains how the existing doctrine of indispensable parties may affect claims concerning investments on disputed territory. Section III introduces the hypothetical doctrine of indispensable issues, and then explains how it may affect such claims. Section IV then examines one line of cases in particular—the Crimea arbitrations—to show how investments tribunals seized of disputes concerning investments in disputed territory may sometimes avail themselves of 'escape mechanisms' in order to avoid considering the two doctrines. Section V then concludes the Article.

2. Indispensable Parties

Two preliminary remarks regarding the doctrine of indispensable parties should be made here. First, the doctrine is often referred to as 'the *Monetary Gold* principle' in public international law. This Article, however, employs the term 'doctrine of indispensable parties' not only to elucidate the parallel with the proposed 'doctrine of indispensable issues', but also to emphasize the

1 Many modern IIAs employ the word 'area' instead of 'territory', but they ultimately define 'area' in terms of 'territory'. See eg Agreement on Reciprocal Encouragement and Protection of Investments Between the Kingdom of the Netherlands and the Republic of Turkey (signed 28 August 2016) art 1(f) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2090> accessed 12 September 2017; Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) art 1(10) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2090> accessed 12 September 2017.

2 A similar issue arises for investments in disputed waters, as many IIAs define 'territory' to include the territorial sea, exclusive economic zone, and/or continental shelf of the respondent State. See eg Agreement Establishing the Free Trade Area Between the Caribbean Community and the Dominican Republic (signed 22 August 1998) art 1(2) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3110> accessed 12 September 2017; Agreement Concerning the Reciprocal Promotion and Protection of Investments Between Bosnia and Herzegovina and the Government of the State of Qatar (signed 1 June 1998, entered into force 5 February 2009) art 1(2)(b) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/487> accessed 12 September 2017.

3 The respondent States invoked the doctrine in *Ping An Life Insurance v Belgium* and *Chevron Corporation v Ecuador*, but the tribunals did not find the doctrine applicable. See *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v Kingdom of Belgium*, ICSID Case No ARB/12/29, Award (30 April 2015) paras 127-28; *Chevron Corporation and Texaco Petroleum Company v Ecuador*, PCA Case No 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 February 2012) para 4.60.

4 For further discussion on the doctrine of indispensable issues, see Peter Tzeng, 'The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond', EJIL: Talk! (14 October 2016) <https://www.ejiltalk.org/the-doctrine-of-indispensable-issues-mauritius-v-united-kingdom-philippines-v-china-ukraine-v-russia-and-beyond/> accessed 12 September 2017.

fact that the doctrine as it exists today is the product of jurisprudence across multiple cases before the International Court of Justice (ICJ), not just *Monetary Gold*. Indeed, although the ICJ does not employ the term 'indispensable parties' to refer to the principle, international tribunals,[5] States,[6] and many commentators[7] have used the term to refer to this line of ICJ jurisprudence.

Second, commentators generally consider the doctrine of indispensable parties as an objection to admissibility rather than jurisdiction,[8] and the ICJ's jurisprudence suggests the same.[9] This Article does not take a position on this classification, but for consistency will treat the question as one of admissibility.

2.1. Public International Law

Much ink has been spilled over the doctrine of indispensable parties, in particular over its application in three ICJ cases: *Monetary Gold*, *Certain Phosphate Lands*, and *East Timor*.[10] As is now well known, in *Monetary Gold*, the ICJ held that a claim is inadmissible if the legal interests of a State outside of its jurisdiction *ratione personae* 'would not only be affected by a decision, but would form the very subject-matter of the decision'.[11] The critical question, however, is how one should go about identifying the 'very subject-matter' of the decision.

The Court answered this question in its subsequent jurisprudence. In *Certain Phosphate Lands*, the Court held that the legal interests of New Zealand and the United Kingdom would not form the 'very subject-matter' of the decision because 'the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite to the [decision of the Court]'.[12] And in *East Timor*, the Court held that the legal interests of Indonesia would form the 'very subject-matter' of the decision because '[i]n order to decide the claims . . . , [the Court] would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct'.[13]

Two tests thus lie at the heart of the doctrine: the 'very subject-matter' test of *Monetary Gold* and the 'prerequisite determination'[14] test of *Certain Phosphate Lands* and *East Timor*. A close examination of the passages from *Certain Phosphate Lands* and *East Timor* cited above reveal that satisfaction of the 'prerequisite determination' test is both a necessary[15] and sufficient[16] condition for the satisfaction of the 'very subject-matter' test.

The literature most often associates the doctrine of indispensable parties with the 'very subject-matter' test, but the 'prerequisite determination' test is just as important: there is no question that courts and tribunals consider the 'prerequisite determination' test to be determinative on whether they can exercise jurisdiction over a dispute. This can be seen first and foremost in ICJ jurisprudence. In *Armed Activities* and *Interim Accord*, the Court in considering the doctrine of indispensable parties applied the 'prerequisite determination' test alongside the 'very subject-matter' test.[17] And in two recent cases, *Nicaragua v Honduras* and *Croatia v Serbia*, the

5 See eg *The M/V 'Norstar' Case (Panama v Italy)* (Preliminary Objections) (2016) ITLOS Case No 25, paras 171-74; *South China Sea (Philippines v China)* (Merits) (2016) PCA Case No 2013-19, paras 157, 1202; *Chevron v Ecuador* (n 3) para 4.62.

6 See eg *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Merits) [2005] ICJ Rep 168, para 200; *Turkey—Restrictions on Imports of Textile and Clothing Products* (31 May 1999) WTO Doc WT/DS34/R, para 3.39; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v UK)* (Preliminary Objections of the United Kingdom) (15 June 2015), paras 83-103.

7 See eg Christine Chinkin, *Third Parties in International Law* (OUP 1993) 198-212; Vaughan Lowe, *International Law* (OUP 2007) 146; Chester Brown, 'Article 59' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, 2012) 1416, 1441; Alain Pellet, 'Judicial Settlement of International Disputes' in *Max Planck Encyclopedia of Public International Law* (2013) para 10.

8 See eg Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol 1 (OUP 2013) 971; Yuval Shany, 'Jurisdiction and Admissibility' in Cesare PR Romano and others (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 779, 797-98.

9 See eg *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, para 35; *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240, para 55; *Monetary Gold Removed from Rome in 1943 (Italy v France, UK, US)* [1954] ICJ Rep 19, 33.

10 See eg Chinkin (n 7) 198-212; Natalie S Klein, 'Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case' (1996) 21 Yale JIL 305; Tobias Thienel, 'Third States and the Jurisdiction of the International Court of Justice: The Monetary Gold Principle' (2014) 57 GYBIL 321.

11 *Monetary Gold* (n 9) 32.

12 *Certain Phosphate Lands* (n 9) para 55.

13 *East Timor* (n 9) para 35.

14 Note that this is not a direct quote from the Court's jurisprudence, but in *Certain Phosphate Lands* and *East Timor*, the Court used the word 'prerequisite' in this sense in determining whether the 'very subject-matter' test was satisfied.

15 See text to n 12.

16 See text to n 13.

17 See *Armed Activities* (n 6) para 204; *Application of the Interim Accord of 13 September 1995 (Macedonia v Greece)* [2011] ICJ Rep 644, para 43.

Court in considering the doctrine referred to the 'prerequisite determination' test without referring to the 'very subject-matter' test at all.[18] Other international tribunals have also held that, under the doctrine of indispensable parties, they would not be able to exercise jurisdiction over a dispute if the decision requires a prerequisite determination on the legal responsibility of a State outside of their jurisdiction *ratione personae*.[19] As Judge Crawford put it recently in his dissenting opinion in the *Nuclear Disarmament* cases:

> The case law has . . . set firm limits to the *Monetary Gold* principle. It applies only where a determination of the legal position of a third State is *a necessary prerequisite* to the determination of the case before the Court.[20]

In conclusion, then, the doctrine of indispensable parties can be summarized as follows: an international court or tribunal cannot exercise jurisdiction over a dispute if the legal interests of a State outside of its jurisdiction *ratione personae* would form the 'very subject--matter' of the decision, which is the case if and only if the decision requires a 'prerequisite determination' on the legal responsibility of that State.

2.2. Investment Law

To this day, no investment tribunal has applied the doctrine of indispensable parties to declare a claim inadmissible.[21] This should not come as a surprise, as investment disputes are typically bilateral disputes that take place between an investor and a State. Nevertheless, claims concerning investments on disputed territory could render the doctrine of indispensable parties applicable. The applicability of the doctrine may depend on whether the territory is (1) disputed between two States; or (2) disputed between a State and a non--State actor. These two scenarios will be discussed in turn.

In the first scenario, the application of the doctrine of indispensable parties would likely render the claim inadmissible. Suppose, for example, that a US corporation makes an investment on the Falkland Islands, and subsequently sues Argentina for not having afforded it the protections guaranteed under the Argentina-US BIT. Article I(1)(a) of the BIT defines 'investment' as 'every kind of *investment* in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party'.[22] As a result, assuming that the tribunal does not avail itself of an escape mechanism (as discussed below in Section IV), the decision on the US corporation's claim would require a 'prerequisite determination' on whether the Falkland Islands constitute Argentinian territory. Since the United Kingdom also claims sovereignty over the Falkland Islands, this determination on sovereignty would constitute a determination on the legal interests of the United Kingdom, a State over which the tribunal does not have jurisdiction *ratione personae*. As a result, applying the doctrine of indispensable parties, the tribunal would find that the legal interests of the United Kingdom would form the 'very subject-matter' of the decision, rendering the claim inadmissible.

It is worth evaluating whether, normatively speaking, this is the preferable result. On the one hand, the result makes sense, as it would be antithetical to the principles of consent and *audi alteram partem* for the tribunal to rule on sovereignty over the Falkland Islands without the United Kingdom at the table. Allowing the tribunal to make such a determination would be particularly concerning in light of the fact that the two parties to the arbitration—the US corporation and Argentina—have an interest in convincing the tribunal that the Falkland Islands constitute Argentinian territory. The corporation has such an interest because the Falkland Islands must constitute Argentinian territory for its investment to qualify as an 'investment' under Article I(1)(a) of the BIT, and Argentina has such an interest because it would not want to undermine the legitimacy of its claim of sovereignty over the Falkland Islands. Moreover, the parties would likely have the right to appoint a majority

18 *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 659, para 312; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep, para 116.

19 *M/V Norstar* (Preliminary Objections) (n 5) para 173; *South China Sea (Philippines v China)* (Jurisdiction and Admissibility) (2015) PCA Case No 2013-19, para 180; *Larsen v Hawaiian Kingdom* (2001) PCA Case No 1999-01, 119 ILR 566, para 11.23.

20 *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Dissenting Opinion of Judge Crawford) [2016] ICJ Rep, para 32 (emphasis added).

21 See n 3.

22 Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (signed 14 November 1991, entered into force 20 October 1994) art I(1)(a) (emphasis added) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/127> accessed 12 September 2017.

of the arbitrators sitting on each tribunal,[23] so the tribunal itself may not be completely impartial.

On the other hand, declaring the claims inadmissible may be normatively unappealing for at least four reasons. First, the application of the doctrine appears inappropriate. It is true that the tribunal's settlement of the investment claim would require a 'prerequisite determination' on the legal interests of the United Kingdom. Nevertheless, putting aside the plethora of jurisprudence on the doctrine mentioned above,[24] it is difficult to understand how the legal interests of the United Kingdom would form the 'very subject-matter' of the decision in the ordinary sense of the phrase 'very subject-matter'. Absent any indication otherwise, the 'very subject-matter' of the investment claim is undoubtedly the investment claim itself, not the underlying issue of sovereignty. Therefore, one could make a cogent argument that the doctrine of indispensable parties as developed by the ICJ and accepted by other courts and tribunals should be either revised or rejected in the context of investment disputes concerning investments on disputed territory.

Second, the application of the doctrine appears unjustified. The determination on sovereignty would be *res inter alios acta* between the investor and the respondent State only, and in any case would merely form part of the *ratio decidendi*, not the *dispositif*. As a result, the determination would neither be binding on the absent State, nor would it have *res judicata* effect on the absent State, nor would it give rise to any legal consequences aside from the settlement of the investment dispute. The counterargument, however, is that any determination by an international court or tribunal, even if not formally binding, may carry significant informal weight. After all, it should be recalled that these arguments have also been raised against the doctrine of indispensable parties in general, but they did not stop the ICJ from applying the doctrine and refusing to exercise jurisdiction in *Monetary Gold* and *East Timor*.

Third, the application of the doctrine appears inequitable. The reason is that the respondent State would on the one hand be able to claim sovereignty over a certain piece of territory, but on the other hand not be held responsible for obligations that should apply to its entire territory on that piece of territory. The claimant could try to invoke estoppel, but the tribunal may decide that it must determine its jurisdiction and the admissibility of the claim *proprio motu*, without relying on the objections of the parties.[25] In the end, this concern is best addressed through the drafting (or redrafting) of IIAs. If one is truly concerned about activities of States on territory under their 'effective control' and/or 'jurisdiction and/or control', then IIAs should employ those terms rather than 'territory'.

Fourth, the application of the doctrine could incentivize the respondent State to engage in misconduct. In particular, in light of the potential for an estoppel argument as discussed above, the respondent State may choose to not participate in the proceedings. This way, it can avoid the difficult scenario of claiming sovereignty over a certain piece of territory while asserting that obligations that should apply to its entire territory do not apply to that piece of territory. Indeed, Russia may have chosen to not participate in the Crimea arbitrations (discussed below in Section IV), for this very reason. In addition, the application of the doctrine could also incentivize the respondent State to claim the existence of territorial disputes in order to render investment claims inadmissible. This concern, however, is mitigated by the fact that, more often than not, respondent States would not wish to admit that certain territory that they claim is in dispute. For example, it would be peculiar for Russia to argue before the Crimea tribunals that Crimea is disputed territory; rather, if it were to participate in the arbitrations, it would likely argue that Crimea lawfully acceded to Russia via popular referendum. In any case, under the principle of competence-competence, the tribunal would be the one deciding whether a genuine territorial dispute exists.

In the second scenario mentioned above—where

23 Like many other IIAs, the US-Argentina BIT allows for arbitrations to be instituted under the ICSID Convention or the UNCITRAL Rules. See ibid art VII(3). In the common scenario of a three-member tribunal, Article 37(2)(b) of the ICSID Convention and Article 9(1) of the UNCITRAL Rules provide that each party has the right to appoint one arbitrator.

24 See text to n 10-20.

25 See *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* [1972] ICJ Rep 46, para 13; *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) para 65; Baiju S. Vasani and Timothy L Foden, 'Burden of Proof Regarding Jurisdiction' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2010) 271, 271; Alex Grabowski, 'The Definition of Investment Under the ICSID Convention: A Defense of Salini' (2014) 15 Chicago JIL 287, 289.

the territory is disputed between a State and a non-State actor—the application of the doctrine of indispensable parties would probably not render the claim inadmissible. The same logic applies, but the difference is that the 'indispensable party' is no longer a State, but rather a non-State actor. Suppose, for example, that a British corporation makes an investment in Western Sahara, and subsequently sues Morocco for not having afforded it the protections guaranteed under the Morocco-UK BIT. Article 1(a) of the BIT defines 'investment' as 'every kind of investment made in accordance with legislation and regulations in force in the *territory* of each of the Contracting Parties'.[26] As a result, assuming that the tribunal does not avail itself of an escape mechanism, it may have to determine whether Western Sahara constitutes Moroccan territory. The tribunal could attempt to invoke the doctrine of indispensable parties, citing the Sahrawi Arab Democratic Republic as the 'indispensable party'. But the question arises as to whether non-State actors can be indispensable parties under the doctrine.

As a matter of public international law, the answer is a resounding 'no'. The reason is that the principle of consent—the ultimate source of the doctrine of indispensable parties—only requires the consent of States, not the consent of non-State actors. *East Timor* is a prime example. While the ICJ accepted the argument that Indonesia was an indispensable party to the proceedings, the Court did not even consider whether the people of East Timor could be an 'indispensable party'.[27] To cite another example, in *Obligation to Prosecute or Extradite*, the ICJ rendered a judgment where the rights of former Chadian President Hissène Habré arguably formed the 'very subject-matter' of the decision, but he was not a party to the dispute.[28] In short, as a matter of public international law, non-State actors may not constitute 'indispensable parties'.

Should this also be true for investment tribunals? As many scholars have noted, investment arbitration stands at the juncture between public and private international law. The very fact that one of the parties to almost every investment dispute is a non-State actor may suggest that investment tribunals should recognize non-State actors as subjects of the international legal order. Moreover, from the perspective of public policy, it would seem peculiar if the doctrine of indispensable parties applied only to some disputed territories (those disputed between two States) but not others (those disputed between a State and a non-State actor). Nevertheless, the policy consequences of allowing *any* non-State actor to be an indispensable party would be significant: non-governmental organizations and international corporations whose rights are implicated by the decisions of investment tribunals could start claiming indispensable party status. As a result, if one allows non-State actors to be indispensable parties, there must be a line drawn regarding the sorts of entities that may qualify as indispensable parties.

It would thus be difficult for the doctrine of indispensable parties to render a claim concerning an investment on territory disputed between a State and a non-State actor inadmissible. Nevertheless, in such a case, the doctrine of indispensable issues may be of use.

3. Indispensable Issues

In order for an international court or tribunal to exercise jurisdiction over a dispute, it must have both jurisdiction *ratione personae* over the parties and jurisdiction *ratione materiae* over the issues. In theory, then, if the doctrine of indispensable parties exists, a corresponding doctrine for jurisdiction *ratione materiae*—which this Article calls 'the doctrine of indispensable issues'—should exist as well. As mentioned above in Section I, the present author is not necessarily of the opinion that such a 'doctrine of indispensable issues' exists or should exist in international law. Nevertheless, the author wishes to explore this hypothetical doctrine in light of its potential applicability to disputes concerning investments on disputed territory.

As examined above in Section II, under the doctrine of indispensable parties, an international court or tribunal cannot exercise jurisdiction over a dispute if the legal interests of a State outside of its jurisdiction *ratione personae* would form the 'very subject-matter' of the decision, which is the case if and only if the decision

26 Agreement Between the Government of the United Kingdom of Great Britain and Northern Island and the Government of the Kingdom of Morocco for the Promotion and Protection of Investments (signed 30 October 1990, entered into force 14 February 2002) art 1(a) (emphasis added) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2051> accessed 12 September 2017.

27 *East Timor* (n 9); see Chinkin (n 7) 210.

28 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422.

requires a 'prerequisite determination' on the legal responsibility of that State. Analogously, then, under the doctrine of indispensable issues, an international court or tribunal cannot exercise jurisdiction over a dispute if a legal issue outside of its jurisdiction *ratione materiae* forms the 'very subject-matter' of the decision, which is the case if and only if the decision requires a 'prerequisite determination' on that legal issue.

Unlike the doctrine of indispensable parties, courts and tribunals dealing with indispensable issues have tended to treat the question as one of jurisdiction. This Article once again does not take a position on this classification, but for consistency will treat the question as one of jurisdiction.

3.1. Public International Law

At least two ICJ disputes and two disputes under the United Nations Convention on the Law of the Sea (UNCLOS)[29] have raised the question of indispensable issues. Neither the ICJ nor the UNCLOS tribunals expressly recognized or applied all elements of the doctrine of indispensable issues as defined above. Nevertheless, in at least three of the disputes, the holding was consistent with the doctrine and the reasoning reflected at least some elements of the doctrine.

The first ICJ case is *Aegean Sea Continental Shelf*.[30] In that case, Greece instituted proceedings against Turkey, requesting the Court to, *inter alia*, delimit the continental shelf between Greece and Turkey.[31] The Court had jurisdiction over the delimitation dispute under the General Act for the Pacific Settlement of International Disputes (the General Act).[32] A Greek reservation to the General Act, however, excluded the Court's jurisdiction over 'disputes relating to the territorial status of Greece',[33] which the Court considered to include issues of entitlement to the continental shelf.[34]

In order to determine whether it had jurisdiction over the dispute, the Court decided that it had to identify 'the subject-matter of the dispute'.[35] It then held:

> The very essence of the dispute, as formulated in the Application, is . . . the entitlement of [the] Greek islands to a continental shelf, and the delimitation of the boundary is a secondary question *to be decided after*, and in the light of, the decision upon the first basic question.[36]

The Court therefore held that the dispute fell within the Greek reservation, such that it did not have jurisdiction over the delimitation dispute.[37]

The Court's holding was consistent with the doctrine of indispensable issues: the delimitation would have required a prerequisite determination on the entitlement issue, which fell outside the Court's jurisdiction *ratione materiae*. The Court's reasoning also contained elements of the doctrine. The Court relied on its identification of 'the subject-matter of the dispute', just as the Court in *Monetary Gold* relied on its identification of the 'very subject-matter' of the decision. And the Court noted that the delimitation issue could only be decided after a determination on the entitled issue; in other words, settling the delimitation dispute required a prerequisite determination on the entitlement issue. The Court's reasoning, however, slightly parted from the doctrine of indispensable issues in that, as seen in the quote excerpted above, the Court considered the formulation of the dispute in Greece's Application in identifying the 'very essence of the dispute'.

The second ICJ case is *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*.[38] In that case, Malaysia and Singapore requested the Court to determine, *inter alia*, whether Malaysia or Singapore had sovereignty over a low-tide elevation called South Ledge.[39] By virtue of the special agreement, the Court had jurisdiction over this sovereignty dispute.[40] Nevertheless, this dispute implicated the question of maritime delimitation between the two States, over which the

29 United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

30 *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3.

31 ibid para 15.

32 ibid para 33.

33 ibid para 48. To be precise, Greece's reservation excluded 'disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece'. ibid. The Court held that this clause 'comprises two reservations, one of disputes concerning questions of domestic jurisdiction and the other a distinct and autonomous reservation of "disputes relating to the territorial status of Greece"'. ibid para 68.

34 ibid para 84.

35 ibid para 82.

36 ibid para 83 (emphasis added).

37 ibid para 90.

38 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep 12.

39 ibid paras 1-2, 31.

40 ibid para 298.

Court did not have jurisdiction *ratione materiae*.[41] This was because, as a low-tide elevation, South Ledge was subject to the rule that 'a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea',[42] and yet South Ledge lied within twelve nautical miles (the breadth of the territorial sea[43]) of both Pedra Branca and Middle Rocks.[44]

The Court's handling of this matter was very concise. It did not specify who had sovereignty over South Ledge, instead merely observing that 'sovereignty over South Ledge . . . belongs to the State in the territorial waters of which it is located'.[45] Like the Court's holding in *Aegean Sea Continental Shelf*, the Court's holding here was consistent with the doctrine of indispensable issues because the settlement of the sovereignty dispute would have required a prerequisite determination on the delimitation issue. The Court's reasoning, however, was very sparse and thus did not contain any reference to the 'very subject-matter' or 'prior determination' tests.

Two recent UNCLOS tribunals have also rendered decisions concerning the doctrine of indispensable issues. In *Chagos Marine Protected Area*, Mauritius requested an UNCLOS tribunal to interpret and apply the term 'coastal State' as used in UNCLOS with respect to the Chagos Archipelago.[46] The tribunal had jurisdiction over disputes concerning the interpretation or application of UNCLOS, but this UNCLOS dispute implicated the issue of whether Mauritius or the United Kingdom had sovereignty over the archipelago, an issue that fell outside the jurisdiction of the tribunal.[47]

In order to determine whether the dispute fell within its jurisdiction, the tribunal began by characterizing the dispute.[48] In making this evaluation, the tribunal observed:

> There is an extensive record, extending across a range of fora and instruments, documenting the Parties' dispute over sovereignty. . . . Moreover, . . . the consequences of a finding that the United Kingdom is not the coastal State extend well beyond the question of the validity of the MPA.[49]

As a result, the tribunal concluded that 'the Parties' dispute . . . is properly characterized as relating to sovereignty over the Chagos Archipelago',[50] such that the tribunal did not have jurisdiction over Mauritius's first submission.[51]

At first glance, one might consider that the decision was consistent with the doctrine of indispensable issues. Since the determination of the 'coastal State' within the meaning of UNCLOS required a prerequisite determination on the sovereignty issue, the tribunal could not exercise its jurisdiction. Nevertheless, as seen in the quote excerpted above, the tribunal relied not on this 'prerequisite determination' analysis, but rather on the historical record of the dispute and the consequences of its decision to find that it did not have jurisdiction. Moreover, in *obiter dicta*, the tribunal went on to note that if the dispute had been properly characterized as an UNCLOS dispute, then its jurisdiction would 'extend[] to making such . . . ancillary determinations of law as are necessary to resolve the dispute presented to it'.[52] Therefore, although the tribunal's disposition on Mauritius's first submission was consistent with the doctrine of indispensable issues, the tribunal's reasoning was inconsistent with the doctrine.

A second UNCLOS case that dealt with indispensable issues is *South China Sea*.[53] In this case, the Philippines asked an UNCLOS tribunal to declare that China had violated multiple UNCLOS provisions through its activities in the South China Sea. China, however, argued that the tribunal did not have jurisdiction because, *inter alia*, the 'essence of the subject-matter of the arbitration is the territorial sovereignty over maritime features in the South China Sea',[54] which generally falls

41 ibid.

42 See ibid para 295 (quoting *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain)* (Merits) [2001] ICJ Rep 40, para 204).

43 UNCLOS (n 29) art 3.

44 *Pedra Branca* (n 38) para 297.

45 ibid para 299.

46 *Chagos Marine Protected Area (Mauritius v UK)* (2015) PCA Case No 2011-03, para 203.

47 See Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (OUP 1987) 140; Bernard H Oxman, 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 394, 400; Irina Buga, 'Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals' (2012) 27 IJMCL 59, 68, 70-71.

48 See *Chagos Marine Protected Area* (n 46) paras 208, 211.

49 ibid para 211.

50 ibid para 212.

51 ibid para 221.

52 ibid para 220.

53 *South China Sea* (Merits) (n 5); *South China Sea* (Jurisdiction and Admissibility) (n 19).

54 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines' (7 December 2014) (Position Paper of China) para 3.

outside the jurisdiction of UNCLOS tribunals.[55]

In order to determine whether it had jurisdiction over the dispute, the tribunal held that it was required to 'identify the object of the claim'.[56] It then held:

> The Tribunal might consider that the Philippines' Submissions could be understood to relate to sovereignty if it were convinced that either (a) the resolution of the Philippines' claims would *require the Tribunal to first render a decision on sovereignty*, either expressly or implicitly; or (b) the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty.[57]

The tribunal found that neither of these two elements was true,[58] and therefore upheld its jurisdiction over the dispute.[59]

This holding was consistent with the doctrine of indispensable issues, as the adjudication of the Philippines' claims did not require a prerequisite determination on questions of sovereignty. Moreover, the tribunal's reasoning in many ways reflected the doctrine of indispensable issues. The tribunal first sought to 'identify the object of the claim', just like identifying the 'very subject-matter' of the decision. It then applied the test of whether the Philippines' claims would require it to 'first render a decision on sovereignty', not unlike making a prerequisite determination on sovereignty. Indeed, it expressly upheld its jurisdiction with respect to certain of the Philippines' claims because the exercise of such jurisdiction would 'not [be] dependent on a prior determination of sovereignty'.[60] Some differences, however, remain. The tribunal, for example, also examined the 'actual objective' of the Philippines' claims. And it furthermore held that the satisfaction of the 'prerequisite determination' test or the 'actual objective' test 'might' (not 'would') lead it to consider that the Philippines' submissions 'could be understood to relate to sovereignty' (not 'have sovereignty as its subject-matter').

3.2. Investment Law

Elements of the doctrine of indispensable issues may also be seen in two of the three Mexican sugar investor-State arbitrations. In 2001, Mexico imposed a 20% tax on the importation of any drink that used high fructose corn syrup as a sweetener.[61] In response, three U.S. investors—Archer Daniels Midland (*ADM v Mexico*),[62] Corn Products International (*CPI v Mexico*),[63] and Cargill (*Cargill v Mexico*)[64]—instituted arbitration proceedings against Mexico under Chapter XI of the North American Free Trade Agreement (NAFTA). In all three cases, Mexico argued, *inter alia*, that if the imposition of the tax breached its obligations under Chapter XI of NAFTA, the wrongfulness of this conduct could be precluded on the basis of countermeasures, since the United States had allegedly violated other provisions of NAFTA.[65] The question of indispensable issues arose because the tribunals had jurisdiction over the alleged violation of Chapter XI, but not over the alleged violation of other NAFTA provisions. As the *CPI v Mexico* tribunal noted:

> Mexico maintained that it was entitled to take countermeasures because the United States had violated [other] obligations under the NAFTA . . . . But the Tribunal . . . does not have jurisdiction to determine whether any provision of the NAFTA falling outside Chapter XI has been violated. How, then, can the Tribunal determine whether the HFCS tax was a response to *a prior violation of international law*? And if it cannot determine that this requirement of a lawful countermeasure is satisfied, how can it uphold Mexico's countermeasures defence?[66]

All three tribunals ultimately avoided the problem. The *ADM v Mexico* tribunal held that the other requirements for countermeasures were not met, so that in any case the tax was not a valid countermeasure.[67] And the *CPI v Mexico* and *Cargill v Mexico* tribunals held that, as

55 See n 47.

56 *South China Sea* (Jurisdiction and Admissibility) (n 19) para 150 (quoting *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457, para 30).

57 *South China Sea* (Jurisdiction and Admissibility) (n 19) para 153 (emphasis added).

58 ibid.

59 ibid.

60 ibid para 153; see *South China Sea* (Merits) (n 5) paras 545, 759, 927, 1045. Note that the tribunal upheld its jurisdiction based on this abstract, logical analysis, rather than through an interpretation of Article 298(1)(a)(i).

61 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v The United Mexican States*, ICSID Case No ARB(AF)/04/05, Award (21 November 2007) para 82.

62 *ADM v Mexico* (n 61).

63 *Corn Products International, Inc v The United Mexican States*, ICSID Case No ARB(AF)/04/01, Decision on Responsibility (15 January 2008).

64 *Cargill, Incorporated v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award (17 September 2008).

65 *ADM v Mexico* (n 61) paras 110, 124; *CPI v Mexico* (n 63) para 150; *Cargill v Mexico* (n 64) para 379.

66 *CPI v Mexico* (n 63) para 182 (emphasis added).

67 *ADM v Mexico* (n 61) paras 180, 182.

a general matter, Mexico could not invoke countermeasures against an investor in Chapter XI proceedings.[68]

In *obiter dicta*, however, the *ADM v Mexico* and *CPI v Mexico* tribunals appeared to support the doctrine of indispensable issues. The *ADM v Mexico* tribunal held that had the other requirements for countermeasures been satisfied, it would have to consider Mexico's request for a stay of the proceedings.[69] And the *CPI v Mexico* tribunal suggested that Mexico could not succeed on its countermeasures defense because Mexico had the burden of proof for establishing each of the requirements for countermeasures.[70] In both cases, the tribunals thus agreed that it would not be able to make an affirmative finding on Mexico's defense of countermeasures because doing so required a prerequisite determination on the lawfulness of the U.S. measures.

These two decisions, of course, are insufficient to establish a *jurisprudence constante*. And they arise from a context that is, for many reasons, distinguishable from the context of investments on disputed territory. Nevertheless, these two decisions reveal that even investment tribunals may refuse to make certain legal determinations when doing so would require them to render a prerequisite determination on a legal issue outside of their jurisdiction *ratione materiae*.

If this doctrine of indispensable issues is applied to claims concerning investments on disputed territory, the claims would likely be rendered inadmissible. The reason is that, since investment protections typically apply only on the 'territory' of the respondent State under the relevant IIA, the determination of sovereignty over the territory in question would be a necessary prerequisite to the determination of whether the investment on such territory is protected.

Although the status of the doctrine of indispensable issues is not well established in public international law generally, there are four reasons why the doctrine is particularly appropriate for investment tribunals, at least when compared to the ICJ and UNCLOS tribunals.

First, in the investment context, it is clear that the States party to the IIA never intended investment tribunals to make determinations on territorial sovereignty disputes. The principal function of investment tribunals is to settle investment disputes. It is now widely accepted that they can apply secondary rules of international law and take into account primary rules of international law to aid in its settlement of these disputes.[71] But investment tribunals were never intended to make determinations on territorial sovereignty disputes. On the other hand, the ICJ has long settled territorial sovereignty disputes.[72] As for UNCLOS tribunals, some argue that the drafters had intended them to settle territorial disputes in the mixed dispute scenario.[73] And even those that disagree would acknowledge that the drafters intended them to solve maritime delimitation disputes, so extending their jurisdiction to resolve territorial disputes would not be as significant of a leap.

Second, in the investment context, it is not clear that the arbitrators would always have the requisite expertise for settling territorial disputes. Some arbitrators appointed for investment disputes have expertise in public international law; however, others come from a commercial background and have little familiarity with public international law. As a result, it may not be appropriate to have arbitrators appointed to settle an investment dispute also decide serious matters of public international law such as territorial sovereignty. Judges and arbitrators on the ICJ and UNCLOS tribunals, on the other hand, typically have significant background in

68 *CPI v Mexico* (n 63) para 161; *Cargill v Mexico* (n 64) paras 385, 429.

69 *ADM v Mexico* (n 61) paras 133.

70 *See CPI v Mexico* (n 63) para 189.

71 See *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability (27 October 1989) 95 ILR 184; *Mondev International Ltd v United States of America*, Award, ICSID Case No ARB(AF)/99/2 (11 October 2002) 42 ILM 85; *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) 43 ILM 133; *Azurix Corp v The Argentine Republic*, ICSID Case No ARB/01/12, Award (14 July 2006); Eric De Brabandere, *Investment Treaty Arbitration as Public International Law* (CUP 2016) 142; Moshe Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' in Pierre-Marie Dupuy and others (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 97, 99-105.

72 See eg *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2012] ICJ Rep 624; *Pedra Branca* (n 38); *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6; *Sovereignty over Certain Frontier Land (Belgium/Netherlands)* [1959] ICJ Rep 209.

73 See eg Gudmundur Eiriksson, *The International Tribunal for the Law of the Sea* (Brill 2000) 113; Alan E Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 ICLQ 37, 44; Philippe Gautier, 'The International Tribunal for the Law of the Sea: Activities in 2005' (2006) 5 Chinese JIL 381, 389-390; P Chandrasekhara Rao, 'Delimitation Disputes Under the United Nations Convention on the Law of the Sea: Settlement Procedures' in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes* (Brill 2007) 877, 891-92.

public international law.

Third, in the investment context, there would be greater questions concerning the legitimacy of the tribunal to make determinations on territorial disputes. Disputes over territorial sovereignty are matters that primarily concern the interests of States. The fact that typically only one member of the tribunal is appointed by a State may undermine the legitimacy of the tribunal to rule on such matters. By contrast, States indirectly nominate the judges of the ICJ[74] and ITLOS,[75] and usually appoint at least two arbitrators on UNCLOS arbitral tribunals.[76]

Fourth, if one were to accept the doctrine of indispensable parties for only territory disputed between two States (and not for territory disputed between a State and a non-State actor), then it would lead to the arguably unreasonable result that investment claims concerning investments on some disputed territory (disputed between two States) would be inadmissible, but claims concerning investments on other disputed territory (disputed between a State and a non-State actor) would be admissible. The doctrine of indispensable issues could be invoked in the latter case to also render those claims inadmissible.

These four reasons provide some support for why, even if the doctrine of indispensable issues is not widely recognized in public international law generally, it may be appropriate in the context of investment claims concerning investments on disputed territory.

4. Escape Mechanisms: The Crimea Arbitrations

As with many prominent legal issues that come before international courts and tribunals, there are often various 'escape mechanisms' that allow the court or tribunal to avoid addressing them. The availability of such mechanisms would depend on the specific case in question. For demonstrative purposes, this Section examines one line of cases: the Crimea investor-State arbitrations. It should be noted that the Crimea arbitrations arise from a particular factual situation; as a result, escape mechanisms available to the Crimea tribunals may not necessarily be available to other tribunals seized of disputes concerning investments on disputed territory.

As of August 2017, Ukrainian investors have instituted at least eight arbitrations against Russia under the Russia-Ukraine Bilateral Investment Treaty (BIT) for expropriating their investments in Crimea.[77] Article 1(1) of the BIT defines 'investment' as 'all kinds of property and intellectual values, which are put in by the investor of one Contracting Party on the *territory* of the other Contracting Party in conformity with the latter's legislation'.[78] It thus appears that the eight tribunals may have to confront the doctrines of indispensable parties and indispensable issues. Nevertheless, as of August 2017, five of the eight tribunals have already rendered confidential decisions on jurisdiction without

74 Statute of the International Court of Justice (opened for signature 26 June 1945, entered into force 24 October 1945) UKTS 67 (1946) (ICJ Statute) art 4(1).

75 UNCLOS (n 29) annex VI, art 4(1).

76 ibid annex VII, art 3.

77 The eight publicly known cases are: (1) *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v The Russian Federation*; (2) *PJSC CB PrivatBank and Finance Company Finilon LLC v The Russian Federation*; (3) *Limited Liability Company Lugzor, Limited Liability Company Libset, Limited Liability Company Ukrinterinvest, Public Joint Stock Company DniproAzot, Limited Liability Company Aberon Ltd v The Russian Federation*; (4) *Stabil LLC, Rubenor LLC, Rustel LLC, Novel-Estate LLC, PII Kirovograd-Nafta LLC, Crimea-Petrol LLC, Pirsan LLC, Trade-Trust LLC, Elefteria LLC, VKF Satek LLC, Stemv Group LLC v The Russian Federation*; (5) *PJSC Ukrnafta v The Russian Federation*; (6) *Everest Estate LLC et al v The Russian Federation*; (7) *NJSC Naftogaz of Ukraine (Ukraine) et al v The Russian Federation*; and (8) *Oschadbank v The Russian Federation*. For information on the first seven cases, see Permanent Court of Arbitration, 'Cases' <https://pca-cpa.org/en/cases/> accessed 12 September 2017. For information on the eighth case, see Luke Eric Peterson, 'In the First of a Possible Wave of BIT Claims by Ukraine State-owned Entities Against Russia, an UNCITRAL Tribunal Is Finalized' (2016) Inv Arb Rep <https://www.iareporter.com/articles/in-the-first-of-a-possible-wave-of-bit-claims-by-ukraine-state-owned-entities-against-russia-an-uncitral-tribunal-is-finalized/> accessed 12 September 2017; Lacey Yong, 'Russia faces US$2.6 Billion Claim Over Losses in Crimea' (2016) Global Arb Rev <http://globalarbitrationreview.com/article/1069603/russia-faces-ususd26-billion-claim-over-losses-in-crimea> accessed 12 September 2017. For information on a potential ninth case, *DTEK Krymenergo v The Russian Federation*, see IAReporter, 'Russia BIT Claims: Recent Developments in Arbitrations Against the Russian Federation' (2017) Inv Arb Rep <https://www.iareporter.com/articles/russia-bit-claims-recent-developments-in-arbitrations-against-the-russian-federation/> accessed 12 September 2017; Lacey Yong, 'More Crimea Claims Clear Threshold' (2017) Global Arb Rev <http://globalarbitrationreview.com/article/1143949/more-crimea-claims-clear-threshold> accessed 12 September 2017.

78 Agreement Between the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments (signed 27 November 1998, entered into force 27 January 2000) (Russia-Ukraine BIT) art 1(1) (emphasis added) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2233> accessed 12 September 2017.

dismissing their respective proceedings.[79] Although the tribunals may have considered the two doctrines, they could also simply have availed themselves of the aforementioned escape mechanisms. A non-exhaustive list of such mechanisms available to the Crimea tribunals is provided here.

First, the tribunals could determine that there is actually no legal dispute over Crimea. They could find that, as a factual matter, Ukraine has sovereignty over Crimea. The tribunals could base this 'factual' finding on determinations by the United Nations General Assembly,[80] the Venice Commission,[81] and the Chair of the Organization for Security and Co-operation in Europe[82] that the referendum is invalid. This would lead to the determination that Crimea is still the territory of Ukraine, thereby relieving Russia of responsibility under the Russia-Ukraine BIT for the alleged expropriations. From a broader policy perspective, proponents of such a factual finding may point out that the recognition of the existence of a legitimate legal dispute concerning sovereignty over Crimea would incentivize States to take unlawful actions to create legal 'disputes' in order to raise an objection based on the doctrines of indispensable parties and indispensable issues before international courts and tribunals, thereby undermining the efficient settlement of disputes.

Second, the tribunals could interpret Article 1(1) of the BIT to require only that the investment be in territory under the 'effective control' and/or 'jurisdiction and/or control' of Russia.[83] While this would go against the text of the BIT, it would arguably be in line with the object and purpose of the treaty.[84] Indeed, this is reportedly the line of argumentation adopted by Ukraine in its non-disputing party submissions to the various Crimea tribunals that have accepted such submissions.[85] The result would be that the tribunals would find that they may exercise jurisdiction over the investment claims, since it is undeniable that Russia has 'effective control' and/or 'jurisdiction and/or control' over Crimea.

Third, the tribunals could hold that the word 'territory' in Article 1(1) should be interpreted in reference to the time at which the BIT was concluded.[86] As the argument would go, Russia consented only to apply investment protection over its 'territory' as it existed at the time it signed the BIT. The tribunals would thus conclude that they may not exercise jurisdiction over the dispute. Nevertheless, this argument could contradict the customary 'moving treaty frontiers' rule.[87]

Fourth, along the same lines, the tribunals could

79 Permanent Court of Arbitration, Press Release, 'Arbitration Between Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky as Claimants and the Russian Federation: The Tribunal Issues Its Interim Award' (9 March 2017); Permanent Court of Arbitration, Press Release, 'Arbitration Between PJSC Privatbank and Finance Company Finilon LLC as Claimants and the Russian Federation: The Tribunal Issues Its Interim Award' (9 March 2017); Permanent Court of Arbitration, Press Release, 'Arbitration Between PJSC Ukrnafta as Claimant and the Russian Federation—Arbitration Between Stabil LLC and Ten Others as Claimants and the Russian Federation: The Tribunal Issues Its Awards on Jurisdiction' (4 July 2017); Permanent Court of Arbitration, Press Release, 'Arbitration Between Everest Estate LLC and Others as Claimants and the Russian Federation: The Tribunal Issues Its Decision on Jurisdiction' (5 April 2017).

80 UNGA Resolution 68/262, Territorial Integrity of Ukraine, UN Doc A/RES/68/262 (27 March 2014) para 6; see ibid para 5; see also Baiju S. Vasani and others, 'Crisis in Crimea: Is Your Foreign Investment There Protected By a Treaty?', 10 April 2014, Jones Day <http://www.jonesday.com/crisis-in-crimea-is-your-foreign-investment-there-protected-by-a-treaty-04-10-2014/> accessed 12 September 2017; Yaraslau Kryvoi and Maria Tsarova, 'Protecting Foreign Investors in Crimea: Is Investment Arbitration an Option?', 29 July 2014, CIS Arbitration Forum <http://www.cisarbitration.com/2014/07/29/protecting-foreign-investors-in-crimea-is-investment-arbitration-an-option/> accessed 12 September 2017.

81 European Commission for Democracy Through Law (Venice Commission), Opinion on 'Whether the Decision Taken By the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles', Opinion No 762/2014 (21 March 2014) para 27.

82 Organization for Security and Co-operation in Europe, 'OSCE Chair Says Crimean Referendum in its Current Form is Illegal and Calls for Alternative Ways to Address the Crimean Issue' (11 March 2014) <http://www.osce.org/cio/116313> accessed 12 September 2017.

83 See Richard Happ and Sebastian Wuschka, '*Horror Vacui*: Or Why Investment Treaties Should Apply to Illegally Annexed Territories' (2016) 33 Journal of International Arbitration 245, 260.

84 See ibid.

85 Yong, 'More Crimea Claims Clear Threshold' (n 77).

86 Kryvoi and Tsarova (n 80) ('Apparently when Russia entered into investment treaties Crimea was not controlled by it. Therefore Russia can argue that its consent did not cover the territory of Crimea.').

87 See Vienna Convention on Succession of States in Respect of Treaties (opened for signature 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3. Commentators and at least one tribunal agree that this principle reflects customary international law. See eg *Sanum Investments v Laos* (Jurisdiction) (2013), PCA Case No 2013-13, para 221; Gerhard Hafner and Gregor Novak, 'State Succession in Respect of Treaties' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 396, 399; Mustafa Kamil Yasseen, 'La Convention de Vienne sur la Succession d'Etats en Matière de Traités' ['Vienna Convention on Succession of States in Respect of Treaties'] (1978) 24 AFDI 59, 92.

emphasize that Article 1(1) requires that the investment be '*put in* by the investor of one Contracting Party *on the territory* of the other Contracting Party *in conformity with the latter's legislation*'.[88] Accordingly, regardless of which State currently has sovereignty over Crimea, the investments were originally put in by the Ukrainian investors on the territory of Ukraine in conformity with Ukraine's legislation. Therefore, the tribunal would not have jurisdiction over the dispute.

Fifth, the tribunals could find that, despite the sovereignty dispute over Crimea, Russia is estopped from asserting that Crimea does not constitute part of its 'territory' given its consistent behaviour over the past few years in treating Crimea as part of its territory. Nevertheless, such a holding may contravene the principle that the tribunal should *proprio motu* consider whether it has jurisdiction over the dispute, and not depend solely on the objections of the parties.[89]

Beyond these possibilities, the tribunals could come up with other ways to find or decline jurisdiction while avoiding the doctrines of indispensable parties and indispensable issues,[90] and, of course, each of the tribunals could rely on different grounds for making its decision. Therefore, although the application of the doctrines of indispensable parties and indispensable issues may lead to certain results, it is very possible that they may not be applied at all in these cases.

88 Russia-Ukraine BIT (n 78) art 1(1) (emphasis added); see Sergejs Dilevka, 'Arbitration Claims by Ukrainian Investors under the Russia-Ukraine BIT: Between Crimea and a Hard Place?', 17 February 2016, CIS Arbitration <http://www.cisarbitration.com/2016/02/17/arbitration-claims-by-ukrainian-investors-under-the-russia-ukraine-bit-between-crimea-and-a-hard-place/> accessed 12 September 2017; Timur Bondaryev and others, 'Protecting Investments in Crimea: Does Ukrainian or Russian Law Apply?' (2015) 44 International Law News 14, 16.

89 See *Jurisdiction of the ICAO Council* (n 25) para 13; *Micula v Romania* (n 25) para 65; Vasani and Foden (n 25) 271; Grabowski (n 25) 289.

90 For example, one team of authors asserts that, following the case of *Berschader v Russia*, the tribunals could decline jurisdiction by holding that there is only a dispute with respect to the fact of expropriation, whereas Article 9(1) of the BIT only gives jurisdiction to the tribunals for disputes 'arising in connection with investments, including disputes related to the amount, terms or compensation payment procedure envisaged in Article 5'. Bondaryev and others (n 88) 17 (quoting Russia-Ukraine BIT (n 78) art 9(1)). See also Ofilio J Mayorga, 'Occupants, Beware of BITs: Applicability of Investment Treaties to Occupied Territories' (2017) 19 Palestine YBIL (forthcoming).

5. Final conclusions

In conclusion, it is not contended that investment tribunals *must* or even *should* apply the doctrines of indispensable parties and indispensable issues to disputes concerning investments on disputed territory. This is particularly the case for the doctrine of indispensable issues because, as emphasized earlier, the author is not necessarily of the opinion that such a doctrine exists or should exist in international law. Nevertheless, it is the hope of the author that investment tribunals at least *consider* the applicability of these two doctrines. If applied in an appropriate manner, they could serve as an appropriate means of regulating the jurisdiction *ratione personae* and jurisdiction *ratione materiae* of investment tribunals.

Notably, the two doctrines may also be applied by other international courts and tribunals that may similarly be asked to make a determination on a sovereignty dispute prior to settling a dispute of another subject-matter. For example, Article 12(2) of the Rome Statute of the International Criminal Court (ICC) provides that 'the Court may exercise its jurisdiction if . . . [t]he State on the *territory* of which the conduct in question occurred [is Party to this Statute]'.[91] As another example, Article 10 of the Chicago Convention provides that 'every aircraft which enters the *territory* of a contracting State shall, if the regulations of that State so require, land at an airport designated by that State for the purpose of customs and other examination'.[92] As a third example, Article 72(2) of the FIFA Statutes provide that '[m]ember associations and their clubs may not play on the *territory* of another member association without the latter's approval'.[93] In all of these cases, if a court or tribunal has jurisdiction over a dispute concerning the application of the provision in question in disputed territory, it may have to make a prerequisite determination on the sovereignty dispute. The doctrines of indispensable parties and indispensable issues could potentially bar

91 Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 12(2) (emphasis added).

92 Convention on International Civil Aviation (signed 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (Chicago Convention) art 10 (emphasis added).

93 FIFA Statutes: Regulations Governing the Application of the Statutes (May 2008) art 72(2) (emphasis added) <https://resources.fifa.com/mm/document/affederation/generic/01/09/75/14/fifa_statutes_072008_en.pdf> accessed 12 September 2017.

the court or tribunal from exercising jurisdiction over such cases.

The key takeaway is that international courts and tribunals must not go beyond the limited scope of their jurisdiction. Staying within the powers conferred upon them is critical not only for the legitimacy of their decisions, but also for the overarching stability of the dispute settlement system of the international legal order. It is thus the hope of the author that, at the very least, investment tribunals seized of disputes concerning investments on disputed territories consider applying the doctrines of indispensable parties and indispensable issues.

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The Influence of General Exceptions on the Interpretation of National Treatment in International Investment Law

A influência das exceções gerais na interpretação do tratamento nacional no direito internacional dos investimentos

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The Influence of General Exceptions on the Interpretation of National Treatment in International Investment Law*

A influência das exceções gerais na interpretação do tratamento nacional no direito internacional dos investimentos

Louis-Marie Chauvel**

Abstract

Recent International Investment Agreements have incorporated General Exceptions similar to GATT Article XX in order to balance the respect of National Treatment and protection of States' right to regulate. The purpose of this article is to determine if these exceptions are a suitable choice in order to achieve this objective or if another option would be preferable. We first established that General Exceptions are operative exceptions and not interpretative statements. This allowed to assess their effect on the interpretation of national treatment and we managed to prove their potentially detrimental effect on the right to regulate. Then, we searched for other means to interpret National Treatment compatible with general exceptions but none appears to be really effective in achieving the purpose to balance protection of investments and State's right to regulate. As a consequence, a final study for other treaty wording achieving the stated objective allows to conclude that the most suitable choice would be to codify selected arbitral award allowing to take into account public policy objectives to determine if two investors are in same circumstances, therefore securing the contemplated balance.

Keywords: International investment law, international investment agreements, international trade law, general exceptions, national treatment, right to regulate.

Resumo

Os recentes acordos internacionais de investimento incorporaram exceções gerais semelhantes ao artigo XX do GATT com o intuito de equilibrar o respeito do Tratamento nacional e a proteção do direito dos Estados de regular. O objetivo deste artigo é determinar se essas exceções são uma escolha adequada para alcançar esse objetivo ou se outra opção seria preferível. Primeiro, estabelecemos que as exceções gerais são exceções operacionais e não declarações interpretativas. Isso permitiu avaliar seu efeito sobre a interpretação do tratamento nacional e conseguimos provar o seu potencial efeito prejudicial sobre o direito de regular. Logo, procuramos outros meios

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para interpretar o Tratamento Nacional de maneira compatível com as exceções gerais, mas nenhum parece ser realmente efetivo na realização do objetivo de equilibrar a proteção dos investimentos e o direito do Estado de regulamentar. Como consequência, um estudo final de outras provisões de tratados alcançando o objetivo declarado permite concluir que a escolha mais adequada seria codificar determinadas sentenças arbitrais de forma a poder levar em consideração os objetivos de políticas públicas para determinar se dois investidores estão nas mesmas circunstâncias, garantindo assim o previsto equilíbrio.

Palavras-chave: exceções gerais; direito de regular; tratamento nacional

1. Introduction

National Treatment (NT) has been a central piece in both the International Trade Law (ITL) and International Investment Law (IIL) systems. However, as several authors have detailed,[1] this standard is applied differently in these two fields of International Law. This is due to differences in each field's law making process and the concept's respective purpose and history in each of these domains. The differences in application are also due to significant differences between Trade and Investments themselves.

IIL and ITL have different purposes and organizations.[2] ITL is made to liberalize the streams of goods and services worldwide by the exchange of tariff concessions and other provisions reducing barriers to trade.[3] It is governed by a multilateral organization: World Trade Organisation (WTO). It is enforced by a multilateral mechanism, the WTO Dispute Settlement Body (DSB) which can authorize retaliation by one state on another. Disputes are therefore only State-to-State disputes. As Pauwelyn and DiMascio summarize: "the trade regime is about overall welfare, efficiency, liberalization, state-to-state exchanges of market access, and trade opportunities - not individual rights".[4]

Meanwhile, IIL has a different objective, it provides protection to investors that are present[5] in the territory of the other contracting State. These investors can get enforcement of these protection through Investor-State Dispute Settlement (ISDS) provided for in most of the more than 3,000 International Investment Agreements (IIAs) currently in force. These arbitral mechanisms can make the host state liable for reparation if the investor has suffered losses from a breach of the protections provided for in the agreement by the host State.

Therefore, while ITL is headed to liberalize the exchange of goods and services worldwide, IIL is made to protect and give more predictability to investors from both parties by granting them rights in the territory of the other Party. These differences have consequences on NT provisions and analysis under both regimes.

Because of the differences of purpose between ITL and IIL, NT has also different objectives in each of these regimes. NT in the ITL frame has a double role[6].

1 DIMASCIO N. and PAUWELYN J. "Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?", 2008, vol.102, n°1 American Journal of International Law, p.48; KURTZ J., "The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents", 2009, vol. 20, n°3 EJIL, p.749; DIEBOLD N., "Non-Discrimination and the Pillars of International Economic Law – Comparative Analysis and Building Coherency", Society for International Economic Law, Second Biennial Global Conference, July 8-10 2010, SIEL Working Paper No 2010/24, online, SSRN, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632927> ; HOWSE R. and CHALAMISH E., "The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz", 2010, vol.20 n°44 EJIL, p.1087; KURTZ J. "The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents: A rejoinder to Robert Howse and Efraim Chalamish", 2010, vol. 20, n°4 EJIL, p.1095; WEILER T.J., "Treatment No Less Favorable Provisions Within the Context of International Investment Law: "Kindly Please Check Your International Trade Law Conceptions at the Door.", 2014, vol.12, n°1, Santa Clara Int'L L., p.77.

2 DIMASCIO N. and PAUWELYN J. *supra* note 1 at pp.53-8.

3 General Agreement on Tariffs and Trade, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 194 [hereinafter GATT], The Preamble of the GATT of 1947 exposes this liberalization purpose: "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce" (para. 3), being a way to "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods" (para. 2).

4 DIMASCIO N. and PAUWELYN J. *supra* note 1 at p.54.

5 In some treaties, NT also applies to investors that are seeking to invest in the host State. These treaties apply NT pre-establishment by referring to establishment and acquisition in the list of operations covered by the clause. This has been mainly found in treaties by Canada and the United States: See DOLZER R. and SCHREUER C., *Principles of International Investment Law, 2nd edition*, 2012, Oxford : Oxford University Press, at p. 89.

6 DIMASCIO N. and PAUWELYN J., *supra* note 1, at pp.59-60 ; KURTZ J. "The Use and Abuse of WTO Law in Investor-State Ar-

First, it prevents States from reducing the value of their tariff concessions by the use of internal restrictions. Second, it prevents protectionism, as described by the Appellate Body (AB):

"The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production"'[7]

The purpose of NT in IIL is different. This provision is part of several protections provided to the investor. At first, it was not the most significant one. Indeed, in the 1960's, when the first IIAs were concluded, there was an opposition between developing and developed countries. The first ones, mostly importers of investments, relied on Carlos Calvo's doctrine and wanted to afford only "National Treatment" to foreign investors.[8] Developed States, hence, integrated in the first BITs absolute protections as the principle of compensation for expropriation and Fair and Equitable Treatment. Their idea was that a minimum standard of treatment existed towards foreign investors, even if the host states did not provide such treatment to its own nationals. Therefore, NT was in the first place seen as a minimal protection. However, with the conclusion of IIAs between developed States since NAFTA[9] and the higher level of treatment accorded to national investors in developed States, NT has become a more prominent standard and allows to create a level playing field.[10]

These different objectives resulted in different treaty wordings and interpretations.

IIAs usually contain a NT provision as follows:

"Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[11]

NT has been interpreted by arbitral tribunals through a three-step analysis. First, tribunals look for the existence of "like circumstances". While doing this analysis, most tribunals have required the national investor and the foreign investor to be in a competitive relationship.[12]

Second, the investor has to bring the proof that it has received a less favorable treatment than an investor in like circumstances.[13]

Third, if there has been a "less favorable treatment", the State has the possibility to bring the proof that the difference of treatment is justified by a legitimate policy objective. Such an objective would exclude the fact that the National Investor and the foreign one are in like circumstances and as a consequence exclude a breach of NT.[14]

NT in ITL is based on a different treaty language and has received a different interpretation by the AB of the WTO.

NT is embodied in GATT (General Agreement on Tariffs and Trade) Article III. Article III.4 provides that:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

Contrary to the provisions present in most IIAs, Article III.1 provides for an indication on the purpose of the NT provision:

"The contracting parties recognize that internal

bitration: Competition and its Discontents", *supra* note 1, at p.753.

7 Appellate Body Report, *Japan- Taxes on Alcoholic Beverages* (hereinafter *Japan – Alcoholic Beverages II*), WT/DS8/AB/R, WT/DS10/AB/R, & WT/DS 11 /AB/R, adopted November 1, 1996, at p.17.

8 CALVO C., *Derecho Internacional Teorico y Practico de Europa y* America, 1868.

9 North American Free Trade Agreement, Signed on December 17, 1992, Entered into force on January 1, 1994, vol. 32, ILM, p.605.

10 DIMASCIO N. and PAUWELYN J., *supra* note 1, at pp.67-8.

11 NAFTA, *supra* note 8, Article 1102 (1). Article 1102 (2) provides the same treatment for investments of the investors.

12 *SD Myers v Canada*, First Partial Award, November 13, 2000, ICSID Reports, vol.8, p.18 at para. 250; *Pope and Talbot v. Canada,* Award on the Merits of Phase 2, April 10, 2001, ICSID Reports, vol.7, p.102 at para. 78; *Feldman v. Mexico,* Award, December 16, 2002, ICSID Reports, vol.7, p.341 at para. 171; *ADF v. United States,* Award, January 9, 2003, at para. 155; *Archer Daniels Midland v. Mexico,* Award, November 21, 2007, at paras. 196-8; *Corn Products v. Mexico,* Decision on responsibility, January 15, 2008, at para.120.

13 *Pope and Talbot v. Canada, supra* note 11, at para 42 ; *Feldman v. Mexico, supra* note 11, at 173 ; *Archer Daniels Midland, supra* note 11, at para. 196.

14 *Pope and Talbot*, *supra* note 11, at para 78 ; *SD Myers v Canada, supra* note 11, at para 246 ; *Marvin Roy Feldman v Mexico,* Award, *supra* note 11, at para 184 ; *GAMI v Mexico,* Award, November 15, 2005, ICSID Report, vol.13, p.147, at para 114.

taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products *so as to afford protection to domestic production*." (emphasis added)

The interpretation has therefore been different compared to the one developed in IIL. It consists of three steps.

First, there is to identify what is the scope of "like products". This operation is based on a competitive analysis.[15] The AB has rejected the possibility to take into account a legitimate objective while determining the scope of "like products".[16] This is a rejection of an "aim and effect" analysis, an interpretation of "so as to afford protection" requiring an intention to discriminate from the State.[17] This interpretation is based on the textual differences between Article III.2 and article III.4 and the presence of GATT Article XX General Exceptions (GE), that would have made this approach redundant.[18]

The "so as to afford protection" part of Article III:1 has eventually been interpreted as requiring the measure to have the effect to treat imported products less favorably than the national ones.[19] This is taken into account in the second phase of the analysis: the establishment of a "less favorable treatment", by comparing the treatment accorded to the whole group of imported products to the one granted to the whole group of national products.[20]

The legitimate objectives are taken into account during a third step, under GATT Article XX, that contains an exhaustive list of purposes and conditions. Such exceptions do not exist in IIL.

However, with the development of a growing concern about the preservation of a regulatory space for the host State, several treaties and model Bilateral Investment Treaties (BITs) have incorporated a GE clause either identical or similar to GATT[21] Article XX.[22] This move has been started by Canada since 1994 and incorporated in its 2004 Model BIT.[23] If it is not widespread, GE have been recently included in each of the EU's IIAs[24], including in its proposal for the investment chapter of the Transatlantic Trade and Investment Partnership (TTIP)[25] that will serve as a pattern for its future IIAs negotiations[26]. This appropriation by the EU

15 Appellate Body Report, *European Communities – Measures Affecting Asbestos* (hereinafter *EC – Asbestos*), WT/DS135/R, adopted April 5, 2001, at para. 99.

16 Appellate Body Report, *Japan –Beverages II*, *supra* note 6, at 27-8.

17 HUDEC, R.E. "GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test", 1998, vol.32, n°3 The International Lawyer, p.619, at pp.632-3.

18 Appellate Body Report, *Japan – Alcoholic Beverages*, *supra* note 15, at 28-31.

19 Appellate Body Report, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (hereinafter *Korea – Beef*), WT/DS161/AB/R, WT/DS169/AB/R, adopted January 10, 2001, at paras. 135-7.

20 Appellate Body Report, *EC – Asbestos*, *supra* note 14, at para. 115

21 Foreign Affairs and International Trade Canada (DFAIT), Canadian FIPA Model, 20 May 2004, Article 10, online, Italaw < http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf >; Final CETA (Comprehensive Economic and Trade Agreement) Text, released February 29, 2016, online: European Commission < http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf >.

22 NEWCOMBE A., "The use of general exceptions in IIAs: increasing legitimacy or uncertainty?", in LÉVESQUE C. and DE MESTRAL A. (eds.), *Improving International Investment Agreements*, 2013, New York: Routledge, p.267, at p.268.

23 LEVESQUE C., "The Challenges of 'Marrying' Investment Liberalisation and Protection in the Canada-EU CETA" in BUNGENBERG M., REINISCH A. and TIETJE C., *EU and Investment Agreements – Open Questions and Remaining Challenges*, Hart Publishing, 2012, p.121, at p.139.

24 EU-Singapore Free Trade Agreement – Authentic text as of May 2015, negotiations concluded 14 October 2014, online, European Commission: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>, Article 9.3§3; Comprehensive Economic and Trade Agreement between Canada, of the one part, and EU and its Member States, on the other, online, European Union Council, <http://www.consilium.europa.eu/en/press/press-releases/2016/10/28-eu-canada-trade-agreement/>, Article 28.3; EU-Vietnam Free Trade Agreement, Agreed text as of January 2016, online, European Commission, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>, Part on Trade in Services, Investment and e-Commerce, Chapter VII.

25 European Commission, Draft text of TTIP Chapter II Investments, 12 June 2015, online, European Commission, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364>, to be read jointly with the whole proposal of the Commission regarding TTIP, Chapter VII, Article 7.1.

26 European Commission, Concept paper "Investment in TTIP and beyond - the path for reform Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court", 12 May 2015, online, European Commission, <chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>, at p.4. For studies on the IIA model of the EU, see HERVE A., "L'Union européenne comme acteur émergent du droit des investissements étrangers : pour le meilleur ou pour le pire?", CDE, 2015, pp. 179-234; TITI C., "International Investment Law and the European Union: Towards a New Generation of International In-

may spread such clauses, due to its growing prominent position and influence in IIL.[27]

In the treaties incorporating such exceptions, a new scheme is created, similar to the one existing between GATT Articles III and XX. Considering the differences between the two regimes described above, questions arise from the impact of these exceptions on the interpretation of NT in IIL, which could go against the very purpose of the inclusion of this type of provisions: balancing the governments' right to regulate and the protection of foreign investors.

To address these interrogations, this article first demonstrates that GE are operative exceptions and not interpretative statements (Part I), and that their inclusion may have consequences on the interpretation of NT in IIL, requiring to adopt mainly competitive analysis (Part II). Therefore, there is to find possibilities to interpret NT that permit to fill the gaping loophole for legitimate policy objectives (Part III). Even with these interpretations, it would be better to find other ways to achieve the same objective while drafting IIAs (Part IV).

2. General Exceptions Are Operative Exceptions and not Interpretative Statements

Authors have followed two different ways in discussing the consequences of the integration of GATT Article XX like Exceptions in the IIAs. On the one hand, some of them have described these as being interpretative statements that only inform the meaning of other provisions, without having much effect on NT itself.[28] On the other hand, some others have considered these exceptions as restricted and operative exceptions, therefore having effects on the interpretation of NT.[29]

We consider that GE in the shape of GATT Article XX cannot be seen as "interpretative statements". Some IIAs have incorporated interpretative statements as a way to encourage the general policy objectives to be taken into account in the application and interpretation of IIAs provisions, such as NT. For Instance, NAFTA Article 1114 (1) provides that:

"Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

This kind of interpretative statements are very different from the GE in the shape of GATT Article XX. GATT Article XX like exceptions have two specificities. First, they allow to exclude a breach of NT if the contested measure is necessary to achieve a closed list of public purposes.[30] These objectives are core values taken into account otherwise in IIAs as possible exceptions to the liability of the State. Indeed, protection of health and environment are considered as "Legitimate Public Welfare Objectives" excluding the existence of an expropriation even if a regulatory measure has wholly deprived the investor of its investment.[31]

Second, their application is conditioned by the requirements of the "chapeau", providing:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a dis-

vestment Agreements, 2015, vol. 26, n°3, EJIL, p. 639; GUICHARD-SULGER B., "Le nouveau modèle européen d'accords portant sur l'investissement étranger : Un modèle singulier et innovant?", Geneva Jean Monnet Working Paper, 2016, n°26/2016, online, CEJE, <http://www.ceje.ch/index.php/download_file/view/462/2714/>.

27 DE MESTRAL A., "The Evolving Role of the European Union in IIA treaty-making", in LÉVESQUE C. and DE MESTRAL A. (eds.), *Improving International Investment Agreements*, 2013, New York: Routledge, p.42; TITI C*., supra* note 26, at p. 661; CHAUVEL L.-M., "Normative Inlfuence of the European Union in the Field of International Investment Law, 2017, forthcoming;

28 SABANOGULLARI L., 'The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice', May 21 2015, Online: Investment Treaty News < https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/ >, Accessed on 29 May 2017.

29 LEVESQUE C., "Influences of the Canadian FIPA Model and the US Model BIT : NAFTA Chapter 11 and Beyond", 2006, vol.44, Can. Y.B. Int'l L., p.249; LEVESQUE C., "The Inclusion of GATT Article XX exceptions in IIAs: a potentially risky policy", in ECHANDI E. and SAUVÉ P., eds., *Prospects in International Investment Law and Policy* Cambridge: Cambridge University Press, 2013, p.363; NEWCOMBE A., *supra* note 21.

30 For instance, Canadian FIPA Model of 2004, *supra* note 20, at Article 10 (1) allows "measures necessary: (a) to protect human, animal or plant life or health; (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or (c) for the conservation of living or non-living exhaustible natural resources".

31 *Ibid.,* Annex B.13(1).

guised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures”[32]

Therefore, it appears that, by conditioning the exceptions implemented to protect the most core objectives of Public Policy according to IIAs, it establishes a new scheme in the interpretation of NT. The provision on NT becomes the rule and the exceptions are specifically laid down in a separate provision. The difference with interpretative statements has to be found there. Interpretative statements inform the interpretation of provisions, such as NT, to take into account some policy objectives. It is still possible to interpret the provisions more broadly, to take into account other interests.

Otherwise, GE require that the interpretation given of NT do not deprive them of their utility, by making them redundant.[33] Indeed, following the principle of effectiveness in treaty interpretation in International law, a treaty provision cannot be interpreted in a way that would deprive it of its utility, except if doing otherwise would go against the purpose of the treaty.[34]

The fact that the NT should be interpreted differently when Article XX like exceptions are incorporated in the Agreement has also been highlighted by Investment rulings. In the *SD Myers* award, the tribunal has found that the absence of GE in NAFTA Chapter 11 informed the way to interpret the NT provision itself.[35] While incorporating these exceptions in IIAs, the State Parties knew this interpretation. Therefore, the intention of the Parties are not to consider that GE are mere informative statements but standing operative exceptions to the NT Provision.

Hence, the inclusion of GE in IIAs requires that the criteria taken into account while determining the existence of a breach of NT do not have the effect to deprive them of their utility and objective in the Agreement. The analysis will then focus on the criteria taken into account by several arbitral tribunals to determine if they may deprive the GE of their useful effect.

3. The consequences on the Interpretation of National Treatment : A Competitive Analysis of the "Same circumstances" criterion

While interpreting the NT provision, an arbitral tribunal mainly takes into account three factors: legitimate policy objectives (A), nationality (B) of the investor and competitive relationship (C). The integration of GE will tend to reduce drastically the importance of the two first criteria, resulting in a mainly competitive analysis of NT.

3.1. A Drastic Diminution of the Role of Legitimate Policy Objectives in the Determination of "Like Circumstances"

As described earlier, in the determination of a breach of NT, Tribunals have taken into account the objective of the measure as part of the analysis of "like circumstances". Indeed, once a less favorable treatment has been shown, the burden of proof shifts. The State has then to demonstrate that this treatment is based on a "legitimate policy objective".[36] This would then allow to exclude the existence of "like circumstances" between a national investor and the foreign investor.[37]

Tribunals have admitted a very broad range of legitimate policy objectives. In the *GAMI* award, the tribunal has admitted the objective of "ensuring that the sugar industry was in the hands of solvent enterprises".[38] In *Pope and Talbot*, the relevant objective was "to implement

32 GATT, *supra* note 3, Article XX.

33 LEVESQUE C., "The Inclusion of GATT Article XX exceptions in IIAs: a potentially risky policy", *supra* note 23, at p.366.

34 DAILLIER P., FORTEAU M. and PELLET A., Droit international public, 8th edition, 2009, Paris: LGDJ, at pp.288-289. Interpreting NT in a way that would not deprive GE of their utility and therefore restricting the possibility of taking into account legitimate policy objectives would not go against the purpose of II As, which is often stated as follows: "Recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development", for the example of the Canada Model BIT (2004), inviting to interpret exceptions narrowly.

35 *SD Myers v Canada, supra* note 11, at para 246.

36 Arbitral tribunals have used different languages but have consistently taken these objectives into account: *Pope and Talbot,* Award on the Merits of Phase 2, *supra* note 11, at para 78 : « reasonable nexus to rational government policies" ; *SD Myers v Canada, supra* note 11, at para 246 : "legitimate policy measures that are pursued in a reasonable manner"; *Marvin Roy Feldman v Mexico,* Award, *supra* note 11 , at para 184, rely on the analysis developed by the tribunal in *Pope and Talbot*; *GAMI v Mexico, supra* note 13 , at para 114: "that measure was plausibly connected with a legitimate goal of policy".

37 The whole analysis is described by the tribunal in *Pope and Talbot*, *supra* note 11, at paras 78-9.

38 *GAMI v Mexico, supra* note 13, at para 114.

the SLA"[39] The SLA (Soft Lumber Agreement) was an 1996 Agreement between the United States of America (USA) and Canada to solve a trade dispute.[40]

Moreover, Tribunals have not required a stringent standard of effectiveness from the State concerning the means to achieve its objective. The tribunal in the *GAMI* case have admitted that:

"The Government may have been misguided. That is a matter of policy and politics. The Government may have been clumsy in its analysis of the relevant criteria for the cutoff line between candidates and non-candidates for expropriation. Its understanding of corporate finance may have been deficient. But ineffectiveness is not discrimination."[41]

This analysis of "like circumstances" in the NT provision seems to be inconsistent with the introduction of GE. As a matter of fact, a measure by a state that would have been found in breach of National Treatment interpreted this way could not meet the requirements of GATT Article XX like exceptions. Such a measure would not have been justified by any policy objective interpreted much more broadly than the closed list provided for in GATT Article XX. Moreover, it would not have met the only requirement of effectiveness described in the *GAMI* award: not to be *per se* discriminatory. Thus, it is more than unlikely that this measure could enter into the scope of the GE, as it would certainly neither pursue one of the objectives listed nor meet the requirement of "necessity" and the conditions of the *chapeau*. In conclusion, to take into account legitimate policy objectives under the analysis of "like circumstances" as described above would make the GE useless and would go against the principle of effectiveness in treaty interpretation as described above.

However, legitimate policy objectives could still be taken into account, although in a much more restrictive way. Lévesque suggests to rely on the decision of the AB in the *EC – Asbestos* case.[42] In this decision, the AB has considered it relevant to take into account criteria such as health risk in the analysis of the existence of "like products", but only to the extent that the health risk was relevant to "[assess] the competitive relationship in the marketplace between allegedly like products".[43] Otherwise, it is taken into account in the context of GE as "a sufficient basis for "adopting or enforcing" a WTO-inconsistent measure on the grounds of human health".[44] In the context of investments, this finding could be broaden from "like products" to "like circumstances". The risk affecting the competitive relationship could be due to the investment as a whole and not only to the items produced by the investor. However, the difference, for example in the polluting characteristics of the enterprise and the production, should affect the competition between a foreign investor and a national investor itself and not only require to take measures to protect the environment, such as rules on the management of specific wastes. Therefore, the line separating a health or environmental risk affecting competitive relationship and those serving as basis for a measure according to GATT Article XX like exceptions could be blurry.

To conclude, except for the circumstances where a factual differentiation is to be taken into account as affecting the competition relationship between two investors, legitimate policy objectives may not be taken into account in the determination of a breach of NT when GE are incorporated in the agreement as it would deprive those of their useful effect. Another consequence of the integration of such exceptions may be to restrain the role assigned to the nationality criterion.

3.2. The Incertitude on the Role of Nationality

The addition of GE questions the role of the nationality criterion in the determination of a breach of NT. Indeed, to take it into account while determining "like circumstances" would deprive these exceptions of their "effet utile" or useful effect (1) and taking it into account in the assessment of the existence of a "less favorable treatment" is ill-adapted to IIL (2).

3.2.1. The Impossibility to take into account Nationality While Determining the Existence of "Like Circumstances".

Most ISDS Tribunals consider the nationality of the investor as a criterion for the determination of "like cir-

39 *Pope and Talbot v Canada, supra* note 11, at para 103.

40 *Ibid.,* at para 18.

41 *GAMI v Mexico, supra* note 13, at para 114.

42 LEVESQUE C., "Influences of the Canadian FIPA Model and the US Model BIT : NAFTA Chapter 11 and Beyond", *supra* note 23, at p.275.

43 *EC – Asbestos, supra* note 14, at para 115.

44 *Ibid.*

cumstances". They have done so in two different ways.

First, some tribunals take the nationality of the investor into account while assessing the existence of a "legitimate policy objective". This objective is considered as a proof that the less favorable treatment lies on another basis than the nationality of the investor.[45]

Second, tribunals have considered that "like circumstances" would require the use of the closest national comparator available.[46] That means a comparator that would be in the exact same circumstances as the foreign investor but for their nationality.[47] If there is no national identical comparator, these tribunals have accepted to use the same analysis as the one described above.[48]

These two ways, in fact, end in the same result. Indeed, foreign investors are only found "in like circumstances" with a national investor if there is no other difference between them than their nationality.

Thus, this use of nationality is inconsistent with GE. Indeed, a measure that would have been found in breach of the NT would have imposed "less favorable treatment" to a foreign investor than to a national investor in the exact same circumstances except for their nationality. Therefore, there would be no factual basis that could justify a difference of treatment under the requirements of GATT Article XX like exceptions. For instance, it would not be possible to justify a differential treatment as necessary to protect public health if the two investors are in the exact same circumstances, the activity of one of them being no more dangerous than the activity of the other.

Therefore, this use of the criterion of nationality is not compatible with the inclusion of GATT Article XX like exceptions and two investors may be "in like circumstances" even if they have other differences than their sole nationality.

As a consequence, any difference of treatment, even if it were not based on the nationality of the foreign investor, could amount to a breach of NT. Another possible way to understand the nationality criterion would be to rely on ITL, that takes into account nationality in the analysis of the "less favorable treatment".

3.2.2. The Role of Nationality in the Determination of the Existence of a "Less Favorable Treatment".

In ITL, nationality has been taken into account in a different way. Once the existence of "like products" has been identified, "a complaining Member must still establish that the measure accords to the group of "like" imported products "less favourable treatment" than it accords to the group of "like" domestic products".[49] This analysis would not make GE without object as demonstrates its use in a GATT context but it seems, however, very unsatisfactory in an IIL context in three aspects: it is based on one of the main differences between ITL and IIL NT provisions; it is not adapted to situations in which the claimant is an individual; and would also be very unsatisfactory for the host State.

First, the analysis of nationality in ITL is based on the requirements of Article III (1) that the less favorable treatment must be accorded "so as to afford protection to domestic production".[50] Meanwhile, IIAs do not contain such requirement. Therefore, there is no textual basis to justify such an analysis as a requirement to find a breach of NT in IIL.[51] It has been used, however, in the *Corn Products* case.[52] As a consequence, even if this analysis is not mandated by the provision on NT, some tribunals could decide to rely on it if the nationality of the investor could not be taken into account otherwise.

Second, even if this analysis were applied, it would have many disadvantages for the investor in an IIL context because of the mere characteristics of investment

45 *Pope and Talbot v Canada, supra* note 11, at para 78: "Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies."; *GAMI v Mexico*, *supra* note 13, at para 215: the analysis of the tribunal searches to determine if the difference of treatment was based on the nationality of the investors, as it concludes: "that GAMI has failed to demonstrate that the measures it invokes 'resulted from or have any connection to GAMI's participation in GAM; nor were they geared towards treating GAM in a different mode because of GAMI's participation in their social capital'" knowing that GAMI was a foreign shareholder of GAM; *Marvin Roy Feldman v Mexico, supra* note 11, the decision relies on the findings or the *Pope and Talbot* award, at para 184.

46 KURTZ J., *supra* note 1, at pp.765-9.

47 *Methanex v United States*, Award, August 3, 2005, ILM, vol.44, p.1345, at para.17 ; *Archer Daniel Midlands v Mexico, supra* note XXX, at 202.

48 *Ibid.*

49 *EC – Asbestos*, *supra* note 14, at para 100.

50 *Ibid.*

51 WEILER T.J., *supra* note 1 at p.102; KURTZ J., *supra* note 1, at p.753.

52 *Corn Products v Mexico*, *supra* note 11, at paras 132 and 138.

compared to trade and because the claimant is a private person.

The proof that the overall group of foreign products has been treated less favorably than the group of national products is quite easy to make. The nationality of products is determined by detailed rules of origin, and the volumes of exchanged goods is recorded by customs officials. The situation is different for investments. Indeed, once the scope of investors "in like circumstances" has been established, the investor will have to distinguish between national and foreign investors. But, the establishment of the nationality of an investor or an investment is difficult to make, as it can rely on different methodologies, as the nationality of shareholders, the incorporation of the enterprise or the place of the main seat.[53]

Then, the investor would have to bring the proof that the less favorable treatment has had a more important impact on foreign investors as a whole than on the group of National investors. Moreover, the question may be to know if this disproportion has to be determined on a proportion of the number of investors of each group, by a proportion of the overall production or even of the total income. These proofs also appear very difficult to make.

Furthermore, in IIL, the claims are brought by an investor and not by a State. This difference adds to the difficulties to bring the proof of a difference of treatment based on nationality in the analysis of the "less favorable treatment". Indeed, States dispose of large internal services with competence in Economy or Trade issues that make them able to conduct the type of analysis described above and necessary to bring a proof of a disproportionate impact on foreign investors or products. Moreover, as members of several International organizations, they have access to shared information, facilitating to gather the elements to prove the disproportion.[54] Investors, conversely, do not have such resources and it would make it even more difficult for them to bring the required proofs.

The tribunal in the *Pope and Talbot* case has taken into account the preceding arguments and therefore rejected this analysis in IIL:

"Simply to state this approach is to show how unwieldy it would be and how it would hamstring foreign owned investments seeking to vindicate their Article 1102 rights. Only in the simplest and most obvious cases of denial of national treatment could the complainant hope to make a case for recovery. The Tribunal is unwilling to take a step that would so weaken the provisions and objectives of NAFTA and, for the reasons stated, rejects Canada's disproportionate disadvantage test."[55]

However, this approach has been followed in the *Corn Products* award.[56] In this case, the claimant was successful to prove the existence of a breach of NT. But, the particular conditions of this case seem to amount to "the simplest and most obvious cases of denial of national treatment" referred to by the Tribunal in the *Pope and Talbot* award. In the case of *Corn Products*, the two industries, HFCS producers and Cane sugar producers were, for one, totally nationally owned and the other totally owned by foreign investors.[57] Moreover, a WTO panel had found that the contentious measure was discriminatory, as it imposed a tax for the use of HFCS in soft drinks whereas such a tax did not exist for cane sugar.[58] This measure was intentionally discriminatory as it was a countermeasure against the United States.[59]

This may have been much more difficult for the investor to prove if there had been no WTO Panel decision on discriminatory intent. In the same way, if the two industries had been partially owned by foreign and national investors, if an investor had produced both products or if an enterprise had been owned both by national and foreign shareholders, to bring a proof of a disproportionate disadvantage for the foreign investors would have been much more challenging.

Moreover, as noted by Pauwelyn and DiMascio, there would be no difference of treatment if the investor was the only foreign investor to receive less favorable treatment. He would indeed need to demonstrate that the measure affects most of the foreign investors.[60]

This analysis of nationality under the requirement

53 DOLZER R. and SCHREUER C., *supra* note 5, at p.47.

54 KURTZ J., "The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents", *supra* note 1, at pp.757-8.

55 *Pope and Talbot v Canada, supra* note 11, at para 72.

56 *Corn Products v Mexico, supra* note 11, at paras 132-42.

57 *Ibid.,* at para 132.

58 *Ibid.*, at para 47: *Mexico - Tax Measures on «Soft Drinks» and Other Beverages*, WT/DS308/AB/R, released on March 6, 2006 (Report cited in the award).

59 *Ibid.,* at para 137.

60 DIMASCIO N. and PAUWELYN J., *supra* note 1, at p.82.

of a "less favorable treatment" is also unsatisfactory for the host State. In ITL, a measure that accords less favorable treatment to the group of foreign products than to the group of national like products is considered as being discriminatory. This is justified by the fact that an import of goods is considered by the states as being more "negative" and they have incentives to put barriers to reduce these imports.[61] Therefore, the same analysis in IIL would mean that measures treating less favorably foreign investments than national ones, are presumed to be discriminatory treatment. However, the range of measures that apply to investors is way more important than those applied to products and as a consequence there might be a more important variety of justifications to accord a differential treatment. In addition, imports of investments are often seen as positive by the states as they provide jobs, cash flows, tax revenues, therefore it is more difficult to assume that the difference of treatment can be presumed as discriminatory.[62]

To take into account the nationality of the investor in the determination of "less favorable treatment" in a similar way than it is done in ITL would not deprive GE of their utility. However, there is no treaty basis to use this possibility and it would have, as described above, many side effects for both the investor and the State.

Tribunals, while taking a decision on NT in a treaty containing GE, would have a choice between two unsatisfying options as to take into account nationality as a basis for the less favorable treatment. First, they could choose not to take into account the nationality of the investor in the analysis of a breach of NT otherwise than to know if the claimant is entitled to bring a claim under the agreement. Secondly, they could take it into account in a similar way than in ITL, which reveals to have major side effects and to be ill-adapted to IIL. Therefore, the understanding of "same circumstances" should be mainly focused on a competition relationship.

3.3. The Compatibility of a Competitive Analysis

Although a competitive analysis between the foreign investor and its domestic comparator is not required in IIL according to treaty wording,[63] it has been consistently used by arbitral tribunals while determining if investors were in "like circumstances".[64]

Moreover, this analysis seems in fact necessary. Indeed, when it was not used in the *Occidental* case, the result was inconvenient.[65] The tribunal found exporters of flowers and exporters of oil as being in "like circumstances". As a consequence, a VAT refund refused to oil exporters but provided to flower or seafood exporters was found as being a "less favorable treatment" breaking NT obligation.[66]

Having accepted the relevance of a competitive analysis, it appears that it would not deprive GE of their useful effect. Competition is part of the analysis of NT under the GATT and has always been applied with the existence of the exceptions of GATT Article XX.

As a consequence, the inclusion of GATT Article XX like exceptions imposes changes on the analysis of NT. Legitimate policy objectives could no longer be taken into account, except in the restrictive way of *EC-Asbestos*. Moreover, nationality may only be taken into account in the determination of a "less favorable treatment" but this possibility appears to be very unsatisfactory in a IIL context. Therefore, the assessment of the existence of "like circumstances" would be mainly based on a competitive analysis, which could have major side effects.

4. Finding a Way to fill the Gaping Loophole for Legitimate Policy Objectives

A mainly competitive analysis of "like circumstances" with the only use of the GE to exclude the liability of the State would be a dramatic path for the right to regulate of the host State (A). However, an interpretation using the causation or impossibility analysis found in *Dominican Republic – Cigarettes* report of the AB could reduce these negative effects (B).

61 *Ibid.*, at 81-2.
62 *Ibid.*
63 KURTZ (J.), *supra* note 1, at p.756.

64 *Archer Daniel Midlands v. Mexico, supra* note 11, at paras. 196-8 ; *Corn Products v. Mexico, supra* note 11, at para.120 ; *ADF v. United States, supra* note 11, at para. 155 ; *Feldman v. Mexico, supra* note 11, at para. 171 ; *SD Myers v. Canada, supra* note 11, at para. 250.
65 *Occidental v. Ecuador,* Award, July 1, 2004, ICSID Reports, vol.12, p.156, at paras. 173-6.
66 KURTZ J. *supra* note 1 at pp.763-5.

4.1. The Mere Use of General Exceptions: A Possibly Dramatic Path for the Right to Regulate

With the only use of a competitive analysis, the host state would have to treat all investors in the same economic sector similarly. But, contrary to products, a very broad range of regulations are applied to investors and investments. Products imported in a State are affected by regulations on the entry of products, taxation of these products, and regulations on the products. It goes differently for investments. For instance, if an investment is an enterprise incorporated in the host State it is submitted to every law applied to enterprises in the country, like labor law, tax law or corporation law. Often, these laws provide for different ways to treat the enterprises in order to pursue legitimate policy objectives, what could amount to a violation of the NT obligation under IIL.

If we take the example of a law that applies a tax rate of 15% of the revenues on enterprises which annual revenue is less important than $ 1,000,000 (hereinafter referred to as case 1) and a 30% rate to enterprises with annual revenue more important than $ 1,000,000 (hereinafter referred to as case 2). In the event that two enterprises are in the same economic sector, one national in case 1 and a foreign in case 2, these two enterprises, being competitors, would be found as being "in like circumstances". But, the foreign one would get a 30% tax rate whereas the national would get a 15 % tax rate, which would amount to a "less favorable treatment" of the foreign investment and, consequently, to a breach of NT.

Therefore, in order to avoid being found in breach of NT, host States will have to organize their law regimes by economic sector as differences based on other criteria may result in a potential breach of NT, except for the laws pursuing one of the objectives of the GE and respecting the conditions of "necessity" and of the 'chapeau' of Article XX like exceptions.

In fact, the list of objectives which a measure can pursue under GATT Article XX is a very restrictive one, as it allows measures:

- To protect public morals
- to protect human, animal or plant life or health;
- relating to the importations or exportations of gold or silver;
- to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- measures relating to the products of prison labour;
- imposed for the protection of national treasures of artistic, historic or archaeological value;
- the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;
- restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;[67]

This list of objectives is indeed much more stringent than the objectives that have been taken into account in several arbitral decisions.[68] Even in the frame of ITL, it has been considered restrictive, although it is used to excuse differences of treatment for a much smaller ran-

67 This list is extracted from GATT Artcle XX.

68 See the examples listed *supra* p.6.

ge of measures.[69] However, this article could be interpreted a bit more broadly than in the context of trade law. Indeed, in ITL, the difference of treatment allowed under Article XX must be based on the product. That is to say, the product itself must present a health risk or endanger the preservation of natural resources, excluding health risk or consequences on animal life, for example, due to production methods.[70] In the context of IIL, NT is imposed to "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments".[71] Therefore, a difference of treatment could be justified not only because of an health or environmental risk created by the end product but because the way the investment operates presents more risks for environment or health than a national investor in "like circumstances". This would be, for instance, the case of two investors in "like circumstances" creating similar products, if one presents risks of contamination of water supplies and not the other, due to the way the two factories proceed.

However, even if a measure were justified in the light of the objectives listed in the GE, it would still have to meet the requirements of 'necessity' and the ones of the 'chapeau'.

Some treaties have extensively incorporated GATT article XX.[72] Conversely, others have adapted it. In the first case, measures must be "relating to" some of the objectives and necessary to protect others. Contrary to this, Canadian FIPA model has imposed a requirement of necessity for all the purposes of the GE, even when the GATT only requires these to "relate to" the objective.[73] The interpretation of "relating to" might be quite close to the requirement used by ISDS tribunals of a "reasonable nexus"[74] or "reasonable manner"[75] or "rational justification"[76].

It is different for the necessity test. It has been first interpreted by the AB in the *Korea – Beef* case. It has required, on its face, a *cost-benefits analysis*, demanding "a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports".[77] At the same time, it recognised that the State was free to fix its own level of protection.[78] Regan points the contradiction of these two requirements and explains that the real test is not a mere 'cost-benefits' analysis, which would require to weigh the purpose of the measure with its consequences on trade, allowing the tribunal to reject the very purpose of the measure.[79]

According to Regan, the analysis is rather different.[80] The panel accepts the level of protection required by the State but searches for alternative possibilities to achieve the same objective with less restriction on trade, except if the administrative costs of the alternatives appears to be unreasonable for the State.[81] Regan notes that this approach has been consistently used by the AB in the cases of *EC – Asbestos*[82], *US – Gambling*[83] and *Dominican Republic – Cigarettes*[84].[85]

As a consequence, any measure by the host State resulting in a difference of treatment between a national and a foreign investor in the same economic sector would have to be no more restrictive than necessary to achieve its objective in order not to constitute a breach of NT.

In addition, a measure would also have to meet the requirements of the 'chapeau' of GATT article XX. Therefore, it must "not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". This has been interpreted in the *Brazil – Retreated*

69 ZHOU W., '*US – Clove Cigarettes* and *US – Tuna II (Mexico)*: Implications for the Role of Regulatory Purpose under Article III:4 of the GATT' (2012) 15: 4 Journal of International Economic Law 1075, at 1112.

70 HUDEC R.E., *supra* note 16, at p.624.

71 NAFTA, *supra* note 10, article 1105.

72 Final CETA text, *supra* note 20, article 28.3 (2).

73 Canada FIPA Model (2004), *supra* note 20, article 10.

74 *Pope and Talbot v. Canada, supra* note 11, at para.78.

75 *SD Myers v. Canada, supra* note 11, at para.246.

76 *Feldman v. Mexico, supra* note 11, at para. 170.

77 *Korea – Beef, supra* note 18, at para. 164.

78 *Ibid.,* at para 176.

79 REGAN D.H., 'The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV : the myth of cost-benefit balancing',2007, vol.6, n°3, World Trade Review*,* p.347 at p.348.

80 *Ibid.* at pp.348-9.

81 *Korea – Beef, supra* note 18, at paras. 180-2.

82 *EC – Asbestos, supra* note 14,

83 Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/AB/R, adopted April 20, 2005.

84 Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sales of Cigarettes,* WT/DS302/AB/R, adopted May 19, 2005.

85 REGAN D.H., *supra* note 72, at p.350.

Tyres case.[86] In this case, Brazil imposed a ban on the importation of retreated tyres to prevent health risks. The measure presented two exceptions, one allowing the importation of these tyres from other countries of the MERCOSUR, to comply with MERCOSUR rules, another allowing Brazilians to retreat imported used tyres.[87] The AB found that these exceptions were "means of arbitrary and unjustifiable discrimination" because the rationales given for the exceptions were not related to the general objective of the measure.[88] As a consequence, any exception to the measure that would treat differently investors would have to be justified by the very purpose of the measure.

This could be very problematic if this path was followed in the context of investments as laws taken by the host state often take into account various objectives. For example, tax laws often receive exceptions in order to serve as an incentive for economic actors to adopt certain behaviors, making it difficult to be consistent with the conditions imposed by the 'chapeau'.

As a consequence, for a measure to be consistent with the NT clause, it would have to treat all investors of the same economic sector similarly. If these were treated differently, the difference would have to be necessary to pursue one of the objectives listed in the GE, meaning that no alternative less restrictive for the foreign investor would be reasonably available. Moreover, any exception or derogation to the measure should be justified by a rationale relating to the objective of the measure itself. Hence, it would be very difficult for a measure by the host state to stick to the line of compliance with NT provision. Moreover, in ITL a State found in breach of NT only has to ensure compliance in the future, while in IIL, the State would be liable to provide a reparation to the investor, thus making it impossible to experiment measures to find if they are consistent with the GE and NT. This may result in more regulatory chill.[89] However, ISDS tribunal could use the causation or impossibility analysis in order to make the interpretation of NT more protective of the Right to regulate of the State.

4.2. Using Causation or Impossibility Analysis: Relying on *Dominican Republic – Cigarettes*

According to the reasoning exposed in the previous development, the example of the differential tax between small and bigger businesses given earlier would be in breach of NT. The purpose, to adapt the amount of taxes to the capacity to contribute of each enterprise, is not covered by the list of purposes of GATT Article XX.

However, by relying on the findings of the AB in *Dominican Republic - Cigarettes*[90]*,* it could be possible to develop an analysis that would avoid some of the drawbacks caused by the mere use of GE.

In this case, Dominican Republic imposed a bond of the same amount to every producers and importers of cigarettes. Among other arguments to challenge the measure on the ground of NT. Honduras advanced that National Producers had more shares of the market than foreign importers, making the per-unit amount of the bond heavier for imported cigarettes than for nationally produced, and resulting in a "less favorable treatment" of imported cigarettes.[91] The AB rejected this allegation on the basis that the difference in treatment was only "explained by the fact that the importer of Honduran cigarettes has a smaller market share than two domestic producers".[92]

Zhou suggest two interpretations of this finding.[93] First, this could be seen as a causation analysis implying that "a case of less favorable treatment would be established as long as a contested measure itself is found to be responsible for an alleged disparate impact", excluding less favorable treatment merely due to the facts of the case.[94] Using this analysis could exclude the breach of NT by the taxation measure given as an example above. Indeed, the differential treatment is not created by the measure itself but by the fact that the foreign investor has more important revenues than the national one.

Second, it could be seen as an impossibility analysis. It would mean that a difference of treatment would be contrary to NT in the event that the foreign investor could never get the better treatment accorded to the

86 Panel Report, *Brazil – Measures Affecting Imports of Retreated Tyres* (hereinafter *Brazil – Retreated Tyres*), WT/DS332/R, Appellate Body Report, WT/DS332/AB/R, adopted December 17, 2007.

87 ZHOU W., *supra* note 62, at p.1098.

88 *Brazil – Retreated Tyres,* Appellate Body Report, *supra* note 80.

89 DIMASCIO N. and PAUWELYN J., *supra* note 1, at p.81.

90 *Dominican Republic – Cigarettes, supra* note 78.

91 *Ibid.,* at para. 96.

92 *Ibid.*

93 ZHOU W., *supra* note 62, at pp.1087-8.

94 *Ibid.*

national one.[95] This would also exclude the breach in the former example. The foreign investor could get the same treatment as the national investor as soon as its annual revenue would be less important than $1,000,000. Conversely, the national investor could get the same treatment as the foreign investor if its revenue rose above the same bar. This could be a way to exclude breaches of NT when the State applies general measures providing differential treatments on the basis of factual differences as soon as the factual conditions of the investor are susceptible to evolve, making it to be treated differently.

However, there are some reasons to think that this test would possibly not be applicable to the example given and to IIL more generally.

First, in the *Dominican Republic – Cigarettes* case, the measure of the State did not create any category and the difference of treatment was merely due to a factual difference. Therefore, the test established by the AB could be not applicable to measures creating different categories, even if these are based on mere factual differences.

Second, the analysis is based on the 'so as to afford protection to domestic production' provision of GATT Article III:1 as interpreted by the AB in the *EC-Asbestos*[96] and the necessity of a detrimental effect on the conditions of competition of the national investor in *Korea – Beef* cases[97].[98] The conclusion of the analysis was that, as the difference of treatment resulted from factual differences, the difference of the bond per-unit did "not depend on the foreign origin of the imported cigarettes".[99] However, as explained above,[100] NT in IIL does not provide such "so as to afford protection" language and therefore does not require the difference of treatment to be based on nationality, what could exclude the use of the causation or impossibility analysis, which purpose is to demonstrate that the difference of treatment is not linked to the nationality of the investor.

Therefore, the mere use of GE may have major detrimental effects in the frame of IIL, reducing drastically the right to regulate of the State without being found liable for a breach of NT, conversely to its objective. However, there may be other ways to draft IIAs to pursue the same objective, without the risk to experience the detrimental effects described above.

5. Finding Better Ways to Achieve the Same Objective

In order to find better ways to achieve the same objective than the inclusion of GATT Article XX exceptions in IIAs, there is to determine exactly this objective (A). Two possible ways are to use the analysis developed under the Agreement on Technical Barriers to Trade (TBT Agreement)[101] (B) or to codify some selected arbitral awards (C).

5.1. The Objective of GATT Article XX like Exceptions: Balancing Regulatory and Investor's Interests

The inclusion of GE serves a couple of objectives:[102] First, to provide written exceptions so as to avoid that an arbitral tribunal would only base a breach of NT clause on the fact that a foreign investor has received "less favorable treatment" than a national "in like circumstances" without taking into account any legitimate policy objective that would justify the measure.[103]

A second objective is also to establish precisely the balance between the interests of the investor and the need to pursue legitimate policy objective through the requirements of necessity and the conditions of the 'chapeau', avoiding the risk that legitimate policy objectives would be accepted too broadly.

But, as described above, the use of GE may be far too stringent for a State's right to regulate, and therefore detrimental to the first objective. Nonetheless, the establishment of this balance between the right to regulate of the States and the protection of investors is a subject of major importance and must preferably be determi-

95 *Ibid.,* at 1088.

96 *EC – Asbestos, supra* note 14, at para. 100.

97 *Korea – Beef, supra* note 18, at para. 137.

98 *Dominican Republic – Cigarettes, supra* note 78, at paras. 91-92, 96.

99 *Ibid.,* at para. 96.

100 See *supra* The Incertitude on the Remaining Role of Nationality, p.7.

101 Agreement on Technical Barriers to Trade, 1868 *U.N.T.S.* 120 (referred to as TBT Agreement).

102 NEWCOMBE A., *supra* note 21, at p.268.

103 For example, the tribunal in *Corn Products v. Mexico, supra* note 11, considered that it did not have to search for a legitimate policy objective that could have justified the difference of treatment., at para. 142.

ned in the treaties than by arbitrators.[104] It is therefore necessary to find other ways to achieve this objective.

5.2. Analysis of "less favorable treatment" under TBT Agreement

A first way to protect a broad range of public policy objectives while balancing the interests of both the investors and the host State could be to import in BITs the NT clause of TBT article 2:

> "2.1. Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.
>
> 1.2. Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create."

This provision has been interpreted by the AB in the cases *US – Clove Cigarettes*[105] and *US – Tuna II*[106]. In the *US-Clove Cigarettes* case, the AB differentiated the analysis of NT under the TBT agreement from the one developed under GATT.

It first established that the analysis of "like products" only serves to determine "the scope of products that should be compared to establish whether less favorable treatment is being accorded to imported products", therefore not changing the analysis from the one developed under GATT Article III:4.[107]

Nevertheless, the AB, relying on the linkage between article 2.1 and article 2.2 and the preamble of the TBT agreement considered that a legitimate objective should be taken into account to determine if the imported product has received less favorable treatment. It considered that article 2.2 accords the possibility to create obstacles to international trade if these are "not […] more trade restrictive than necessary to fulfil a legitimate policy objective". As a consequence, if the analysis of differential treatment did not take into account the legitimate objective and forbid any less favorable treatment, article 2.2 would be deprived of its *effet utile*.[108] Also taking into account the preamble of the agreement[109] and the context given by other WTO Agreements[110], the AB concluded that the less favorable treatment under TBT should be considered through a two-stage analysis. First, there is to search for a less favorable treatment of the group of imported products, compared to the one accorded to the group of national products. Second, there is to "analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products".[111] In the event that legitimate objective would justify the measure, it would have to respect the conditions of article 2.2. The same analysis was followed by the AB in *US – Tuna II*.[112]

In its reports, the AB has also interpreted the meaning of the necessity requirement of Article 2.2. It has retained an interpretation consistent with the one developed under GATT,[113] considering the liability would be excluded if a less-restrictive, reasonably available alternative that would make an equivalent contribution to the objective, as described above.[114] Moreover, it stated that the burden of proof is on the claimant, who has to bring a *prima facie* proof that the measure is not necessary to achieve its objective by proposing an alternative consistent with the criteria detailed above[115]. If the claimant succeeds to bring that proof, the burden shifts to the respondent to prove that the measure is necessary, by demonstrating "for example, that the alternative measure identified by the complainant is not, in fact, "reasonably available", is not less trade restrictive, or does not make an equivalent contribution to the achievement of the relevant legitimate objective."[116]

Using this treaty language while drafting NT provisions of IIAs would allow to meet the two objectives that have driven States to use GATT Article XX like exceptions without experiencing most of the side effects

104 DIEBOLD N., *supra* note 1, at p. 15.

105 Appellate Body Report, *United States – Mesures Affecting the Production and Sale of Clove Cigarettes* (hereinafter *US – Clove Cigarettes*), WT/DS406/AB/R, Adopted April 24, 2012.

106 Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (hereinafter *US-Tuna 2*), WT/DS361/AB/R, Adopted June 13, 2012.

107 *US – Clove Cigarettes, supra* note 98, at para. 116.

108 *Ibid.,* at para. 171.

109 *Ibid.,* at paras. 172-3.

110 *Ibid.,* at paras. 176-81.

111 *Ibid.,* at para. 182.

112 *US – Tuna II, supra* note 99, at paras. 215-6.

113 *Ibid.,* at para. 322.

114 See *supra,* p.16.

115 *US – Tuna II, supra* note 99, at para. 323.

116 *Ibid.*

described in this paper.

First, it would require for the tribunals to consider legitimate policy objectives justifying differences in treatment using an open list of examples. This would make possible to take into account more policy objectives than GATT Article XX exceptions. Second, the requirement of "necessity" would create more balance between the right to regulate and the investors' interests than the simple requirement of a "reasonable nexus to legitimate policy objective".[117]

The requirement of necessity has been accepted by the States that have added GE to their IIAs as it is also a part of the analysis of GATT Article XX. Nevertheless, it seems to be an unsatisfying requirement for both the investor and the host State.[118]

As described above[119], States have different administrations with different competences and knowledge, important resources and have access to information from International organizations. Therefore, it is manageable for them to bring the proof that a measure is not necessary to achieve the legitimate objective by providing an example of a less restrictive, reasonably available measure that makes the same contribution to the objective. This task would be much more difficult for an investor. Indeed, investors are private actors whose daily activity is not to draft regulations. They do not have the administrations' expertise to settle if a proposed measure achieves the same objective, or the information provided by International organizations. Moreover, they do not have statistic services and data in order to establish that the cost of a proposed measure would not be so high that it would not make it reasonably available. As a consequence, they would have to hire a lot of experts, making the cost of an arbitration much higher, and could still lack information that only States can obtain.

This would be also problematic for the State. Indeed, the requirement of "necessity" provides a stringent standard of review to the arbitrators. Every regulation that would differentiate between a national and a foreign investor would have to be no more restrictive than what is necessary to achieve its legitimate objective. This is problematic as it would be required for the very broad range of rules applied to investors. Moreover, if a State failed to prove the measure is indeed necessary, it would be found directly liable for a reparation.

As a consequence, if this possibility would permit the first objective described above to be achieved, the way to respond to the second one would be very unsatisfying for both the host State and the investor. Thus, it is preferable to find a third way.

5.3. Codification of Selected Arbitral Awards

A way to achieve the objective of the inclusion of GATT Article XX like exceptions is to codify relevant arbitral awards while drafting the treaty, in order to make sure that the tribunals take into account the legitimate objectives justifying differences of treatment. This is the choice that has been made in the Trans – Pacific Partnership Agreement (TPP) through the endnote 14, enlightening the interpretation of Article 9.4 (NT):

"For greater certainty, whether treatment is accorded in "like circumstances" under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives". [120]

This solution achieves the first objective described earlier without side effects, as it has been developed in an IIL context, taking into account its specificities.

To answer to the second objective, it would be possible to modify the outcome of decisions by incorporating a more stringent standard of review than the requirement of a "reasonable nexus" but less restrictive than "necessity". This could be, for instance, manifest disproportion. Thus, the State would have the possibility to treat a foreign investor less favorably if it is justified by a legitimate objective, except if the consequences on the foreign investor are manifestly disproportionate compared to the objective. It is possible to take the example of a measure forbidding totally a production method used by a foreign investor in order to prevent a health risk whereas the one used by a national investor

117 *Pope and Talbot v. Canada, supra* note 12, at para. 78.

118 DIEBOLD N., *supra* note 1, at p. 22; LEVESQUE C., *supra* note 23, at p.143.

119 See *supra* p.10

120 Trans-Pacific Partnership, legally verified text, released January 26, 2016, online: New Zealand Foreign Affairs and Trade < https://www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership/ >, footnote 14.

would still be accepted. It would be manifestly disproportionate if minor adaptations of the process would have permitted to protect health in the same way.

Therefore, the State would have much more leeway to regulate without being found responsible and the investor would have less difficulty to bring a proof, due to the obviousness of such a breach.

6. Final conclusions

GE have been incorporated in a limited, but growing, number of IIAs in order to set a necessary balance between regulatory purposes and protection of foreign investors. They do so by establishing an exhaustive list of legitimate objectives and the nexus between a measure and the said objectives. However, incorporating such exceptions may drive ISDS tribunals to distance themselves from what has become a dominant practice. Indeed, GE are operative exceptions. Hence, the principle or effectiveness in treaty interpretation may require that these exceptions are not deprived of their useful effect by the interpretation of NT.

If this path was followed by ISDS tribunals, it could have detrimental effects for the right to regulate of the States. First, it would no longer be possible to take into account legitimate policy objectives in the determination of "like circumstances". Second, nationality could only be taken into account whether through a "disproportionate disadvantage test" that is ill-adapted to the IIL context or to identify a comparator. Therefore, NT would be interpreted as forbidding any less favorable treatment imposed to a foreign investor compared to a national one in the same economic sector.

Then, GE would be the only possibility to excuse a breach of NT to take into account a regulatory purpose. This solution presents two detrimental effects. First, the purposes listed at GATT Article XX are two restrictive in the IIL context. Second, the requirement of "necessity" and of the chapeau are too stringent. Moreover, no convenient interpretation pathway may allow to exclude these detrimental effects.

Thus, the most convenient way to achieve the objective followed by the integration of GE in IIAs without the risk of such detrimental effects is to develop a treaty wording that would rely on solutions developed in the IIL framework. This could take the form of a clause inviting to take into account the regulatory purpose in the determination of "like circumstances". While drafting this clause, the parties would have the possibility to detail the understanding of a regulatory purpose and establish a nexus between the measure and the objective more adapted to IIL than the "necessity" one.

More broadly, this example invites to question the appropriateness of importing solutions developed in ITL in IIL, due to the core differences between these two fields of International economic law.

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Uma proposta de reflexão sobre os ACFIs: Até que ponto o tratamento de nação mais favorecida pode minar a estratégia política que os embasa?

A proposal for reflection on ACFIs: To what extent the most favored nation treatment can undermine the political strategy on which ACFIs are based on?

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Uma proposta de reflexão sobre os ACFIs: Até que ponto o tratamento de nação mais favorecida pode minar a estratégia política que os embasa?*[1]

A proposal for reflection on ACFIs: To what extent the most favored nation treatment can undermine the political strategy on which ACFIs are based on?

Michelle Ratton Sanchez Badin**

Daniel Tavela Luis***

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Resumo

O presente artigo se propõe a fazer uma breve análise das possíveis consequências da inserção da cláusula de tratamento de nação mais favorecida (NMF) nos Acordos de Cooperação e Facilitação de Investimentos (ACFIs), considerando tanto o escopo de aplicação dos acordos, como as disposições de tratamento específico do investimento. Para tanto, o artigo terá como amostra os ACFIs assinados pelo Brasil, entre março de 2015 e abril de 2017, o que resulta em um total de oito ACFIs. Em suma, o artigo se propõe a compreender o papel da cláusula de nação mais favorecida nos ACFIs e na sua relação, em especial, com outros acordos internacionais de investimento. O artigo busca realizar alguns apontamentos sobre as características e riscos que a inserção das cláusulas da nação mais favorecida nos ACFIs pode trazer para o modelo brasileiro de ACFI, considerando sua gênese de contestação do tradicional sistema de proteção internacional do investimento estrangeiro. As provocações levantadas no fim do texto procuram favorecer melhores negociações e desenhos de cláusulas NFM nos ACFIs, por parte do Poder Executivo quando da negociação de novos acordos, bem como que sirvam de subsídio ao Poder Legislativo, quando do processo de ratificação dos ACFIs já assinados.

Palavras-chave: International Investment Law – ACFI – MFN – Cláusula de nação mais favorecida – Direito Internacional Econômico – Acordos internacionais de investimento.

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1 Os acordos assinados pelo Brasil com Peru e Mercosul não receberam a denominação de ACFIs, mas incorporaram as principais características desse modelo de acordo. O acordo assinado com o Peru, em abril de 2016, é um Acordo de Ampliação Econômico-Comercial, com um capítulo de investimentos, além de capítulos sobre o comércio de serviços e sobre contratação pública. No caso do Mercosul, o acordo tem o formato de Protocolo — Protocolo de Cooperação e Facilitação de Investimentos Intra-Mercosul — e está associado ao Tratado de Assunção de 1991. Além disso, ambos os acordos estão integrados ao guarda-chuva regional do Tratado de Montevidéu de 1980, que constitui a Associação Latinoamericana de Integração (ALADI). Dado que as estruturas na regulação sobre investimentos entre suas Partes seguem, basicamente, a linguagem e o conteúdo essencial do modelo ACFI, neste artigo serão incluídos na referência genérica de ACFI e, pontualmente, para o caso do Protocolo do Mercosul como PCFI.

Abstract

This article proposes a brief analysis of the possible consequences of the insertion of the most favored nation treatment clause (MFN) into the Investment Cooperation and Facilitation Agreements (ACFIs), considering both the scope of application of the agreements and the provisions specific of treatment of investment. To do so, the article will have as a sample of analysis the ACFIs signed by Brazil between March 2015 and April 2017, resulting in a total of eight ACFIs. In short, the article aims to understand the role of the most favored nation clause in ACFIs and their relationship, in particular, with other international investment agreements. The article seeks to make some commentaries about the characteristics, and risks, that the insertion of most favored nation clauses in ACFIs can bring to the Brazilian model of ACFI, considering its origin as a contestation of the traditional system of international protection of foreign investment. The provocations raised at the end of the text seek to favor better negotiations and drafts of MFN clauses in ACFIs by the Executive Branch when negotiating new agreements, as well as to serve as a subsidy to the Legislative Branch, when ratifying the already signed ACFIs.

Keywords: International Investment Law – ACFI – MFN – Most Favored Nation Clause – International Economic law – International investment agreements.

1. Introdução

Este artigo tem como objetivo introduzir uma reflexão sobre as possíveis consequências da inserção da cláusula de tratamento de nação mais favorecida nos Acordos de Cooperação e Facilitação de Investimentos (ACFIs)[2] considerando tanto o escopo de aplicação dos acordos como as disposições de tratamento específico do investimento. Para tanto, o artigo terá como amostra os ACFIs assinados pelo Brasil, entre março de 2015 e abril de 2017, o que resulta em um total de oito ACFIs, detalhados abaixo.

Considerando que o tratamento de nação mais favorecida pode ser entendido como um mecanismo de comunicabilidade entre dispositivos de diferentes acordos internacionais, permitindo a aplicação de definições, formas de tratamento e mecanismos institucionais para relações além das partes de um acordo, o artigo se propõe a compreender o papel dessa cláusula nos ACFIs e na sua relação entre si e, em especial, com outros acordos internacionais de investimento.

Para apresentar essa análise, realizar-se-á uma breve apresentação do histórico dos ACFIs como um movimento de contestação do Brasil aos padrões estabelecidos pelos acordos internacionais de investimento (2); posteriormente, será traçado um breve histórico da cláusula da nação mais favorecida e seu papel nos acordos internacionais de investimento (3); em seguida, será apresentado como a cláusula de nação mais favorecida foi integrada nos ACFIs assinados pelo Brasil (4). Por fim, serão feitos alguns apontamentos sobre as características e riscos que a inserção das cláusulas da nação mais favorecida nos ACFIs pode trazer para o modelo brasileiro, considerando sua gênese de contestação do tradicional sistema de proteção internacional do investimento estrangeiro (5).

2. ACFI: novo conteúdo para velhas estruturas de acordos de investimento

O Brasil publicou, pela primeira vez, o modelo ACFI em março de 2015. Esse modelo de acordo de investimento pode ser considerado uma resposta a não ratificação dos 14 Acordos de Promoção e Proteção de Investimentos (APPIs) assinados pelo Brasil, durante os anos 1990. Fortes oposições políticas no Congresso e no Judiciário, combinadas a um Executivo indeciso, impediram o país de ratificar tais acordos à época.[3] Os

2 Os acordos assinados pelo Brasil com Peru e Mercosul não receberam a denominação de ACFIs, mas incorporaram as principais características desse modelo de acordo. O acordo assinado com o Peru, em abril de 2016, é um Acordo de Ampliação Econômico-Comercial, com um capítulo de investimentos, além de capítulos sobre o comércio de serviços e sobre contratação pública. No caso do Mercosul, o acordo tem o formato de Protocolo — Protocolo de Cooperação e Facilitação de Investimentos Intra-Mercosul — e está associado ao Tratado de Assunção de 1991. Além disso, ambos os acordos estão integrados ao guarda-chuva regional do Tratado de Montevidéu de 1980, que constitui a Associação Latinoamericana de Integração (ALADI). Dado que as estruturas na regulação sobre investimentos entre suas Partes seguem, basicamente, a linguagem e o conteúdo essencial do modelo ACFI, neste artigo serão incluídos na referência genérica de ACFI e, pontualmente, para o caso do Protocolo do Mercosul como PCFI.

3 Sobre o histórico de não ratificação dos APPIs dos anos 1990

principais pontos de rejeição aos APPIs eram: (i) previsões de expropriação indireta e suas formas de indenização; (ii) a cláusula de tratamento justo e equitativo e (iii) o mecanismo de solução de controvérsias investidor-Estado[4].

Com vistas a repensar a estratégia de regulação dos investimentos, em 2003, foi criado um grupo de trabalho interministerial juntamente à Câmara de Comércio Exterior (CAMEX). Em 2007, o Conselho de Ministros da CAMEX aprovou as diretrizes gerais do grupo de trabalho, que sugeriram a renegociação dos acordos de investimento dentro do Mercosul e a negociação de novos acordos com países da América do Sul e com países extra-regionais. Contudo, apenas em 2012 a CAMEX concedeu mandato formal a um Grupo Técnico de Estudos Estratégicos de Comércio Exterior (GTEX) para trabalhar no rascunho de um novo acordo de investimento que fosse sensível às necessidades e às preocupações brasileiras, o que resultou no modelo lançado em 2015[5].

O discurso oficial de lançamento do modelo do ACFI ressaltou três pilares desse novo acordo: (i) cooperação e facilitação de investimento, incluindo agendas temáticas; (ii) governança institucional; e (iii) mitigação de risco e prevenção de disputas[6]. Embora essa estrutura não seja original frente aos acordos internacionais de investimento, a proposta do ACFI procura trazer novos elementos para o seu conteúdo.

Nesses dois anos, o Brasil assinou ACFIs com Moçambique, Angola, México, Malawi, Colômbia, Chile, Peru e um Protocolo com os Estados Partes do Mercosul[7]. Esses oito ACFIs mantêm a estrutura geral anunciada, mas novas cláusulas e tópicos têm sido adicionados ao modelo de acordo, conforme o parceiro econômico do Brasil. Existe uma diferença mais acentuada entre alguns perfis de regras e seu grau de precisão e quanto ao grau de flexibilidade para restrições ao investimento ou quanto à prerrogativa das políticas públicas nacionais. Isso marca dois perfis de ACFIs assinados até o momento: (i) os acordos com países africanos de menor desenvolvimento relativo[8] — que serão, neste artigo, denominados de ACFIs de 1ª geração; e (ii) os acordos com os países latinoamericanos da Aliança do Pacífico e do próprio Mercosul, denominados de ACFIs de 2ª geração[9].

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ver Campello, D.; Lemos, L. *The non-ratification of bilateral investment treaties in Brazil: a stootry of conflict in a land of cooperation*. In: Review of International Political Economy, pp. 1-32, 2015.

4 Uma opinião determinante no âmbito do Congresso está expressa na Opinião da Consultoria Legislativa Déborah Bithiah de Azevedo, *Os acordos para a promoção e a proteção recíproca de investimentos assinados pelo Brasil*. Consultora Legislativa da Área XVIII, Direito Internacional Público, Relações Internacionais, Brasília, maio de 2001. Disponível em: <http://www2.camara.leg.br/documentos-e-pesquisa/publicacoes/estnottec/arquivos-pdf/pdf/102080.pdf>. Acesso em: 30/05/17.

5 Uma breve apresentação do histórico de elaboração do modelo do ACFI é exprimida em MOROSINI, F. C.; BADIN, M. R. S. *ACFI: o que está por trás desta inovação regulatória?* PONTES: Informações e análises sobre comércio e desenvolvimento sustentável, v. 12, pp. 9-12, 2016. Disponível em: <http://www.ictsd.org/sites/default/files/review/Pontes_12-1.pdf>. Acesso em: 30/05/17. Uma análise mais completa é apresentada em MOROSINI, F.; BADIN, M. R. S. *Navigating between resistance and conformity with the international investment regime: The Brazilian Agreements on Cooperation and Facilitation of Investments* (ACFIs), In: MOROSINI, F.; BADIN, M. R. S. *Reconceptualizing International Investment Law from the Global South*. Cambridge: CUP. No prelo.

6 Ver GODINHO, D.; COZENDEY, C. *Novos acordos de investimentos no menu*. Valor Econômico, São Paulo, 24 de julho de 2015. Disponível em: <http://www.valor.com.br/opiniao/4148030/novos-acordos-de-investimentos-no-menu/>. Acesso em: 30/05/2017. SOUZA, R. R. C. *Acordos de cooperação e facilitação de investimentos*. AMCHAM's Conference Brasil e os Acordos bilaterais de promoção de investimentos, São Paulo, 30 de abril de 2015. Disponível em: <http://www.itamaraty.gov.br/pt-BR/component/tags/tag/644-acordo-de-cooperacao-e-facilitacao-de-investimentos>. Acesso em: 30/05/2017. No mesmo sentido, UNCTAD, *World Investment Report 2016*. Investor Nationality: Policy Challenges, 22 Jun 2016, p. 108. Disponível em: <http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf>. Acesso em: 31/05/2017.

7 O texto completo dos acordos está disponível na base de dados do Ministério de Relações Exteriores do Brasil. Disponível em: <http://dai-mre.serpro.gov.br/>. Acesso em: 30/05/2017. Vale explicitar que o Protocolo de Cooperação e Facilitação de Investimentos Intra-Mercosul (Mercosul/CIII GMC/P.DEC. Nº 01/17) revoga o Protocolo de Colônia para a Promoção e Proteção Recíproca de Investimentos no Mercosul (intrazona) (Mercosul/CMC/DEC. Nº 11/93), o qual não havia sido ratificado apenas pelo Brasil. Isso porque o Protocolo de Colônia seguia a estrutura básica de um APPIs, contendo as cláusulas questionadas pelo Brasil no processo de internalização dos APPIs da década de 1990, início dos anos 2000s.

8 O grupo dos países qualificados como de menor desenvolvimento relativo é oficialmente reconhecido pela Organização das Nações Unidas, para fins de benefícios de políticas internacionais específicas. A atualização mais recente ocorreu em maio de 2016 e incluiu Angola, Malawi e Moçambique. Ver UNITED NATIONS. *List of Least Developed Countries*. (as of May 2016). Disponível em: <http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf>. Acesso em: 30/05/2017.

9 O governo brasileiro, também, anunciou que estão em fase final de negociação acordos similares com Algéria, Índia, Jordânia, Marrocos e Etiópia, cf. COZENDEY, C.; NETO, A. A. *Um balanço até aqui dos acordos de investimentos*. Valor Econômico, São Paulo, 29 de maio de 2017. Disponível em: < http://www1.valor.com.br/opiniao/4984022/um-balanco-ate-aqui-dos-acordos-de-investimentos>. Acesso em: 29/05/2017. Será interessante observar o padrão regulatório que esses novos ACFIs assinados apresentarão, como forma

Como parte da sua estrutura básica, o ACFI declara como seu principal propósito a facilitação de investimento[10] — e, nesse sentido, o governo brasileiro se apresenta inovador na percepção sobre o principal papel dos acordos internacionais de investimento[11]. O modelo para os ACFIs se propõe, dessa maneira, a retirar a noção de proteção do investimento e do investidor do eixo central e articulador dos acordos internacionais de investimento, deslocando esse eixo para os esforços contínuos dos Estados signatários para implementar suas obrigações de facilitação e cooperação no desenvolvimento e manutenção de investimentos. Para tanto, três tipos de compromissos foram introduzidos pelos ACFIs: (i) os que reconhecem a flexibilidade para aplicação de regras domésticas às principais definições e formas de tratamento do investimento estrangeiro[12]; (ii) os que definem uma agenda temática de cooperação entre as partes; e, finalmente, (iii) os canais de cooperação e diálogo entre as partes, seus investidores e outros interessados.

Além desses mecanismos cooperativos, a dimensão de mitigação do risco do ACFI inclui, ao lado de regras sobre o investimento estrangeiro e sua proteção, regras sobre expropriação e sua compensação, regras sobre transferência, regras sobre a responsabilidade dos investidores e mecanismos de prevenção e de solução de controvérsias. Na regra sobre expropriação, em geral, dá-se particular destaque à expropriação direta[13] e à forma de compensação, que observe a legislação interna dos Estados signatários. No mesmo sentido, as regras de transferência admitem flexibilidades para casos de restrição no balanço de pagamentos, um ponto central para países com economias menores e mais vulneráveis. Por fim, ao enfatizar a prevenção de disputas, o ACFI apresenta um conjunto inovador de mecanismos institucionais para alcançar esse objetivo na seara dos investimentos.

Beneficiando-se do trabalho de organizações multilaterais, como a Conferência das Nações Unidas sobre Comércio e Desenvolvimento (UNCTAD)[14] e experiências de outros países, o Brasil enfatizou, fortemente, a prevenção de disputas em seu modelo de ACFI. Os papéis dos dois principais mecanismos institucionais de cooperação do ACFI — o Comitê Conjunto e o Ponto Focal — são, em primeiro lugar, promover o intercâmbio regular de informações e evitar litígios e, em caso de litígio, implementar o mecanismo de resolução de litígios baseado em consultas, negociações e mediação. Esse mecanismo visa dissuadir os investidores de desafiar, judicialmente, as medidas do governo anfitrião. A arbitragem Estado-Estado fica, nessa estrutura, como último recurso para a solução de controvérsias reagindo ao formato tradicional de arbitragem investidor-Estado, nos acordos internacionais de investimento[15].

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de confirmar ou não esta classificação em gerações.

10 A UNCTAD elegeu a facilitação como um dos itens mais importantes a serem considerados na reforma do sistema de investimento internacional. A organização distingue promoção e facilitação como: "A promoção é sobre o marketing de um local como um destino de investimento e, portanto, é voltada a um país específico e competitivo por natureza. A facilitação consiste em facilitar aos investidores o estabelecimento ou a ampliação de seus investimentos e a condução de seus negócios diários" (tradução livre). Ver original, em inglês, em UNCTAD, *World Investment Report 2016*. Investor Nationality: Policy Challenges, 22 Jun 2016, p. 25. Disponível em: <http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf>. Acesso em: 31/05/2017.

11 De acordo com Carlos Cozendey e Abrão Árabe Neto, que estão entre os principais articuladores do modelo do ACFI e de suas negociações até o momento: "O pioneirismo do Brasil em incorporar a facilitação de investimentos a seus acordos internacionais tem gerado frutos nos planos plurilateral e multilateral. Impulsionado pela boa aceitação do ACFI, o tema de facilitação de investimentos tem ganhado relevância na OCDE, na Unctad e no G-20. Na OMC, o assunto tem sido discutido com crescente interesse e poderá produzir resultados na Conferência Ministerial (MC11), a ser realizada na Argentina no final de 2017.", Ver COZENDEY, C.; NETO, A. A. *Um balanço até aqui dos acordos de investimentos*. Valor Econômico, São Paulo, 29 de maio de 2017. Disponível em: < http://www1.valor.com.br/opiniao/4984022/um-balanco-ate-aqui-dos-acordos-de-investimentos>. Acesso em: 29/05/2017.

12 Isto está em sintonia com o relatório da UNCTAD sobre a crescente percepção da legislação nacional como um veículo importante para promover e facilitar o investimento estrangeiro. Ver UNCTAD, *World Investment Report 2016*. Investor Nationality: Policy Challenges, 22 Jun 2016, p. 92. Disponível em: <http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf>. Acesso em: 31/05/2017.

13 Os ACFIs de 1ª geração fazem uma referência expressa à noção de expropriação, sem qualificá-la como direta ou indireta. Já os ACFIs da 2ª geração traçam uma distinção na regulação entre expropriação direta e indireta. Para referência mais aprofundada sobre a distinção ver: LUÍS, D.T. *A Proteção do Investimento Brasileiro no Exterior: uma reflexão a partir do caso africano.* Tese de Doutorado (Direito Internacional) – Faculdade de Direito, Universisdade de São Paulo, São Paulo, 2017, pp. 137-139.

14 Ver UNCTAD. *Reform of investor–state dispute settlement: In search of a roadmap*. IIA Issues Note No. 2 (Junho 2013), p. 5. Disponível em: <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf>. Acesso em: 30/05/2017. (Afirmando que "os métodos ADR podem ajudar a economizar tempo e dinheiro, encontrar uma solução mutuamente aceitável, evitar a escalada da disputa e preservar uma relação viável entre as partes em disputa" – tradução livre).

15 O novo Protocolo de investimento intraMercosul – PCFI, basicamente, segue o modelo do ACFI, em especial no tocante às cláusulas de definições e de tratamento. A estrutura institucional difere, apenas, no que se refere ao procedimento de solução de controvér-

As disposições do ACFI são, assim, resultantes de um processo técnico e político no âmbito do Estado brasileiro, mas também um produto e um agente da agenda internacional para reformar o regime internacional de investimento. Em síntese, o modelo brasileiro tem procurado responder com novos conteúdos nos acordos a preocupações sobre padrões dos tradicionais acordos internacionais de investimento, em especial os APPIs, quanto à proteção do investimento e suas formas de tratamento assim como quanto a procedimentos de indenização e de solução de controvérsias.

3. Breve histórico de cláusulas de nação mais favorecida e sua influência nos acordos internacionais de investimento

3.1. Conteúdos da cláusula em diferentes acordos e momentos da história

A cláusula de nação mais favorecida, também conhecida pelo seu acrônimo em inglês MFN (*Most-Favoured--Nation*) ou NMF (nação mais favorecida) em português, está associada a um princípio de não discriminação. A definição mais precisa de seu conteúdo foi apresentada pela Comissão de Direito Internacional da Organização das Nações Unidas (CDI), na tentativa de codificação da cláusula da nação mais favorecida (conhecidos por 1978 *Draft Articles*). Conforme art. 5 da proposta:

> "O tratamento de nação mais favorecida é o tratamento consensuado pelo Estado garantidor ao Estado beneficiário, ou a pessoas ou a coisas vinculadas a determinada relação com esse Estado, não menos favorável que o tratamento concedido pelo Estado garantidor a um terceiro Estado ou a pessoas ou coisas vinculadas a um mesmo tipo de relação com esse terceiro Estado" (tradução livre, ILC A/33/10).

Os trabalhos conduzidos pela CDI se iniciaram em 1968 e fizeram um resgate histórico do uso da cláusula de nação mais favorecida em acordos internacionais, o qual está sendo atualizado, com a manutenção da temática na agenda da CDI. Esses trabalhos evidenciam o uso da cláusula NMF, de formas muito diferentes ao longo da história, especialmente quanto ao seu objeto; à forma de concessão de tratamento, desde uma garantia unilateral ao multilateralismo; à extensão, do contratualismo ao principiologismo; ao perfil das partes, da regra geral sob a presunção da igualdade formal às exceções relacionadas à desigualdade econômica[16].

Embora os históricos de cláusulas de tratamento, com base no conceito de nação mais favorecida, tenham sido rastreados desde o século XII, tais cláusulas se tornaram mais conhecidas pela adoção recorrente em acordos de comércio e navegação durante os séculos XVIII e XIX. Nesse período, as cláusulas NMF eram frequentemente condicionais, o que significava que os benefícios concedidos por um Estado dependiam da concessão dos mesmos benefícios pelo outro Estado signatário. A abordagem de caráter incondicional surgiu durante a segunda metade do século XVIII, a partir do ideal de liberalização do comércio internacional, ainda que por meio de acordos bilaterais. O recurso à cláusula NMF, no seu formato incondicional nos acordos bilaterais, proporcionava o que se convencionou chamar de um multilateralismo *de facto* do sistema de comércio[17].

Tal tendência no sistema internacional de comércio foi revertida após a Primeira Guerra Mundial e durante a depressão econômica de 1929, refletindo o forte protecionismo econômico da época. No entanto, após a Segunda Guerra Mundial, impulsionado por novos esforços de tendência multilateralista, a abordagem de caráter incondicional do tratamento de nação mais favorecida foi revitalizada no contexto da Carta de Havana (que foi negociada em 1949, porém nunca entrou em vigor). Foi reproduzida no Acordo Geral de Tarifas e Comércio (acrônimo em inglês, GATT) de 1947, quando a cláusula NMF na qualidade de princípio tornou-se um dos pilares do sistema multilateral de comércio[18]. O tratamento de NMF, hoje, nos acordos da Organização Mundial do Comércio (OMC) ultrapassa a sua aplicação

sias. Os investimentos intraMercosul estão sujeitos aos mecanismos previstos no Protocolo de Olivos. Mas, nessa estrutura institucional, foi integrado o procedimento de prevenção de controvérsias que também é conduzido por uma Comissão formada por representantes dos Estados Partes (art. 23 do PCFI). Como no modelo do ACFI, a Comissão poderá convidar os representantes do investidor privado para participar de suas reuniões (art. 23.3 do PCFI).

16 Um resumo desses diferentes conteúdos consta do verbete "Cláusula da Nação Mais Favorecida", por Michelle Ratton Sanchez Badin, para a Enciclopédia Luso-Brasileiro de Direito Internacional (no prelo).

17 SCHILL, Stephan W. The Multilateralization of International Investment Law. Cambridge: Cambridge University Press, 2009, p. 11-19.

18 UNCTAD. *Most Favored Nation Treatment*. UNCTAD Series on Issues in International Investment Agreements II. New York and Geneva, 2010. p. 11.

BADIN, Michelle Ratton Sanchez; LUIS, Daniel Tavela; OLIVEIRA, Mario Alfredo de. Uma proposta de reflexão sobre os ACFIs: Até que ponto o tratamento de nação mais favorecida pode minar a estratégia política que os embasa?. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 159-177

original ao comércio de bens e foi incorporado às regras sobre o comércio de serviços e sobre os direitos de propriedade intelectual relacionados ao comércio.

Para além do comércio e com um histórico similar, a cláusula NMF passou a ser replicada em acordos bilaterais de investimentos. A sua incorporação a esses acordos não é, contudo, uniforme. Algumas cláusulas NMF em acordos internacionais de investimento têm uma linguagem mais aberta e abrangente, enquanto outras são mais estritas, acompanhadas de definições, critérios e situações para sua aplicação. O contexto dos acordos internacionais de investimento em que as cláusulas estão inseridas é, também, variável, identificando-se, inclusive, diferenças quanto aos propósitos de cada acordo. Apesar da falta de uniformidade em seu tratamento, a presença da cláusula NMF é marcante nos acordos internacionais de investimento: a UNCTAD, em 2010, estimou que a cláusula de nação mais favorecida estaria presente em mais de 80% dos acordos[19]. Essa ampla penetração da cláusula NMF nos acordos de investimento favorece o argumento de uma parte da doutrina que defende o efeito multilateralizador da cláusula em acordos internacionais de investimento[20]; contudo a posição não é pacífica.

3.2. Perfil da cláusula em acordos internacionais de investimento

Como observado, diferentemente do campo do comércio internacional, não se pode observar um único perfil da cláusula NMF nos acordos internacionais de investimento. Isso deriva da própria natureza desses acordos que são, essencialmente, bilaterais. Apesar disso, é possível identificar características usuais nesse tipo de cláusula nos acordos internacionais de investimentos.

Primeiramente, considerando que as cláusulas NMF buscam assegurar aos investimentos cobertos tratamento não menos favorável que o concedido a investimentos de investidores de qualquer outra nacionalidade, a igualdade de condições de competitividade é, então, fundamental. Existem duas características das cláusulas da nação mais favorecida que são relativamente comuns em acordos modelo de diversos países e que objetivam limitar seu alcance.

A primeira dessas características é a necessidade de se identificar "circunstâncias similares" entre os investidores ou investimentos. A definição de circunstâncias similares deve ser feita tendo em vista os casos concretos. Nesse sentido, em geral, observam-se se os setores econômicos, produtos e serviços são os mesmos, bem como se existe competição entre os investidores ou investimentos que se pretendem comparar.

A segunda é definir limites ao escopo de aplicação da cláusula. Há duas formas de definir esses limites: com base em uma lista de exceções de setores excluídos ou por alguns conceitos previstos no acordo. No primeiro caso, alguns acordos indicam que a cláusula NMF não seria aplicável a setores econômicos específicos[21]. No segundo caso, os limites podem ser dados por diversos conceitos, tais como os de "estabelecimento, aquisição, expansão, gestão, condução, operação e venda dos investimentos", de tal sorte que o tratamento oferecido pela cláusula NMF estaria limitado a essas matérias[22]. Em outras palavras, a cláusula NMF pode abarcar tanto condições mais favoráveis anteriores ao estabelecimento do investimento como posteriores ao estabelecimento do investimento.

19 UNCTAD. *Most Favored Nation Treatment*. UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2010, p. 12. Na época, a amostra da UNCTAD era de 715 acordos internacionais de investimento. Considera-se que, atualmente, exista mais de 3.330 acordos internacionais, cf. UNCTAD, Investment Policy Monitor No. 17, 16 de março de 2017. Disponível em: <http://unctad.org/en/PublicationsLibrary/webdiaepcb2017d1_en.pdf > Acesso em: 30/05/17.

20 SCHILL, S. W. *The Multilateralization of International Investment Law*. Cambridge: Cambridge University Press, 2009, pp. 19-22.

21 Esta foi a forma de limitar o escopo da cláusula da nação mais favorecida prevista no APPI modelo dos Estados Unidos de 1984. O tratado previa que a cláusula não se aplicaria aos seguintes setores: Transporte aéreo; navegação no oceano e na costa; atividades bancárias; seguro; subsídios do governo; seguros e programas de empréstimo governamentais; produção de luz e energia; agentes de alfândega; posse de bens imóveis; propriedade e operação de redes de transmissão ou as estações de rádio e televisão de operadoras comuns; propriedade de ações na *Communications Satellite Corporation*; a prestação de serviços de transmissão de telefone e telégrafos comuns; a prestação de serviços por cabos submarinos; uso de terras e recursos naturais. Uma comparação do modelo de APPI de 1984 com o de 2004 é apresentada de forma didática em: <http://www.law.nyu.edu/sites/default/files/ECM_PRO_066871.pdf>. Acesso em: 30/05/17.

22 Esta foi a forma de limitar o escopo da cláusula NMF prevista no APPI modelo dos Estados Unidos de 2012 (artigo 4). Disponível em: <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>. Acesso em: 30/05/17. Referência essa que passou a ser reproduzida nos acordos bilaterais de comércio e investimento e também no acordo mega-regional *Transpacific Partnership* (TPP) (artigo 9.5). Disponível em: <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>. Acesso em: 30/05/17.

Muito embora a cláusula NMF seja cada vez mais frequente no âmbito de acordos internacionais de investimento, sendo considerada como uma cláusula-padrão, ela, ainda, não chega a ser considerada representativa do direito internacional costumeiro ou mesmo um princípio do direito internacional dos investimentos[23]. Ao contrário, é posição relativamente consensual que os efeitos do tratamento da nação mais favorecida apenas podem ser conferidos àqueles investidores ou investimentos que estejam dentro do escopo de um determinado acordo internacional. Isto é, a base legal para o benefício da NMF em acordos internacionais de investimento é, sempre, um determinado acordo que contenha essa cláusula, razão pela qual a leitura da cláusula é feita de forma restritiva, em uma abordagem contratualista e não principiológica[24].

Por esse motivo, se costuma dizer que o tratamento gerado pela cláusula é relativo, pois, diferentemente de parâmetros absolutos de tratamento (tais como tratamento justo e equitativo, proteção geral e segurança, parâmetro mínimo internacional, entre outros), que são aplicáveis aos investidores e investimentos independentemente do tratamento conferido a outros investidores e investimentos, o tratamento da cláusula NMF exige a comparação entre o tratamento conferido a investidores ou investimentos de diferentes nacionalidades.

Dessa característica de relatividade da cláusula deriva o princípio *ejusdem generis*. Assim, a operabilidade da cláusula NMF depende da identificação de assuntos relacionados à mesma matéria ou conjunto de matérias[25]. Esse princípio limita a extensão do benefício da nação mais favorecida a acordos que tenham a mesma natureza. Assim, o princípio garante que os benefícios de um acordo eminentemente tributário (para evitar bitributação, por exemplo) não sejam extensíveis a acordos relacionados à imunidade diplomática, comerciais ou de investimentos. A compreensão dos limites impostos por esse princípio é relevante quando da comparação entre diferentes tipos de acordos internacionais de investimento, que podem ter escopo protetivo, liberalizante, promocionais ou uma combinação destas características.

Além disso, a proteção conferida pela previsão da NMF apenas é conferida para remediar situações em que a discriminação do investidor ou do investimento se deu por conta da nacionalidade do investidor. Isto é, o tratamento NMF não impediria discriminações entre investidores e investimentos distintos que fossem razoáveis e proporcionais, considerando uma análise objetiva que justifique o tratamento diferenciado[26].

3.3. A cláusula interpretada pelos tribunais arbitrais de investimento

O contencioso internacional dos acordos internacionais de investimentos, em especial com base no procedimento arbitral investidor-estado, tem sido muito intenso desde a década de 1990[27]. Apesar de violações do tratamento previsto pela cláusula NMF não terem sido fatores de muita controvérsia, a aplicação da previsão da cláusula por tribunais arbitrais de investimento gerou amplo debate, ainda não sedimentado.

Quanto à aplicação da cláusula NMF para direitos materiais previstos nos acordos, apesar de haver relativo consenso no sentido de permitir os benefícios da NMF para formas de tratamento, os tribunais arbitrais têm apresentado interpretação restritiva da cláusula. Por exemplo, no caso "ADF *vs*. Estados Unidos", no âmbito do NAFTA, o requerente buscava se beneficiar da redação mais abrangente da cláusula do tratamento justo e equitativo de acordos celebrados pelos Estados Unidos com Albânia e Estônia. Nesse caso, o tribunal arbitral decidiu que não havia indicação clara de violação do parâmetro e, assim, não estendeu os benefícios da NMF[28].

Por outro lado, no caso "CME *vs*. Republica Tcheca", o tribunal arbitral constituído sob o acordo entre Republica Tcheca e Países Baixos se utilizou do APPI

23 DOLZER, R.; SCHREUER, C. *Principles of international investment law*. Second ed. Oxford: Oxford University Press, 2012. p.206.

24 DOLZER, R.; SCHREUER, C. *Principles of international investment law*. Second ed. Oxford: Oxford University Press, 2012. p.207.

25 Cf. CDI 1978 *Draft Articles, Art*. 9.

26 Este foi o fundamento para a decisão no caso Parkerings v. Lituânia. Parkerings-Compagniet AS v. República da Lituania, ICSID Caso N.. ARB/05/8, Sentença de 11 de Setembro de 2007.

27 O número de procedimentos do tipo investidor-Estado cresceu consideravelmente desde a década de 1990 até os dias de hoje. Os dados da UNCTAD indicam que, em 2016, eram conhecidos 696 procedimentos arbitrais do tipo investidor-Estado, dos quais 70 foram iniciados em 2015 (o recorde da série histórica iniciada em 1987). Para maiores informações sobre os dados quantitativos de disputas do tipo investidor-Estado, ver UNCTAD, *World Investment Report 2016*. Investor Nationality: Policy Challenges, 22 Jun 2016, 232 p. Disponível em: <http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf>. Acesso em: 31/05/2017.

28 ADF Group Inc. v. Estados Unidos da América, ICSID Caso No. ARB (AF)/00/1, Sentença de 09 de janeiro de 2003. Disponível em: <https://www.italaw.com/cases/43>. Acesso em: 31/05/2017.

da Republica Tcheca com os Estados Unidos para definir o conceito de "compensação justa" como sendo o mesmo de "valor justo de mercado"[29]. Nessa decisão, portanto, a cláusula da NMF foi utilizada como forma de importar de outro APPI uma interpretação mais favorável ao investidor.

Em outros casos, tribunais arbitrais aceitaram a utilização da NMF para importar previsões materiais de acordos que não continham qualquer previsão a respeito de uma determinada proteção. Isso ocorreu, por exemplo, no caso "MTD *vs*. Chile", no qual um tribunal arbitral, constituído no âmbito do APPI entre Chile e Malásia, utilizou-se de previsões contidas nos APPIs entre Chile e Dinamarca e entre Chile e Croácia para resolver a disputa[30]. Nesse caso, o requerente pretendia ver reconhecido seu direito de receber algumas licenças para desenvolver um investimento no desenvolvimento imobiliário. O APPI com a Malásia não continha uma previsão obrigando os Estados a emitir as licenças necessárias para a realização do investimento, mas os APPIs com a Dinamarca e a Croácia continham essa previsão[31]. No mesmo sentido, observa-se o caso "Bayindir *vs*. Paquistão", em que o tribunal arbitral, cuja jurisdição derivava do APPI entre Paquistão e Turquia, entendeu que poderia incorporar ao acordo o parâmetro de tratamento justo e equitativo de outro APPI, apesar de o primeiro não possuir uma cláusula expressa a respeito. O tribunal recorreu ao APPI Paquistão-Suíça para indicar, em uma análise *prima facie*, que os investidores e investimentos protegidos pelo APPI Paquistão e Turquia deveriam receber o tratamento justo e equitativo[32].

Também houve casos em que requerentes de processos arbitrais buscaram alterar o escopo de aplicação do acordo, seja ele *ratione temporis* ("Tecmed *vs*. Mexico" e "MCI *vs*. Equador", por exemplo), ou *ratione materiae* ("Societé Génerale *vs*. República Dominicana"). Nos casos que lidaram com a extensão do escopo *ratione temporis*, ambos os tribunais entenderam que os APPIs não poderiam ter efeitos retroativos[33]. Já no caso que lidou com a extensão material do escopo dos APPIs, os tribunais entenderam que, primeiramente, deveria ser definida a aplicação do acordo em si, por meio de suas cláusulas de escopo e definição. Somente após esse primeiro passo, um investidor poderia invocar uma cláusula buscando um tratamento substantivo mais favorável a si[34].

Quanto à aplicação da cláusula NMF para direitos processuais previstos nos acordos, a possibilidade de importação de previsões relacionadas à cláusula de resolução de conflitos investidor-Estado de outros acordos é, ainda, bastante debatida. Pode-se distinguir entre duas categorias de casos: (i) casos em que os requerentes buscam suprimir um requisito procedimental que constitua uma condição para um pedido em uma arbitragem (questões de admissibilidade), e; (ii) casos em que requerentes buscam estender o limite jurisdicional de um tribunal arbitral por meio da cláusula NMF, garantindo que problemas ou disputas que o acordo base não contemplava sejam objeto de um procedimento arbitral (questões jurisdicionais).

O *leading case* que lida com as questões de admissibilidade é o caso "Maffezzini *vs*. Espanha". Nesse caso, um tribunal arbitral, constituído sob a égide do APPI entre Argentina e Espanha, decidiu que a cláusula NMF poderia ser utilizada para dispensar o período de 18 meses exigido pela cláusula arbitral, antes do início de um procedimento arbitral[35]. Fundamentalmente, o ar-

29 CME Czech Republic B.V. v. República Tcheca, UNCITRAL, Sentença final de 14 de Março de 2003. Disponível em <https://www.italaw.com/cases/281>. Acesso em: 31/05/2017.

30 MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile, ICSID Caso N. ARB/01/7, Sentença de 25 de maio de 2004, para. 104. Nesse caso houve procedimento de anulação da sentença arbitral junto ao ICSID. Entretanto, o comitê de anulação não anulou a decisão do tribunal arbitral nesse ponto. O histórico e documentos do caso podem ser acessados em: <https://www.italaw.com/cases/717>. Acesso em: 31/05/2017.

31 O acordo entre Chile e Malásia está disponível em: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/690>. O acordo entre Chile e Dinamarca está disponível em: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/671>. O acordo entre Chile e Croácia está disponível em: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/667>. Acesso aos links aqui referidos: 31/05/2017.

32 Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Republica Islâmica do Paquistão, ICSID Caso N. ARB/03/29, Decisão de Jurisdição de 14 de novembro de 2005, paras. 227–235. Disponível em: <https://www.italaw.com/cases/131>. Acesso em: 31/05/2017.

33 Tecnicas Mediambientales Tecmed S.A. v. Estados Unidos do México, ICSID Caso no. ARB (AF)/00/02, Sentença de 29 de Maio de 2003. Disponível em: <https://www.italaw.com/cases/1087>. Acesso em: 31/05/2017. M.C.I. Power Group L.C. and New Urbine, Inc. V. República do Equador, ICSID Caso No. ARB/03/6, Sentença de 31 de Julho de 2007. Disponível em: <https://www.italaw.com/cases/662>. Acesso em: 31/05/2017.

34 Société Générale v. República Dominicana, UNCITRAL, LCAI Case No. UN 7927, Sentença de 19 de setembro de 2008, para. 41. Disponível em: <https://www.italaw.com/cases/1039>. Acesso em: 31/05/2017.

35 Emilio Agustín Maffezini v. Reino da Espanha, ICSID Caso N. ARB/97/7, Decisão do tribunal arbitral nas objeções jurisdicionais de 25 de janeiro de 2000. Disponível em: <https://www.italaw.com/cases/641>. Acesso em: 31/05/2017.

gumento utilizado pelo requerente da arbitragem era o de que o acordo concluído entre Espanha e Chile não continha esse requisito e garantia, assim, acesso menos restrito ao mecanismo de arbitragem investidor-Estado. Esse mesmo argumento foi levantado em outros casos contra a Argentina, visando evitar o período de espera para início de arbitragens investidor-Estado, que consta em alguns acordos de investimento celebrados pela Argentina[36].

No caso Maffezzini, o tribunal arbitral considerou que a cláusula NMF permitiria a dispensa desse período no caso concreto. O tribunal levou em consideração as práticas da Espanha, cujos acordos, em geral, permitiam o acesso direto à jurisdição arbitral internacional e também a particular redação da cláusula NMF, que possuía redação genérica o suficiente, diferentemente de outros acordos da Espanha. Assim, o tribunal entendeu que se poderia compreender que a previsão da NMF autoriza a dispensa do período de 18 meses antes do início da arbitragem e que o recurso à arbitragem de investimento forma parte integral da proteção do investidor[37].

No entanto, o tribunal arbitral, também, notou que a cláusula NMF não poderia suprimir acordos que os Estados considerem importantes como questão de política pública, tais como: (i) necessidade de exaurir recursos locais, (ii) previsão bifurcação na estrada (tradicionalmente conhecida por seu acrônimo em inglês "*fork in the road*"); (iii) a escolha por uma determinada instituição para a resolução de disputas, como o Centro Internacional para a Arbitragem de Disputas sobre Investimentos (acrônimo em inglês, ICSID) ou sob uma regra muito específica, como no caso do NAFTA[38].

Apesar de haver relativa harmonia entre diversas decisões discutindo os requisitos de admissibilidade, há, também, casos que foram decididos em sentido contrário ao caso Maffezzini. É este o caso de "Wintershall *vs*. Argentina", no qual o requerente, também, buscava suprimir o período de espera para iniciar uma arbitragem no âmbito do ICSID. O tribunal arbitral entendeu que o requisito de aguardar esse período era parte indissociável do consentimento da Argentina para arbitrar, bem como que a linguagem da cláusula NMF não permitiria estender sua aplicação para mecanismos de resolução de disputas[39].

O segundo grupo de casos relacionados à extensão de proteções procedimentais de acordos internacionais de investimento busca estender requisitos jurisdicionais para garantir jurisdição a tribunais arbitrais. Nessas situações, em geral, os tribunais arbitrais têm sido mais reticentes em aplicar a cláusula NMF, indicando que não se poderia extrair a noção de consentimento por meio de uma incorporação por referência a outros acordos, exceto se isto estivesse, absolutamente, claro no acordo internacional de investimentos. Destacam-se três casos paradigmáticos ao lidar com esta questão: "Salini *vs*. Jordânia", "Plama *vs*. Bulgária" e "Telenor *vs*. Hungria".

No caso Salini, o tribunal arbitral baseou sua decisão no fato de que a cláusula NMF não continha previsão expressa estendendo sua aplicação para as disposições de resolução de conflitos[40]. Nos casos de Plama[41] e Telenor[42], o requerente buscava utilizar-se de um acordo que permitisse que novos pedidos de compensação fossem feitos, mas o tribunal entendeu que o histórico de negociações da Bulgária indicava a intenção de ter escopos mais restritos de resolução de conflitos, de tal sorte que isto impediria a importação de previsões de outros acordos por meio da NMF.

Como no caso dos requisitos de admissibilidade, nas questões envolvendo extensão da jurisdição do tribunal arbitral, também há decisões que aceitaram estender a jurisdição do tribunal por meio da cláusula NMF. Isto ocorreu no caso "RosInvestCo *vs*. Federação da Rússia", no qual o tribunal arbitral aceitou o argumento do requerente para expandir a jurisdição do tribunal arbitral, sob o fundamento de que traçar uma distinção entre garantias procedimentais e substantivas era irrelevante.

36 UNCTAD, *Most Favored Nation Treatment*. UNCTAD Series on Issues in International Investment Agreements II. New York and Geneva, 2010, P. 66.

37 Emilio Agustín Maffezini v. Reino da Espanha, *op. cit.*

38 Emilio Agustín Maffezini v. Reino da Espanha, *op. cit.*

39 Wintershall Aktiengesellschaft v. República da Argentina, ICSID Caso N. ARB/04/14, Sentença de 8 de Dezembro de 2008. Disponível em: <https://www.italaw.com/cases/1171>. Acesso em: 31/05/2017.

40 Salini Costruttori S.p.A. e Italstrade S.p.A. v. Reino Haxemita da Jordânia, ICSID Caso N. ARB/02/13, Decisão Jurisdicional de 09 de Novembro de 2004. Disponível em: <https://www.italaw.com/cases/954>. Acesso em: 31/05/2017.

41 Plama Consortium Limited v. República da Bulgaria, ICSID Caso N. ARB/03/04, Decisão jurisdicional de 8 de Fevereiro de 2005. Disponível em: <https://www.italaw.com/cases/857>. Acesso em: 31/05/2017.

42 Telenor Mobile Communications A.S. v. República da Hungria, ICSID Caso N. ARB/04/15, Sentença de 13 de Setembro de 2006. Disponível em: <https://www.italaw.com/cases/1093>. Acesso em: 31/05/2017.

O tribunal, no caso, entendeu que a garantia de acesso à arbitragem formava parte integral do tratamento assegurado ao investidor estrangeiro, o que permitiria o uso da cláusula NMF para aumentar o escopo da jurisdição do tribunal arbitral e aceitar o pedido do requerente[43].

O Anexo 1 apresenta um resumo sistematizado destas principais interpretações apresentadas da cláusula NMF. E, como observações gerais, pode-se identificar que a possibilidade de incorporação de previsões substantivas e procedimentais por meio da cláusula NMF é assunto ainda bastante debatido e sobre o qual não há um posicionamento consistente de tribunais arbitrais. Ao tomarem a decisão em casos envolvendo a cláusula da nação mais favorecida, os tribunais arbitrais parecem levar em consideração a linguagem específica das cláusulas NMF e seu sentido comum, conforme previsto na Convenção de Viena sobre Direito dos Tratados, bem como os objetivos gerais de proteção de investimento dos acordos e o contexto de sua negociação, particularmente em relação à identificação de tendências nas relações do Estado demandado.

4. A cláusula de nação mais favorecida nos ACFIs

4.1. O contexto das cláusulas

O tratamento não discriminatório integra a estrutura básica dos ACFIs. Isso se traduziu já nos primeiros acordos assinados pelo Brasil, com Moçambique e Angola, em abril de 2015. Contudo, a estrutura das cláusulas difere, sensivelmente, trazendo à tona duas preocupações relevantes: (i) se, no conjunto de ACFI, esses serão considerados acordos similares e, portanto, com a possibilidade de extensão dos direitos e formas de tratamento entre as diferentes partes; e (ii) como os ACFIs dialogarão com o conjunto de outros tipos de acordos internacionais de investimento, incluindo os tradicionais APPIs. A seguir, apresenta-se a título de ilustração o quadro com as contrapartes do Brasil nos ACFIs e os acordos de investimentos por elas assinados com terceiros:

43 RosInvestCo UK Ltd. v. Federação da Rússia, Câmara de Arbitragem de Estocolmo, Caso N. 079/2005, Sentença em aspectos jurisdicionais de 01 de outubro de 2007. Disponível em: <https://www.italaw.com/cases/923>. Acesso em: 31/05/2017.

Tabela 1 - Acordos de investimento assinados por contrapartes no ACFI

ACFI e contrapartes		APPIs	AIIs
Moçambique		26	8
Angola		10	8
México		32	16
Malawi		7	8
Colômbia		15	20
Chile		51	29
Peru		29	28
Mercosul	**Argentina**	56	16
Mercosul	**Paraguai**	23	16
Mercosul	**Uruguai**	31	18
Mercosul	**Venezuela***	28	5

Fonte: UNCTAD. *International investment agréments navigator*. Disponível em <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu>. Acesso em: 30/05/2017.

Obs. 1: Foram considerados todos os acordos assinados e não aqueles que estão em vigor.

Obs. 2: A Venezuela consta como contraparte por integrar o Mercosul. Mas, no momento de assinatura do Protocolo de Cooperação e Facilitação de Investimentos (PCFI), em abril de 2017, a Venezuela estava suspensa do bloco e não assinou o Protocolo.

4.2. Conteúdo das cláusulas de nação mais favorecida nos ACFIs

Considerando os oito ACFIs assinados e os dois principais perfis de acordos (1ª e 2ª geração) nas suas diferenças, aquelas quanto a definições e formas de tratamento, o perfil da cláusula NMF é um dos pontos de destaque. A expressão "tratamento de nação mais favorecida" aparece, apenas, nos ACFIs assinados com Chile (artigo 6) e Peru (artigo 2.6), nos demais ACFIs o título do artigo é "tratamento aos investidores e investimentos" ou "não discriminação". Essa forma de nominar os compromissos da cláusula tem reflexos nos compromissos delineados.

No caso dos ACFIs com Angola e Moçambique a cláusula de "tratamento aos investidores e investimentos" é mais genérica quanto à não discriminação e, ainda, apresenta ressalvas importantes sobre possíveis exceções atribuídas pela legislação doméstica.

A partir do primeiro ACFI assinado com um parceiro latino-americano, o ACFI Brasil-México, a cláusula passa a assumir um formato mais próximo ao de cláusula NMF de acordos internacionais de investimento, incluindo os APPIs da década de 1990. Nesse sentido, as cláusulas, além de preverem que uma parte garantirá aos investidores e aos investimentos da outra parte tratamento não menos favorável ao concedido a investidores e investimentos de um estado não parte, adicionam (i) as condições em que o tratamento deve ser garantido, (ii) os parâmetros para definir a discriminação, (iii) as situações em que o tratamento deve ser garantido e (iv) as exceções ao tratamento NMF.

As condições e os parâmetros são estabelecidos com referência a "condições similares" em todos os ACFIs assinados com países latino-americanos, com exceção de México. Mas nesse acordo, assim como no da Colômbia, traz-se o referencial das condições de concorrência proporcionadas aos investidores de diferentes países. Essa noção, como apresentado anteriormente, deriva da prática dos APPIs e de sua linguagem. De maneira similar, a referência enumerada das situações em que estas condições são consideradas — "no que se refere à expansão, administração, condução, operação, venda ou outra disposição dos investimentos em seu território" — reproduzidas a partir do ACFI assinado com a Colômbia com exceção do PCFI do Mercosul. Nota-se, portanto, na redação da cláusula NMF uma influência, a cada novo acordo mais presente, dos padrões e critérios dos APPIs que orientam a aplicação da não-discriminação.

As exceções são, contudo, os elementos mais interessantes para serem explorados quanto à aplicação do tratamento NMF. Isso porque é a partir desses dispositivos que está delimitada a aplicação da cláusula. Todos os ACFIs excluem do tratamento NMF as concessões feitas em acordos para evitar a dupla tributação e em acordos regionais de comércio[44]. Além das exceções a esses tipos de acordos, a partir do ACFI com o México, nos acordos com países da América Latina, passam a ser excepcionadas disposições de acordos internacionais de investimento.

O ACFI Brasil-México inova em relação aos ACFIs de 1ª geração ao fazer referência expressa que o tratamento de não discriminação não deve ser estendido às disposições de solução de controvérsias de investimentos — o que nos ACFIs subsequentes passa a ser reproduzido (art. 5.3(b) ACFI Brasil-Colômbia; art. 6.3(a) (ii) ACFI Brasil-Chile; art. 2.6.3 ACFI Brasil-Peru). Essas disposições respondem às interpretações de cláusula NMF apontadas na seção 3(c) acima que procuram estender o tratamento de um acordo a outro, tanto para fins procedimentais como jurisdicionais. Sua inserção nos ACFIs busca, assim, salvaguardar o Brasil de enfrentar os procedimentos de uma arbitragem no formato investidor-Estado via NMF, baseando-se em acordos, especialmente APPIs, que esses países possam ter com países terceiros[45]. Ponto interessante nesse aspecto é que alguns dos ACFIs já fazem a referência não só aos acordos de investimento em si, mas a acordos com capítulos de investimento (ACFIs Brasil-México, Brasil-Chile e Brasil-Peru e PCFI) e acordos internacionais de comércio (ACFI Brasil-Peru).

É válido notar que os ACFIs com Colômbia e Chile, especificamente, procuram ser ainda mais precisos na limitação da aplicação da cláusula NMF, elucidando sua aplicação não somente para o mecanismo de solução de controvérsias (questões jurisdicionais e procedimentais) como também para os "padrões de tratamento" (aspectos materiais) dos demais acordos de investimento (artigos 5.3 dos ACFIs indicados). Nesse caso, há, então, uma espécie de "fechamento estrutural" dos ACFIs para as disposições estabelecidas em outros acordos internacionais. O ACFI Brasil-Chile, no entanto, faz essa restrição, apenas, para acordos de investimentos

44 Aplica-se aqui a noção ampla de "acordos regionais de comércio", a partir da definição promovida pela OMC: "RTAs in the WTO are taken to mean any reciprocal trade agreement between two or more partners, not necessarily belonging to the same region". Conforme página eletrônica da OMC, *Regional trade agreements and the WTO*. Disponível em: <https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm>. Acesso em: 30/05/2017. Tal definição responde à referência, com algumas pequenas variações nos ACFIs a "zonas de livre comércio, uniões aduaneiras ou mercados comuns". Interessante apenas destacar que o ACFI Angola-Brasil é o único que inclui nesse rol os Acordos Internacionais de Cooperação Econômica (artigo 11.4), ato comum na sua relação bilateral com o Brasil e também do Brasil com outros parceiros.

45 O ACFI Angola-Brasil tem uma previsão ampla no artigo 11.7 do acordo que, com uma interpretação muito extensiva — ou quase abusiva, poderia sugerir a possibilidade de se invocar a cláusula NMF em termos jurisdicionais: "Cada Parte, no seu território, concede aos investidores da outra Parte um tratamento não menos favorável do que o concedido em circunstâncias semelhantes aos seus próprios investidores ou aos investidores de uma Parte não contratante, com respeito ao acesso a tribunais de justiça e a agências administrativas, ou ainda à defesa de direitos de tais investidores." Entendemos, no entanto, que a referência aos mecanismos de defesa está mais associada, dado o perfil do acordo e a redação da cláusula, aos institutos e instituições internas de cada parte no acordo.

assinados antes da data de entrada em vigor do ACFI (art. 6.3(b)). Tal fechamento estrutural está, portanto, no caso do Chile, limitado a outros acordos de investimentos assinados pelo Chile com terceiros países antes da entrada em vigor do ACFI. Não existem limitações para a aplicação do parâmetro NMF após a entrada em vigor do ACFI[46].

Uma restrição temporal nos mesmos moldes do ACFI Brasil-Chile foi inserida no PCFI do Mercosul (art. 5.6), que estende sua restrição a quaisquer acordos internacionais que tenham disposições sobre investimentos, assinados antes da entrada em vigor do PCFI. O PCFI ainda busca ser mais preciso sobre a aplicação da cláusula de nação mais favorecida, no seu artigo 5.7 ao explicitar que:

> "Para maior certeza, as disposições deste Artigo não se aplicarão para incorporar disposições substantivas ou afetas à solução de controvérsias não contidas no presente Protocolo."

Tal dispositivo procura assegurar o princípio *ejusdem generis* na aplicação do tratamento de nação mais favorecida, o que significa que o tratamento só pode ser concedido a questões pertencentes ao mesmo assunto ou a mesma categoria de assuntos a que se refere a cláusula. Portanto, o PCFI tenta explicitar um princípio que alguns entendem subentendido na cláusula de nação mais favorecida dos acordos internacionais de investimento, conforme apresentado na seção 3 acima.

Ainda no que diz respeito ao escopo de aplicação da cláusula NMF, é possível identificar uma diferença entre os ACFIs de 1ª e 2ª geração quanto à contemplação da fase pré-estabelecimento e da fase pós-estabelecimento. Os ACFIs de 1ª geração, explicitamente, garantem o tratamento da nação mais favorecida também antes do estabelecimento do investimento, isto é, assegura aos investidores igualdade de condições para realizar um investimento no outro Estado. Essa linguagem não é explícita nos acordos de 2ª geração, que limitaram o escopo da cláusula NMF à expansão, administração, condução, operação, venda do investimento e outra disposição dos investimentos em seu território. Em princípio, a linguagem não parece ser suficiente para contemplar a fase anterior ao estabelecimento do investimento, muito embora se deva reconhecer que a expressão genérica "outra disposição dos investimentos" possa vir a ser interpretada como compreendendo a fase anterior ao estabelecimento do investimento.

Há, no entanto, dois pontos de inovação dos ACFIs que não foram refletidos, devidamente, nas disposições de nação mais favorecida. O primeiro deles é referente à abordagem mais valorizada pelo ACFI que é de facilitação de investimento e não de proteção de investimento. As disposições de tratamento NMF em todos os ACFIs assinados têm como pressuposto o interesse em atender à proteção do investidor e de seu investimento que é o eixo central dos acordos tradicionais de investimento[47]. Fica, assim, marginalizada a perspectiva da flexibilidade conferida aos Estados anfitriões na condução de suas políticas. Se a perspectiva é de "nação" mais favorecida, poderia um Estado invocar as flexibilidades previstas em outro ACFI mais favorável a um terceiro Estado na implementação de suas políticas? A leitura dos dispositivos dos ACFIs sugere que não, na medida em que a redação da disposição de NMF, ainda, está fortemente atrelada à perspectiva do investidor. Por isso, a linguagem da cláusula com dispositivos de não discriminação indicando que se trata de "tratamento aos investidores e investimentos" é a mais apropriada para o conteúdo do capítulo nos ACFIs assinados até o momento.

Isso não significa, entretanto, que inovações não possam ser retrabalhadas para se pensar em como ampliar as noções de NMF nos acordos de investimento. O ACFI Brasil-Peru tem algumas tentativas nesse sentido, ao incluir uma diversidade de exceções dentro da cláusula de nação mais favorecida que estão relacionadas a políticas públicas consideradas essenciais por aquele Estado. Entre essas políticas, no caso do ACFI Brasil-Peru, foram excepcionados tratamentos específicos sobre: aviação, pesca, ou assuntos marítimos; pesca artesanal; indústrias culturais, inclusive audiovisual; serviços de readaptação social; serviços sociais estabelecidos ou mantidos por razões de interesse público; mino-

46 Um exemplo da possível extensão da cláusula NMF é o APPI entre Chile e Hong Kong, assinado em novembro de 2016, em moldes tradicionais. Tal como este, é possível que outros acordos de investimento sejam assinados com terceiros países e, então, poderão ter suas disposições invocadas no âmbito do tratamento NMF. Para acesso ao AAPI Chile-Hong Kong, ver <http://investmentpolicyhub.unctad.org/IIA/CountryBits/41#iiaInnerMenu>. Acesso em: 30/05/17,

47 Essa é a noção básica dos acordos tradicionais de investimento, em especial os APPIs, cf. DOLZER: "MFN treatment is not required under customary law. The simple goal of MFN clauses in treaties is to ensure that the relevant parties treat each other in a manner at least as favourable as they treat third parties. The normal effect of an MFN clause in a BIT is to widen the rights of the investor" (p. 206).

rias social ou economicamente desfavorecidas e grupos étnicos; propriedade rural[48].

O segundo ponto de inovação não contemplado são as agendas temáticas. Grande parte dos temas contemplados nas agendas visa facilitar a relação de investimentos entre as partes. Eventualmente, regulações e procedimentos específicos ou facilitados discriminatoriamente e que possam prejudicar a concorrência entre as partes podem ser questionados. Por outro lado, a agenda de facilitação entre as partes é diferente porque está pautada nas necessidades das relações bilaterais de investimento e isso pode prejudicar a implementação da cláusula NMF sob o princípio *ejusdem generis*.

4.3. Efeitos das cláusulas intra e extra partes dos ACFIs

As diferenças pontuais existentes nos ACFIs assinados favorecem o questionamento sobre a extensão e as reais limitações da aplicação do tratamento NMF quanto aos direitos previstos em outros acordos, sejam eles ACFIs ou acordos tradicionais de investimento. Isso recai sobre alguns pontos essenciais dessas diferenças nas cláusulas:

> 1) No caso dos ACFIs sem restrição explícita aos direitos materiais – ACFIs Brasil-México, Brasil-Peru e os de 1ª geração – podem tratamentos mais favoráveis previstos em quaisquer acordos de investimentos (ACFIs ou outros) serem invocados em benefício dos investidores?
>
> 2) Ainda que o ACFI tenha previsões de limitação jurisdicional e material para outros acordos de investimento, se essa limitação for apenas para os "acordos assinados antes da entrada em vigor" do ACFI, o tratamento NMF pode ser aplicado aos acordos posteriores?[49]
>
> 3) Quanto à restrição aos sistemas de solução de controvérsias de outros acordos internacionais de investimento, como pensar, especificamente, o caso dos ACFIs assinados com Angola, Moçambique e Malawi (sem esta previsão), e eventual demanda de aplicação de NMF para fins jurisdicionais para recurso às possibilidades de arbitragem investidor-Estado conforme os APPIs em vigor daqueles países com terceiros? Serão levadas em consideração as restrições explícitas de ACFIs posteriores ou mesmo o debate político interno no Brasil de resistência ao modelo de arbitragem investidor-estado?

Essas questões se relacionam, diretamente, com os efeitos intra e extra partes da cláusula da NMF. Esses efeitos, como apresentado anteriormente (seção 3.b), dependem de uma série de condições, dentre as quais destacamos (i) a linguagem específica das cláusulas NMF e seu sentido comum, conforme previsto na Convenção de Viena sobre Direito dos Tratados, (ii) os objetivos gerais de proteção de investimento dos acordos, e (iii) o contexto de negociação dos acordos, particularmente em relação à identificação de uma postura política coerente do Estado demandado envolvido.

Assim, qualquer estudo sobre os efeitos da cláusula da NMF deve levar em consideração os diversos acordos celebrados pelo Estado contra o qual se busca aplicar um tratamento mais favorável. É inviável fazer um estudo com esse grau de profundidade neste artigo, de tal sorte que aqui ilustra-se o argumento apresentado a partir da análise da cláusula NMF nos acordos do Chile e do Peru, especificamente em relação ao acordo mantido entre esses dois Estados, destes Estados com a Holanda e do acordo entre Brasil e Chile.

Como uma das condições destacadas para aplicação da cláusula NMF é sua linguagem específica, transcrevemos abaixo as cláusulas NMF presente nos referidos acordos:

48 Vale observar, no entanto, que esta não é uma inovação do ACFI, mas sim uma reprodução do padrão de cláusula apresentada no modelo de APPI dos Estados Unidos, desde 1984, cf. nota de fim 21.

49 Exemplos concretos disso são os acordos internacionais de investimento, no formato tradicional de APPIs, assinados entre México e Arábia Saudita e entre Chile e Hong Kong, ambos posteriores aos ACFIs assinados com Brasil. Para acesso a esses acordos, v. UNCTAD, International INvestment Navigator. Disponível em: <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu>. Acesso em: 30/05/2017.

APPI Peru-Chile	APPI Holanda-Chile/ APPI Holanda-Peru
ARTICULO 4. 1. Cada Parte Contratante deberá **garantizar un tratamiento justo y equitativo** dentro de su territorio a las inversiones de los inversionistas de la otra Parte Contratante. **Este trato no será menos favorable** que aquel otorgado por cada Parte Contratante a las inversiones de sus propios inversionistas efectuadas dentro de su territorio, **o aquel otorgado por cada Parte Contratante a las inversiones de inversionistas de la nación más favorecida efectuadas dentro de su territorio,** si este último tratamiento fuere más favorable.	Article 3. 5) [em ambos tratados] If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement **contain a regulation, whether general or specific, entitling investments by nationals of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement**.
ACFI Brasil-Chile	
Artigo 6º Tratamento de Nação Mais Favorecida 1. Sujeito a suas leis e regulamentos vigentes no momento em que o investimento seja realizado, cada Parte outorgará aos investidores da outra Parte tratamento não menos favorável do que o outorgado, em circunstâncias similares, aos investidores de um Estado não Parte, no que se refere à expansão, administração, condução, operação, venda ou outra disposição dos investimentos em seu território. 2. Sujeito a suas leis e regulamentos vigentes no momento em que o investimento seja realizado, cada Parte outorgará aos investimentos de investidores de um Estado não Parte tratamento não menos favorável do que o outorgado, em circunstâncias similares, aos investimentos de investidores de um Estado não Parte, no que se refere à expansão, administração, condução, operação, venda ou outra disposição dos investimentos em seu território.	

Fonte: APPI Peru-Chile. Disponível em: < http://www.sice.oas.org/BITS/chiper_s.asp > APPI Holanda-Chile. Disponível em:

<http://www.sice.oas.org/Investment/BITSbyCountry/BITs/CHI_Netherlands.pdf>.

APPI Holanda-Peru. Disponível em:

<http://www.sice.oas.org/Investment/BITSbyCountry/BITs/PER_Netherlands.pdf>. Acesso aos links em: 31/05/2017.

ACFI Brasil-Chile. Disponível em: <http://www.itamaraty.gov.br/pt-BR/notas-a-imprensa/12526-acordo-de-cooperacao-e-facilitacao-de-investimentos-entre-o-brasil-e-o-chile-santiago-23-de-novembro-de-2015#port>. Acesso em: 16/08/2017.

Como se verifica em ambas as cláusulas dos APPIs acima transcritos, ainda que o propósito geral delas seja o mesmo, a linguagem delas difere significativamente. No acordo entre Peru e Chile, verifica-se que o tratamento NMF é lido conjuntamente com a noção de tratamento justo e equitativo. Isto sugere uma delimitação do escopo da cláusula, limitando seu alcance a garantias substantivas.

Os APPIs com a Holanda, por sua vez, parecem mais compreensivos, mas também limitados a garantias substantivas. Isso porque, diferentemente do quanto observado nos casos em que garantias procedimentais foram incorporadas por meio da NMF, não há linguagem suficiente para indicar que o escopo da NMF se aplica a todas as garantias. Ao contrário, a indicação é a de disposições que contenham uma regulação, que possa ser considerada mais favorável, podem ser importadas por meio da NMF. Não nos parece que uma garantia procedimental possa ser compreendida dentro desse conceito de regulação.

Como já verificado na seção anterior, o ACFI Brasil-Chile, busca limitar o escopo da cláusula NMF à expansão, administração, condução, operação ou venda de investimentos. Entretanto, a utilização da expressão genérica "ou outra disposição dos investimentos" pode dar margem à interpretação expansiva que compreenda também garantias procedimentais. Não nos parece, no entanto, que esta disposição seria suficiente para permitir que um investidor buscasse se utilizar de uma cláusula investidor-Estado no âmbito do ACFI, pelo simples motivo que não é possível identificar nos ACFIs qualquer tipo de consentimento à arbitragem investidor-Estado por parte dos Estados. Assim, parece-nos que a melhor interpretação da cláusula NMF nos ACFIs limita a importação de disposições substantivas para a proteção do investimento.

Como vimos, também, na seção indicativa da aplicação da NMF por tribunais arbitrais, parece-nos que as noções de investimento, investidor e os elementos derivados da cláusula de denegação de benefícios não poderiam ser importados via cláusula da NMF. Isto porque, na sistemática dos ACFIs e também dos APPIs indica-

dos nesta seção, em particular, o escopo de aplicação é definido pelos conceitos de investimento e investidor e denegação de benefícios, de tal sorte que não seria possível definir o escopo de aplicação do acordo em função da cláusula NMF. Como apresentado, deve-se, primeiramente, garantir a aplicação do acordo para que, na sequência, possa-se avaliar se é o caso de aplicação da NMF.

Assim, os benefícios da NMF, apenas, podem ser assegurados aos investidores sob um ponto de vista substantivo. Essas garantias substantivas, por sua vez, podem se referir a elementos que não foram inseridas nos ACFIs, mas que estão nos APPIs do Chile com o Peru ou a Holanda, tais como proteção integral e segurança, tratamento justo e equitativo, garantias contra expropriação indireta. Decerto que a ausência de mecanismos adjudicatórios nos ACFIs, do tipo investidor-Estado, torna qualquer previsão sobre essas garantias incerta e sujeita a debates que poderão ser resolvidos no âmbito dos Comitês Conjuntos, estabelecidos pelos ACFIs.

5. Considerações finais

Este artigo se propôs a compreender o papel da cláusula NMF nos ACFIs e na sua relação, em especial, com outros acordos internacionais de investimento. Esse é um ponto fundamental para a agenda política representada pelos ACFIs, pois o tratamento NMF é mecanismo de comunicabilidade entre dispositivos de diferentes acordos internacionais, permitindo a aplicação definições, formas de tratamento e mecanismos institucionais para relações além das partes de um acordo bilateral.

Para atingir esses objetivos, foi apresentada neste artigo uma breve digressão do histórico dos ACFIs como um movimento de contestação, o histórico da cláusula NMF associado ao seu papel nos acordos internacionais de investimento, discutindo especificamente como elas foram transplantadas do sistema multilateral de comércio para os acordos internacionais de investimento, seu perfil e como elas foram interpretadas por tribunais arbitrais de investimento. O contraste desse último ponto com o curto histórico da cláusula NMF nos ACFIs, pretende favorecer a exploração de algumas questões relevantes sobre os efeitos que a cláusula pode gerar para os ACFIs, considerando seus efeitos intra e extra partes.

A análise apresentada permitiu identificar três questões que parecem essenciais para a compreensão dos riscos que a cláusula NMF pode trazer para a agenda política que os ACFIs representam para o Brasil. O objetivo deste artigo é incitar essa reflexão que, ainda, parece ausente do debate nacional, a partir desses três pontos.

A primeira questão relevante é delimitar como os ACFIs serão recebidos pelo chamado "regime internacional de investimentos": se como um novo padrão, que surge da contestação dos tradicionais APPIs, ou como uma versão *light* do padrão tradicional de proteção de investimento. A distinção pode ser relevante para estabelecer como as cláusulas de não discriminação e, particularmente a harmonização almejada pela NMF, serão interpretadas e quais funções exercerão à luz do princípio *ejusdem generis*.

A segunda questão é se os ACFIs serão considerados como um conjunto, qualificados em suas gerações ou individualmente, em função das negociações exclusivamente bilaterais entre o Brasil e seus parceiros. A aceitação dos ACFIs como um conjunto pode, também, ter impactos na extensão da interpretação da cláusula da NMF, tendo em vista que os acordos previram linguagens diferentes nas diversas negociações já realizadas.

Uma terceira questão refere-se à própria sobrevivência dos ACFIs quando forem utilizados em processos de interpretação adjudicatórios, por exemplo, pelas cortes nacionais, se elas se depararem com pedidos de aplicação da cláusula NMF baseada em acordos de investimento tradicionais.

Espera-se que as provocações e questionamentos identificados neste artigo favoreçam, além de um aprofundamento do debate acadêmico sobre os eixos identificados, melhores negociações e desenhos de cláusulas NFM nos ACFIs, por parte do Poder Executivo quando da negociação de novos acordos, bem como que sirvam de subsídio ao Poder Legislativo, quando do processo de ratificação dos ACFIs já assinados.

Anexo 1 - Tabela Resumo das reivindicações de natureza de NMF

EFEITO BUSCADO	CASOS	RESULTADO
Sobrepor um período de espera de 18 meses perante tribunais locais	*Maffezini v. Spain, Siemens, Gas Natural, Camuzzi, Suez, National Grid, Wintershall v. Argentina*	Concedido, exceto para Wintershall
Submeter disputas além do limite jurisdicional	*Plama v. Bulgaria, Salini v. Jordan, Telenor Mobile v. Hungary, RosInvestCo v. Russia, Berschader v. Russia, Renta 4S v. Russia, Tza Yap Shum v. Peru*	Negado, exceto para RosInvestCo
Beneficiar-se de conteúdo substancial adicional	*Bayindir v. Pakistan, MTD Equity v. Chile*	Concedido
Beneficiar-se de disposições semelhantes consideradas "mais favoráveis"	*AAPL v. Sri Lanka, ADF v. United States*	Negado
Alterar o âmbito de aplicação do BIT (ratione temporis ou ratione materiae)	*Tecmed v. Mexico, MCI v. Ecuador, Société Générale v. Dominican Republic*	Negado
Sobrepor uma cláusula geral de exceção de emergência	*CMS v. Argentina*	Negado
Alterar o padrão de compensação para expropriação	*CME v. Czech Republic*	Concedido
Comparar o tratamento entre dois investidores estrangeiros	*Bayindir v. Pakistan, Parkerings v. Lithuania*	Nenhuma violação foi encontrada

Fonte: UNICTAD, *Most Favored Nation Treatment.*
UNCTAD Series on Issues in International Investment
Agreements II. New York and Geneva, 2010, p. 82-83.

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ECUADOR's 2017 termination of treaties: How not to exit the international investment regime

A terminação dos tratados do Ecuador em 2017: Como não sair do regime dos investimentos internacionais

Jose Gustavo Prieto Muñoz

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ECUADOR's 2017 termination of treaties: How not to exit the international investment regime*

A terminação dos tratados do Ecuador em 2017: Como não sair do regime dos investimentos internacionais

Jose Gustavo Prieto Muñoz**

Abstract

On 16 May 2017, Ecuador terminated all the 16 Ecuadorian Bilateral Investment Treaties (BITs) still remaining in force. This decision was the end of a longer process that aimed to disengage the South American state from the international investment regime, a process begun nearly a decade earlier, with the drafting of a new constitution in 2008, one that contained an article prohibiting the state from giving consent to investment arbitration. The article argues that it was not the 2017 decision itself, but the different erratic legal steps that led to Ecuador's poor performance in terms of FDI policy. These steps included the initial and unfortunate draft of a constitutional provision, the timing involved in re-evaluating this constitutional decision so many years later, and in general the lack of any pre-established course for action during this process. In this light, the article further claims that an analysis of the Ecuadorian experience can contribute to a better understanding of how the constitutional sphere can best interact with international investment law, potentially by applying specific principles of investment rather than prohibitions on constitutional texts.

Keywords: Ecuador, International Investment Law, legitimacy, Latin America.

Resumo

Em 16 de maio de 2017, o Equador terminou todos os seus 16 investimentos bilaterais de investimentos. Esta decisão foi o fim de um processo mais longo que visava desvincular o Estado sul-americano do regime de investimento internacional, um processo iniciado quase uma década antes, com a elaboração de uma nova constituição em 2008, constituição esta que continha um artigo proibindo o Estado de dar consentimento à arbitragem de investimento. O artigo argumenta que não é a própria decisão de 2017 que causou a performance fraca do Equador em termos de investimentos diretos estrangeiro, mas os diferentes passos legais erráticos, incluindo a má elaboração de uma disposição constitucional, o tempo envolvido na reavaliação da decisão constitucional tantos anos mais tarde e, em geral, a falta de um curso de ação pré-estabelecido durante este processo que levou ao mau

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desempenho do Equador em termos de sua política de IDE. Nesta luz, o artigo afirma ainda que uma análise da experiência equatoriana pode contribuir para uma melhor compreensão de como o âmbito constitucional pode interagir melhor com o direito de investimento internacional, potencialmente aplicando princípios específicos de investimento ao invés de proibições sobre textos constitucionais.

Palavras-chave: Equador; legitimidade; direito dos investimentos

1. Introduction

On 16 May 2017, the President of Ecuador signed executive decrees[1] terminating all of the 16 Ecuadorian Bilateral Investment Treaties (BITs) still remaining in force. This decision was the end of a longer process that aimed to disengage the South American state from the international investment regime, a process begun by the same president nearly a decade earlier, when his political movement moved forward with the drafting and, in 2008, approval of a new constitution that contained an article prohibiting the state from consenting to investment arbitration.

After this constitutional prohibition went into force, the ICSID convention was denounced, and 9 out of 26 Ecuadorian 'in force' BITs[2] were terminated in 2008 while the remaining 17 BITs underwent a tangled process of termination. This process included: different and sometimes contradictory judgements by the Ecuadorian constitutional court regarding the compatibility of BITs with the new constitution; approval processes for the denunciation of the treaties by the legislative branch; the formation in 2013 of a special commission, composed of high officials along with a group of international experts, to audit the international investment law regime; and finally, the termination of the remaining BITs in the year 2017.

Ecuador's decision and the long road taken to terminate the totality of its BITs constitutes a unique case for studying the legitimacy of the international investment regime because Ecuador is one of the few developing countries that has taken the radical decision to terminate all of its connections with the international investment regime. In addition, Ecuador was one of the first countries, along with Venezuela[3] and Bolivia[4], to introduce an express constitutional clause to forbid the state from entering into such agreements.

In this context, Ecuador's termination of BITs in 2017 ought to be analyzed not as a new development or resistance to investment arbitration, but rather as the last in a series of chaotic steps that severed the country from the Investment Regime as way to resist to international economic structures, perceived to be 'neoliberal'. In consequence, the steps taken starting from the article inserted in the constitution of 2008 could be one, if not the main cause, of the terrible performance of the Ecuadorian Foreign Direct Investment (FDI) policy in the last years.

The state of Ecuadorian FDI policy is evident now since the country is one of the last destinations for in-

1 Presidential Decree No 1399 Denunciation of the Great Britain and Northern Ireland - Ecuador BIT, 16 May 2017; Presidential Decree No 1400 Denunciation of the Federal Republic of Germany -Ecuador BIT, 16 May 2017; Presidential Decree No 1401, Denunciation of People´s Republic of China - Ecuador BIT, 16 May 2017; Presidential Decree No 1402, Denunciation of Swiss Confederation - Ecuador BIT, 16 May 2017; Presidential Decree No 1403, Denunciation of Republic of Chile - Ecuador BIT, 16 May 2017; Presidential Decree No 1404, Denunciation of Kingdom of Sweden - Ecuador BIT, 16 May 2017; Presidential Decree No 1405, Denunciation of French Republic - Ecuador BIT, 16 May 2017; Presidential Decree No 1406, Denunciation of Kingdom of the Netherlands - Ecuador BIT, 16 May 2017; Presidential Decree No 1407, Denunciation of Republic of Venezuela - Ecuador BIT, 16 May 2017; Presidential Decree No 1408, Denunciation of Argentine Republic - Ecuador BIT, 16 May 2017; Presidential Decree No 1409, Denunciation of Canada - Ecuador BIT, 16 May 2017; Presidential Decree No 1410, Denunciation of United States of America - Ecuador BIT, 16 May 2017; Presidential Decree No 1411, Denunciation of Kingdom of Spain - Ecuador BIT, 16 May 2017; Presidential Decree No 1412, Denunciation of Republic of Peru - Ecuador BIT, 16 May 2017; Presidential Decree No 1413, Denunciation of Republic of Bolivia - Ecuador BIT, 16 May 2017; Presidential Decree No 1414, Denunciation of Republic of Italian Republic - Ecuador BIT, 16 May 2017.

2 Ecuador negotiated 31 known BITs, from those: 1) the 1965 Ecuador - Germany (BundesrepubIik Deutschland) was replaced in 1996 with a new one; 2) the Ecuador- Russia BIT (1996) was never ratified by Russia; 3) The Ecuador-Panama BIT (1996) never entered into force; 4) the Ecuador-Costa Rica BIT (2001) never entered into force; 5) The Ecuador-Egypt BIT according with the information made public by Ecuador was be concluded in 1995 for no renovation of the parties. Therefore, in 2008 Ecuador had only 26 'in force' BITs. See *http://investmentpolicyhub.unctad.org/IIA* and CAITISA, "Informe Ejecutivo de la Auditoría Integral Ciudadana de Los Tratados de Protección Recíproca de Inversiones y del Sistema de Arbitraje en Materia de Inversiones en Ecuador," [CAITISIA Report] (Quito, Ecuador 2017), at 15-16.

3 Art 151 of Venezuela's Constitution (1999).

4 Art 366 of Bolivia's Constitution (2007).

vestment flow in Latin America, it has been one of the most frequently sued states in investment arbitration, and in general has been outperformed by its neighbors[5] in terms of attracting foreign investment.

On these grounds, I argue here that it was not the 2017 decision itself, but the different erratic legal steps, including the poor drafting of the constitutional provision, the confusing reasons given for a series of constitutional judgements, the timing involved in re-evaluating the constitutional decision so many years later, and in general the lack of a pre-established course of action during this process, that hurt Ecuadorian performance in terms of its FDI policy. In this light, one could also argue that the Ecuadorian experience is a key case study for those studying the interplay between constitutional law and international investment law on the one hand and the alleged constitutionalization of international investment law on the other. I further claim that specific principles of investment should be used rather than prohibitions on constitutional texts.

This analysis proceeds as follows: Section 1 will briefly describe the different legal steps undertaken by Ecuador to effectively disconnect itself from the regime, commenting on the ambiguities of the constitutional provision (2008) and the distinct reasons expressed in the judgments of the Ecuadorian Constitutional Court (2010-2013). Then, Section 2 will focus on the termination of the remaining BITs and the very critical report of the commission created by the executive branch which formed the basis for this decision. This section will analyze how the tone, structure and timing of the report functioned as a curtain to hide the poor performance of Ecuadorian FDI policy over the last decade. Finally, in the last section, I will further argue that we can learn from the Ecuadorian experience that any use of the constitutional sphere to interact with investment arbitration should be based on the insertion of principles of investment rather than rules or prohibitions.

2. The long road of Ecuador BIT terminations

2.1 The Constitutional Assembly and article 422 of the Ecuadorian Constitution

In 2008, in the town of Montecristi, Ecuador, a constitutional assembly drafted the twentieth Ecuadorian constitution. Article 422 of the new Ecuadorian Constitution, a very extended constitutional text composed of 444 articles, aims to disengage the country from the international investment law regime. The text of the article is the following:

> No international treaties or instruments may be concluded where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities, in disputes involving contracts or of a commercial nature, between the State and natural persons or legal entities.
>
> The treaties and international instruments that provide for the settlement of disputes between States and citizens of Latin America by regional arbitration entities or by jurisdictional organizations designated by the signatory countries are exempt from this prohibition. […][6]

As pointed out by the Argentinean jurist Gargarella, the constitutional changes effected in Latin America since the late twentieth century represent a response to two important kinds of historical event: the grave human rights abuses committed by dictatorial governments, and the social crisis which is, in part, a result of the so called 'neoliberal' structural adjustment programs during the 1990s. Taking this into account, article 422 of the Ecuadorian constitution, could also be explained as a reaction to economic governance structures as will be further explained in Section 3.

The drafting of any important legal text and especially the constitution of a country demands special care in order to avoid ambiguities that could obstruct the fulfillment of the very collective choices that should be implemented. This is precisely the case with the text of article 422 of the Ecuadorian constitution, as has

5 In the last years, the flows of FDI into Ecuador have been considerably less than those for its two neighbors, Colombia and Peru, countries that also share similar economic and social characteristics. In the period 2006 - 2011, the flows of FDI into Ecuador (2,639 USD MM) were about 5 % of FDI in Colombia (55,414 USD MM) and 7% of FDI in Perú (38,109 USD MM). In the period 2012 - 2016, the FDI of Ecuador (4,133 USD MM), was about 6% of FDI in Colombia (72,736 USD MM), and 10% of FDI in Peru (41,164 USD MM). See the information available in: UNCTAD WIR17 World Investment Report 2017: UNCTAD WIR16 World Investment Report 2016; UNCTAD WIR15 World Investment Report 2015; UNCTAD WIR14 World Investment Report 2014: UNCTAD WIR13 World Investment Report 2013; UNCTAD WIR12 World Investment Report 2012.

6 Author's translation of Art. 422.

already been commented on in the literature[7], because it contains at least three important ambiguities that ought to be noted: About the subject, the object and the temporal effect of the constitutional provision.

The first ambiguity is related to the scope of the prohibition against yielding state sovereignty to international arbitration for disputes of a 'commercial nature' [*indole commercial*] without directly making use of the word 'investment.' The use of the phrase 'of a commercial nature' implies a different set of economic transactions that are governed by different regimes (i.e. WTO law) on the international level.

The second ambiguity is in the object of the prohibition, since the article makes reference to "No international treaties or instruments may be concluded" [*No se podrán celebrar tratados o instrumentos*] where it is not clear if the prohibition covers investment "contracts" as well. Once again, regardless of the assessment of the benefits of the measure, the drafters of the constitution could have directly included more specific words such as "contracts" or "investment" in the wording of the article, if their intention was to completely disengage the state from the investment regime.

Finally, a third ambiguity results from the silence throughout the constitutional text on the temporal effect of such strong decisions, since this prohibits the cession of sovereignty, but does not specify the consequences for investment treaties already in force. It is worth noting that the Ecuadorian constitution includes 30 temporal clauses to regulate the transition between the new and old constitutions, but in none of these specifies what should be done with the investment treaties already in force. From the discussions of the constitutional assembly, it appears that the drafters where not even aware exactly what treaties the Ecuadorian state was party to. On this point, it would have sufficed if the Ecuadorian drafters had simply included a text mandating the re-negotiation or termination of valid treaties.

The described ambiguities show that the drafters of the constitution did not envision a clear legal course of action for how the termination process should proceed, beyond specific references to the Occidental (la OXY) case lost by Ecuador. This case was the first of two-important arbitral processes between the south American state and the Occidental Exploration and Production Company, a corporation incorporated in the state of California, US. The first Occidental award related to a participation contract with Petroecuador, a State-owned corporation, to undertake exploration and production of oil. The conflict started when the Ecuadorian tax authority (SRI) denied applications for VAT tax refunds and required the return of previous reimbursements[8]. In 2004, an arbitral Tribunal found that Ecuador had breached the national treatment and fair and equitable standards contained in the USA-Ecuador BIT[9].

The case gained public attention, despite its highly technical nature, because it was believed to be a 'tax matter' that ought to fall within Ecuadorian sovereign competences. For this reason, Ecuador tried to set aside the award in the UK courts and lost its last appeal on March 2007, months before the constitutional process started. The issue was therefore still on the minds of the Ecuadorian drafters[10].

Besides the mention of this case, the discussions reflected on the transcripts of the Ecuadorian constitutional assembly are remarkable for the absence of any reference to empirical studies that could shed some light on the possible outcomes and impact of the insertion of article 422. Even more, a clear complaint was made by one of the Ecuadorian drafters who strongly denounced the lack of time given to properly study the provision, saying: 'It cannot be analyzed [referring to a group of articles including 422]. If I wanted to talk about all the articles, I would need exactly fifteen seconds for each of them and that is impossible'[11]. Since, the use of a constitutional text implies long term use and impact, one would have expected a deeper analysis to be conducted when the prohibition was introduced.

7 For a clear analysis of the text see Katia Fach Gómez, Ecuador's Attainment of the Sumak Kawsay and the Role Assigned to International Arbitration (4 August 2011), available electronically at SSRN: https://ssrn.com/abstract=1904715 or http://dx.doi.org/10.2139/ssrn.1904715

8 *Occidental Exploration and Production Company v the Republic of Ecuador*, (2004), paras 1-6.

9 Ibid para 200.

10 See Ecuador Constitutional Assembly [Asamblea Constituyente Ecuador] Acta 038 Sumario - 22 April 2008; [Asamblea Constituyente Ecuador] Acta 050- A, 16 May 2008.

11 Personal translation of the of the speech pronounced by drafter Diana Acosta, Transcripts of the discussions of article 422, Asamblea Constituyente Ecuador [Ecuador Constitutional Assembly] Act No 050- A -16 May 2008.

2.2 The Ecuadorian Constitutional Court Judgements

Ecuador concluded in 1965 its first BIT with the Federal Republic of Germany[12] (*BundesrepubIik Deutschland*), and since then signed at least 30 BITs more and the ICSID convention. When the constitutional assembly drafted article 422 in 2008, with the intention of disengaging the country from the international investment regime, Ecuador was a part of 26 bilateral investment treaties[13]. Since then, the country began the process of the denunciation of nine BITs using the previous constitutional rules (constitution of 1998), which allowed the executive branch to terminate them directly without the consent of the parliament[14]. For the remaining seventeen treaties, the process of termination began using the rules of the new 2008 constitution which mandated that the newly created constitutional court of Ecuador should make a determination as to the compatibility of the international treaties before denunciation.

As one of the first constitutional judges to be confronted with the legitimacy of investment arbitration, the Ecuadorian Constitutional Court had the unique opportunity to shape not only legal discourse in the field, but also to solve the practical problems that arose from the ambiguities of article 422.

However, the outcome was a set of diverse judgments issued by the Ecuadorian court on the same topic. In the period 2010-2013 the court produced a series of decisions regarding the constitutional analysis of each of the remaining BITs in the process of being terminated. Yet, despite the fact that this was the same constitutional court interpreting the same article in regard to the same type of similar investment treaties, the court couldn't produce a uniform line of reasoning for the various judgements and instead used different arguments and even arrived at different conclusions.

First, in 2010, a group of sentences contained a more radical argumentation, where the court not only studied the compatibility of the BIT with the constitution but adopted a defensive stance towards the investment regime. Specifically, on the Ecuador–Great Britain BIT judgement, the Ecuadorian Court appeared to be responding or interacting with a non-determined interlocutor in its judgement, one that apparently claimed that the Ecuadorian system is slow and immoral, but without specifying who had made these claims nor in what context they were made. The words of the court were the following:

> "In essence, through these instruments [referring to BITs], the Ecuadorian State has ceded the jurisdiction of national judges in disputes or conflicts, at the international level. It has been argued that our legal system is neither reliable nor suitable, that it is slow and immoral, and it has been argued that external arbitration is the ideal mechanism for resolving conflicts or differences […][15]

In addition, the court raises various additional ideas in a few sentences regarding the real benefits for Ecuadorian investors included in the BITs, the facts that the country had not negotiated the treaties properly, and that arbitration does not represent collective interest.[16]

Also in 2010, another group of decisions adopted a different, more balanced argumentative approach, by analyzing in a more structured manner whether the whole text of the BITs was compatible with the new constitution. For instance, the France-Ecuador BIT judgement analyses the compatibility of each of the treaty clauses with the new constitution. In this development, the court establishes that all the substantive standards of the treaty are in accordance with the Constitution. Even more, it determines that the Fair and Equitable standard —the most controversial and widely used standard in investment arbitration litigation — is compatible with at least three articles of the new Ecuadorian constitution.[17] Finally, following this reasoning, the Court determined in the case analyzing the Ecuador- France BIT that only those articles containing the investor-state arbitration clause were contrary to article 422 of the Ecuadorian constitution. The Court further explained that it was necessary to partially denounce the treaties, and even reminded the legislative branch that it was of *'vital importance'*[18] to establish mechanisms for

12 See the text available electronically at http://investmentpolicyhub.unctad.org/

13 See n. ii

14 CAITISA, "Informe Ejecutivo de la Auditoría Integral Ciudadana de los Tratados de Protección Recíproca de Inversiones y del Sistema de Arbitraje en Materia de Inversiones en Ecuador" [CAITISA Report] (Quito, Ecuador 2017), at 24.

15 *Ecuador - Great Britan BIT, Dictamen No 020-10-Dti-Cc Caso No 0008-10-Ti*, (2010), at 25

16 One of the sources used by the Court is the website www.quiendebeaquin.org, see footnote 14, on ibid. at 24.

17 It mentions that the FET is compatible with articles: 284.8, 339, 416.12 and 321. See *Francia - Ecuador BIT, Dictamen No 031-10-Dti-Cc Caso No 0007-10-Ti*, (2010), at 21.

18 See ibid at 27.

dispute resolution, which must be subject to the common agreement of the contracting parties.

Since neither the Vienna Convention of the law of the treaties, nor the Ecuador – France BIT specified a process for the denunciation of just part of a treaty, the sentence of the Court could have been understood not as a mandate to directly terminate the BIT but rather as a mandate to renegotiate its terms.

Finally, in 2013 the last group of decisions regarding the remaining BITS were drafted and here again there were two types of approaches to article 422, those that were more critical and those that were more balanced. For instance, in the judgment on the Spain–Ecuador BIT, the court concluded that the investor-state clause was incompatible with the constitution, but also stated as a reason for its decision that arbitral tribunals, without specifying which ones[19], did not respect tax sovereignty and thus affected the 'national interest'[20], justifying the denunciation of the treaty.

In contrast, in the Argentina – Ecuador BIT judgement, the Ecuadorian court determined that the treaty was incompatible with the new Constitution, but unlike the previous cases did not mention the termination of all the agreements and expressly mandated that the 'public bodies concerned'[21] had to renegotiate the articles that contained the dispute resolution mechanisms.

2.3 The CAITISA report and the 2017 BIT terminations

In May 2013, when the last set of decisions of the Ecuadorian constitutional court were being made, the president of Ecuador, issued an executive decree[22] that constituted the 'Commission for the Integral Citizens Audit of the Treaties for the Protection of Investment and the Investment Arbitration System' *[Comisión para la Auditoría Integral Ciudadana de los Tratados de Protección Recíproca de Inversiones y del Sistema de Arbitraje en Materia de Inversiones*] (CAITISA). This Commission was composed of nine experts (eight international and one Ecuadorian) along with four high officials of the Executive branch representing the Ecuadorian government.

Two hypotheses could explain the formation of CAITISA. The first is that Ecuador's government was not sure if the decisions taken on the BITs were appropriate, simply didn't know what to do with them or was honestly seeking information to re-assess the consequence of distancing itself from the regime.

The second hypothesis is that the Ecuadorian government was convinced that it should disengage from the Regime, but desperately needed additional 'good reasons' to justify its policy choices against this regime, both internally and externally. Put more concretely, Ecuador might have been planning to replicate the strategy it used to reduce its public debt in 2007 and 2008, as stated in the same report of CAITISA[23], when it created a similar entity to determine that the public debt was 'illegitimate' in order to push bond holders to renegotiate a discount on the debt.

This second hypothesis makes more sense considering that just a few months before creating the CAITISA commission, on October 2012, Ecuador was notified about the award in its second case against Occidental, where it was ordered to pay the biggest sum of money ever paid to any investor to date. [24] So, while Ecuador was creating CAITISA, it was at the same time starting to litigate the annulment process of the Occidental II award. In this scenario, Ecuador needed 'good reasons' to resist the authority of the different investment arbitration process. 'Good reasons' that could not be found either in the discussions of article 422, nor in the contradictory statements made by the Ecuadorian Constitutional Court regarding the same article.

In May 2017, the CAITISA commission presented its report about the investment regime and it became one of the main reasons included in the recitals of each of the sixteen decrees cited by the Ecuadorian president to justify the termination of the remaining BITS.

This report presents historical information on how Ecuador entered the regime by signing a series of bi-

19 Probably in reference to the *Occidental Exploration and Production Company v the Republic of Ecuador*, (2004).

20 *España - Ecuador BIT, Dictamen No 010-13-Dti-Cc, Caso No 0010-11-Ti* Corte Constitucional del Ecuador, (2013), at 15.

21 The original Spanish text of the sentence is the following: *"En consecuencia, corresponderá a los órganos públicos correspondientes renegociar el contenido declarado incompatible con la Constitución de la República, a fin de que las partes determinen otros mecanismos de solución de las diferencias, acordes con los preceptos constitucionales" Argentina- Ecuador Bit Dictamen No 0003-013-Dti-Cc, Caso No 0009-10-Ti*, (2013), at 21.

22 Executive Decree No 1506, President of Ecuador, 6 May 2013, (2013).

23 CAITISA Report, *supra* n. xiv, at 12.

24 *Occidental Petroleum Corporation, Occidental Exploration and Production Company v The Republic of Ecuador (Icsid Case No. Arb/06/11)*, (2012).

lateral investment treaties in the nineties, as well as information on the different cases where the state was a responded state. In addition, it contains a strong critique of the legitimacy and legality of the International Investment Regime. In this regard, the report includes legal, sociological, moral and even utilitarian criticisms of the international investment regime that had appeared in the literature over the preceding years and adapted these to the Ecuadorian experience.

These very critical remarks can be summarized as follows: The BITs signed by Ecuador were poorly or not at all negotiated[25] and they lacked internal debate prior to their ratification[26]. In addition, the report claims that these treaties introduced a 'biased' adjudication system that has since caused serious economic damage to the country in terms of various awards granted on 'tendentious' and 'unjust'[27] grounds. Finally, the report argues that in any case, these treaties did not fullfil their main function[28] which was to attract Foreign Direct Investment (FDI) to the host state.

It further argued that the small amounts of FDI that entered the country, not only were inefficient with respect to its development aims [29] but also had an adverse impact on human rights terms and the environment[30] With this strong rhetoric, the report justified a series of recommendations, most remarkably that the treaties must be terminated and new more balanced ones should be negotiated. The report does not provide a particular draft model of an Ecuadorian BIT treaty, but it does provide a series of recommendations[31] to follow for its elaboration, which move in the same direction as the 'New Generation of Investment Policies' developed within the 2015 multilateral framework of UNCTAD[32].

The report offers concrete historical information concerning the way that the Ecuadorian state had entered into the investment regime, by examining the phase of negotiation and ratification of the different investment treaties made in the nineties. Since it has been a common assumption in the international investment field[33] that developing countries understood the possible costs of Investment agreements, these findings could shed more light on the truly naive way in which developing countries entered the international investment regime in the nineties

In this sense, the argument made in the report is that the Ecuadorian State did not negotiate, and insufficiently debated the content of the BITS. On the one hand, regarding negotiation, the CAITISA commission affirmed that treaties were not submitted to a process of negotiation 'as such'[34] since the Ecuadorian officers of the previous governments did not assess the consequences of the treaties. On the other hand, concerning the ratification processes, the report affirms that the treaties did not undergo a proper legislative debate or that this debate did not take place at all. For example, it presents the curious case of seven treaties that were approved on the same day by the Ecuadorian parliament[35].

Despite the fact that this information illustrates a solid point supporting one of the criticisms of investment arbitration, it is still not clear from the report if this problem, both in the negotiation and ratification processes, was one experienced by Ecuador only with respect to its investment treaties, or if on the contrary, it was something that happened to all of treaties signed by that country during the nineties[36]. This is not a minor concern, because it could help to clarify whether the problem was that those treaties were actually imposed on Ecuador, or rather that the country lacked the technical capacity to assess any type of important agreement, not only those related to investment. Two observations can be further elaborated in this regard.

First, the quality of the consent of the host state touches on one of the pillars of the conceptual framework of international law since the very beginning of the discipline, and that is that '*nations are free, indepen-*

25 CAITISA Report, *supra* n. xiv, at 15.
26 Ibid at 16-17.
27 Ibid at 50 – 62, at 94.
28 Ibid at 63-65.
29 Ibid at 66-70.
30 Ibid at 71-85.
31 Ibid at 100 -108.
32 See Investment Policy Framework for Sustainable Development (UNCTAD, 2015).

33 See Poulsen, Lauge Skovgaard and Aisbett, Emma. "When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning", World Politics, 65 No. 2 (2013).
34 CAITISA Report, *supra* n. xiv, at 15.
35 Ibid. at 17.
36 For a broader study on how developing countries often ignored the risks of bilateral investment treaties (BITs) until they themselves became subject to an investment treaty claim see Poulsen, Lauge N. Skovgaard and Aisbett, Emma. "When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning", World politics, 65 No. 2 (2013). See also Gus Van Harten, "Five Justifications for Investment Treaties: A Critical Discussion." Trade, Law and Development 2 No 1 (2010) 19-58.

dent, and equal'[37]. These premises allow us to structure a legal system where the legal equality of its actors (states) is reflected in the capacity to possess the same rights and obligations. An argument can be made that this *de jure* equality might not reflect the *de facto* asymmetries in specialized information —and the methods for processing that information— that exist between developed and developing countries, especially as treaty matters become ever more complex (e.g. international taxation, finance, etc.)

However, this asymmetry in technical information, is not exclusively a problem for international investment treaties, but rather one of the major challenges to the international legal system as we know it, because it empowers epistemic communities that do not necessarily belong to a nation state, but that are transversal in their formation and can influence the text of international legal rules.

The second observation on the consent argument is the global context of the investment regime. During the nineties when most of these treaties were negotiated, arbitral jurisprudence was in its infancy. The AAPL case[38], the first known investor arbitration case, was decided in 1990, but it was only in the first decade of this century that its impact was evaluated by the doctrine[39]. The same can be said of the Fair and Equitable Standard of Treatment, since its first use in a process was in the year 2001[40], and it was only after the controversial NAFTA cases that it became one of the 'hot topics' of investment arbitration. From this perspective, it was not only the Ecuadorian negotiators or legislators that did not assess the possible consequences of their treaties; All countries, even developed ones, suffered from this lack of awareness of the regime during the nineties.

Another set of criticisms made in the CAITISA report addresses a series of substantive points that have been made about the regime over the last few years. For instance, the report analyzes the problems regarding specific provisions of standards of treatment, most remarkably the Fair and Equitable Standard[41] and explains how arbitrators in some Ecuadorian cases have reached different contradictory conclusions[42]. Also, the report puts special emphasis on the 'double hatting' problem in arbitration[43], referring to conflicts of interest that can arise when actors play multiple roles within the investment regime. These criticisms, while important, have already been documented[44] and debated not only by the doctrine but most importantly, they have been debated multilaterally, also by Ecuador, in the different UNCTAD[45] fora.

3. The questions that lie beneath the CAITISA report and the termination of BITs in 2017

The CAITISA report, notwithstanding the useful information compiled about the historical Ecuadorian experience on the international investment regime that was briefly commented on in the previous section, has an important downside: The time of its release, and some of its methodological choices.

First, the report was released almost ten years after the initial political decision was taken by the Ecuadorian constitutional assembly of Montecristi, about

37 Emer Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, Le Droit Des Gens ou Principes de la Loi Naturelle (London: Clarke, 1811), at liii.

38 *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka, International Centre for the Settlement of Investment Disput ICSID Case No. ARB/87/31990*, para 18.

39 See James Thuo Gathii, "War's Legacy in International Investment Law," *International Community Law Review,* Martinus Nijhoff Publishers 11 (2009).

40 It is believed that the first use on a process of the standard was in *Emilio Agustín Maffezini v. The Kingdom of Spain*, see Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours," *Santa Clara Journal of International Law* 12 Issue 1 Symposium on the Law and Politics of Foreign Investment (2014), at 10.

41 CAITISA Report, *supra* n. xiv, at 18.

42 On this point, the report documented the problem of different tribunals arriving at different conclusions while interpreting the same law (Ley 42), see ibid at 39-40.

43 CAITISA Report, *supra* n. xiv, at 50-62.

44 For an analysis of legitimacy of contradictory arbitral decisions see for instance S. D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions," *Fordham Law Review* 73, no. 4 (2005).; Stephan Schill, "Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach," *Virginia Journal Of International Law* Vol 52 (2011). For an analsis of the 'double hatting' issue in international investment practice see the most recent study of Malcolm Langford, Daniel Behn, Runar Hilleren Lie. "The Revolving Door in International Investment Arbitration." Journal of International Economic Law Vol 20 (2017) 301-332.

45 UNCTAD United Nations Conference on Trade and Development, "IIA 2013, Issue Note No. 3: Reform of Investor-State Dispute Settlement: in Search of a Roadmap " (2013); "World Investment Report 2012 - UNCTAD," (United Nations Conference on Trade and Development, UNCTAD, 2012).

seven years after the first set of Ecuadorian Constitutional Court judgments on the matter, and what seems more intriguing two years after the same commission had concluded its work. In relation to the latter point, the report contains a short statement included in one of the footnotes:

> 'The Commission completed its work in May 2015, despite this, an update was made on the situation of the investor claims '[46].

This short sentence raises more questions. The first one is that according to this information the CAITISA commission finished its work in 2015, but the report was presented to the public in 2017, two years later. This statement reveals that even when the report was ready, the commission decided to keep the information on its findings away from the public by deciding not to release it for a considerable time.

The reasons for this decision are unclear but, at first glance, a point can be made that the release of the information, and the final decision to terminate the remaining 16 BITs, came months after the EU and Ecuador had ratified the treaty of accession to the Free Trade Agreement (FTA) between Colombia, Peru and the EU.

It could be argued that it would have been more difficult for Ecuador to achieve the ratification of its FTA with the EU, if the BITs with key EU member states —Great Britain, Germany, Sweden, Netherlands, France, Spain and Italy— had been terminated by Ecuador before the EU Parliament decided on the accession of Ecuador to the FTA on December 2016. This also indicates that there is still much to learn from the impact that an Investment treaty might have outside the scope of investment, and more concretely, how investment treaties improve (or not) the political relations between countries, and how they can prepare the ground for deeper commercial agreements.

Second, the report is affected by an important methodological choice used in their investigations; it removed from its inquiry the impact of the decision to disconnect itself from the regime in 2008. With this choice, the report effectively avoids answering the main question that Ecuador needed to ask in the year 2017: What was the impact of the decision to exit the regime, a decision enforced by article 422 in the new constitution and implemented over the last decade?

46 CAITISA Report, *supra* n. xiv, Footnote 19.

In other words, by the year 2017, Ecuador did not need another legal, sociological and moral assessment of the investment regime and its problems, because the country had already taken the political decision to abandon this regime a decade ago. What the country urgently needed was to know the impact of the decision, rather than why there were 'good reasons' to abandon the regime, in the same way that a patient wants to know from a doctor the results of his/her surgery rather than explanations of why the surgery was needed in the first place.

The report does shed some light on the situation of Foreign Direct Investment (FDI) in Ecuador, since it concludes that FDI arriving in Ecuador is 'reduced'[47] a word that is conservative considering that the same report acknowledges that the flow of capital coming into Ecuador during the period from 2000 to 2013 was only 0.79% of the total amount of FDI that arrived in Latin America and the Caribbean, placing Ecuador 29th out of the 32 countries in this regard in Latin America[48].

The situation of Ecuador seems even more alarming if the data released by UNCTAD is considered. From this data, we learn that FDI arriving in Ecuador represents only 0.5% of the total arriving in South America during the chaotic period of disengagement with the regime (2006 to 2017), a considerably smaller amount than that of its two neighbors[49], Peru and Colombia, which have greatly outperformed Ecuador's economy in this regard. Along these lines, a legitimate inquiry would rather be how much article 422, the contradictory judgements of the constitutional court, the denunciation of ICSID and BITS affected the disastrous performance of Ecuador in terms of capital inflows.

Even more, the main fear of those who opposed drafting article 422 was precisely that it would affect the flows of FDI coming to the country. As expressed bluntly by one of the few drafters that strongly opposed article 422:

> It would be severe for the country, [...] to isolate us from these [...] mechanisms that exist in the world.

47 Ibid at 63.

48 Ibid.

49 The Foreign Direct Investment (FDI) of Ecuador represents a range that varies between 6 to 10 % of the FDI of Peru and Colombia during the period 2006 to 2016. See the different data contained in UNCTAD WIR17 World Investment Report 2017: UNCTAD WIR16 World Investment Report 2016; UNCTAD WIR15 World Investment Report 2015; UNCTAD WIR14 World Investment Report 2014: UNCTAD WIR13 World Investment Report 2013; UNCTAD WIR12 World Investment Report 2012.

> It's not WE the ones who are going to change the world pretending that these mechanisms do not exist. People in the world will not care that Ecuador does not want to go into arbitration, what they are going to say is: gentlemen, you do not want to go into arbitration, we do not want to have relationships with you. [...][50]

The CAITISA report by removing the impact of the new constitution as a key variable of the study of Ecuador's investment policy and flows of FDI missed the opportunity to assess the Ecuadorian experience comprehensively. Any country that is seeking to either reform or exit the investment regime, in a well-informed way, should look beyond the CAITISA report in this regard.

4. The use of the constitutional sphere in international investment arbitration

The Ecuadorian experience shows the unique nature of international investment law, where an arbitral tribunal not only resolves disputes, but exercises a unique type of public authority[51] that overlaps with that of the state. Like any authority, it needs to be legitimized in the social field where it is exercised. Under this conception, the process of legitimation implies the ability of the investment arbitration system to generate a 'pull of self-compliance'[52] that occurs when 'good reasons'[53] are given for accepting someone else's authority, whether those reasons are sociological, legal or moral[54].

These 'good reasons' in the case of international investment arbitration were based on utilitarian grounds that fall between moral and social reasons. This means that countries accepted the insertion of arbitration clauses in the first place because they were expecting a benefit, whether it was an increase in investment flows or like many small economies, the promise of development. If investment arbitration stops providing those reasons the pull of self-compliance fades away. In this case, compliance can only be achieved exclusively by coercion, which in investment arbitration means the different processes used to enforce awards.

Unlike many regimes of international law, investment arbitration possesses a well-designed legal structure for enforcing decisions relying on the national law of the different states, the ICSID and New York Conventions. Notwithstanding the efficiency of this enforcement mechanism, a system cannot rely entirely on coercion, which can sooner or later provoke a process of resistance.

The Ecuadorian Constitutional process of Montecristi in 2008 illustrates this point. Once an international regime, such as the investment one, stops generating 'good reasons' for the population of the host state to comply with it, a process of resistance could occur. For that reason, the deeper inquiry not only into the legal text of the Ecuadorian constitution that entered into force in 2008, but also into the reasons expressed during the drafting process of Article 422, were useful. Because this process revealed the real reasons that led to a break with the system, not the ones expressed ten years later.

In the different discussions of article 422 of the Ecuadorian constitution, it is possible to distinguish a three-element discourse used by some of the Ecuadorian drafters to resist international investment arbitration. The first is that investment arbitration is perceived as part and parcel of other categories of international economic governance.

In fact, during the discussions by the Ecuadorian constitutional assembly, there were plenty of examples[55] that illustrated how in the same arguments references to institutions such as 'ICSID', 'IMF', 'WTO', World Bank' were used interchangeably as if all of them were a single body, system or concept. This is a reminder that the academic lines drawn by legal experts can sometimes fade away in public discourse, and the failures of one pillar of economic governance will 'de facto' affect others.

The second element in the Ecuadorian constitutional discourse is the strong idea of exclusion from the

50 Personal translation of the speech pronounced by the drafter Pablo Lucio-Paredes, Transcripts of the discussions of article 422, Ecuador Constitutional Assembly [Asamblea Constituyente Ecuador] Acta 038 Sumario - 22 April, 2008

51 See, Armin Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press 2014).

52 Thomas M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium," *The American Journal of International Law* 100, No. 1 (2006), at 20.

53 Parochialism, Cosmopolitanism, and the Paradigms of International Law, Armin von Bogdandy and Sergio Dellavalle in Mortimer N. S. Sellers, *Parochialism, Cosmopolitanism, and the Foundations of International Law*, Asil Studies in International Legal Theory (Cambridge: Cambridge Univ. Press, 2012), at 47.

54 See Richard H. Fallon, Jr. "Legitimacy and the Constitution", Harvard Law Review 118 (2005), 1787-2921.

55 Asamblea Constituyente del Ecuador (2008) Acta no. 038 and Acta No.51.

systems of globalization and transnationalism by an external "other" (e.g. the elite, multinational corporations', etc.). The perceived exclusion by this "other" whether it was referred to as "the multinationals" or "ICSID" was described in specifically economic terms.

Finally, a third element is the search for a methodological refuge from this 'other' inside the absolute conception of the sovereignty of the nation-state. This means that in the logic of this discourse there is an idea that the absolute power of the state should prevail on economic matters. This three-element discourse can be better illustrated by looking at some of the reasons stated behind the Ecuadorian process of 2008, for example the following lines:

> 'With regard to international arbitration, a globalizing order is evident in the world, in the last decades, where it is said that there are no frontiers, especially for capital; And, International Law instead of defending life, the People, the human being, defends the interests of capital and the multinationals, that is why instruments such as the famous ICSID which protects foreign investment, must be rejected by the people [...] That is why we must recover; National sovereignty also implies that we do not submit to this type of arbitration [referring to international investment arbitration].'[56]

However, the experience of Ecuador can also illustrate the difficulties of using the constitutional sphere to disengage from the investment regime, especially when there is no clear course of action planned before the actual decision is taken. This lack of planning cannot be better illustrated that with the conclusions of the CAITISA report that sketch guidelines[57] for an Ecuadorian model of investment agreement. There is no problem with these ideas of reform, but what is notable is that so many years after the decision, there is still not even a model of a treaty on the part of the Ecuadorians with which to take on any new negotiations.

While it is clear that social discontent can trigger constitutional responses to international economic governance, as has happened not only in Ecuador but also in Venezuela and Bolivia, in these cases, it seems that a more appropriate way to process such reactions is by insertion of principles rather than by rules containing prohibitions as in the Ecuadorian case. There are at least three good reasons why the use of principles represents an advantage.

First, since constitutions are supposed to be designed for the long term, it is easier to use principles to adapt to the needs of different generation's foreign investment policy needs. If a rigid and ambiguous prohibition is inserted as in the case of Ecuador, then it could limit the range of policy choices for future generations, who will have to either find loopholes in the provision, or seek to reform it. For instance, if the ambitious multilateral project of an investment court advances, Ecuador will have to again change its constitution to be a part of it.

In addition, a second reason is that principles could transform social needs into a legal language. This mean that once a principle has been inserted in a constitution it has already transformed a specific social problem into a legal obligation, that can eventually be addressed in a legal process or influence the drafting of a treaty.

In consequence, a third reason is that a constitutional text could be a more powerful tool to influence internal change in a regime. This is because it ismore likely that principles that represent social choices transformed into legal language, will be transported to the international legal sphere, either by influencing the text of new treaties, or by supporting specific legal arguments in a particular arbitration process.

Finally, the Ecuadorian case highlights the important role that Constitutional Judges can have when they interact with the regime. The vast majority of Investment Treaties celebrated during the nineties did not undergo the high levels of constitutional scrutiny at the national level that new treaties during the last five years have received. For that reason, interactions between constitutional judges and arbitrators are a new legal phenomenon worth exploring. In this regard, the Ecuadorian experience illustrates the dual functions that Constitutional judges can serve in this interplay: First, is the obvious internal task of controlling the constitutionality —within the legal framework of the host state— of the specific Investment treaty brought to the Court's consideration. However, a second function is generating legal discourses that could engage investment arbitrators in judicial dialogue. It is as part of this second unexplored function that a constitutional judge gains social legitimacy, as well as the legal standing to define new principles that can be used by arbitrators.

The Ecuadorian Constitutional Court missed the opportunity to exercise this second systemic function,

56 Personal translation of the intervention of the drafter Geovanny Atarihuana, Transcripts of the discussions of Art. 422 of the Ecuadorian Constitutional Assembly. Acta No.038, 22 April 2008.
57 CAITISA Report, *supra* n. xiv, at 100-103.

because they did not develop a uniform legal discourse, even arriving at different judgments as was pointed out above. One of the reasons for this inconsistency in judgements is that without knowing, the Ecuadorian judges where probably among the first constitutional judges to have the opportunity to interact with the investment regime. However, their experience is valuable for understanding these new kinds of interactions which take place ever more frequently on the global stage

5. Conclusion

The International Investment Law regime has been undergoing a process of deep transformation at different levels. There is a consensus on the need to reform the regime, with current debates centering on the best methods for such reform. The termination of investment treaties in Ecuador probably represents the most drastic of these methods, and using the constitutional sphere to effect this termination could have long-term consequences. The Ecuadorian experience demonstrates that establishing a well-informed, pre-defined legal course of action is fundamental before measures of this kind are taken. Also, that the use of the constitutional sphere to effect reform might benefit a country more if it is aimed at the construction of principles to be applied in investment rather than at rules establishing prohibitions of any kind. In any case, whether a country is considering terminating its existing BITs, or is more generally investigating the transformation of the international investment regime, the Ecuadorian experience constitutes one of the few experiments in termination and deserves further study in all its complexity.

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ONE BELT, ONE ROAD: novas interfaces entre o comércio e os investimentos internacionais*

ONE BELT, ONE ROAD: new interfaces between trade and international investments

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Resumo

O presente artigo tem como ponto de partida uma nova geoeconomia das rotas transcontinentais, dando possibilidade de revisitar os preceitos fundamentais dos investimentos internacionais à luz do comércio internacional. Nesse sentido, o artigo se estrutura em três capítulos, no primeiro se propõe um levantamento histórico das relações comerciais em termos de investimentos internacionais, no segundo propõe-se uma imersão sob as perspectivas que envolvem o conceito de investimentos internacionais e, no terceiro e último capítulo do estudo, se apresentam as diretrizes do Direito Internacional dos Investimentos. É na incursão aos anúncios advindos dos movimentos asiáticos de cooperação e desenvolvimento econômico mundial, que uma célula de investimentos internacionais pode ser encontrada. Afirma-se que, por ser uma releitura contemporânea de preceitos de um ramo importante do Direito Internacional, não se esgotam as pretensões deste estudo, mas é plausível demonstrar que as mutações geoeconômicas, como a que ocorre a partir do projeto *One Belt, One Road (OBOR)*, intimamente relacionado a uma vertente importante do Direito Internacional, que é o Direito Internacional dos Investimentos, faz deste um objeto de análise constante.

Palavras-chave: Investimentos Internacionais. Comércio Internacional. One Belt, one Road.

Abstract

The present article has as starting point a new geoeconomy of the transcontinental routes, giving possibility to revisit the fundamental precepts of the international investments in light of the international trade. In this sense, the article is structured in three chapters, the first proposes a historical survey of commercial relations in terms of international investments, the second invites to an immersion under the perspectives that involve the concept of international investments, and in the third and final chapter of the study, the guidelines of the International Investment Law are presented. It is the incursion to the announcements coming from the Asian movements of cooperation and world-wide economic development, that a cell of international investments can be found. It is argued that, because it is a con-

temporary re-reading of foundational precepts of an important branch of International Law, the pretensions of this study are not exhausted, but it is plausible to demonstrate that geoeconomic mutations, such as that occurring with the project One Belt, One Road (OBOR), closely related to an important aspect of International Law, which is International Investment Law, makes it an object of constant analysis.

Keywords: International Investment. International Trade. One Belt, One Road.

1. Introdução

No horizonte atual, uma das iniciativas mais promissoras da economia global é traduzida no ambicioso projeto *One Belt, One Road (OBOR, sigla em inglês)*[1] ou *Um Cinturão, uma Rota*. Trata-se de uma reestruturação geoeconômica transcontinental que causará significativos impactos no comércio e nos investimentos internacionais, revivendo no Século 21 as rotas comerciais milenares que conectavam o Ocidente e o Oriente.

Na mais recente reunião do *Fórum do Cinturão e da Rota para a Cooperação Internacional (BRFIC, sigla em inglês)*,[2] uma das mais sólidas economias globais, a China[3], assinou acordos de cooperação e desenvolvimento econômico com sessenta e oito países e organizações internacionais. Esses acordos efetivam o projeto em duas frentes,[4] a primeira com projeções para que nos próximos anos ocorra a estruturação denominada *Cinturão Econômico da Rota da Seda*. Emoldurando, também, em outra frente, a *Rota da Seda Marítima do Século 21*, resultante das últimas rodadas de negociações da Associação de Nações do Sudeste Asiático *(ASEAN, sigla em inglês)*.[5]

Os dois projetos, em linhas gerais, assumem que a iniciativa busca integrar a Europa, a Ásia e a África por meio de cinco diferentes rotas e envolvem mais de sessenta por cento da população mundial. Quando a China assumiu a coordenação bianual da *Conferência de Interação e Medidas de Confiança na Ásia (CICA, sigla em inglês)*,[6] voltou-se a falar da ideia como forma de reconectar países que partilhavam um passado comercial comum.[7] A meta da iniciativa é promover uma extensa rede de infraestrutura, comércio e cooperação econômica ao longo dos mais de sessenta países que compõem o extenso trajeto que engloba os três continentes.

Programas de ferrovias de mercadorias até a Europa, de transporte de gás com a Rússia e de corredores econômicos com a península indostânica,[8] têm sido anunciados com relação direta a este novo modelo de relações de comércio mundial. Essa teia de iniciativas estratégicas está em linha com a formação, do *Banco Asiático de Investimentos em Infraestrutura (AIIB, sigla em inglês),*[9] composto por cerca de setenta países interessados e que tem como missão promover o alicerce financeiro de megaprojetos de infraestruturas nas áreas das telecomunicações, energia e transportes.

Essas movimentações ocorrem ao mesmo tempo em que se animam vários outros esquemas de reconfigura-

1 One Belt, One Road. Disponível em: http://www.xinhuanet.com.

2 Belt and Road Forum for International Cooperation. O evento referido aconteceu em Pequim, na China, em maio de 2017, e tem previsão de ocorrer novamente em 2019, também na capital chinesa. Disponível em: http://www.xinhuanet.com/english/special/201705ydylforum/index.htm.

3 A força econômica da China é tema de destaque em recente estudo que aduz o país protagonizando papéis centrais, inclusive com sua adesão à Organização Mundial do Comércio que, depois de 15 anos do início das tentativas, completou-se em 11 de dezembro de 2001, por decisão da Conferência de Ministros (WT/L/432). Depois dessa data, o país quadruplicou as exportações e triplicou as importações, passando a representar cerca de 10% do comércio mundial, sendo que 45% de suas exportações são destinadas à Ásia e 21% aos Estados Unidos e à Comunidade Europeia. Imperioso a leitura de COSTA, José Augusto Fontoura. Aspectos geopolíticos do GATT e da OMC. *Revista de Direito Internacional*, v. 10, n. 1, p. 28-41, 2013.

4 PAUTASSO, Diego; LOPES, Carlos Renato Ungaretti. A nova roda da seda e a recriação do sistema sinocêntrico. *Revista de Estudos Internacionais,* v. 4, n. 3, p. 25-44, 2017.

5 Association of Southeast Asian Nations. Disponível em: http://asean.org/

6 Conference on Interaction and Confidence-Building Measures in Asia. Disponível em: http://www.s-cica.org/index.html.

7 PAUTASSO, Diego; LOPES, Carlos Renato Ungaretti. A nova roda da seda e a recriação do sistema sinocêntrico. *Revista de Estudos Internacionais,* v. 4, n. 3, p. 25-44, 2017.

8 Correspondente a uma área peninsular, onde estão situados os estados da Índia, Paquistão, Bangladesh, Nepal e Butão. Por motivos culturais e tectônicos, a ilha do Sri Lanka e as Maldivas são também consideradas como pertencentes ao Subcontinente. Essa região do sul-asiático foi historicamente conhecida por Hindustão, nomenclatura que hoje somente é utilizada no contexto histórico da relação entre os povos europeus e o subcontinente. Maiores detalhes vide: SUBCONTINENTE INDIANO. *Subcontinente Indiano ou Península Indostânica.* Disponível em: http://subcontinenteindiano-9b.blogspot.com.br/2011/09/localizacao_16.html. Acesso em: 25 maio 2017.

9 Asian Infrastructure Investment Bank. Disponível em: https://www.aiib.org/en/index.html.

ção global, de impacto significativo na economia mundial, sobretudo, em termos de comércio e investimentos internacionais. Por um lado, ao nível de rotas, procede-se ao alargamento da *Passagem Interoceânica da América Central,*[10] e está em curso a corrida pela passagem marítima na *Rota do Mar do Norte no Ártico*.[11] Por outro lado, ao nível das movimentações institucionais, economias em desenvolvimento tentam dar corpo a tratados de cooperação e livre comércio como a *Parceria Transpacífica (TPP, sigla em inglês)*[12] e o *Acordo de Parceria Transatlântica de Comércio e Investimento (TTIP, sigla em inglês)*.[13]

É diante desse contexto que o presente artigo pretende abordar as mais recentes interfaces entre o comércio internacional e os investimentos internacionais. Um desafio lançado sob a perspectiva da conjugação dos esforços dos coautores, academicamente inseridos em grupos de fomento e desenvolvimento à pesquisa do Direito Internacional dos Investimentos e do Direito do Comércio Internacional.

Partindo-se dessa reconfiguração das relações transcontinentais resultante dos esforços dos países em cooperar no âmbito da economia global, o objetivo principal da pesquisa é revisitar os preceitos fundamentais dos investimentos internacionais à luz das iniciativas asiáticas de cooperação no comércio internacional. Nesse sentido, o artigo se estrutura em três capítulos. O primeiro propõe um levantamento histórico das relações comerciais em termos de investimentos internacionais; o segundo convida a uma imersão sob as perspectivas que envolvem o conceito de investimentos internacionais; e o terceiro e último capítulo do estudo apresenta os novos rumos na interface entre o Direito Internacional dos Investimentos e o Direito do Comércio Internacional.

Em termos de considerações finais, afirma-se que, por ser uma releitura contemporânea de preceitos fundantes de um ramo importante do Direito Internacional, não se esgotam as pretensões deste estudo. No entanto, é plausível demonstrar que as mutações geoeconômicas como a que ocorre com o projeto *Um Cinturão, uma Rota (OBOR)*, intimamente relacionado a uma vertente importante do Direito Internacional, que é o Direito Internacional dos Investimentos, faz deste um objeto de análise constante. Especialmente, por tratar-se de um ramo jurídico de matriz dinâmica, que versa sobre a fluidez das relações de comércio internacional e que necessita corresponder com rapidez e flexibilidade as movimentações do mercado global, razão pela qual, seus estudos, não apenas devem ser transdisciplinares, mas, sobretudo, permanentemente revisitado com novos olhares sob o comércio internacional que responde aos anseios do desenvolvimento da economia global.

2. Aporte histórico das relações comerciais em termos de investimentos internacionais

O primeiro capítulo do estudo se desenvolve sob a perspectiva histórica que resta alicerçada na mais atual proposta geoeconômica do mercado mundial, uma iniciativa asiática que impulsiona o comércio internacional com reflexo direto nos investimentos internacionais. Sendo, então, necessária uma incursão na evolução conceitual sobre investimento internacional.

O escambo, a troca de mercadorias, o tráfego de produtos e serviços, até o que atualmente, pode-se determinar como fluxo de capitais entre países. Essas são categorias que aproximam o conceito moderno de investimento internacional, surgido com as grandes companhias e chegando às transnacionais da atualidade, ao que ocorria em sociedades antigas.

2.1. Investimentos internacionais na precursora *Rota da Seda*

Tendo como ponto de partida uma nova geoeconomia das rotas transcontinentais, em especial o projeto *Um Cinturão, uma Rota* (OBOR), é possível uma con-

10 BBC BRASIL. *Polêmico canal interoceânico na Nicarágua deve fortalecer China*. Disponível em: http://www.bbc.com/portuguese/noticias/2013/06/130614_canal_nicaragua_fl. Acesso em: 25 maio 2017.

11 REUTERS BRASIL. *Expansão do oceano Ártico leva a regras próprias de navegação*. Disponível em: http://br.reuters.com/article/businessNews/idBRSPEA0S38O2014012. Acesso em: 25 maio 2017. Conference on Interaction and Confidence-Building Measures in Asia. Disponível em: http://www.s-cica.org/index.html.

12 Trans-Pacific Partnership. Disponível em: http://tpp.mfat.govt.nz/text. Sobre a agenda econômica a partir do Trans-Pacific Partnership é importante a leitura de um estudo minucioso a partir de PEREIRA, Mariana Yante Barrêto. O Trans-Pacific Partnership Agreement e seus potenciais impactos para a regulação da biodiversidade no âmbito transnacional. *Revista de Direito Internacional*, Brasília, v. 13, n. 2, p. 376-389, 2016.

13 Transatlantic Trade and Investment Partnership. Disponível em: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

cepção histórica dos investimentos internacionais.[14] É na incursão aos anúncios advindos dos movimentos asiáticos que uma célula de investimentos internacionais pode ser encontrada. A expressão *Rota da Seda* é habitualmente utilizada para designar um conjunto de itinerários terrestres e marítimos que ligaram desde tempos remotos o Oriente ao Ocidente. Necessário referir que *Rota da Seda* é uma designação moderna que é encontrada nas descrições escritas, quer na Antiguidade, quer na Idade Média, tendo sido criada, no final do Século 19, pelo geógrafo alemão Ferdinand vön Richthofen.[15]

A *Rota da Seda* não era um percurso pré-definido e marcadamente fixado, mudando com o uso e com o passar das gerações. A partir da descrição de Becwith,[16] na verdade, não houve uma única rota, mas sim uma combinação de vários percursos, tanto ao norte como ao sul, consubstanciando uma rede de caminhos e trilhos e entrelaçando vários entrepostos. Uma forma de negociação internacional antiga, com período de 206 a.C a 220 d.C, a *Rota da Seda* foi, como afirmam Findlay e O`Rourke[17] "a infraestrutura mercantil e cultural de uma 'protoglobalização' articulou entidades até então isoladas, tornou-as componentes interativos de um sistema unificado".

Tanto sua composição antiga quanto sua arquitetura atual demonstram avanços de envergadura em termos de investimentos internacionais.[18] Ressaltam Pautasso e Lopes[19], ao descreverem os aspectos principais da iniciativa, *Um Cinturão, uma Rota* (OBOR):

> Em relação ao *Cinturão Econômico da Rota da Seda*, três rotas conectando: a) China e Europa através da Ásia Central e da Rússia; b) China e Oriente Médio através da Ásia Central; c) China, Sudeste Asiático, Ásia Meridional e Oceano Índico. No que diz respeito à *Rota da Seda Marítima do Século 21*, são duas rotas integrando: a) China e Europa através do Mar do Sul da China e Oceano Índico; b) China, Pacífico Sul e o Mar do Sul da China. Considerando estas rotas principais, a iniciativa tem como finalidade aproveitar a já existente infraestrutura logística internacional de modo a estabelecer seis corredores econômicos internacionais: a) China-Mongólia-Rússia; b) Nova Ponte Terrestre da Eurásia; c) China-Ásia Central-Ásia Ocidental; d) Bangladesh-China-Índia-Myanmar; e) China-Península Indochina; f) China-Paquistão.

Considerando-se a amplitude das iniciativas, assume-se que a projeção visa estabelecer a articulação de um grande mercado eurasiático.[20] Esse mercado, por sua vez, representa uma rede de 4,4 bilhões de pessoas, sessenta e oito países e um Produto Interno Bruto (PIB) de US$ 21 trilhões de dólares — aproximadamente 29% da produção global.[21] Nesse sentido, se acredita que a

14 Apenas por uma escolha pontual e atual. Sem ignorar todas as composições doutrinárias que, com maestria e atemporais, realizaram levantamentos no mesmo sentido. Vide: RIBEIRO, Marilda Rosado de Sá. (Org.). Direito dos Investimentos e Petróleo. *Revista da Faculdade de Direito da UERJ,* Rio de Janeiro, v. 1. n. 18, 2010. XAVIER JUNIOR, Ely Caetano. *Direito Internacional dos Investimentos*: o tratamento justo e equitativo dos investidores estrangeiros e o direito brasileiro. Rio de Janeiro: Gramma, 2016. Também em XAVIER JUNIOR, Ely Caetano. As (in)definições de investimento estrangeiro. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p.11-43. CASTRO, Emília Lana de Freitas. *O Direito Internacional dos Investimentos e a promoção do direito ao desenvolvimento*: reflexos na indústria do petróleo. Rio de Janeiro: Gramma, 2016. DIAS, Bernadete de Figueiredo. *Investimentos estrangeiros no Brasil e o Direito Internacional.* Curitiba: Juruá, 2010. LOWENFELD, Andreas F. Investment agreements and International Law. *Columbia Journal Transnational Law,* v. 42, p. 123, 2003. ALVAREZ, José E. Um pouco sobre os costumes. Trad. Bruno Fernandes Dias e Christa Maria Calleja. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos.* Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 45-98. SORNARAJAH, Muthucumaraswamy. *The International Law on Foreign Investment*. 3. ed. Cambridge: Cambridge University Press, 2010.

15 LOURIDO, Rui D'Ávila de Fontes Alferes. Do Ocidente à China pelas Rotas da Seda. *Administração,* v. 19, n. 73, p. 1073-1094, 2006.

16 BECWITH, Cristopher I. *Empires of the Silk Road*: A History of Central Eurasia from the Bronze Age to the Present. Princeton, New Jersey: Princeton University Press, 2009.

17 FINDLAY, Ronald; O`ROURKE, Kevin. *Power and Plenty*: Trade, War, and the World Economy in the Second Millennium. Princeton, New Jersey: Princeton University Press, 2007.

18 Os rumos da *Nova Rota da Seda* fez com que a China em 2014 concluísse investimentos na ordem de US$ 30 bilhões com o Cazaquistão, US$ 15 bilhões com o Uzbequistão e US$ 3 bilhões com o Quirguistão, bem como financiamento de US$ 1,4 bilhão na reforma do porto de Colombo, capital do Sri Lanka, além de anunciar criação de um fundo, o Fundo da Estrada da Seda, na ordem de US$ 40 bilhões. Vide em: CECCHIA, Victor José Portella. *A nova rota da seda como prefácio de reestruturação da ordem mundial.* CEIRI Newspapper. 2 de junho de 2015. Disponível em: <http://www.jornal.ceiri.com.br/a-nova-rota-da-seda-como-prefacio-de-reestruturacao-da-ordem-mundial/.> Acesso em: 25 maio 2017.

19 PAUTASSO, Diego; LOPES, Carlos Renato Ungaretti. *A iniciativa 'one belt, one road' (OBOR) e a projeção regional da China*. São Paulo. 27 de outubro de 2016. Disponível em: <http://www2.espm.br/sites/default/files/pagina/semic_2016_-_carlos_renato_ungaretti.pdf. > Acesso em: 25 maio 2017.

20 YIWEI, Wang. *The Belt and Road Initiative*. What Will China Offer the World In Its Rise. Pequim: New World Press, 2016.

21 PAUTASSO, Diego; LOPES, Carlos Renato Ungaretti. *A iniciativa 'one belt, one road' (OBOR) e a projeção regional da China*. São Paulo. 27 de outubro de 2016. Disponível em: <http://www2.espm.br/sites/default/files/pagina/semic_2016_-_carlos_renato_ungaretti.pdf. > Acesso em: 25 maio 2017.

modernização e a edificação de infraestrutura logística com ferrovias, rodovias, portos, aeroportos, gasodutos, oleodutos, linhas de transmissão e comunicação, tende a proporcionar o aprofundamento da integração econômica regional.[22] Além disso, a irradiação dos efeitos secundários da integração econômica pode levar ao desenvolvimento integral e compartilhado de setores como finanças, energia, comunicações, logística e turismo.[23]

Sob essa perspectiva histórica alicerçada na mais atual proposta geoeconômica do mercado mundial, a iniciativa *Um Cinturão, uma Rota* (OBOR), é necessário que se constitua uma breve origem do que vem a se determinar, hodiernamente, como investimento internacional.

2.2. As grandes companhias e a célula moderna de investimentos internacionais

A circulação de pessoas e mercadorias entre territórios e culturas, tão díspares na antiga *Rota da Seda*, teve um impacto multilateral nas respectivas sociedades envolvidas entre o Oriente e o Ocidente. Assim, não apenas se transferiram produtos como as sedas e as porcelanas, como as respectivas e sofisticadas técnicas de produção. Os europeus transferiam, por seu lado, novas técnicas e especialidades, desde a construção naval, à astronomia e cartografia, às técnicas inerentes à revolução industrial.[24] O escambo, a troca de mercadorias, o tráfego de produtos e serviços, até o que, atualmente, pode-se determinar como fluxo transfronteiriço de capitais entre países. Essas são categorias que aproximam o conceito contemporâneo de investimento internacional ao que ocorria em sociedades mais remotas.[25]

É no Século 17, com as grandes companhias,[26] que uma forma de investimento internacional aproximada a atual se instaura na esfera internacional das relações. Tidas como núcleo ou origem do que hoje se representa como transnacionais,[27] as grandes companhias disseminaram seu poder pelos mercados mundiais da época e, mesmo que se discuta se houve ou não Direito Internacional antes da Paz de Westphália de 1648,[28] não se pode negar o avanço em termos muito similares ao que na atualidade se tem como investimento internacional.

O fenômeno dos investimentos internacionais é melhor verificável no Século 21, quando considera os avanços sociais tecnológicos e o surgimento dos grandes conglomerados empresariais globais que transcendem suas economias locais, as transnacionais, que possuem papel importante uma vez que sua instalação em diversos países ocasiona um enorme aporte de recursos, que desenvolve a economia local, gerando empregos, receita, modernizando a tecnologia do país receptor dos investimentos internacionais.[29]

22 YIWEI, Wang. *The Belt and Road Initiative*. What Will China Offer the World In Its Rise. Pequim: New World Press, 2016.

23 PAUTASSO, Diego; LOPES, Carlos Renato Ungaretti. *A iniciativa 'one belt, one road' (OBOR) e a projeção regional da China*. São Paulo. 27 de outubro de 2016. Disponível em: <http://www2.espm.br/sites/default/files/pagina/semic_2016_-_carlos_renato_ungaretti.pdf. > Acesso em: 25 maio 2017.

24 LOURIDO, Rui D'Ávila de Fontes Alferes. Do Ocidente à China pelas Rotas da Seda. *Administração,* v. 19, n. 73, p. 1073-1094, 2006.

25 Grandes civilizações da antiguidade como os egípcios, os fenícios, os persas, os assírios e os demais povos mesopotâmios, realizavam intervenções similares como o comércio de insumos, estabelecimento de entrepostos comerciais além de suas fronteiras, colonizações com intuito comercial, dentre outras. BISHOP, R. Doak; CRAWFORD, James; REISMAN W. Michael. *Foreign Investment Disputes*: cases, materials and commentary. 2005.

26 Em referência específica, as Companhias das Índias Orientais – inglesa e holandesa. Vide em: ADAMS, Julia. Principals and Agents, colonialists and Company men: the decay of colonial control in Dutch East Indies. *American Sociological Review,* v. 61, p. 12-28, 2007

27 Em referência as Empresas Transnacionais, neste artigo, admitidas para fins terminológicos como transnacionais. Vide em: ADAMS, Julia. Principals and Agents, colonialists and Company men: the decay of colonial control in Dutch East Indies. *American Sociological Review,* v. 61, p. 12-28, 2007.

28 Não sendo objeto de análise, é importante se demonstrar que, muito embora autores como Truyol y Serra TRUYOL Y SERRA, Antonio. *Histoire du droit international public*. Paris: Economica, 1995 e Korff KORFF, Sergei Aleksandrovich. *Introduction à l'histoire du droit internacional prive*. 1923. v. 1, p. 1-24. (Recueil des Courses de Haia L`Academie de Droit International) ensinem que o Direito Internacional é tão antigo quanto a civilização sendo também uma consequência da própria civilização. É com Grotius GROTIUS, Hugo. *O Direito da guerra e da paz*. Trad. de Ciro Mioranza com introdução de Antonio Manuel Hespanha. Ijuí: Unijuí, 2004. (Coleção dos Clássicos do Direito Internacional) que esse Direito Internacional rudimentar das civilizações antigas, passa a configurar-se numa ciência autônoma e sistematizada de estudo. Assim, as relações eram pautadas pelo direito natural, a vontade dos indivíduos, os costumes e a boa-fé de se viver em harmonia. Grotius reconhecia a soberania, mas afirmava que esta era limitada a natureza das regras sociais. Essa é a essência da Paz de Westphália. Assim, para os clássicos o Direito Internacional surge no contexto da Europa dos Séculos 16 e 17, cujo marco histórico foi a célebre Paz de Westphália em que corresponde à assinatura dos Tratados de Münster e Osnnabrück, que consolidaram o fim da Guerra dos 30 anos.

29 Muito embora não se negue que efeitos negativos também são ocasionados pela incursão das transnacionais, ainda mais quando não consideram os princípios fundamentais e os princípios gerais do desenvolvimento. Para maior aprofundamento vide: CASTRO, Emília Lana de Freitas. *O Direito Internacional dos Investimentos e a pro-*

Esses conglomerados empresariais de grande porte, com origem nas grandes companhias e que passaram a ser designadas de transnacionais, possuem uma atuação que, como o próprio nome sugere, transcende os limites territoriais do país de origem, pressupondo aplicação de investimentos em escala mundial. Ao longo dos anos, as grandes companhias então passaram a desenvolver suas atividades em níveis globais e a exercer, de forma significativa, fundamental relevância na economia mundial. Essa relação mantida entre os países e as empresas estrangeiras foi, sempre, uma pauta relevante das negociações internacionais, já nos tempos das grandes companhias.[30]

No contexto de uma ordem econômica globalizada, que se compõe de transnacionais e seus voluptuosos aportes de investimentos internacionais, as decisões do sistema financeiro em relação à matéria acabam por transformar-se em uma "forma de poder sem uma localização nítida ou precisa".[31] Nesse mesmo sentido, Ribeiro[32] entende que "a sociedade contemporânea convive com um fluxo de investimentos internacionais, em teias de crescente complexidade, que envolvem a presença global de sociedades transnacionais".

2.3. Os investimentos internacionais na contemporaneidade das transnacionais

As transnacionais, na visão de Arroyo,[33] assim como os seres humanos nos dois últimos séculos, vêm experimentando toda a mobilidade que lhes facilitou o fenômeno da globalização. As transnacionais são tidas como sujeitos de Direito Internacional em razão de suas interferências no mercado global, causando forte impacto nas economias nacionais que recebem os aportes de investimentos dessas empresas.[34]

As transnacionais compõem o rol dos principais atores do Direito Internacional dos Investimentos, configuram uma maneira de se cooperar com o capital financeiro internacional e permitem que os países que recepcionam os investimentos de grandes conglomerados empresariais tenham acesso a novas tecnologias e modelos de gestão de seus negócios.[35] Ao definir uma pessoa jurídica transnacional, Mello[36] a caracteriza como apresentando grande potencial financeiro, com administração internacional, com patrimônio científico-tecnológico e que possuísse unidade econômica e diversidade jurídica, por meio de filiais ou subsidiárias que poderiam possuir nacionalidades distintas.

As atuações das transnacionais na economia global repercutem na construção do arcabouço jurídico de regulação dos investimentos internacionais. Ademais, o poder econômico das transnacionais no mercado interno pode ser medido por sua influência política, chegando a determinar que o país que recepcione seus investimentos relativize parcela de seu poder soberano, que, nos dizeres de Silveira[37] "tende a sofrer ingerências do investidor estrangeiro no sentido de pressionar pela edição de políticas públicas que o beneficiem".

O pano de fundo dessa relação economicamente positiva é a garantia de segurança jurídica que o país deve oferecer ao seu investidor internacional. A sociedade contemporânea convive com o crescente fluxo dos investimentos internacionais, o que envolve a massiva atuação das empresas transnacionais.[38] Argumento, também, apresentado por Postiga[39] no sentido de que "os fluxos de investimento são hoje quatro vezes maiores do que os fluxos de comércio internacional, assumindo proporções que ultrapassam os limites das possi-

moção do direito ao desenvolvimento: reflexos na indústria do petróleo. Rio de Janeiro: Gramma, 2016.

30 RENTE, Eduardo Santos. Investimentos Estrangeiros e Resseguro. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 659-683.

31 FARIA, José Eduardo. *O direito na economia globalizada*. São Paulo: Malheiros, 2004.

32 RIBEIRO, Marilda Rosado de Sá. (Org.). Direito dos Investimentos e Petróleo. *Revista da Faculdade de Direito da UERJ*, Rio de Janeiro, v. 1. n. 18, p. 2, 2010.

33 ARROYO, Diego Pedro Fernández. *Un derecho comparado para el derecho internacional privado de nuestros días*. Chía: Ibáñez, 2012.

34 RENTE, Eduardo Santos. Investimentos Estrangeiros e Resseguro. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 659-683.

35 CASTRO, Emília Lana de Freitas. *O Direito Internacional dos Investimentos e a promoção do direito ao desenvolvimento*: reflexos na indústria do petróleo. Rio de Janeiro: Gramma, 2016.

36 MELLO, Celso D. de Albuquerque. *Direito Internacional Econômico*. Rio de Janeiro: Renovar, 2009.

37 SILVEIRA, Eduardo Teixeira. *A disciplina jurídica do investimento estrangeiro no Brasil e no Direito Internacional*. São Paulo: J. Oliveira, 2002. p.56-57.

38 XAVIER JUNIOR, Ely Caetano. *Direito Internacional dos Investimentos*: o tratamento justo e equitativo dos investidores estrangeiros e o direito brasileiro. Rio de Janeiro: Gramma, 2016.

39 POSTIGA, Andréa Rocha. A emergência do direito administrativo global como ferramenta de regulação transnacional do investimento estrangeiro direto. *Revista de Direito Internacional*, Brasília, v. 10, n. 1, p. 171-193, 2013. p.172.

BRUNO, Flávio Marcelo Rodrigues; RIBEIRO, Marilda Rosado de Sá. ONE BELT, ONE ROAD: novas interfaces entre o comércio e os investimentos internacionais. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 192-213

bilidades regulatórias domésticas." É nesse sentido, que se ressalta que a necessária atração de investimentos internacionais, de fato, gera impactos sobre as políticas estratégicas de econômica e de legislação, já que o país que recepciona os investimentos de uma transnacional tem o seu poder enfraquecido pela volatilidade do capital estrangeiro.[40]

Determina Arenhardt[41] que "a importância do investimento estrangeiro e a necessidade de sua regulação para garantir um grau mínimo de segurança jurídica redundou na proliferação de acordos de investimentos." Diante desse cenário de desenvolvimento e contexto histórico, o contemporâneo desenho negocial que se encontra é de muita fluidez, grande mobilidade, flexibilidade e dinamismo. Um mercado que propaga o deslocamento de riquezas na qualidade de investimentos estrangeiros resultando na expansão dos negócios internacionais das transnacionais, ao passo que promove o desenvolvimento econômico e se traduz em benefícios sociais para os países que recepcionam os investimentos estrangeiros.[42]

Essa arquitetura apresentou-se no resgate de como se apresentavam os investimentos internacionais na antiga *Rota da Seda,* passando pelas grandes companhias e chegando-se as transnacionais da atualidade. E se cristaliza ao analisar a realidade na perspectiva do projeto *Um Cinturão, uma Rota* (OBOR), uma iniciativa asiática que impulsiona o comércio internacional com reflexo direto nos investimentos internacionais.

3. Perspectivas sobre o conceito de investimentos internacionais

Uma análise jurídica não apresenta uma definição de investimento estrangeiro de forma objetiva, pois um conceito é estabelecido conforme o instrumento regulatório que descreve, em específico, para as atividades ali previstas, o que vem a ser investimento internacional.[43] A natureza eminentemente econômica dos investimentos internacionais exige que sejam considerados alguns preceitos propriamente econômicos.[44]

Três são as perspectivas na construção de uma definição para investimento internacional. A primeira provém da uma busca doutrinária jurídica que circunda as próprias indefinições sobre o conceito de investimentos internacionais, a segunda é como foi concebido na literatura econômica, e uma terceira parte dos marcos regulatórios multilaterais que definem, com vias de seus objetivos diretos, o que vem a ser investimento internacional.

3.1. A busca por um conceito e as indefinições sobre os investimentos internacionais

O conceito de investimento internacional, ainda, é um tema de questionamentos inconclusivos no plano do internacional.[45] Nesse contexto, Morosini e Xavier

40 RIBEIRO, Marilda Rosado de Sá. (Org.). *Novos Rumos do Direito do Petróleo*. Rio de Janeiro: Renovar, 2009. É nesse sentido a afirmação de renúncia de soberania por parte do Estado que espera receber capital por meio de investimento estrangeiro. Vide: SORNARAJAH, Muthucumaraswamy. *The International Law on Foreign Investment*. 3. ed. Cambridge: Cambridge University Press, 2010.

41 ARENHART, Fernando Santos. Investimento estrangeiro: o padrão de tratamento justo e equitativo e o papel da boa-fé. *Revista de Direito Internacional*, Brasília, v. 10, n. 1, p. 154-169, 2013. p. 167

42 Não desconsiderando os fatores negativos, que não são objeto da argumentação estabelecida por esta pesquisa, mas que são muito bem elucidados em: CASTRO, Emília Lana de Freitas. *O Direito Internacional dos Investimentos e a promoção do direito ao desenvolvimento*: reflexos na indústria do petróleo. Rio de Janeiro: Gramma, 2016.

43 RENTE, Eduardo Santos. Investimentos Estrangeiros e Resseguro. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 659-683.

44 XAVIER JUNIOR, Ely Caetano. As (in)definições de investimento estrangeiro. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p.11-43.

45 A esse respeito, com muito aprofundamento, é apresentado um levantamento da conceituação sobre o investimento internacional na ordem jurídica brasileira em XAVIER JUNIOR, Ely Caetano. *Direito Internacional dos Investimentos*: o tratamento justo e equitativo dos investidores estrangeiros e o direito brasileiro. Rio de Janeiro: Gramma, 2016. p. 101-108. Vide na doutrina pátria também: SILVEIRA, Eduardo Teixeira. *A disciplina jurídica do investimento estrangeiro no Brasil e no Direito Internacional*. São Paulo: J. Oliveira, 2002. BASTOS, Celso Ribeiro. Regime jurídico dos investimentos de capital estrangeiro. *Revista de Direito Constitucional e Internacional,* v. 8. n. 32. p. 9-28, 2000. TEIXEIRA, Egberto Lacerda. Regime jurídico-fiscal dos capitais estrangeiros no Brasil. *Revista Forense,* v. 248, p. 454-466, 1974. POSTIGA, Andréa Rocha. A emergência do direito administrativo global como ferramenta de regulação transnacional do investimento estrangeiro direto. *Revista de Direito Internacional*, Brasília, v. 10, n. 1, p. 171-193, 2013. p. 173. MARTINS, Ives Gandra da Silva. Os aspectos legais do investimento estrangeiro na área de informática. *Revista Forense,* v. 84, n. 301, p. 3-16, 1988. BAPTISTA, Luiz Olavo. *Investimentos internacionais no direito comparado e brasileiro*. Porto Alegre: Livraria do Advogado, 1998. ROSSI, Matheus Corredato. O tratamento das empresas de capital nacional e o direito ao desenvolvimento. *Revista de Direito Constitucional e Internacional,* v. 15, n. 61, p. 218-240, 2007.

Júnior[46] demonstram as ondas de regulação dos investimentos estrangeiros no Brasil evidenciando que o país, por meio da regulação, tem respondido às pressões externas e internas para adesão ao regime internacional de investimento estrangeiro, ora para resisti-lo e preferir soluções nacionais, ora para integrá-lo em novas bases. Nesse mesmo sentido, Hastreiter e Winter[47] destacam a reciprocidade com que o país tem cuidado ao contratar, uma vez que o Brasil não está negociando apenas com países nos quais o fluxo de investimentos é unilateral. Apesar dos acordos assinados com países africanos representarem uma resposta à demanda de grandes empresas — em especial construtoras — brasileiras que participam de grandiosos projetos no continente, o Brasil assinou acordo também com o México, mesmo sendo o principal destino de investimentos mexicanos na América Latina. Da mesma forma, o fluxo de investimentos entre o Brasil e Chile é recíproco.

É possível, inclusive, mensurar os impactos da adesão do Brasil aos acordos internacionais em matéria de investimentos estrangeiros, que podem ser estudados a partir de diferentes parâmetros, dentre os quais a definição de investimento internacional.[48] A definição de investimento estrangeiro tem dupla importância para o Direito Internacional dos Investimentos como assevera Xavier Júnior[49]

> Em primeiro lugar, há uma exigência teórica de definição do objeto material de estudo do Direito Internacional dos Investimentos. Em segundo lugar, há duas questões práticas fundamentais que dependem da definição de investimento estrangeiro: a) a caracterização de determinada transação econômica internacional como investimento, de maneira que ela possa ser aplicada as regras jurídicas – nacionais ou internacionais – específicas, e b) a fixação de jurisdição para os tribunais arbitrais com atribuição para solução de controvérsias relativas a investimentos.

O que podemos chamar de direito dos investimentos internacionais goza hoje de uma autonomia própria focalizando diretamente as operações econômicas e jurídicas que envolvem a saída e entrada de valores destinados a fins econômicos, no território de um país.[50] Os investimentos internacionais, em sua definição, convergem, estritamente, aos aspectos fundamentais da internacionalização das trocas econômicas de mercadorias, a globalização de empresas e a globalização dos fluxos de capitais.[51] E, nesse contexto, o Direto Internacional não conhece uma noção de investimento internacional. Destina-se a definir os direitos e deveres dos indivíduos exercendo uma atividade econômica em território estrangeiro.[52]

É nesse sentido a concepção de Ribeiro[53] de que o Direito Internacional dos Investimentos consiste em *standards*[54] emanados do Direito Internacional Econômico e princípios e regras específicas, incorporando-se, eventualmente, as leis dos países que recepcionam os investimentos internacionais. E, ademais, tais *standards* teriam como postulado o respeito à lei interna do país que recepciona os investimentos internacionais, a garantia por parte deste de um padrão mínimo e razoavelmente seguro à realização de investimento e a possibilidade das medidas de expropriação.[55]

DIAS, Bernadete de Figueiredo. *Investimentos estrangeiros no Brasil e o Direito Internacional*. Curitiba: Juruá, 2010. RAFFAELLI, Paulo Cesar Pimentel. Aspectos tributários do investimento estrangeiro no mercado financeiro e de capitais. *Revista Tributária e de Finanças Públicas,* v. 12, n. 57, p. 257-277, 2004.

46 MOROSINI, Fabio; XAVIER JÚNIOR, Ely Caetano. Regulação do investimento estrangeiro direto no Brasil: da resistência aos tratados bilaterais de investimento à emergência de um novo modelo regulatório. *Revista de Direito Internacional*, Brasília, v. 12, n. 2, p. 420-447, 2015.

47 HASTREITER, Michele Alessandra; WINTER, Luís Alexandre Carta. Racionalidade econômica e os acordos bilaterais de investimento. *Revista de Direito Internacional*, Brasília, v. 12, n. 2, p. 283- 302, 2015.

48 É o que fora realizado com maestria em: XAVIER JUNIOR, Ely Caetano. As (in)definições de investimento estrangeiro. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p.11-43.

49 XAVIER JUNIOR, Ely Caetano. As (in)definições de investimento estrangeiro. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p.11-43.

50 BAPTISTA, Luiz Olavo. *Investimentos internacionais no direito comparado e brasileiro*. Porto Alegre: Livraria do Advogado, 1998. p. 20

51 STERN, Brigitte. *O contencioso dos investimentos internacionais*. Barueri: Manole. 2003.

52 CARREAU, Dominique; JULLIARD, Patrick; FLORY, Thiebaut. *Manuel du Droit International Économique*. 2. ed. Paris: LGDJ, 1990. p. 561.

53 RIBEIRO, Marilda Rosado de Sá. (Org.). Direito dos Investimentos e Petróleo. *Revista da Faculdade de Direito da UERJ,* Rio de Janeiro, v. 1, n. 18, p. 2, 2010.

54 Seriam tais *standards* as cláusulas e as condições devem ser estabelecidas à luz do princípio da boa-fé, e sua amplitude deve ser constitucionalmente validada pelos ordenamentos jurídicos internos e compatível com o direito internacional. Vide: DOLZER, Rudolf; SCHREUER, Cristoph. *Principles of International Investment Law*. New York: Oxford University Press, 2008.

55 RIBEIRO, Marilda Rosado de Sá. (Org.). Direito dos Investimentos e Petróleo. *Revista da Faculdade de Direito da UERJ,* Rio de

No direito internacional, é possível conceber duas concepções de definição sobre investimentos internacionais. A primeira seria uma doutrina anglo-saxã, que baseia a noção de investimento estrangeiro no direito de propriedade. A segunda, uma doutrina continental, para a qual o investimento internacional é visto como um fato econômico e passa a ser entendido com base na importância e nos efeitos que pode trazer à economia do país que recepciona os investimentos internacionais.

3.2. O conceito de investimentos internacionais na concepção econômica

Não há como separar a visão jurídica da sua noção econômica, pois o investimento internacional é um fenômeno econômico. O investimento internacional é, essencialmente, multidisciplinar e, nesse sentido, também representa um fenômeno econômico de dimensões transnacionais. Afirma com lucidez Castro,[56] que a realização de investimentos internacionais passa pelas estratégias de maximização de lucros, pelo repatriamento de capital pelos respeito ao padrão ambiental, social e econômico regional.

Ao transpor o fenômeno econômico para a esfera jurídica, se dilui a sua definição. Porém, de um ponto de vista mais racional, a definição de investimento estrangeiro tem mudado ao longo do tempo, acompanhando as mudanças sofridas pelas relações econômicas internacionais. Essa fluidez do conceito de investimento acaba refletindo, em certa medida, a multiplicidade de fontes e de interesses envolvidos na regulação internacional de investimentos estrangeiros.[57]

O termo investimento é compreendido de empregabilidade de capital em títulos mobiliários ou em empreendimentos tecnológicos e comerciais. Configura-se, essencialmente, toda a aplicação de capital, em geral em longo prazo, que deva render lucratividade para as transnacionais e crescimento sócio econômico para o país que recepciona os investimentos. Na visão econômica conceitual, investimento internacional deve ser formado por: transferências de fundos, projetos de longo prazo, objetivos de ganhos regulares, participação da pessoa que transferiu os fundos na administração do projeto, e assunção dos riscos do negócio.[58]

Se analisado sobre as categorias econômicas do aporte, do termo e do risco. O aporte seria equivalente ao valor do investimento, que pode ser feito em espécie ou *in natura* e deve ter fins lucrativos, já o termo seria correspondente ao prazo que não pode ser simultâneo entre a constituição do investimento e a remuneração advinda deste, sob pena de se caracterizar o investimento como especulativo; e o risco, envolveria a incerteza quanto aos resultados econômicos do negócio em torno do volume de investimento internacionais envolvidos.[59]

Em termos econômicos, duas são as categorias de investimentos internacionais, os investimentos internacionais diretos são definidos por Krugman e Obstfeld[60] como "fluxos internacionais de capital pelos quais uma empresa em um país cria ou expande uma filial em outro". Uma forma de investimento internacional de longo prazo por envolver não apenas transferências de recursos, mas também aquisição de controle. E os investimentos de portfólio, assim definidos por Hubbard e O`Brien,[61] como investimentos nos quais o investidor não obtém uma influência duradoura sobre o gerenciamento do negócio. Normalmente, eles são de curto prazo e englobam investimentos em ativos financeiros sem a expectativa de controle e gerenciamento dos ativos reais, nos quais os ativos financeiros estão baseados e também, incluem interesses em acordos de concessão, direitos contratuais e aplicações financeiras.[62]

Os investimentos internacionais, também, são tidos, não apenas como transferências de recurso, mas também como aquisição do controle de empreendimento.

Janeiro, v. 1, n. 18, p. 2, 2010.

56 CASTRO, Emília Lana de Freitas. *O Direito Internacional dos Investimentos e a promoção do direito ao desenvolvimento*: reflexos na indústria do petróleo. Rio de Janeiro: Gramma, 2016.

57 XAVIER JUNIOR, Ely Caetano. As (in)definições de investimento estrangeiro. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p.11-43.

58 DOLZER, Rudolf; SCHREUER, Cristoph. *Principles of International Investment Law*. New York: Oxford University Press, 2008.

59 ROSA, Luiz Fernando Franceschini da. Investimentos. O > Acesso à jurisdição brasileira e a situação do investidor estrangeiro. In: MERCADANTE, Araminta de Azevedo; MAGALHÃES, José Carlos de. *Solução e prevenção de litígios internacionais*. São Paulo: NECIN - Projeto Capes, 1998. p. 197-226.

60 KRUGMAN, Paul R.; OBSTFELD, Maurice. *Economia Internacional:* teoria e política. Tradutor técnico Eliezer Martins Diniz. 6. ed. São Paulo: Pearson Addison Wesley, 2006.

61 HUBBARD, Glenn; O'BRIEN, Anthony P. *Introdução à Economia.* 2. ed. atual. Porto Alegre: Bookman, 2010.

62 ARAÚJO. Leandro Rocha de. O Brasil e a Regulamentação dos Investimentos Estrangeiros na Organização Mundial do Comércio. *Revista da Faculdade de Direito da Universidade de São Paulo,* São Paulo, v. 99, p. 829-946, 2004.

Nesse sentido elucida Sornarajah[63] que "investimento estrangeiro envolve a transferência de ativos tangíveis e intangíveis de um país a outro, com o propósito de utilizá-los neste país gerando riqueza por meio do controle total ou parcial do proprietário".

Deve-se observar que o capital deve ultrapassar fronteiras, sendo oriundo do exterior, tem de haver uma destinação econômica, apresentar caráter de permanência e seu ingresso deve ser efetivo e desvinculado, não havendo nenhum tipo de contrapartida em relação a sua entrada.[64] Razão pela qual, sob o viés jurídico, a definição de investimento seria dada por meio do reenvio à legislação do país que recepciona os investimentos internacionais.[65] Não sendo este o argumento que o presente trabalho tem como foco central. Por ser a proposta uma interface entre comércio internacional e investimento internacional, o foco se dá em uma compreensão atual de investimento a partir de tratados bilaterais ou multilaterais de promoção e proteção ao comércio com base no investimento internacional.

3.3. Os investimentos internacionais sob o viés das normativas multilaterais

Atualmente, existem inúmeros acordos internacionais que tratam do tema, sejam eles multilaterais ou bilaterais.[66] O termo investimento internacional passou a ser utilizado após a 2ª guerra mundial, até então, a expressão bens estrangeiros era o termo usual no Direito Internacional. O que era, apenas, uma política em relação aos bens dos estrangeiros situados no território nacional, gradativamente, passou a consistir em um regime de investimentos estrangeiros, uma regulamentação do movimento de capitais, desde o seu ponto de partida até o de chegada, acentuando o caráter internacional da operação.[67]

Em termos de aproximação do comércio internacional e a realidade da atuação do Brasil na economia global[68], tem-se em nível regional e multilateral uma definição sobre investimento internacional no denominado Protocolo de Colônia,[69] um *Acordo para a Promoção e a Proteção Recíproca de Investimentos no Mercosul*, de 1993, firmado entre os países que compõe a integração regional, criado com o objetivo de propiciar condições favoráveis para os investimentos, intensificar a cooperação econômica e acelerar o processo de integração entre os países.[70] Ainda no âmbito regional, no Protocolo de Buenos Aires sobre o *Acordo de Promoção e Proteção de Investimentos Provenientes de Estados não-Partes do Mercosul,*[71] de 1994, que possui o mesmo objetivo, com a particularidade de se referir aos países que não fazem parte do bloco econômico.[72] Em ambos os casos, o investimento

63 SORNARAJAH, Muthucumaraswamy. *The International Law on Foreign Investment*. 3. ed. Cambridge: Cambridge University Press, 2010.

64 SILVEIRA, Eduardo Teixeira. *A disciplina jurídica do investimento estrangeiro no Brasil e no Direito Internacional*. São Paulo: J. Oliveira, 2002. p. 56-57.

65 Tema muito elucidativamente abordado como um dos objetos da análise em: XAVIER JUNIOR, Ely Caetano. *Direito Internacional dos Investimentos*: o tratamento justo e equitativo dos investidores estrangeiros e o direito brasileiro. Rio de Janeiro: Gramma, 2016. p. 84-117.

66 A tratativa em termos bilaterais sobre os investimentos internacionais não serão tratadas nesta pesquisa, sendo objeto de estudo com grau de aprofundamento em: XAVIER JUNIOR, Ely Caetano. *Direito Internacional dos Investimentos*: o tratamento justo e equitativo dos investidores estrangeiros e o direito brasileiro. Rio de Janeiro: Gramma, 2016. p. 67-83.

67 BAPTISTA, Luiz Olavo, *Investimentos internacionais no direito comparado e brasileiro*. Porto Alegre: Livraria do Advogado, 1998.

68 Sobre os investimentos estrangeiros em dados estatísticos envolvendo o Brasil, cabe a leitura de BAS, Magdalena. América do Sul em face dos tratados bilaterais de investimento: rumo ao retorno do Estado na solução de controvérsias? *Revista de Direito Internacional*, Brasília, v. 13, n. 1, p. 132-144, 2016.

69 MERCOSUL. *Protocolo de Colônia para a Promoção e a Proteção Recíproca de Investimentos no Mercosul.* Disponível em: <http://dai-mre.serpro.gov.br/atos-internacionais/multilaterais/protocolo-de-colonia-para-protecao-e-promocao-reciproca-de-investimentos-no-mercosul-dec-cmc-11-93/>. Acesso em: 25 maio 2017.

70 MERCOSUL. Protocolo de Colônia para a Promoção e a Proteção Recíproca de Investimentos no Mercosul: Art. 1 – Definições: O termo "investimento" designa todo tipo de ativo, investido direta ou indiretamente, por investidores de uma das Partes Contratantes no território de outra Parte Contratante, em conformidade com as leis e a regulamentação dessa última. Inclui, em particular, ainda que não exclusivamente: a) a propriedade de bens móveis e imóveis, assim com os demais direitos reais, tais como hipotecas, cauções e penhoras; b) ações, quotas societárias e qualquer outro tipo de participação em sociedades; c) títulos de crédito e direitos sobre obrigações que tenham um valor econômico; os empréstimos estarão incluídos somente quando estiverem diretamente vinculados a um investimento específico; d) direitos de propriedade intelectual ou imaterial, incluindo direitos de autor e de propriedade industrial, tais como patentes, desenhos industriais, marcas, nomes comerciais, procedimentos técnicos, knowhow e fundo de comércio; e) concessões econômicas de direito público conferidas em conformidade com a lei, incluindo as concessões para a pesquisa, cultivo, extração ou exploração de recursos naturais.

71 MERCOSUL. *Protocolo de Buenos Aires sobre Promoção e Proteção de Investimentos Provenientes de Estados não-Partes do Mercosul.* Disponível em: <http://dai-mre.serpro.gov.br/atos-internacionais/multilaterais/protocolo-sobre-promocao-e-protecao-de-investimentos-provenientes-de-estados-nao-membros-do-mercosul-dec-no-11-94/>. Acesso em: 25 maio 2017.

72 MERCOSUL. Protocolo de Buenos Aires sobre Promoção e

internacional está definido de uma forma imprecisa incluindo ainda um rol exemplificativo que abrange desde bens móveis e imóveis até ações, títulos de crédito e direitos de propriedade intelectual.

Também em nível multilateral, embora não exista em vigor um marco regulatório sobre investimentos, vigora a Convenção de Seul de 1985 que criou a *Agência Multilateral de Garantia para Investimentos (MIGA).*[73] Criada com o objetivo de estimular investimentos estrangeiros nos países em desenvolvimento por meio de garantias a investidores, contra prejuízos causados por riscos não comerciais, a agência também proporciona assistência técnica para ajudar os países a divulgarem informações sobre oportunidades de investimento. A referida convenção não traz uma definição de investimento internacional, mas tão somente formas para a sua proteção, incentivo e promoção.[74]

Ainda no âmbito multilateral, a íntima ligação que os investimentos internacionais têm com o comércio internacional deu origem à criação, no âmbito da *Organização Mundial do Comércio (OMC),*[75] de três negociações multilaterais sobre o tema dos investimentos internacionais, o *Acordo sobre Medidas de Investimentos relacionadas ao Comércio (TRIMS, sigla em inglês),*[76] o *Acordo sobre Medidas relacionadas à Propriedade Intelectual (TRIPS, sigla em inglês),*[77] e o *Acordo sobre o Comércio de Serviços (GATS, sigla em inglês).*[78] Todos com o objetivo de regular o fluxo de investimento em relação, especificamente, ao comércio de bens, a propriedade intelectual e ao comércio de serviços. Ambos os acordos versam sobre temas específicos, não sendo capazes de fornecer um conjunto coerente e completo para a definição clara e objetiva dos investimentos internacionais.

Atores importantes na economia global, algumas organizações internacionais de peso nas relações multilaterais do comércio, a exemplo do *Fundo Monetário Internacional (FMI),*[79] a *Organização para a Cooperação e o Desenvolvimento Econômico (OCDE)*[80] e a *Conferência das Nações Unidas sobre Comércio e Desenvolvimento (UNCTAD,*

Proteção de Investimentos Provenientes de Estados não-Partes do Mercosul: Art. 2, A – Definições: 1. O termo "investimento" designa, em conformidade com as leis e as regulamentações do Estado Parte em cujo território se realize o investimento, todo tipo de ativo investido direta ou indiretamente por investidores de um Terceiro Estado no território do Estado Parte, de acordo com a legislação deste. Inclui em particular, ainda que não exclusivamente: a) a propriedade de bens móveis e imóveis, assim com os demais direitos reais, tais como hipotecas, cauções e penhoras; b) ações, quotas societárias e qualquer outro tipo de participação em sociedades; c) títulos de crédito e direitos sobre obrigações que tenham um valor econômico; os empréstimos estarão incluídos somente quando estiverem diretamente vinculados a um investimento específico; d) direitos de propriedade intelectual ou imaterial, incluindo direitos de autor e de propriedade industrial, tais como patentes, desenhos industriais, marcas, nomes comerciais, procedimentos técnicos, knowhow e fundo de comércio; e) concessões econômicas de direito público conferidas em conformidade com a lei, incluindo as concessões para a pesquisa, cultivo, extração ou exploração de recursos naturais.

73 BRASIL. *Decreto nº 698 de 08.12.1992 que promulga a Convenção que Estabelece a Agencia Multilateral de Garantia para Investimentos (MIGA), concluída em Seul em 11 de outubro de 1985, e que entrou em vigor para o Brasil.* 23 de setembro de 1992. Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/D0698.htm.> Acesso em: 25 maio 2017.

74 A Convenção, em seu artigo 11, enumera os riscos políticos da seguinte forma: a) transferências; b) expropriação, nacionalização38 e medidas assemelhadas; c) quebra de contrato; d) guerras e distúrbios civis. BRASIL. *Decreto nº 698 de 08.12.1992 que promulga a Convenção que Estabelece a Agencia Multilateral de Garantia para Investimentos (MIGA)*, concluída em Seul em 11 de outubro de 1985, e que entrou em vigor para o Brasil, em 23 de setembro de 1992. Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/D0698.htm>. Acesso em: 25 maio 2017.

75 WORLD TRADE ORGANIZATION. [*Homepage*]. Disponível em: https://www.wto.org

76 WORLD TRADE ORGANIZATION. *Trade-Related Investment Measures*. Disponível em: <https://www.wto.org/english/tratop_e/invest_e/trims_e.htm>.

77 WORLD TRADE ORGANIZATION. *Agreement on Trade-Related Aspects of Intellectual Property Rights*. Disponível em: <https://www.wto.org/english/tratop_e/trips_e/trips_e.htm>.

78 WORLD TRADE ORGANIZATION. *General Agreement on Trade in Services*. Disponível em: <https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm>.

79 Investimento direto é a categoria de investimento internacional que reflete os objetivos de uma entidade residente em uma economia visando um interesse duradouro em uma empresa residente em outra economia. [...]. O interesse duradouro implica a existência de uma relação longa entre o investidor e a empresa estrangeira e um significativo grau de influência do investidor na gestão da empresa. Investimento direito compreende não somente a transação inicial que estabelece a relação entre o investidor e a empresa, mas também todas as transações subsequentes entre eles e entre as empresas filiadas, como também as incorporadas ou não incorporadas. FMI. *Balance of Payment Manual*. 5. ed. 1993. p. 86. Disponível em: <http://www.imf.org/external/np/sta/bop/bopman.pdf> Acesso em: 25 maio 2017.

80 Investimento estrangeiro direito reflete os objetivos de uma relação duradoura por parte da entidade residente em uma economia (investidor direito) em uma entidade residente em uma economia outra que aquela do investidor (investimento estrangeiro). Esse interesse duradouro implica a existência de uma longa relação entre o investidor direto e a empresa e um significativo grau de influência na gestão dessa empresa. Investimento direto envolve as transações iniciais entre ambos e todas as transações de capital subsequentes entre eles e entre as empresas filiadas, incorporadas e não incorporadas. OCDE. *Benchmark Definition of Foreign Direct Investment*. p. 7. Disponível em <http://www.oecd.org/dataoecd/10/16/2090148.pdf>. Acesso em: 25 maio 2017.

sigla em inglês)[81] fornecem uma definição de investimento internacional que corresponde a visão econômica sobre investimentos. Essas definições, sob o contexto multilateral das relações de comércio são bastante similares sendo possível concluir que todas essas regras relacionadas ao investimento internacional, que, basicamente, consistem no ingresso de capitais estrangeiros em um país, seja por meio da construção, fusão ou aquisição de uma unidade produtiva nacional ou ainda transações entre matriz e subsidiárias de caráter internacional, são incapazes de fornecer uma definição estritamente jurídica sobre os investimentos internacionais, a relação direta com os fenômenos econômicos que definem investimentos é necessária no momento de tomar como definição o que as regras multilaterais analisadas apresentam.

A ideia de investimento internacional supera o simples movimento de capitais, fazendo parte de um amplo movimento de expansão das atividades econômicas. Trata-se de alocar recursos, maximizar riquezas, assimilar custos correspondentes com a expectativa de auferir riquezas que superem custos imediatos. Tem um viés de perspectiva futura, de crença em determinado mercado nacional por parte de um transnacional que desprende seus esforços em investir em determinado país.[82] Por outro lado, se constante de um tratado multilateral, assentará os interesses dos países que ratificaram o instrumento.[83]

É possível vislumbrar que investimentos internacionais podem tomar diversas formas. Novos tipos e modos de investir se desenvolvem continuamente, de tal forma que é possível se deparar com novas situações econômicas e alcançar metas financeiras mais ousadas.[84] A ausência de uma única definição jurídica de investimento internacional contrasta com o acentuado desenvolvimento teórico do Direito Internacional dos Investimentos. Há uma necessidade de se estudar o conceito de investimento internacional que se assenta justamente nas indefinições doutrinárias dessa perspectiva, como assevera Kahn[85], no sentido de que mesmo após anos de estudos, de numerosas aplicações financeiras e de instrumentos jurídicos contendo diversas definições, a questão ainda não se encontra superada.

4. Novos rumos na interface entre o Direito Internacional dos Investimentos e o Direito do Comércio Internacional

Há de se considerar que inúmeras e diversificadas foram às transformações geopolíticas e socioeconômicas no mundo, desde que a regulação de fluxo transfronteiriço de capitais se tornou uma matéria de interesse e impacto significativo no comércio internacional. Destaca Postiga[86] que as preocupações envolvendo o investimento estrangeiro nos planos econômico, político e de segurança pública demonstrando que esses receios levaram a uma necessária regularização dos investimentos estrangeiros por parte dos ordenamentos jurídicos internos dos países. Razão pela qual alguns órgãos manifestaram sua compreensão sobre os investimentos estrangeiros. Como bem assevera Xavier Júnior[87], investimento e comércio foram determinantes no conjunto de regras jurídicas que atualmente compõem o que se passou a determinar como sendo o Direito Internacional dos Investimentos.

81 Investimento estrangeiro direto é definido como um investimento envolvido em um relacionamento de longo prazo, que reflete um interesse e controle duradouros, por uma entidade residente em uma economia, sobre um empreendimento sediado em outra economia, que não aquela do investidor direito. O investimento estrangeiro direto implica o exercício de certo grau de influência na gestão do empreendimento residente na outra economia. UNCTAD. *World Investment Report – 2005. Transnational corporations and the internationalization of ReD*. 2005. p. 329. Disponível em: <http://www.unctad.org> Acesso em: 25 maio 2017.

82 XAVIER JUNIOR, Ely Caetano. As (in)definições de investimento estrangeiro. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p.11-43. No mesmo sentido: DIAS, Bernadete de Figueiredo. *Investimentos estrangeiros no Brasil e o Direito Internacional*. Curitiba: Juruá, 2010.

83 RENTE, Eduardo Santos. Investimentos Estrangeiros e Resseguro. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 659-683. E também: DIAS, Bernadete de Figueiredo. *Investimentos estrangeiros no Brasil e o Direito Internacional*. Curitiba: Juruá, 2010.

84 SALACUSE, Jeswald W. *The law of investment treatis*. Great Bretain: The Oxford University Press, 2010.

85 KAHN, Philippe. Les definitions de l`investissement international. In: SOREL, Jean-Marc. (Org). *Le droit international économique à l`aube du XX le siècle*. Paris: Pedone, 2009.

86 POSTIGA, Andréa Rocha. A emergência do direito administrativo global como ferramenta de regulação transnacional do investimento estrangeiro direto. *Revista de Direito Internacional*, Brasília, v. 10, n. 1, p. 171-193, 2013. p.174.

87 XAVIER JUNIOR, Ely Caetano. *Direito Internacional dos Investimentos*: o tratamento justo e equitativo dos investidores estrangeiros e o direito brasileiro. Rio de Janeiro: Gramma, 2016.

As transnacionais são caraterizadas por atuação a níveis globais e que, a partir da abertura das economias internacionais, passaram a ter fundamental influência na economia mundial e na atualidade são as responsáveis pela grande circulação de capital pelo mundo. Os países estavam preocupados com a influência dos investidores em seu território, buscando, sempre, zelar pela sua soberania, enquanto os investidores, por outro lado, se mostravam preocupados em manter a proteção e segurança dos seus investimentos da interferência do país que os recepciona. O surgimento desses conflitos acabava por apresentar uma série de problemas paralelos, relacionados ao direito aplicável e a jurisdição competente para solucionar as controvérsias inerentes à relação entre investidores estrangeiros e países que recepcionam tais investimentos.

O último capítulo da pesquisa é destinado a determinar os novos rumos na interface entre o Direito Internacional dos Investimentos e o Direito do Comércio, ao definir o Direito Internacional dos Investimentos, verificar o tratamento dos investimentos internacionais no contexto do multilateralismo e apresentar os últimos aportes sobre as interações entre comércio e investimentos internacionais.

4.1. As definições sobre o Direito Internacional dos Investimentos

O Direito Internacional dos Investimentos é inserido na esfera do Direito Internacional Econômico e possui caráter multidisciplinar, uma vez que apresenta os princípios gerais e as normas fundamentais de regulamentação das relações econômicas que transcendem os aspectos políticos, geográficos e estatais.[88] Nesse mesmo sentido, Ribeiro[89] leciona que o Direito Internacional dos Investimentos consiste em um conjunto de padrões de tratamento emanados do Direito Internacional Econômico, além de princípios e regras específicas, incorporando-se a elas, eventualmente, as leis nacionais do país que recepciona os investimentos internacionais.

Do ponto de vista econômico, os investimentos internacionais procuram promover o livre fluxo de capitais por entre as fronteiras. O principal objetivo dessa esfera jurídica é a proteção dos investidores estrangeiros, afirmando proteções que já são concedidas em termos de costume internacional, admitindo garantias suplementares com base em tratados e fornecendo segurança jurídica em relação a solução de conflitos que possam vir a surgir em âmbito de negociações bilaterais ou multilaterais que envolvam investimentos internacionais.[90]

Veja-se quão importante passa a ser a temática e da mesma monta de importância passa a ser, a determinação das características de pluralidade e transversalidade de um Direito Internacional em sua visão contemporânea que justificam o estudo do tema. O Direito Internacional dos Investimentos corresponde a um desafio a clássica dicotomia internacionalista entre o que é público e privado, ou entre o interno e o internacional.[91] Fundamenta-se na cooperação entre distintos, mas correlacionados setores sociais, isto porque não se compõem, exclusivamente, de um conjunto normativo predeterminado, mas sim, de uma série de normas esparsas de origens diversas.[92] Quer seja de espaços de integração regional, de acordos bilaterais e multilaterais, ou, ainda, de diretrizes patrocinadas por organizações internacionais diversas.[93]

Considerando-se as regras convencionais na ordem jurídica internacional, assinala Alvarez[94] que, nos capítu-

88 ALMEIDA, Bruno Rodrigues. Investimentos Estrangeiros Diretos, Direitos Humanos e a Ordem Pública Transnacional. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 603-619. No mesmo sentido: SCHWARZENBERGER, Georg. *The Principles and standards of International Economic Law*. 1966. p. 1-98. (Recueil des Courses de Haia L`Academie de Droit International).

89 RIBEIRO, Marilda Rosado de Sá. (Org.). Expropriação: revisitando o tema no contexto dos estudos sobre investimentos estrangeiros. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 45-98.

90 ALVAREZ, José E. Um pouco sobre os costumes. Trad. Bruno Fernandes Dias e Christa Maria Calleja. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 45-98.

91 ALMEIDA, Bruno Rodrigues. Investimentos Estrangeiros Diretos, Direitos Humanos e a Ordem Pública Transnacional. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 603-619.

92 JESSUP, Philip. *Direito Transnacional*. Trad. Carlos Ramires Pinheiro da Silva. Rio de Janeiro: Fundo de Cultura, 1965.

93 DOLZER, Rudolf; SCHREUER, Cristoph. *Principles of International Investment Law*. New York: Oxford University Press, 2008.

94 ALVAREZ, José E. Um pouco sobre os costumes. Trad. Bruno

los reservados aos investimentos internacionais, tipicamente se concedem a investidores estrangeiros direitos relativos a não discriminação, garantias mínimas de se conceder um tratamento justo e equitativo, proteção integral e segurança, justa, pronta e adequada indenização em caso de expropriação, um tratamento não menos favorável do que o exigido pelo Direito Internacional, direito de repatriar os lucros decorrentes da operação de sua empresa e a garantia de que os investidores lesados têm um recurso direto a uma arbitragem internacional vinculante, para afirma qualquer dos seus direitos baseados em tratados, sem que venha a ser necessário esgotar os recursos locais do país hospedeiros em que se encontram localizados ou de buscar a cooperação de seu Estado de origem.[95]

Da metade final do século passado, quando a Corte Internacional de Justiça determinava ser surpreendente o fato de que o Direito dos Investimentos Internacionais ainda não havia cristalizado, apresar do crescente ciclo de investimento estrangeiro entre países.[96] Importante salientar que a temática representa uma importante característica do Direito Internacional em seu viés contemporâneo de compreensão, sobretudo com a crescente inserção dos Estados em tratados que tem por objetivo normatizar uma gama de matérias pontuais de interesse regional e global, com a finalidade estratégica de crescimento e desenvolvimento de suas economias.[97] No mesmo sentido, afirma Alvarez[98] ao citar os estudos de Lowenfeld e Schwebel, no sentido do impacto de mudança que o Direito Internacional dos Investimentos tem causado na esfera do Direito Internacional, tanto em nível descritivo quanto em termos normativos.

4.2. Investimentos Internacionais no contexto do multilateralismo

Em relação aos investimentos internacionais, é a partir da década de noventa que os países desenvolvidos percebem a real necessidade de um marco regulatório multilateral com destino a assegurar condições transparentes, estáveis e previsíveis para o fluxo de capitais no mercado mundial, especialmente no setor produtivo, propulsor da expansão comercial.[99]

No contexto multilateral, a primeira iniciativa nesse sentido foi o *Acordo sobre Medidas de Investimentos Relacionadas ao Comércio de Bens (TRIMs, sigla em inglês)*[100]. Assinado ao final da Rodada Uruguai, de 1986 a 1995, esse Acordo disciplinou uma série de políticas de incentivo e de requisitos de desempenho, que eram utilizados pelos países na sua relação com empresas transnacionais, para promover políticas industriais.

Relatam Suñe e Vasconcelos[101] que o Acordo resultou de difíceis negociações entre países desenvolvidos e em desenvolvimento acerca da melhor maneira de se regulamentarem os investimentos internacionais ligados ao comércio. De um lado, as nações centrais procuraram direcionar as discussões no sentido de conceder maior proteção e segurança aos investidores internacionais, daí a ênfase na redução da capacidade de intervenção dos governos dos países que recepcionam investimen-

Fernandes Dias e Christa Maria Calleja. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos.* Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 45-98.

95 Para maior aprofundamento, o mesmo autor indica: BISHOP, R. Doak; CRAWFORD, James; REISMAN W. Michael. *Foreign Investment Disputes*: cases, materials and commentary. 2005. p. 1007-1169.

96 ALVAREZ, José E. Um pouco sobre os costumes. Trad. Bruno Fernandes Dias e Christa Maria Calleja. In: RIBEIRO, Marilda Rosado de Sá. (Org). *Direito Internacional dos Investimentos*. 1ª edição. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Ed. Renovar, 2014. p. 45-98.

97 ALMEIDA, Bruno Rodrigues. Investimentos Estrangeiros Diretos, Direitos Humanos e a Ordem Pública Transnacional. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 603-619.

98 LOWENFELD, Andreas F. Investment agreements and International Law. *Columbia Journal Transnational Law,* v. 42, p. 123, 2003. SCHWEBEL, Sthepen M. The influence of bilateral investment treaties on Customary International Law. *Amsterdan Society International Law,* v. 9827, 2004. *apud* ALVAREZ, José E. Um pouco sobre os costumes. Trad. Bruno Fernandes Dias e Christa Maria Calleja. In: RIBEIRO, Marilda Rosado de Sá. (Org). *Direito Internacional dos Investimentos*. 1ª edição. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Ed. Renovar, 2014. p. 45-98.

99 SUÑE, Natasha; VASCONCELOS, Raphael Carvalho de. O Direito dos Investimentos no Mercosul: realidade e possibilidades. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos.* Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 159-178.

100 WORLD TRADE ORGANIZATION. *Trade-Related Investment Measures*. Disponível em: <https://www.wto.org/english/tratop_e/invest_e/trims_e.htm>.

101 SUÑE, Natasha; VASCONCELOS, Raphael Carvalho de. O Direito dos Investimentos no Mercosul: realidade e possibilidades. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos.* Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 159-178.

tos internacionais. De outro, as economias periféricas salientavam a necessidade de regular a excessiva autonomia e as práticas anticompetitivas das transnacionais, que impedem as economias dos países que receptores de capturar os benefícios dos investimentos. Em razão dessas divergências de concepção, o Acordo é considerado tímido e apresentou baixa adesão pelos países desenvolvidos.[102]

Em estudo fomentado pelo *Instituto de Pesquisa Econômica Aplicada (IPEA)*, Gonçalves[103] determinou que, no tocante aos custos do Acordo, o aspecto central de análise consiste na perda de autonomia de formular políticas públicas. Assim, conquanto seja positivo o processo de normatização de temas relevantes para o crescimento do comércio internacional, como no caso dos investimentos internacionais, é preciso evitar que essa tendência crie constrangimentos à capacidade de os países em desenvolvimento estabelecerem políticas públicas que favoreçam o crescimento econômico. O mesmo estudo demonstrou que, após a assinatura do Acordo, houve redução na autonomia dos países em desenvolvimento para a promoção de políticas públicas, uma vez que existe, obviamente, um risco para as economias emergentes na evolução do Direito do Comércio Internacional.[104]

Tendo em vista as divergências existentes entre países emergentes e desenvolvidos a respeito de como proceder à normatização desses fluxos de capitais, existe dificuldade de se estabelecer um arcabouço normativo capaz de regulamentar esses fluxos de investimentos em nível multilateral[105]. As discussões para criação de um acordo multilateral sobre investimentos internacionais, feitas pelos países em foros internacionais, procuram compatibilizar as exigências de estabilidade, de transparência e de previsibilidade, demandadas pelos investidores, com a autonomia, defendida por economias emergentes, para forjar políticas públicas direcionadas à promoção do desenvolvimento.[106]

4.3. Últimos aportes sobre as interações entre comércio e investimentos internacionais

A normatização dos investimentos internacionais constitui assunto controvertido, que, tradicionalmente, tem dividido países desenvolvidos e em desenvolvimento. A despeito do processo de liberalização e da tendência para o estabelecimento de regimes internacionais em diversas áreas, esses fenômenos não ocorreram com intensidade semelhante na esfera da regulação dos investimentos internacionais. A ausência de um regime multilateral sobre investimentos internacionais deve-se à dificuldade de aproximar as perspectivas, muito distintas, dos países desenvolvidos e em desenvolvimento sobre os parâmetros que devem orientar um acordo nessa matéria.

Em virtude da evolução do Direito do Comércio Internacional, cada vez mais a capacidade de os países legislarem e agirem de forma autônoma tem sido limitada. No âmbito da divisão existente entre direito internacional e direito interno, o primeiro tem ganhado espaço em relação ao segundo. As normas, antes restritas a um pequeno grupo de países europeus, ampliaram-se e têm adquirido um caráter cada vez mais universal, sobretudo no campo do comércio internacional.[107]

Com efeito, o espaço jurídico da *Organização Mundial do Comércio (OMC)* tem-se ampliado, substancialmente, na medida em que o número de assuntos e de países sob a jurisdição da instituição é cada vez maior. Em 1996 foi criado na Organização um Grupo de Trabalho sobre a Relação entre Comércio e Investimentos para tratar de alcance e definição, de transparência, de não discrimina-

102 SUÑE, Natasha; VASCONCELOS, Raphael Carvalho de. O Direito dos Investimentos no Mercosul: realidade e possibilidades. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 159-178.

103 GONÇALVES, Samo Sérgio. *Acordo sobre Medidas de Investimentos Relacionadas ao Comércio de Bens (TRIMs):* entraves às políticas industriais dos países em desenvolvimento. Texto para a discussão. Brasília: IPEA, 2011.

104 GONÇALVES, Samo Sérgio. *Acordo sobre Medidas de Investimentos Relacionadas ao Comércio de Bens (TRIMs)*: entraves às políticas industriais dos países em desenvolvimento. Texto para a discussão. Brasília: IPEA, 2011.

105 Uma forma de dimensionar o grau de importância dos investimentos internacionais no comércio internacional é interessante verificar a solução de controvérsias em termos de investimentos internacionais, nesse sentido é pertinente a leitura de GABRIEL, Vivian Daniele Rocha. Arbitragem no direito tributário internacional e no direito internacional dos investimentos: uma manifestação do direito transnacional. *Revista de Direito Internacional*, Brasília, v. 13, n. 3, p. 95-115, 2016.

106 BREWER, Thomas. L.; YOUNG, Stephen. *The multilateral investment system and multinational enterprises*. New York: Oxford University Press, 2000.

107 VOLPON, Fernanda Torres. Investimento Estrangeiro e Comércio Internacional. In: RIBEIRO, Marilda Rosado de Sá. (Org). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 639-658.

ção, de modalidades de compromissos prévios ao estabelecimento baseados em enfoques de listas positivas, de disposições sobre o desenvolvimento, de exceções e salvaguardas por razões de balança de pagamentos, e de celebração de consultas e solução de controvérsias entre membros.[108]

No entanto, os diversos conflitos para que se consiga elaborar um acordo multilateral fazem com que comércio internacional e os investimentos internacionais sejam regidos por normas distintas. Ocorre que, assevera Volpon[109], "a liberalização do comércio é dependente da liberalização do investimento". Mesmo assim, o panorama atual é complexo e demonstra certa fragmentação, especialização e duplicação de normas e de acordos bilaterais, prevalecendo as regulamentações bilaterais e as várias formas de regionalismos.[110]

Ainda que, de certo ponto, o multilateralismo possa resultar em maior segurança, transparência, certeza de conceitos, regras e princípios que regem os temas convergentes sobre investimentos internacionais. Inclusive, incentivando o aumento do fluxo de capitais entre as transnacionais e países que venham a se interessas por seus investimentos. Maior fluidez, dinamismo, certeza e transparência é o cenário ideal para um mercado mundial que cresce à luz dos investimentos internacionais.

5. Considerações Finais

Os investimentos vêm ganhando, cada vez mais, espaço nas discussões acerca de seus efeitos para o comércio internacional. Com isso, já desfrutam de papel de destaque na regulamentação estabelecida no âmbito multilateral da economia global. Muito embora tidos como novos temas numa visão mais contemporânea do Direito Internacional, nos dizeres de Bandin e Tasquetto[111]: "No que tange às negociações comerciais no nível internacional, num ambiente multilateral, é considerado um tema novo e objeto de muito dissenso entre os Estados e suas delegações". Assim, o tema vem assumir relevante papel, no sentido de que os investimentos estrangeiros podem ser mais benéficos para os países receptores desses recursos, na busca de um maior equilíbrio econômico na esfera global.

Ademais, em sentido econômico da concepção dos investimentos internacionais, assinala Almeida[112] que "são de grande relevância econômica e estratégica, podendo contribuir para a redução da pobreza, ou ainda, propiciando o aumento global da qualidade de vida da população local". Portanto, a identificação desse caráter plural e transversal que vai além das questões jurídicas no que envolve o Direito Internacional dos Investimentos, representa uma fragmentação positiva do Direito Internacional em sua visão contemporânea, que demonstra uma faceta que na verdade, cristaliza ainda mais as normas relacionadas aos investimentos internacionais.

É diante desse contexto, que o presente artigo abordou as mais recentes interfaces entre o comércio internacional e os investimentos internacionais. Um desafio lançado sob a perspectiva da conjugação dos esforços dos coautores, academicamente inseridos em grupos de fomento e desenvolvimento à pesquisa do Direito Internacional dos Investimentos e do Direito do Comércio Internacional. E foi com esse núcleo interdisciplinar que se concebeu a pesquisa e sua evolução.

No primeiro capítulo, identificou-se que, na associação do termo investimento com seu adjetivo internacional, encontra-se uma expressão de difícil definição tanto no âmbito nacional, quanto nas esferas fundamentais das fontes internacionais. Com maestria, Costa[113] determina que "não existe, quer na doutrina jurídica, quer na

108 SUÑE, Natasha; VASCONCELOS, Raphael Carvalho de. O Direito dos Investimentos no Mercosul: realidade e possibilidades. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 159-178.

109 VOLPON, Fernanda Torres. Investimento Estrangeiro e Comércio Internacional. In: RIBEIRO, Marilda Rosado de Sá. (Org). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 639-658.

110 WEISS, Friedl. Trade and Investmente. In: MUCHLINSKI, Peter; ORTINO, Federico; SCHREURER, Christoph. (Ed.). *The Oxford International Handbook of International Investment Law*. Oxford: Oxford University Press. 2008.

111 BADIN, Michelle Ratton Sanchez; TASQUETTO, Lucas da Silva. Os acordos de comércio para além das preferências: uma análise da regulamentação sobre os "novos temas". *Revista de Direito Internacional*, Brasília, v. 10, n. 1, p. 105-126, 2013.

112 ALMEIDA, Bruno Rodrigues. Investimentos Estrangeiros Diretos, Direitos Humanos e a Ordem Pública Transnacional. In: RIBEIRO, Marilda Rosado de Sá. (Org.). Direito *Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 612.

113 COSTA, José Augusto Fontoura. *Direito Internacional do investimento estrangeiro*. Curitiba: Juruá, 2010.

literatura econômica, uma definição firme e consolidada de investimento estrangeiro".

No segundo capítulo, verificou-se que o Direito Internacional dos Investimentos é tema de profundas discussões acadêmicas, inúmeras foram objeto de análise ou citadas para conhecimento ao longo do estudo. São das mais diversificadas as questões concernentes à temática, envolvendo sua regulamentação, sua origem até a resolução concreta dos conflitos advindos de sua operacionalização. Uma área do Direito Internacional resultante dos fluxos globais de mercadorias, pessoas, serviços e matérias-primas. Muito elucidativa é a pesquisa de Ribeiro[114] sobre o fato de o estudo das transnacionais inscreverem-se no contexto mais amplo da análise dos padrões de evolução do Direito Internacional aplicável aos investimentos internacionais. Um tema de importância significativa, tanto na compreensão das questões surgidas no âmbito da nova ordem mundial esculpida na década de setenta, e que a partir da relação entre países que recepcionam investimentos e transnacionais que aportam investimentos internacionais, gerou um corpo denso de fontes, tratados, estatutos, doutrinas e decisões arbitrais.

No terceiro e último capítulo, percebeu-se que, ao contrário do regime de comércio internacional, não há um tratado multilateral abrangente sobre o investimento internacional, tampouco um modelo de acordo geral de proteção ou promoção de investimentos internacionais, bem como nenhuma previsão em relação às regras aplicáveis às partes não signatárias de acordos bilaterais ou multilaterais de investimentos internacionais. Imprescindível diante desse cenário um escopo da representatividade de maior segurança jurídica, haja vista o crescente número de tratados de investimentos internacionais que representa em verdade, um esforço no sentido de estruturar o mínimo de uma ordem jurídica sobre o Direito Internacional dos Investimentos.[115] Destacando que é necessária uma cristalização normativa, muito em razão de um aumento na promoção e fomento de investimentos estrangeiros, a regulação das distintas e diversas atividades relacionadas aos projetos em desenvolvimento e proteção aos investimentos já realizados e que não podem padecer de incertezas e inseguranças, sobretudo, regulatórias.[116]

Um dos objetivos do Direito Internacional dos Investimentos é oferecer proteção jurídica aos investimentos internacionais disponibilizados pelas transnacionais e aos países que recepcionam tais investimentos. Os países e as transnacionais possuem seus direitos e deveres previstos nos acordos de investimento. E mesmo que venha a ser possível vislumbrar todo o efeito sócio econômico positivo causado pelos investimentos em solo nacional, as transnacionais, por vezes, em nome do sucesso de seus empreendimentos, acabam por ignorar ou desrespeitar certos aspectos e princípios do desenvolvimento. E é nesse sentido, que a interface entre investimentos e comércio se conjuga ainda mais fundamental, pois é preciso que se estabeleça uma relação sólida entre as áreas na esfera do Direito Internacional dos Investimentos, para que se possam oferecer soluções estruturais para contendas que venham a surgir em razão do fluxo transfronteiriço de capitais.

É importante ressaltar que os investimentos devem ser apreciados como um dos pilares do desenvolvimento, posto serem capazes de promover uma efetiva melhoria na qualidade de vida das populações dos países receptores de investimento, através do aumento de receita, nível de empregos e modernização tecnológica.[117] Razão pela qual, além dos horizontes aqui demonstrados, outros devem ser objetos de análise de forma constante. E nesse sentido é o projeto que dá título ao estudo, uma vez que no horizonte atual, uma das iniciativas mais promissores da economia global é traduzida no, cada vez mais real, ressurgimento da antiga *Rota da Seda* nos moldes do que se denomina *One Belt, One Road (OBOR)* ou *Um Cinturão, uma Rota*.

Trata-se de uma reestruturação geoeconômica transcontinental que causará significativos impactos no comércio e nos investimentos internacionais, revivendo no Século 21 as rotas comerciais milenares que conec-

114 RIBEIRO, Marilda Rosado de Sá. As empresas transnacionais e os novos paradigmas do comércio internacional. In: DIREITO, Carlos Alberto Menezes; TRINDADE, Antônio Augusto Cançado; PEREIRA, Antônio Celso Alves. (Org.). *Novas perspectivas do Direito Internacional Contemporâneo*. Rio de Janeiro: Renovar, 2008. p. 455-492.

115 SALACUSE, Jeswald W; SULLIVAN, Nicholas P. Do BIT`s Really Work? Na evaluation of bilateral investment treaties and their grand bargain. *Harvard International Law Journal,* v. 46, n. 1, 2005.

116 ALMEIDA, Bruno Rodrigues. Investimentos Estrangeiros Diretos, Direitos Humanos e a Ordem Pública Transnacional. In: RIBEIRO, Marilda Rosado de Sá. (Org.). *Direito Internacional dos Investimentos*. Especial colaboração de Ely Caetano Xavier Junior e prefácio de Diego Pedro Fernandez Arroyo. Rio de Janeiro: Renovar, 2014. p. 603-619.

117 CASTRO, Emília Lana de Freitas. *O Direito Internacional dos Investimentos e a promoção do direito ao desenvolvimento: reflexos na indústria do petróleo*. Rio de Janeiro: Gramma, 2016.

tavam o Ocidente e o Oriente e que surge no momento adequado para se buscar novos horizontes, se configurando como o maior projeto econômico em debate na economia global, moldando novas interfaces entre o comércio e os investimentos, que nortearam a pesquisa a revisitar os preceitos fundamentais dos investimentos internacionais à luz das iniciativas asiáticas de cooperação no comércio internacional.

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III. ARTIGOS SOBRE OUTROS TEMAS

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Tolerância e refugio: Um ensaio a partir do acordo EU-Turquia

Tolerance and refuge: An essay based on the UE-Turkey Statement

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Tolerância e refugio: Um ensaio a partir do acordo EU-Turquia*

Tolerance and refuge: An essay based on the UE-Turkey Statement

Flávia Cristina Piovesan**

Ana Carolina Lopes Olsen***

Resumo

O direito internacional dos refugiados, pós II Guerra Mundial, fundamentou-se na noção de "direito a ter direitos", de uma sociedade aberta para a diversidade e o pluralismo, com base na tolerância e na alteridade. Estas concepções estão em xeque com as recentes práticas adotadas pela União Europeia face aos refugiados, notadamente no Acordo União Europeia-Turquia (2016), que prevê a possibilidade de devolução de refugiados aos seus locais de origem, apesar do princípio do *non-refoulement*. A partir de pesquisa bibliográfica, e pelo método indutivo, o presente artigo busca compreender as implicações filosóficas e éticas da rejeição manifestada pela Europa ao grande contingente de refugiados de origem muçulmana, cuja cultura contrasta profundamente com os valores nutridos pelos povos europeus, a fim de sugerir uma nova compreensão da própria ideia de tolerância enquanto fundamento do Direito Internacional dos Refugiados, e mesmo dos direitos humanos. Conclui-se nesse ensaio que mecanismos burocráticos e jurídicos têm sido utilizados como máscara para a intolerância da Europa frente aos refugiados. Desse modo, a partir de contribuições teóricas de Rorty, Appiah, Heller e Ferénc, percebeu-se que somente a partir da superação da noção abstrata de tolerância, para uma compreensão cosmopolita que reconhece as pessoas em sua concretude histórica e social, bem como pelo alargamento da ideia de "nós" para enfrentar a dicotomia "nós-eles", que se pode fundamentar o direito de toda pessoa de ser acolhida, quando enfrenta o risco de sua própria aniquilação.

Palavras-chave: Refugiados; Direitos Humanos; Xenofobia; Tolerância; Europa.

Abstract

The Refugees International Law, created after the II World War, has been founded upon the idea of "a right to have rights", and a society open to diversity and pluralism, based on tolerance and alterity. The recent practices adopted by the European Union challenge these conceptions, notably the EU-Turkey Statement (2016), which prescribes the possibility of returning refugees to their origin or latest place of departure, despite of the "*non-refoulement*" principle. Using bibliographical research, by the inductive method, this

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article aims to understand the philosophical and ethical implications of the rejection of a great amount of muslin refugees by Europe, since their culture contrasts deeply with the values nourished by European peoples, in order to suggest a new comprehension of the ideal of tolerance as a bedrock to the Refugees International Law, and even to Human Rights Law. It concludes that legal and bureaucratic methods have been used as a mask to hide European intolerance towards refugees. Therefore, based on the contribution of Rorty, Appiah, Heller and Ferénc, it verified that tolerance can only be a keystone to the right to pledge refuge when understood in a cosmopolitan way, in which a person is seen in his historical concrete and social being, as well as the conception of "us" is enlarged, to face the dichotomy of "us-them".

Keywords: Refugees; Human Rights; Xenophobia; Tolerance; Europe.

1. Introdução

A preocupação jurídica com o deslocamento de pessoas forçadas a deixar seus países de origem ganhou corpo ao final da II Guerra Mundial. A Europa havia sido devastada pelos anos de conflito, e milhões de pessoas tinham deixado seus lares, sem poder regressar. Mas dessa vez, não apenas em função do conflito, como a história já havia testemunhado. Muitos europeus, e dentre eles um grande número de judeus, perderam sua nacionalidade, seu lar, em função de políticas estatais. Hitler e Stalin juntos promoveram o deslocamento de aproximadamente trinta milhões de pessoas entre 1939 e 1943.[1]

Havia poucos anos a Europa já havia sofrido com deslocamentos em outro grande conflito, a I Guerra, a qual deixara cem milhões de refugiados, dentre eles apátridas. Viviam à margem da sociedade, sem nenhum governo ou Estado que interviesse em seu favor. Estavam protegidos apenas pelo Tratado das Minorias[2] que foi assinado por países europeus imediatamente após a I Guerra Mundial, sem nenhuma intenção real de obediência. Para essas pessoas, a expressão "direitos humanos" prevista no Tratado representava um ato de hipocrisia.[3]

Essa situação denunciou a falha ética de um sistema jurídico que admitia a existência de pessoas desapossadas do conceito de identidade nacional, privando-as de qualquer direito, bem como a total impotência da Liga das Nações em promover uma solução. Um sistema que gerava mais do que a violência, promovia o não reconhecimento do outro, sua estigmatização em uma categoria de indesejáveis. Como coloca Hannah Arendt, eram o "refugo da terra".[4]

Reconhecendo a insustentabilidade desse modelo, os Estados elaboraram um novo paradigma jurídico que deveria guiar os povos estabelecendo um mínimo ético irredutível: o ser humano como sujeito de direitos. Como observa Arendt, como não havia qualquer lugar «incivilizado» na terra, a humanidade precisaria aprender a conviver em um Mundo Único. Esses direitos perdidos, e a dignidade humana que eles outorgam, deveriam prevalecer independentemente de vinculação jurídica do sujeito a uma comunidade.[5]

1 "*This was something new in the European experience. All wars dislocate the lives of noncombatants: by destroying their land and their homes, by disrupting communications, by enlisting and killing husbands, fathers, sons. But in World War Two it was state policies rather than armed conflit that did the worst damage*". JUDT, Tony. ***Postwar**: A Historty of Europe Since 1945*. New York: Penguin Books, 2005, p. 22-23.

2 Segundo Hannah Arendt, "Os Tratados aglutinaram vários povos num só Estado, outorgaram a alguns o status de "povos estatais" e lhes confiaram o governo, supuseram silenciosamente que os outros povos nacionalmente compactos [...] chegassem a ser parceiros no governo, o que naturalmente não aconteceu, e, com igual arbitrariedade, criaram com os povos que sobraram um terceiro grupo de nacionalidades chamadas minorias, acrescentando assim aos muitos encargos dos novos Estados o problema de observar regulamentos especiais, impostos de fora, para uma parte de sua população. Como resultado, os povos não agraciados com Estados, fossem "minorias nacionais" ou "nacionalidades", consideraram os Tratados um jogo arbitrário que dava poder a uns, colocando em servidão os outros. Os Estados recém-criados, por sua vez, que haviam recebido a independência com a promessa de plena soberania nacional, acatada em igualdade de condições com as nações ocidentais, olhavam os Tratados das Minorias como óbvia quebra de promessa e, como prova de discriminação, uma vez que somente os novos Estados, e nem mesmo a Alemanha derrotada [com exceção do território da Silésia oriental, dividida em 1920 com a Polônia em decorrência de plebiscito], ficavam subordinados a eles. ARENDT, Hannah. **As origens do totalitarismo.** Trad. Roberto Raposo. São Paulo: 2012, p. 302-303.

3 Afinal, os direitos criados pela revolução francesa haviam sido atrelados à condição da soberania nacional dos Estados, e o Tratado das Minorias instituído pela Liga das Nações não inspirava confiança porque era a própria Liga formada por Estados soberanos, não dispostos a abrir mão de sua soberania. ARENDT, H. **As origens do totalitarismo**. Trad. Roberto Raposo. São Paulo: 2012, p. 302-303; 305.

4 ARENDT, H. **As origens do totalitarismo**. Trad. Roberto Raposo. São Paulo: 2012, p. 300.

5 ARENDT, H. **As origens do totalitarismo**. Trad. Roberto Ra-

Diante dessa perspectiva, erigiu-se o Direito Internacional dos Refugiados, que procura reconhecer as necessidades prementes daqueles que se veem obrigados a deixar seu país com medo da morte, da tortura, da prisão. De matriz europeia, ele reconhece a todos que se encontram nessas condições o direito de solicitar asilo.

Todavia, em um mundo já pequeno em que todos precisam conviver, os grandes contingentes de refugiados sírios que batem à portas da Europa especialmente nos últimos anos, fugindo da Guerra Civil na qual mergulhou seu país desde 2011, colocou os próprios fundamentos básicos dos Direitos dos Refugiados em cheque, como a tolerância. No lugar de respeito e acolhimento, refugiados sírios passam a ser devolvidos à Turquia em função de um Acordo por ela firmado com a União Europeia em março de 2016.

Mediante pesquisa bibliográfica e pelo método indutivo, o presente artigo procura, numa primeira parte, investigar a tolerância como fundamento básico do Direito dos Refugiados, e dos direitos humanos, em sua matriz original universal. Num segundo ponto, analisa especificamente o Acordo UE-Turquia em suas principais determinações, e suas implicações para os refugiados sírios que chegam ao território europeu. Em uma terceira parte, procura-se demonstrar que o Acordo é uma evidência da intolerância com a qual a Europa tem tratado o problema dos refugiados, agindo com base no preconceito, no racismo e na xenofobia. Finalmente, na quarta e última parte, procura-se oferecer propostas de remodelação da própria noção de tolerância, a partir das lições do cosmopolitismo, e de visões teóricas que procuram enxergar, em cada ser humano, uma pessoa histórica e concreta.

2. Tolerância como fundamento do direito internacional dos refugiados

Passados apenas três anos da criação da Organização das Nações Unidas, foi promulgada a Declaração Universal dos Direitos Humanos, instituindo uma nova era para o Direito Internacional. Com pretensão de aplicabilidade a toda a espécie humana, independentemente de vínculo jurídico qualquer que fosse, a Declaração Universal instituía que todos deveriam ser considerados iguais em dignidade e direitos, inaugurando a concepção contemporânea dos direitos humanos, cuja tônica é a recuperação do ser humano como valor fonte dos sistemas jurídicos, a ser valorizado em si a partir da concepção kantiana de que cada um é um fim em si mesmo, e a possibilidade de flexibilização da soberania dos Estados a fim de proteger os direitos da pessoa humana.[6]

Em seu artigo XIV, a Declaração Universal reconheceu o direito de pedir asilo a todos aqueles que fossem vítimas de perseguição. Essa foi a premissa jurídica para a elaboração, e promulgação em 1951, da Convenção de Genebra sobre o Estatuto dos Refugiados, seguida do Protocolo de 1967. A ideia central era de que qualquer pessoa que fosse vítima de perseguição em seu Estado teria direito de buscar asilo e dele usufruir em qualquer país.[7]

O conceito inaugural de refugiado, da Convenção de 1951, se aplicaria a todo aquele que abandonara seu país em virtude de perseguição por suas convicções políticas ou religiosas, ou por motivo de raça, cor ou nacionalidade, em razão dos acontecimentos anteriores a 1º de janeiro de 1951, na Europa. A evidente preocupação com as consequências da II Guerra mostrou-se incompatível com os acontecimentos que lhe sucederam, gerando novas massas de refugiados carentes de proteção jurídica independentemente de uma limitação temporal ou geográfica. Assim, o conceito de refugiado foi alargado pelo Protocolo de 1967 a fim de abarcar todas as pessoas que se enquadrem na situação de perseguição em função de sua raça, credo, nacionalidade ou posição política, seja porque a perseguição é promovida pelo Estado da qual é nacional, seja porque este não consegue protege-la de quem a persegue.[8] Este conceito abarca também pessoas que fogem de guerras, e de maciças violações de direitos humanos, e de catástrofes naturais que inviabilizaram a vida em seus países de origem.[9]

poso. São Paulo: 2012, p. 331.

6 PIOVESAN, Flávia. **Direitos Humanos e Justiça Internacional**. 6 ed. São Paulo: Saraiva, 2015, p. 45-47.

7 PITA, Agni Castro. Direitos Humanos e Direito Internacional dos Refugiados. In GEDIEL, José Antônio Peres; GODOY, Gabriel Gualano de. (Org.) **Refúgio e Hospitalidade**. Curitiba: Kairós, 2016, p.7.

8 BARBOZA, Estefânia Maria de Queiroz; BACK, Alessandra. A proteção normativa dos refugiados políticos na América Latina e no Brasil. In GEDIEL, José Antônio Peres; GODOY, Gabriel Gualano de. (Org.) **Refúgio e Hospitalidade**. Curitiba: Kairós, 2016, p.92.

9 Trata-se do objeto da declaração do Secretário do Alto Comissariado das Nações Unidas para Refugiados, Aga Khan, em 1976. CAVARZERE, Thelma Thais. **Direito Internacional da Pessoa Humana:** A circulação internacional de pessoas. Rio de Janeiro:

Esse Direito Internacional dos Refugiados, inaugurado com a Convenção de 1951, deve ser interpretado em consonância com o Direito Internacional dos Direitos Humanos, como ensina Cançado Trindade, pois ambos encontram fundamento nos mesmos pressupostos: toda pessoa é sujeito de direitos, em regime de igualdade para todo ser humano. Assim, um pretendente ao asilo é, antes de tudo, um titular de direitos humanos. Na medida em que o motivo que leva milhares de pessoas a abandonar seus países de origem é a violação dos direitos humanos, é preciso reconhecer que a proteção da pessoa humana se deve mesmo antes de consagrada a condição de refugiado.[10] E o reconhecimento dessa condição é verdadeiro direito dessa pessoa, e não mera discricionariedade do Estado.[11]

Uma questão que se pode colocar em busca de uma fundamentação ética para o direito ao refúgio[12] poderia ser a seguinte: por que acolher? Se a resposta passa necessariamente pelo reconhecimento de que todas as pessoas são sujeito de direito, não podendo ser abandonadas quando buscam abrigo, sendo vítimas da injustiça e da perseguição, é porque se exige daqueles destinatários da obrigação de conceder o asilo[13] uma tolerância ampla para com todas essas pessoas, mais ou menos diferentes deles próprios.

A tolerância como um fundamento ético para os direitos humanos dos refugiados, tal como concebidos na Convenção de 1951, e no Protocolo de 1967, tem inicialmente uma conotação universal pois dirigida a todas as pessoas, independentemente de sua origem, sua raça, sua cultura[14]. Como se pretende demonstrar, a tolerância de caráter universal e abstrato não tem dado conta do enfrentamento de culturas decorrente do grande afluxo de refugiados islâmicos para países ocidentais. Ela nasce com o propósito de ser cega em relação às diferenças, no lugar de procurar apontar caminhos para conviver com elas.

Para Norberto Bobbio, a tolerância diz respeito ao reconhecimento dirigido a todos que defendam ideias opostas do seu direito de existir, conviver, manifestar-se. Ela exige o método da persuasão para que os outros conheçam e eventualmente partilhem do que nós pensamos, o que jamais pode ser feito através da imposição.[15] Significa dizer que dentro da lógica nacionais-

Renovar, 1995, p. 93. Nas Américas, a Declaração de Cartagena ampliou a noção de refugiado para também proteger as vítimas de conflitos na Nicarágua, Guatemala e El Salvador, de modo que refugiados seriam "as pessoas que tenham fugido dos seus países porque a sua vida, segurança ou liberdade tenham sido ameaçadas pela violência generalizada, a agressão estrangeira, os conflitos internos, a violação maciça dos direitos humanos ou outras circunstâncias que tenham perturbado gravemente a ordem pública". PAMPLONA, Danielle Anne. PIOVESAN, Flávia. O instituto do refúgio no Brasil: práticas recentes. In **Revista de Direitos Fundamentais e Democracia**, v. 17, n. 17, Curitiba: janeiro/junho de 2015, p. 46.

10 CANÇADO TRINDADE, Antônio Augusto. **Tratado de Direito Internacional dos Direitos Humanos**. Vol. I. Porto Alegre: Sérgio Antônio Fabris, 1997, p. 270-272.

11 Nesse sentido, o campo do *dever ser* determina a redução do domínio da discricionariedade do Estado, a fim de que direitos universalmente assegurados sejam efetivamente implementados. Vale dizer, ao direito de solicitar refúgio e dele gozar, enunciado em documentos internacionais como a Declaração Universal, há de corresponder o dever do Estado de conceder refúgio. PIOVESAN, Flávia. Refugiados sob a Perspectiva dos Direitos Humanos. In: **Seminário Internacional "Fronteiras em Movimento: Deslocamentos e outras Dimensões do Vivido"**, Diversitas – Núcleo de Estudos das Diversidades, Intolerâncias e Conflitos, Universidade de São Paulo, São Paulo: 2013.

12 Liliana Jubilut formulou distinção que ora se adota de direito a refúgio e direito a asilo. O asilo corresponde ao "instituto pelo qual um Estado fornece imunidade a um indivíduo em face de perseguição sofrida por esse em outro", garantindo ao Estado poder discricionário para decidir se concede proteção a determinado indivíduo. É precisamente o caráter de perseguição política (de crença, ideologia) que fundamenta essa decisão, ou seja, trata-se de "asilo político". O refúgio é um direito do indivíduo ou grupo, e um dever do Estado, assumido soberanamente ao ratificar a Convenção para o Estatuto dos Refugiados de 1951, e seu Protocolo de 1967, estando, portanto, fora do âmbito de discricionariedade que se reconhece ao Estado quando diante de pedido de asilo. JUBILUT, Liliana. **O Direito internacional dos refugiados e sua aplicação no orçamento jurídico brasileiro**. São Paulo: Método, 2007, p. 37-38; 42-44.

13 Marcos Wachowicz defende que o direito ao asilo, em virtude de sua íntima conexão com os direitos humanos, não pode ser compreendido como uma mera faculdade do Estado concedente, mas como verdadeiro direito humano. Apoia-se, para tanto, na Declaração Hispano-Luso-Americana de 1951, que institui que "o Direito de Asilo é um direito inerente à pessoa humana, devendo conceder-lhe o Estado solicitado, em virtude da sociabilidade universal de todos os povos". WACHOWICZ, Marcos. O direito de asilo como expressão dos direitos humanos. In **Revista da Faculdade de Direito da Universidade Federal do Paraná**. Curitiba: UFPR, 2002. Disponível em: www.revistas.ufpr.br/direito/article/download/1776/1473 . Acesso em 07 ago. 2016, p. 153.

14 A concepção universal dos direitos humanos, nascida com a Declaração Universal dos Direitos Humanos, tem como fundamento a dignidade da pessoa, um valor intrínseco e inerente a todo ser humano. Para universalistas, existiria um "mínimo ético irredutível" abaixo do qual não se poderia defender nenhuma prática, pois ela representaria violação dos direitos humanos. Esse universalismo admite diversos graus, dependendo da abrangência do que se possa compreender por "mínimo ético irredutível". PIOVESAN, Flávia. **Direitos Humanos e o Direito Constitucional Internacional**. 13 ed. São Paulo: Saraiva, 2012, p. 215, 218.

15 BOBBIO, Norberto. **Elogio da serenidade e outros escritos morais**. Trad. Marco Aurélio Nogueira. São Paulo: UNESP, 2002, p. 153-154.

-estrangeiros[16] personificando a dicotomia entre o 'nós' e os 'outros', a tolerância implicará que o nós respeite as ideias opostas dos outros, e todo e qualquer diálogo entre essas ideias deve fazer uso da ferramenta da persuasão, jamais da imposição. Dessa forma, ser tolerante, no contexto entre nacionais e estrangeiros refugiados, significa vencer o preconceito[17] que eventualmente se tenha, para ver nos outros, sujeitos de direitos assim como nós, bem como reconhecer como válido seu direito de pensar e agir diferente.

Essa noção ideal de tolerância sofre diferentes nuances a partir do espaço político em que se manifesta. Michael Walzer, em sua obra "Da Tolerância", verificou um comportamento diferente dos grupos sociais em relação a tolerância, como sociedades internacionais, Estados-nação ou sociedades de imigrantes[18].

Nas sociedades internacionais, há um regime diferenciado de estruturação social, bastante fraco politicamente e extremamente tolerante, pois todas as práticas adotadas pelos Estados soberanos que as integram são formalmente toleradas. Os Estados negociam entre si através de seus agentes diplomáticos em virtude de interesses econômicos ou até políticos comuns, e convivem com a existência de práticas internas profundamente divergentes entre si, por vezes até internamente intolerantes e violentas. Só não serão tolerados atos ou práticas que "chocam a consciência da humanidade", já que a auto-determinação dos povos não poderia ser um escudo para a selvageria. De qualquer forma, os mecanismos de repressão são fracos, já que não há uma autoridade institucionalizada para determinar condutas.[19]

Já nas consociações, que correspondem a Estados bi ou tri-nacionais, as comunidades diferentes através de seus líderes, e elites cooperam entre si na construção de uma estrutura jurídica que proteja seus interesses divergentes. Esses grupos sociais essencialmente diversos se unem sob um mesmo arranjo constitucional em virtude de há tempos partilharem o mesmo território, e embora pensem diferentemente, pretendem se proteger contra inimigos comuns. Mas precisam, também, tolerar-se uns aos outros, de modo que aqui a tolerância surge como uma confiança partilhada entre os membros.[20]

Os Estados-nação, por sua vez, tem um regime bem mais restrito de tolerância: a partir da instituição de uma só nacionalidade, uma língua, um conjunto historicamente elaborado de valores, práticas divergentes só serão toleradas de forma individual – como se dirige uma tolerância liberal às idiossincrasias alheias.[21] Pouco tolerantes com os grupos, os Estados-nação podem certamente exigir que os grupos sejam tolerantes com os indivíduos, já que todos são cidadãos com os mesmos direitos. Assim, as práticas dos grupos precisam ser aprovadas pelo escrutínio das maiorias. Consequentemente, os grupos passam a se tornar associações voluntárias, com baixo poder coercitivo em razão da proteção que o Estado-nação exerce sobre os indivíduos.[22]

Finalmente, as organizações políticas mais tolerantes são as sociedades de imigração, pois acolhem grupos diversos que abandonaram sua terra natal para chegar

16 "Toda a lógica do Estado-nação moderno foi erigida a partir da construção da figura do estrangeiro, como o referencial negativo para a definição do nacional." Indo mais além, a dicotomia entre nós-eles, nacionais-estrangeiros, tem assumido uma feição ainda mais abissal: nós-resto. "No mesmo diapasão, Huntington elabora a categoria do "resto", como contraponto ao Ocidente. O "resto", diferente do "outro", não tem um conjunto de características independentes e consistentes de uma tribo, nação ou religião. Ele é um "aglomerado de distintas comunidades, nações e civilizações, com conjuntos diferenciados de características" (DAVUTOGLU, 2004, p. 110), mas que ficam rotuladas em sua despersonificação." OLSEN, Ana Carolina Lopes. Imigração e reconhecimento de direitos: o desafio do Brasil na era da (in)tolerância. Revista de Direito Econômico e Socioambiental, Curitiba, v. 6, n. 2, p. 122-155, jul./dez. 2015. doi: http://www2.pucpr.br/reol/pb/index.php/direitoeconomico?dd1=15934&dd99=view&dd98=pb . Acesso em 22 jul. 2016, p. 125; 128.

17 Segundo Bobbio, o preconceito nada mais é que uma opinião ou doutrina que é aceita de forma irrefletida e acrítica, sendo transmitida pela tradição, pelo costume ou pela autoridade legitimamente reconhecida, de modo que não se erige contra ela nenhuma posição racional. BOBBIO, Norberto. **Elogio da serenidade e outros escritos morais**. Trad. Marco Aurélio Nogueira. São Paulo: UNESP, 2002, p. 103.

18 WALZER, Michael. **Da Tolerância**. Trad. Almiro Pisetta. São Paulo: Martins Fontes, 1999, p. 22-49.

19 WALZER, Michael. **Da Tolerância**. Trad. Almiro Pisetta. São Paulo: Martins Fontes, 1999, p. 28-30.

20 WALZER, Michael. **Da Tolerância**. Trad. Almiro Pisetta. São Paulo: Martins Fontes, 1999, p. 32.

21 Como defende Stuart Mill, em *On Liberty*, a tolerância é a disposição em aceitar e respeitar a inviolabilidade da vida privada das pessoas, de modo que o homem deve ter liberdade total para se definir individualmente, podendo contudo ser responsabilizado pelos seus atos na medida em que eles entrem na esfera pública. Cabe ao Estado garantir o espaço sócio-político para que todos desenvolvam suas personalidades e individualidades, promovendo um ambiente urbano diversificado em que cada um possa buscar sua felicidade. WOLFF, Robert Paul. Além da Tolerância. In WOLFF, Robert Paul; MOORE JR., Barrington; MARCUSE, Herbert. **Crítica da Tolerância Pura**. Trad. Ruy Jungmann. Rio de Janeiro: Zahar, 1970, p. 31-34.

22 WALZER, Michael. **Da Tolerância**. Trad. Almiro Pisetta. São Paulo: Martins Fontes, 1999, p. 37-38.

PIOVESAN, Flávia Cristina; OLSEN, Ana Carolina Lopes. Tolerância e refugio: Um ensaio a partir do acordo EU-Turquia. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 215-235

a um novo território, no qual se dispersaram. Para Walzer, o Estado adota uma posição neutra em relação às práticas desses grupos, pois se preocupa basicamente com a titularidade da jurisdição única. As pessoas são absolutamente livres para escolher a que grupos pertencer, que práticas adotar, desde que estas práticas não afrontem direitos de outros cidadãos. Significa dizer que a tolerância para com a pluralidade de ideias, convicções políticas e religiosas, é incentivada como uma prática de Estado, como um dever de cada cidadão.[23]

Os grupos, por sua vez, têm muito limitado seu acesso ao poder do Estado. Só podem ascender através dos canais institucionais definidos juridicamente, os quais definem critérios, limites e condições para efetivamente ascender à esfera pública. Muitos grupos com ideias dissonantes ficam à margem do processo político, como observa Wolff. [24] Não se sabe se sobreviverão dessa forma, ou se vão se diluir em um todo, mas o respeito que esses grupos encontram nas sociedades de imigrantes é o máximo regime de tolerância.

No panorama mundial atual, quando os países europeus se deparam com a chegada de milhões de refugiados como somalis, iraquianos, afegãos e especialmente sírios, seus níveis de tolerância são colocados à prova. Como será analisado adiante, fatos veiculados pela imprensa[25] dão indícios de que a tolerância e a solidariedade[26], essenciais para o direito de refúgio, tem dado lugar ao racismo e à discriminação.

3. O tratamento dispensado aos refugiados no acordo União Européia-Turquia

A fim de conter o significativo afluxo de refugiados que chegam às portas da Europa, a União Europeia celebrou com a Turquia um acordo em 18 de março de 2016.[27] A Turquia foi alçada ao papel de parceira da União Europeia para o assunto de migrantes e refugiados em virtude de sua posição geográfica estratégica como porta de entrada de milhões de sírios que deixam seu país fugindo da Guerra Civil e das práticas radicais adotadas pelo Estado Islâmico, ou ISIS, bem como afegãos, iraquianos e somalis[28].

Resumidamente, o acordo estabelece em sua primeira cláusula que todos os migrantes irregulares que deixarem a Turquia para adentrar a Grécia serão devolvidos ao solo turco, uma medida reconhecida como "extraordinária e temporária para pôr um fim ao sofrimento humano e restaurar a ordem pública"[29]. A cláusula prevê que aqueles que forem enquadrados pelas autoridades gregas como titulares do direito de asilo, terão processados individualmente seus pedidos. Os demais deverão ser retornados à Turquia.

A cláusula segunda trata especificamente dos sírios.

23 Mas os grupos não podem se organizar de forma coercitiva, assumir o controle do espaço público e monopolizar recursos públicos. WALZER, Michael. **Da Tolerância**. Trad. Almiro Pisetta. São Paulo: Martins Fontes, 1999 p. 43.

24 Em análise da democracia pluralista norte-americana, que pode ser reconhecida como uma sociedade de imigração, verifica Wolff que somente os grupos sociais já estruturados conseguem, em competição pelo poder político, ter seus interesses satisfeitos. Dessa forma, certos grupos não conseguem ascender politicamente e suas vozes não são ouvidas, por mais razoáveis e certas que sejam. WOLFF, Robert Paul. Robert Paul. Além da Tolerância. In WOLFF, Robert Paul; MOORE JR., Barrington; MARCUSE, Herbert. **Crítica da Tolerância Pura.** Trad. Ruy Jungmann. Rio de Janeiro: Zahar, 1970, p. 47-48. No mesmo sentido, WALZER, Michael. **Da Tolerância**. Trad. Almiro Pisetta. São Paulo: Martins Fontes, 1999, p. 46-47.

25 "As cercas no leste da Europa, os muros entre os Estados Unidos e o México, as políticas de contenção nos países de origem, em sua maioria da África subsaariana (...), as devoluções da Grécia e, até mesmo, o fechamento temporário de várias fronteiras interiores na União Europeia não conseguiram frear os fluxos migratórios das 65,3 milhões de pessoas que se sentem perseguidas em seus países e cujas vidas correm perigo..." CEBRIÁN, Belén Domínguez. Guerra e perseguição tiram de suas casas 24 pessoas por minuto em todo o mundo. In: **El País**, Madri, 20 jun. 2016. Disponível em: http://brasil.elpais.com/brasil/2016/06/18/internacional/1466273687_619217.html . Acesso em 09 ago. 2016.

26 Segundo o secretário-geral da Nações Unidas, Ban Ki Moon: "Não é uma crise de números, mas uma crise de solidariedade". CEBRIÁN, Belén Domínguez. Guerra e perseguição tiram de suas casas 24 pessoas por minuto em todo o mundo. El País, Madri, 20 jun. 2016. Disponível em: http://brasil.elpais.com/brasil/2016/06/18/internacional/1466273687_619217.html . Acesso em 09 ago. 2016.

27 "*In order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk, the EU and Turkey today decided to end the irregular migration from Turkey to the EU.*"GENERAL SECRETARIAT OF THE COUNCIL. **EU-Turkey statement, 18 March 2016**. Brussels: Press Office, 18 mar 2016. Disponível em: http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/ Acesso em 28 jul 2016.

28 FRONTEX. ***Eastern Mediterranean Route***. Disponível em: http://frontex.europa.eu/trends-and-routes/eastern-mediterranean-route/ . Acesso em 15 jul. 2016. Trata-se da chamada "Rota dos Balcãs", a partir da qual sírios, afegãos, iraquianos e até somalis deixam seus países, passam pela Turquia, e a partir dela ingressam na União Europeia percorrendo Grécia, Macedônia, Sérvia e Hungria.

29 GENERAL SECRETARIAT OF THE COUNCIL, **EU-Turkey statement, 18 March 2016**. Brussels: Press Office, 18 mar 2016. Disponível em: http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/. Acesso em: 28 jul. 2016.

Eles representam o maior contingente populacional de refugiados que chega à Europa, fugindo de uma guerra civil que dura mais de cinco anos. Segundo o Acordo, para cada sírio que seja retornado das ilhas gregas à Turquia, outro será reacomodado na União Europeia, a partir dos Critérios de Vulnerabilidade, desde que não tenha tentado entrar na União Europeia antes, irregularmente. Haveria uma disponibilidade para assentamento de 18.000 mil pessoas, sendo que a União Europeia estaria disposta a abrir vaga para mais 54.000 vulneráveis sírios. Interessante lembrar que somente em fevereiro de 2016, mais de 57.000 migrantes chegaram nas ilhas gregas, dos quais 52% eram sírios, e o restante iraquianos e afegãos.[30] Com isso, a Turquia representaria o primeiro país a conceder asilo aos refugiados sírios, e de cada um que recebesse de volta e acolhesse, outro seria realocado pela própria União Europeia, para os países que estivessem em condições e disponibilidade para receber essas pessoas.[31]

Além disso, a fim de compensar essa devolução de sírios que buscam entrar irregularmente na Europa, a União Europeia se comprometeu em pagar uma cifra adicional de 3 bilhões de euros até 2018 (cláusula sexta), liberar o visto para turcos visitarem a Europa a partir de junho de 2016 (cláusula quinta) e facilitar os trâmites para que a Turquia venha a ser incluída na União Europeia (cláusula oitava).

O que se depreende do Acordo firmado é que, apesar do compromisso de reassentar refugiados que estejam regularmente acomodados na Turquia, todos aqueles que tentarem entrar na Europa irregularmente serão devolvidos – mesmo as vítimas da Guerra Civil Síria, e de perseguições dela decorrentes. A única porta de entrada seria pela via dos trâmites legais e burocráticos, os quais deverão ser providenciados inicialmente na Turquia. A mensagem deixada pelo Acordo é a do Presidente do Conselho Europeu: "não venham a Europa".[32]

Trata-se da materialização de uma tendência que já se verificava nos países industrializados especialmente a partir da década de 90, em que barreiras físicas, legais e burocráticas foram erguidas para evitar que as pessoas que buscavam refúgio chegassem ao seu território. Verifica-se uma tendência retórica e prática de contenção dos fluxos de refugiados e migrantes, para que permaneçam em seus países, ainda que para enfrentar condições adversas em sentido econômico ou de perseguição política e jurídica.[33] Especialmente porque sente que os refugiados ameaçam sua estabilidade política, social e econômica, a Europa decidiu adotar mecanismos refratores.[34]

Para Collet, o Acordo EU-Turquia enfrenta um grave paradoxo. Se, de um lado, as autoridades europeias pretenderem torna-lo efetivo, precisarão atalhar mecanismos legais como proibição de detenções ou direito a recurso[35] para poder devolver sírios ou outros estrangeiros que adentrarem ilegalmente suas fronteiras. Estarão comprometendo um discurso entoado há décadas com países vizinhos sobre os padrões de refúgio. Por outro lado, se decidirem cumprir fielmente todos os tratados e leis protegendo direitos humanos dessas pessoas, podem enfrentar a inviabilidade prática de promover a devolução daqueles que ingressarem irregularmente. Segundo Collet, os governos (da Europa e da Turquia) parecem estar confiando mais na mensagem do Acordo, do que na necessidade de sua efetiva implementação.[36]

Vale observar que um mês antes de o Acordo ser firmado, a Turquia tinha mais de duzentos mil pedidos de asilo não analisados.[37] Este dado fornece uma noção

30 COLLETT, Elizabeth. ***The Paradox of the EU-Turkey Refugee Deal***. Migration Policy Institute, Washington, mar. 2016. Disponível em: http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal . Acesso em: 25 jun. 2016, p. 2-3.

31 ABELLÁN, Lucía; PÉREZ, Claudi. União Europeia e Turquia chegam a acordo para expulsar refugiados. **El País**. Bruxelas, 28 mar. 2016. Disponível em: http://brasil.elpais.com/brasil/2016/03/07/internacional/1457352301_920991.html . Acesso em 20 jul. 2016, p. 2.

32 ABELLÁN, Lucía; PÉREZ, Claudi. União Europeia e Turquia chegam a acordo para expulsar refugiados, p. 4.

33 ACNUR. **La situación de los refugiados em el mundo**: en busca de soluciones. Madrid: Alianza, 1995, p. 59.

34 COLLETT, E. ***The Paradox of the EU-Turkey Refugee Deal***. Migration Policy Institute, Washington, mar. 2016. Disponível em: http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal . Acesso em: 25 jun. 2016 p. 91.

35 Conforme Convenção sobre o Estatuto dos Refugiados de 1951, artigo 32 (2).

36 COLLETT, E. ***The Paradox of the EU-Turkey Refugee Deal***. Migration Policy Institute, Washington, mar. 2016. Disponível em: http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal. Acesso em: 25 jun. 2016, p. 2. Conforme informa a imprensa, as devoluções já tiveram início, com levas de refugiados deixando a Grécia para a Turquia. Em abril de 2016, 600 refugiados foram devolvidos, causando manifestações contrárias e violência nos campos de refugiados. A eficácia do Acordo está sendo posta à prova na medida em que a Grécia mostra dificuldades de operacionalizar o deslocamento das pessoas em segurança, e o fluxo de chegadas de refugiados irregulares não diminuiu. COMEÇAM as novas expulsões de refugiados da União Europeia. In: ***El País***. 4 abr. 2016. Disponível em: http://brasil.elpais.com/brasil/2016/04/03/internacional/1459712252_605155.html . Acesso: em 10 ago. 2016.

37 COMEÇAM as novas expulsões de refugiados da União Eu-

PIOVESAN, Flávia Cristina; OLSEN, Ana Carolina Lopes. Tolerância e refugio: Um ensaio a partir do acordo EU-Turquia. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 215-235

mais próxima do que a União Europeia efetivamente pretende com o Acordo: (i) devolver todos os sírios que chegarem irregularmente as suas fronteiras para a Turquia, pois a porta de entrada só seria possível pelas vias legais; (ii) essa tramitação legal burocrática deverá ser realizada pela Turquia, apesar de ela já enfrentar dificuldades para se desincumbir do mister; (iii) somente aqueles que forem reconhecidos como refugiados sírios pela Turquia poderão ser encaminhados à Europa para assentamento em país a ser designado pela própria União Europeia[38]. Os números não desafiam a possibilidade de implementação da proposta, eles na verdade desmascaram a real intenção europeia: receber o menor número de refugiados possível. A Turquia que retenha, e contenha, os indesejáveis.

Um dos principais princípios postos em cheque pelo Acordo é o princípio do *non-refoulement*, ou da não devolução, pedra angular do Direito Internacional dos Refugiados. Segundo ele, as autoridades de um país estariam proibidas de devolver ao país de onde vieram pessoas em busca de asilo. Diferentemente da expulsão, na qual um país promove a retirada de pessoas já anteriormente admitidas, no *refoulement*, o Estado sequer permite que essa pessoa adentre seu território, sendo imediatamente devolvida ao seu local de origem.[39] O princípio do *non-refoulement* encontra abrigo no artigo 33, parágrafo primeiro da Convenção de 1951 sobre Direitos dos Refugiados, a qual prevê precisamente que um refugiado não pode ser retornado a um país em que sua vida ou liberdade sejam ameaçadas, precisamente em função de sua raça, religião, nacionalidade, grupo social ou opiniões políticas.[40]

Se as pessoas enfrentam as piores condições de jornada possíveis para buscar um lugar que as acolha e proteja da perseguição, da fome, da privação de direitos, o princípio do *non-refoulement*, compreendido em consonância com os direitos humanos mais primários, justamente visa garantir que ela deve estar a salvo dessas privações. Ao lado da solidariedade, a tolerância surge como fundamento para esse princípio, no sentido de não se poder privar uma pessoa de direitos humanos em razão de sua raça, origem, convicções. Significa dizer que todas as identidades merecem respeito e acolhida quando buscam asilo, fugindo de perseguições e privações de direitos que certamente os levarão ao perecimento.

No caso do Acordo UE-Turquia, a União Europeia decide exatamente promover a devolução dos refugiados irregulares, apesar de a comunidade internacional questionar se a Turquia seria um país capaz de receber essas pessoas e evitar que sejam vítimas de perseguição e constantes violações de direitos humanos.[41] Vale lembrar que ela passou por uma traumática tentativa de golpe de estado, mantém declarado estado de emergência e o atual vice-premiê anunciou a suspensão da Convenção Europeia de Direitos Humanos em seu território.[42] A devolução de sírios para a Turquia significa encaminhá-los para um país que enfrenta, ele próprio, uma grave crise, com milhares de pessoas detidas e suspensão de direitos humanos.

Uma situação como essa é precisamente o que o princípio do *non-refoulement* visa prevenir, em se tratando de uma norma imperativa dos direitos humanos dos refugiados, a qual não poderia ser negociada ou derrogada por qualquer Acordo Internacional.[43]

ropeia. In: ***El País***. 4 abr. 2016. Disponível em: http://brasil.elpais.com/brasil/2016/04/03/internacional/1459712252_605155.html . Acesso: em 10 ago. 2016, p. 3.

38 Mesmo esse reconhecimento enfrenta barreiras graves como a dificuldade com a língua, ou seja, a dificuldade em articular uma narrativa, e demonstrar argumentativamente a existência das condições necessárias à configuração da qualidade de refugiado. GODOY, Gabriel Gualano de. Refúgio, Hospitalidade e os Sujeitos do Encontro. In GEDIEL, José Antônio Peres; GODOY, Gabriel Gualano de. (Org.) Refúgio e Hospitalidade. Curitiba: Kairós, 2016, p. 40-42.

39 CAVARZERE, Thelma Thais. **Direito Internacional da Pessoa Humana:** A circulação internacional de pessoas. Rio de Janeiro: Renovar, 1995, p. 97-98.

40 FRIEDRICH, Tatyana Scheila; BENEDETTI, Andréa Regina de Morais. A visibilidade dos Invisíveis e os Princípios de Proteção aos Refugiados: notas sobre os acontecimentos recentes. In GEDIEL, José Antônio Peres; GODOY, Gabriel Gualano de. (Org.) **Refúgio e Hospitalidade**. Curitiba: Kairós, 2016, p. 72.

41 Existem elementos para se responder a essa pergunta negativamente. Como salienta a Comissão Europeia para Ajuda Humanitária e Proteção Civil, a Turquia mantém cerca de 270.000 pessoas em 25 campos de refugiados, mas reconhece que 90% dos refugiados sírios que vivem fora desses campos não são considerados para dados estatísticos, e sobrevivem em condições desafiadoras, sem acesso a informação, serviços públicos como educação e saúde. EUROPEAN COMMISSION – Humanitarian Aid and Civil Protection. **Turkey: Refugee Crisis.** Bruxela, 2016. Disponível em: http://ec.europa.eu/echo/files/aid/countries/factsheets/turkey_syrian_crisis_en.pdf . Acesso em 25 jul. 2016.

42 Turquia suspende aplicação da Convenção Europeia dos Direitos Humanos. **O Globo**. 21 jul. 2016. Disponível em: http://oglobo.globo.com/mundo/turquia-suspende-aplicacao-da-convencao-europeia-dos-direitos-humanos-19757361#ixzz4H35ys1zT . Acesso em 11 ago. 2016.

43 FRIEDRICH, Tatyana Scheila; BENEDETTI, Andréa Regina de Morais. A visibilidade dos Invisíveis e os Princípios de Proteção aos Refugiados: notas sobre os acontecimentos recentes. In GE-

PIOVESAN, Flávia Cristina; OLSEN, Ana Carolina Lopes. Tolerância e refugio: Um ensaio a partir do acordo EU-Turquia. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 215-235

Outro aspecto do Acordo que merece ser considerado é que ele aumenta o tempo de espera dos egressos sírios, afegãos e iraquianos pelo efetivo reconhecimento do direito ao refúgio[44], nos campos de refugiados. Estes campos abrigam tanto os pretendentes a refugiados quanto os já assim identificados, materializando um processo de exclusão social. Ainda que os refugiados assim reconhecidos e designados sejam destinatários de proteção jurídica, organismos internacionais reconhecem que eles podem ser vítimas de intimidação ou agressão em campos de refugiados, seja por parte da comunidade anfitriã que os recebe, seja por seus próprios pares.[45] Mulheres e crianças são um público ainda mais vulnerável, especialmente porque se encontram em um lugar que não necessariamente respeita seus valores culturais, e com autoridades mal aparelhadas para conter os abusos.

O fato de o Direito Internacional dos Refugiados mostrar-se impotente para conter violações de direitos humanos como estas parece denunciar mais que defeitos nos arranjos jurídico-administrativos internacionais, ou problemas econômicos enfrentados pelos países receptores. Nunca foi fácil receber populações de refugiados. Como observa José Manuel Oliveira Antunes[46], o fim da II Guerra Mundial implicou graves fluxos de refugiados por toda a Europa. Naquele momento histórico, contudo, os Estados europeus enfrentavam grave destruição, de modo que os governos do pós-guerra mostraram-se por isso receptivos ao acolhimento de mão-de-obra para recompor-se. Ainda assim, como salienta Oliveira Antunes, "procuravam sempre selecionar os mais convenientes", pois a política de integração com estrangeiros sempre foi vista com reservas.

Na medida em que sírios, afegãos e iraquianos batem às portas em grande volume, o discurso mostra-se drasticamente menos receptivo. O incômodo que os países europeus vêm na chegada dessas populações traz em seu âmago um preconceito profundo que os tem desviado da tolerância sempre propagandeada em tratados internacionais.

4. Intolerância e discriminação: afluxo de refugiados desafia a sinceridade dos valores europeus ocidentais

Ao longo dos últimos anos, a Europa tem sido o palco de diversos atentados terroristas. Os mais recentes, contudo, têm tido sua autoria reivindicada pelo Estado Islâmico (ISIS), traduzindo a política de intolerância desse grupo radical com o modo de viver dos europeus, e com sua política restritiva de imigração. Se de um lado a Europa tinha uma tendência de tolerar práticas religiosas diversas, desde que não comprometessem sua organização política democrática, a realidade atual tem desencadeado sentimentos xenófobos, agravando um preconceito que talvez já estivesse plantado há muitos anos.

O Acordo UE-Turquia vem justamente proteger o território europeu, mediante alegações de que os refugiados sírios, afegãos ou iraquianos trazem entre si pessoas com propósitos terroristas. Ocorre que esses refugiados estão, eles próprios, fugindo de atentados terroristas em seu próprio país[47].

Nesse caso, a União Europeia não tem se comportado como uma sociedade internacional, como ensina Walzer, que adota um padrão de tolerância extremamente forte, tendo em vista que carece de uma estrutura

DIEL, José Antônio Peres; GODOY, Gabriel Gualano de. (Org.) **Refúgio e Hospitalidade**. Curitiba: Kairós, 2016, p. 73.

44 "O refugiado, pois, depende do reconhecimento de seu status (dos motivos fundados e subjetivos do temor que justificam a fuga) por parte de um outro Estado para readquirir, ainda que minimamente, qualquer possibilidade de acesso a direitos básicos. Embora supostamente protegido pelo guarda-chuva do direito humanitário e por agências governamentais internacionais [...], a retomada de seus direitos básicos depende, prioritariamente, de sua reintegração territorial e, por consequência, jurídica ao espaço da política governamental." MOLIN, Carolina. Os direitos humanos dos humanos sem direitos. Refugiados e a política do protesto. In **Revista Brasileira de Ciências Sociais,** v. 26, n. 76, São Paulo, junho, 2011, p. 145-155. Disponível em: http://www.redalyc.org/articulo.oa?id=10719120008. Acesso em: 25 jul. 2016, p. 148.

45 "*Como se demuestra por la reciente experiência de los refugiados ruandeses en Zaire y la anterior de los camboyanos en la frontera tailandesa, um campo de refugiados puede ser uno de los lugares más peligrosos del mundo, especialmente cuando está bajo el control de personas que han sido responsables de violaciones massivas de los derechos humanos en su pátria*". ACNUR, ***La situación de los refugiados en el mundo**: en busca de soluciones*. Madrid: Alianza, 1995, p. 59.

46 ANTUNES, José Manuel Oliveira. Refugiados: um pouco de história, para memórias curtas. In Público. Lisboa, 28 ago. 2015. Disponível em: https://www.publico.pt/mundo/noticia/refugiados-um-pouco-de-historia-para-memorias-curtas-1706138. Acesso em 10 ago. 2016.

47 FRIEDRICH, Tatyana Scheila; BENEDETTI, Andréa Regina de Morais. A visibilidade dos Invisíveis e os Princípios de Proteção aos Refugiados: notas sobre os acontecimentos recentes. In GEDIEL, José Antônio Peres; GODOY, Gabriel Gualano de. (Org.) **Refúgio e Hospitalidade**. Curitiba: Kairós, 2016, p. 69-70.

organizacional capaz de determinar obrigações e deveres, e cobrar o seu adimplemento. No caso europeu, a tolerância condicionada parece ser própria do comportamento de Estados-nação ou sociedades de imigrantes. Grupos minoritários como os refugiados sírios só são admitidos se não oferecerem nenhum risco para o modo de vida europeu, pois ao fazê-lo, justificariam medidas de contenção e intervenção.

Os indivíduos são tolerados em suas características e práticas pessoais, mas os grupos a que pertencem não gozam da mesma proteção. A título de exemplo, nas questões de gênero se percebe um delicado embate entre o direito das comunidades de manter seus rituais (uso da burka, mutilação genital, *sati*[48]) e o direito individual dos cidadãos de não se sujeitar a essas práticas. Na medida em que tanto Estados-nação quanto sociedades de imigrantes impõe uma lei única para homens e mulheres, estes costumes encontram forte resistência.[49]

O choque entre a cultura europeia, e a cultura islâmica, agravada pela chegada dos refugiados tem deixado aflorar entre europeus evidente preconceito, a ser traduzido como uma compreensão a respeito de algo ou alguém, recebida e reproduzida tradicionalmente de forma acrítica, pois dotada de tanta autoridade que não admite refutação racional.[50] É nessa ordem que generalizações como "muçulmanos são terroristas" ganham a força retórica de um dogma, dificultando que se olhe para os refugiados como sujeitos de direitos.

Como consequência, no lugar de uma tolerância condicionada (e já não mais universal) surge o racismo como um preconceito em relação ao diferente, um medo de que ele causará algum mal. Essa predisposição mental dirigida a grupos inteiros, determinando o receio de que as tradições culturais dos "outros" ofusquem, comprometam ou até mesmo violem as "nossas", o medo de perder espaço no mercado de trabalho, determinando o empobrecimento e o perecimento em virtude da chegada do outro, ainda pode levar além do racismo, à xenofobia. Enquanto os valores ocidentais passam a ser considerados universais, intrinsicamente bons e justos, outros são ridicularizados e menosprezados, senão até combatidos. [51]

No presente caso, o choque entre valores ocidentais (Europa) e orientais (Islã), acaba ganhando corpo quando associada a problemas de caráter econômico, como a crise do Estado de Bem-Estar na Europa e o medo de que a avalanche de pessoas miseráveis inviabilize por completo o sistema. Walzer já chamava a atenção para o fato de que a intolerância se mostra ainda mais grave quando aspectos religiosos, raciais, culturais são associados a grupos economicamente subordinados. Imigrantes, quando incorporados aos grupos nacionais europeus, costumam ser tolerados porque são invisíveis.[52] Mas, no caso presente, a massa de refugiados sírios está longe da invisibilidade. Neste panorama o racismo ganha força, tomando a forma de um discurso ideológico entre o bem e o mal.[53]

Significa dizer que pode se materializar, como se suspeita no caso do Acordo UE-Turquia, verdadeira usurpação política e ideológica do racismo, a fim de implementar a possibilidade de grupos dominantes que se pretendem homogêneos de subjugar os diferentes a

48 Imolação da viúva hindu sobre a pira funerária do marido. WALZER, Michael. **Da Tolerância**. Trad. Almiro Pisetta. São Paulo: Martins Fontes, 1999, p. 80.

49 Procurando estabelecer padrões mínimos para a tolerância, de forma mais radical, Zizek defende que a tolerância entre europeus e muçulmanos é impossível: "*In short, things explode when members of a religious community consider the very way of life of another community as blasphemous or injurious, whether or not it constitutes a direct attack on their religion. To curb this propensity, one has to [...] First, formulate a minimum set of norms obligatory for everyone that includes religious freedom, protection of individual freedom against group pressure, the rights of women, etc.—without fear that such norms will appear "Eurocentric." Second, within these limits, unconditionally insist on the tolerance of different ways of life. And if norms and communication don't work, then the force of law should be applied in all its forms.*" ZIZEK, Slavoj. *In the Wake of Paris Attacks the Left Must Embrace Its Radical Western Roots*. **In These Times**. 16 nov. 2015. Disponível em: http://inthesetimes.com/article/print/18605/breaking-the-taboos-in-the-wake-of-paris-attacks-the-left-must-embrace. Acesso em 08 ago. 2016.

50 BOBBIO, Norberto. **Elogio da serenidade e outros escritos morais**. Trad. Marco Aurélio Nogueira. São Paulo: UNESP, 2002, p. 103.

51 BOBBIO, N. **Elogio da serenidade e outros escritos morais**. Trad. Marco Aurélio Nogueira. São Paulo: UNESP, 2002, p. 124.

52 WALZER, M. **Da Tolerância**. Trad. Almiro Pisetta. São Paulo: Martins Fontes, 1999, p. 74-76.

53 Hannah Arendt, em estudo sobre o totalitarismo nazista, defendeu que seu sucesso estava intrinsicamente ligado à ideologia racista por ele implementada, a fim de afirmar a superioridade de uma raça pura ariana sobre as demais. Para ela, a raça foi a justificativa pronta e necessária para todas as atrocidades praticadas pelo nazismo, e a burocracia surgiu precisamente como o mecanismo que permitia a realização do assassinato em massa de forma desumanizada, de modo que nenhum homem poderia assumir sozinho a responsabilidade pelos atos praticados. Todos seriam membros de uma cadeia racional e jurídica que levava à aniquilação da raça considerada inferior. ARENDT, H. **As origens do totalitarismo**. Trad. Roberto Raposo. São Paulo: 2012, p. 238.

partir de concepções de raça, nação, povo.[54]

Com isso, o racismo europeu acaba por impulsionar práticas discriminatórias[55]. O Acordo UE-Turquia prevê que todos os refugiados que saíram da Turquia para a Grécia de forma irregular devem ser devolvidos. Quem são os refugiados que utilizam essa rota? Essencialmente sírios, afegãos e iraquianos, ou seja, povos islâmicos. Esse acordo não abrange, por exemplo, nigerianos que cheguem à Europa por mar a partir do Líbia[56]. Trata-se de uma discriminação jurídica que tem levado à marginalização social[57], na medida em que esses refugiados são mantidos em campos no território turco, até que se vençam os trâmites burocráticos de legalização para assentamento em solo europeu.

Como bem enfatizou Walzer,[58] são os membros de uma determinada estrutura (uma nação, um Estado) que escolhem quem vão admitir, a quem vão estender os laços de afiliação, e segundo quais critérios. A fim de proteger sua liberdade, seu bem-estar social e sua cultura, os Estados devem cuidar de suas fronteiras e impor restrições de acesso ao seu território. Quanto mais fechado for o Estado, mais abertas serão as pequenas comunidades que o formam, menos paroquiais.[59] Significaria afirmar que precisamente para garantir a maior amplitude possível de mobilidade dentro dos Estados que a compõe (como no Acordo Schengen, que aboliu o controle nas fronteiras internas), a União Europeia precisa adotar políticas mais restritivas para os que pretendem nela ingressar.

Menos crédulo de uma identidade cultural europeia, Lehne observa que as migrações provenientes de países europeus mais pobres ocorridas no início dos anos 2000, com o alargamento das fronteiras da União Europeia, levaram a um certo desgaste do sentimento europeu. O Acordo Schengen, para ele, não pretendia necessariamente uma unidade cultural, mas facilitar o trânsito da mão de obra dentro das fronteiras, dinamizar e desonerar as trocas comerciais. Ainda que tenha tentado dar visibilidade à pretensão da Europa de se mostrar como um território integrado, cujos cidadãos gozam de uma "área de liberdade, segurança e justiça",[60] esse intento não foi atingido. Para Lehne, a Europa não criou um espaço político comum, nem uma identidade europeia que pudessem ancorar a abertura interna. Não tendo logrado formar uma comunidade transnacional que possa gerar lideranças capazes de preservar o bem comum de forma efetiva, e enfrentar assimetrias internas, a Europa tem presenciado nas últimas décadas o refortalecimento dos Estados-nação, pois são as eleições internas que distribuem poder político, e o debate público ainda está entrincheirado nas linhas nacionais.

Num primeiro momento, a crise migratória teve efeito disjuntivo, pois diante de uma política receptiva adotada pela União Europeia como um todo, os governos se voltaram para medidas restritivas nacionais, passaram a questionar o futuro do Acordo Schengen e adotar a premissa "cada um por si", em franco prejuízo para a integração europeia.[61] A união só surgiu quando a estrutura europeia se viu ameaçada pela grande massa de refugiados. Identidades fragmentadas se manifestaram para cobrar de seus estados políticas de admissão mais restritivas. Foi nesse sentido que a União Europeia conseguiu um consenso entre seus 28 países para adotar o Acordo com a Turquia, e parece defender a instaura-

54 Não só na Europa o discurso racista foi apropriado pela direita, mas se trata de um movimento global, como se percebe das declarações proferidas pelo então candidato, hoje Presidente eleito dos Estados Unidos, Donald Trump, em entrevista relatada na New York Review of Books, em que condena as decisões de um juiz de Indiana em razão de sua origem mexicana: "*This judge is of Mexican heritage. I'm building a wall*". TOMASKY, Michael. *Can the Monster be Elected?* In **The New York Review of Books**. V. LXIII, n. 12, New York: jul-ago 2016, p. 42.

55 Discriminação aqui compreendida como diferenciação injusta ou ilegítima, surgindo quando aqueles que deveriam ser tratados de maneira igual, são tratados de forma diferente, em seu prejuízo. BOBBIO, **Elogio da serenidade e outros escritos morais**. Trad. Marco Aurélio Nogueira. São Paulo: UNESP, 2002, p. 107.

56 Além de sírios e afegãos, também eritreus, somalis e nigerianos buscam a Europa fugindo da guerra e da privação de direitos humanos. AVELAR, Daniel; BALBINO, Leda. Saiba quais são os principais conflitos que alimentam a crise de refugiados na Europa. In Folha de S. Paulo. São Paulo, 03 set. 2015. Disponível em: http://www1.folha.uol.com.br/asmais/2015/09/1676793-saiba-quais-sao-os-conflitos-que-alimentam-a-crise-de-refugiados-na-europa.shtml Acesso em 10 ago. 2016.

57 BOBBIO, N. **Elogio da serenidade e outros escritos morais**. Trad. Marco Aurélio Nogueira. São Paulo: UNESP, 2002, p. 116.

58 WALZER, Michael. **Esferas da Justiça**: Uma defesa do pluralismo e da igualdade. Trad. Jussara Simões. São Paulo: Martins Fontes, 2003, p. 40-41.

59 WALZER, Michael. **Esferas da Justiça**: Uma defesa do pluralismo e da igualdade. Trad. Jussara Simões. São Paulo: Martins Fontes, 2003, p. 48-50.

60 LEHNE, Stefan. *The Tempting Trap of Fortress Europe*. In **Carnegie Europe**. Bruxela, 21 abr. 2016. Disponível em: www.carnegieeurope.eu/2016/04/21/tempting-trap-of-fortress-europe/ixdx . Acesso em: 11 ago. 2016.

61 LEHNE, Stefan. *The Tempting Trap of Fortress Europe*. In **Carnegie Europe**. Bruxela, 21 abr. 2016. Disponível em: www.carnegieeurope.eu/2016/04/21/tempting-trap-of-fortress-europe/ixdx . Acesso em: 11 ago. 2016.

ção de uma "Fortaleza Europa", com máximas restrições para a entrada de migrantes e refugiados.[62]

É preciso enfatizar que no caso de refugiados, segundo os padrões internacionais da Convenção de 1951, bem como dos direitos humanos, o acolhimento é quase uma imposição. Walzer demonstra essa preocupação ao lembrar que refugiados apresentam a reivindicação mais premente de todas: "Se você não me aceitar, dizem eles, serei assassinado, perseguido, brutalmente oprimido pelo governo do meu próprio país. O que podemos responder?"[63]

Nesse caso, Walzer chega a sugerir que o tratamento a ser dispensado aos refugiados seja o mesmo que se teria com compatriotas, especialmente se aqueles que recebem os refugiados têm alguma responsabilidade com a condição deplorável em que se encontra seu país. Contudo, o aspecto cultural representa, para Walzer, um fator determinante. Afinidades ideológicas e étnicas atravessam fronteiras e exercem uma coerção moral que impulsiona os processos de admissão. *Contrario sensu*, quanto menor a identidade e a afinidade, mais difícil a receptividade dos refugiados.[64]

Assim, os refugiados encontram melhores políticas de admissão quando são culturalmente parecidos, de fácil integração[65], além de estarem em números administráveis. Os Estados autores do Direito Internacional dos Refugiados, ironicamente, interpretam suas normas conforme seus próprios interesses, já que não há uma autoridade supranacional legitimada a determinar compulsoriamente o seu cumprimento. Ainda mais vulneráveis estão os refugiados pois o sistema internacional de proteção não previu mecanismos para receber petições ou denúncias individuais ou entre Estados.[66]

Walzer afirma que o direito internacional dos refugiados foi criado para indivíduos contados um a um, o que muda severamente agravada quando se trata de milhares, ou milhões de pessoas solicitando refúgio.[67] Ainda que este pedido imponha, ética e juridicamente, a aceitação, dada a sua gravidade, a realidade mostra que a política adotada pelos Estados nem sempre tem olhos para a tolerância, e para a inclusão. Para Walzer, a acolhida de grandes números de refugiados, ainda que moralmente salutar, não pode suplantar o direito de uma comunidade de restringir aqueles a quem deseja conceder a afiliação. "O princípio do auxílio mútuo só pode modificar, e não transformar, as políticas de admissão arraigadas na interpretação que determinada comunidade faz de si mesma".[68]

62 "*By effectively keeping refugees out of Europe in the first place, a Fortress Europe policy would greatly reduce the burden to be shared and therefore obviate the necessity of such arrangements. And the conflicts between the first EU countries in which migrants arrive, the transit states, and the countries of final destination—conflicts that have bedeviled the EU's work on this issue—would disappear.*" Para Lehne, essa pretensão tende a falhar por diversas razões, dentre as quais a imensa fronteira terrestre e marítima da Europa, incapaz de conter os afluxos populacionais, e a precariedade da estrutura público-administrativa-policial dos países vizinhos para conter e manter em seu território os refugiados. LEHNE, Stefan. *The Tempting Trap of Fortress Europe.* In **Carnegie Europe**. Bruxela, 21 abr. 2016. Disponível em: www.carnegieeurope.eu/2016/04/21/tempting-trap-of-fortress-europe/ixdx . Acesso em: 11 ago. 2016.

63 WALZER, Michael. **Esferas da Justiça**: Uma defesa do pluralismo e da igualdade. Trad. Jussara Simões. São Paulo: Martins Fontes, 2003, p. 63.

64 Walzer cita como exemplo a acolhida de refugiados políticos pela Inglaterra no século XIX, dentre os quais existiam hereges e oposicionistas diversos, em luta contra as autocracias do Centro e Leste Europeus. Como partilhavam um inimigo comum, foram bem recebidos. Ainda, o exemplo de húngaros que deixaram seu país após a revolução fracassada em 1956, já que partilhavam os valores ocidentais. Em não havendo afinidade alguma, Walzer defende que os refugiados não podem ser aceitos em detrimento de outras pessoas igualmente necessitadas. Defende a existência de fronteiras definidas. WALZER, Michael. **Esferas da Justiça**: Uma defesa do pluralismo e da igualdade. Trad. Jussara Simões. São Paulo: Martins Fontes, 2003, p. 64.

65 Arendt lembra de duas soluções de naturalização diante da crise de refugiados pós I Guerra Mundial: a naturalização dos gregos expulsos da Turquia, naturalizados em bloco em 1922, e aquela que favoreceu os refugiados armênios da Turquia estabelecidos na Síria, Líbano e outros países ex-otomanos, a qual correspondia a uma população com a qual todo o Oriente Próximo compartilhava a cidadania turco-otomana ainda poucos anos antes. ARENDT, H. **As origens do totalitarismo**. Trad. Roberto Raposo. São Paulo: 2012, p. 318. Michael Sandel ainda lembra do resgate dos judeus etíopes pelo Estado de Israel, em virtude da guerra civil eclodida na Etiópia em 1991. SANDEL, Michael. **Justiça**: O que é fazer a coisa certa. 15 ed. Rio de Janeiro: Civilização Brasileira, 2014, p. 279-280.

66 MOREIRA, Julia Bertino. Direito Internacional dos Refugiados e a Legislação Brasileira. In RAMINA, Larissa; FRIEDRICH, Tatyana Scheila (Coord). Coleção Direito Internacional Multifacetado: Direitos Humanos, Guerra e Paz. V. III. Curitiba: Juruá, 2014, p.110-111.

67 Walzer lembra a situação em que milhões de russos foram capturados pelos aliados na II Guerra Mundial e depois devolvidos compulsoriamente para a União Soviética, mesmo sabendo-se que lá muitos deles seriam assassinados. Aqueles que cientes de seu destino pediram asilo, encontraram Estados-nacionais fechados, que por motivos políticos de conveniência (não de assimilação, nem nacionalidade) o negaram. WALZER, M. **Esferas da justiça**. Uma defesa do pluralismo e da igualdade. Trad. Jussara Simões. São Paulo: Martins Fontes, 2003, p. 66.

68 WALZER, M. **Esferas da justiça**. Uma defesa do pluralismo e da igualdade. Trad. Jussara Simões. São Paulo: Martins Fontes, 2003, p. 67.

PIOVESAN, Flávia Cristina; OLSEN, Ana Carolina Lopes. Tolerância e refugio: Um ensaio a partir do acordo EU-Turquia. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 215-235

A defesa de Walzer se justifica dentro de uma concepção comunitarista de sociedade. Todavia, se essa concepção implica a larga violação de direitos humanos essenciais à sobrevivência do homem, ela pode ser questionada. Enviar para o risco de morte grandes contingentes humanos não poderia ser justificado a partir de valores culturais comunitários.

Na verdade, bem andou Collet ao ressaltar o paradoxo em que o Acordo UE-Turquia colocou a comunidade ocidental europeia.[69] Enquanto procura se fechar em uma fortaleza para preservar sua cultura, seus valores seculares, exclui de seu território os mais necessitados, determinando a devolução de refugiados. Ao fazê-lo, acaba por violar aqueles mesmos valores que pretendia proteger, como a tolerância para com o diferente, a inclusão, a isonomia.[70] Se abrir completamente suas fronteiras, por outro lado, teme a União Europeia que, diante do grande afluxo de refugiados de culturas muito diversas, veja diluída e dissolvida mesma cultura.

A questão que fica é se seria possível pensar em recuperar e remodelar a tolerância como fundamento do direito dos refugiados, a fim de direcionar sua interpretação para uma prática de inclusão e respeito.

5. Perspectivas para a recuperação ou remodelação da tolerância

A defesa dos direitos humanos dos refugiados não admite a possibilidade de condicionamentos[71]. Essa afirmação encontra-se amparada em uma concepção universal de direitos humanos que reconhece igualmente em cada pessoa um sujeito de direitos, que não pode ser deportado ou abandonado para perecer. Por fundamento, defende uma máxima tolerância para com a figura do outro, a fim de nele reconhecer um titular de direitos, de modo que sua qualificação como refugiado sírio não poderia ser suficiente para determinar sua devolução, ainda que chegue irregularmente.

A questão merece ser enfrentada à luz de uma alegação que partidários da Europa fazem como justificativa para fechar suas fronteiras, qual seja, a que dentre os refugiados sírios infiltram-se membros do Estado Islâmico que adentram território europeu com o objetivo de praticar atos terroristas. Diante dessa questão, seria necessário questionar se seria exigível ser tolerante também nesses casos.

É preciso esclarecer que não se trata de ser tolerante com terroristas, no sentido de admitir indiscriminadamente pessoas que se sabe ou se tem fundado receio de ser um criminoso. As redes de segurança europeia e internacional têm, de fato, que promover as devidas investigações a fim de localizar e levar a julgamento aqueles que praticam atos contrários aos direitos humanos, como o são os atos terroristas. A questão aqui é que não se pode presumir que as pessoas que deixam a Síria fugindo da intolerância de Bashar al-Assad, de um lado, e do Estado Islâmico, de outro, sejam todas convictos ou potenciais terroristas. Admitir essa presunção vai além de deitar por terra princípios caros ao Estado de Direito, implica a mais franca e desmedida xenofobia.

Refugiados sírios são devolvidos, barrados por muitos estados europeus sem qualquer rastro de tolerância ou solidariedade porque, segundo Walzer, os europeus não conseguem estabelecer com eles um laço de identidade – seja étnica, política, ideológica ou ainda cultural. Indo além, essas diferenças identitárias justificariam a proteção dos recursos econômicos em certa medida já escassos para os compatriotas. Todavia a Europa não logrou demonstrar a total impossibilidade de acolher os refugiados sírios. Talvez esse acolhimento – no grande

69 No mesmo sentido a crítica feita por Sam Kriss a Zizek: "*What kind of Lacanian tells someone that they should effectively abandon their desire for something just because it's not attainable? Or are migrants not worthy of the luxury of an unconscious mind?) In Calais, migrants trying to reach the United Kingdom protested against their conditions with placards demanding "freedom of movement for all." Unlike racial or gender equality, the free movement of peoples across national borders is a supposedly universal European value that has actually been implemented—but, of course, only for Europeans. These protesters put the lie to any claim on the part of Europe to be upholding universal values*". ZIZEK, Slavoj. *In the Wake of Paris Attacks the Left Must Embrace Its Radical Western Roots*. **In These Times**. 16 nov. 2015. Disponível em: http://inthesetimes.com/article/print/18605/breaking-the-taboos-in-the-wake-of-paris-attacks-the-left-must-embrace. Acesso em 08 ago. 2016.

70 Se os europeus ocidentais defendem que sua cultura enaltece a dignidade de cada pessoa humana, que todos são iguais e merecem os mesmos direitos, direito ao respeito a sua própria tradição, religião, raça, como justificar a barbarização do outro? AMADO, Juan Antonio García. ?Por qué no tienen los Inmigrantes dos Mismos Derechos que los Nacionales? In ARNAUD, André-Jean. **Globalização e Direito I**: Impactos nacionais, regionais e transnacionais. 2 ed. Rio de Janeiro: Lumen Iuris, 2005, p. 471-472.

71 PAMPLONA, Danielle Anne; PIOVESAN, Flávia. O instituto do refúgio no Brasil: práticas recentes. In **Revista de Direitos Fundamentais e Democracia**, v. 17, n. 17, Curitiba: janeiro/junho de 2015, p. 51.

volume como se apresenta – comprometesse o padrão de vida hoje mantido por muitos europeus, mas por certo não os levaria à fome e à miséria. Sandel, pensando sobre a possibilidade de se negar acesso ao Estado em função da preservação dos privilégios econômicos dos nacionais, rechaça essa possibilidade. Seria o mesmo que imaginar que somente as pessoas que tiveram a sorte de nascer naquele território tem direito de serem ricas.[72]

Ainda que o problema econômico possa ser questionado, a questão central parece ser mais simples: preconceito, racismo, xenofobia. Sentimentos que dificilmente serão afastados por um ideal universal de que todos partilham da mesma humanidade, pois são muito concretos e presentes. Como observa Silva, tornou-se hegemônico considerar como inferiores pessoas que não participam do mesmo grupo social, quando "não encontramos um pouco de nós mesmos nesse outro".[73] Essa dificuldade vem em razão de valores morais que diferem profundamente, como, no caso islâmico, o tratamento dispensado às mulheres, a laicidade do Estado, e o comprometimento religioso. Com esse nível de discordância, o recurso a um ser humano abstrato e universal não facilita o diálogo.

Richard Rorty observa que a solidariedade entre os grupos sociais surge precisamente em função de uma maior proximidade (étnica, política, religiosa) que possa haver entre eles. Para ele, maior será a solidariedade "quando aqueles com quem nos solidarizamos são vistos como 'um de nós', expressão em que 'nós' significa algo menor e mais local do que a raça humana". Se as semelhanças e diferenças entre os grupos são construídas de forma histórica e contingencial, uma solução universal abstrata seria de difícil sustentação. "É por isso que a frase 'porque essa pessoa é um ser humano' constitui uma explicação pouco convincente para um ato generoso."[74]

Para Rorty, mesmo sem se recorrer a matrizes universalistas, é possível defender que grupos identificados como "nós" busquem alargar seu conceito para serem solidários com aqueles que inicialmente consideravam como "eles". Esse progresso moral caminharia no sentido de gerar uma maior solidariedade entre os homens, porém não em função de um "eu nuclear" que possa ser identificado em toda a humanidade, mas em função de um maior desprezo sobre as diferenças tradicionais (origem, religião) e uma maior preocupação em torno de questões como dor e humilhação.[75] Significaria ver no "outro" alguém que, tão historicamente e contingencialmente informado como "nós", tem os mesmos sentimentos.

A partir dessa proximidade, Rorty sugere acolher aqueles em que ordinariamente se pensa como "eles" para quem passem a ser "nós", no lugar de pensar em termos absolutos como se essa solidariedade existisse num momento pré-existente, como condição humana[76]. Esse "nós" não pode ser visto a partir de um mero etnocentrismo, mas de um etnocentrismo que coloca em dúvida a si mesmo, que questiona sobre sua capacidade de enxergar o outro.

Para Silva, não pode haver uma tolerância incondicional em relação ao outro, pois a tolerância sempre se dirige ao diferente a partir de certas condições que nós estabelecemos como válidas, pressupostos mínimos de aceitação. Para Silva, a tolerância incondicional seria caridade, e, portanto, uma espécie de dominação; ou seria então indiferença, mera aceitação do outro diante da inevitabilidade da vida em comum. Em nenhum desses casos, ela gera solidariedade. Em diálogo com as ideias de Rorty, defende que a tolerância deve propiciar alguma espécie de vínculo com o outro, de modo que ele possa ser visto como "nós", segundo uma categoria de "nós" contingencial e aberta.[77]

Nessa linha, uma situação seria perguntar ao outro se ele tem ou deseja ter as mesmas convicções que nós;

72 SANDEL, Michael. **Justiça**: O que é fazer a coisa certa. 15 ed. Rio de Janeiro: Civilização Brasileira, 2014, p. 284. "Já que o acaso do local de nascimento não justifica o merecimento do direito [...] é difícil conceber como a restrição à imigração pode ser justificada em nome da preservação da riqueza". Se não se opõe a migrantes econômicos, em hipótese alguma se oporia a refugiados.

73 SILVA, Sérgio Gomes da. Direitos humanos: entre o princípio de igualdade e a tolerância. In **Revista Praia Vermelha**, v. 19, n. 1. Rio de Janeiro, jan-jul 2010, p. 80.

74 RORTY, Richard. **Contingência, Ironia e Solidariedade**. Trad. Vera Ribeiro. São Paulo: Martins Fontes, 2007, p. 313-315.

75 RORTY, Richard. **Contingência, Ironia e Solidariedade**. Trad. Vera Ribeiro. São Paulo: Martins Fontes, 2007. p. 316.

76 Este "nós" poderia ser compreendido como "nós, herdeiros das contingências históricas que criaram instituições políticas cada vez mais cosmopolitas e cada vez mais democráticas". RORTY, R. **Contingência, Ironia e Solidariedade**. Trad. Vera Ribeiro. São Paulo: Martins Fontes, 2007, p. 322-323.

77 "A tolerância incondicional é algo desejável, porém, impossível. Nenhuma sociedade, nenhum grupo social ou comunidade, nenhum ser humano em lugar algum do mundo pode ser totalmente tolerante para com seu "irmão em humanidade". SILVA, Sérgio Gomes da. Sérgio Gomes da. Direitos humanos: entre o princípio de igualdade e a tolerância. In Revista Praia Vermelha, v. 19, n. 1. Rio de Janeiro, jan-jul 2010, p. 90-91.

outra, bem diferente, seria perguntar se ele está sofrendo. É na preocupação com a segunda resposta que a questão da solidariedade se apresenta de forma concreta e real.[78]

Seguindo esse mesmo caminho, e ciente de um mundo em que as diversidades culturais se chocam, Kwame Anthony Appiah propõe o cosmopolitismo como uma concepção de mundo fundada em duas noções: a de que as pessoas têm obrigações para com as outras, as quais transcendem os laços de família, ou cidadania; e a de que as vidas humanas em particular têm valor em si, o que traduz uma preocupação com práticas culturais identitárias.[79]

Segundo Appiah, existem dois níveis de discordância sobre valores, o fraco, e o forte. No primeiro, encontram-se os padrões de certo, errado, belo, feio, sobre os quais praticamente todas as sociedades se posicionam, tendo práticas que se enquadram nestas categorias. No segundo, existem conceitos culturalmente profundos que não são partilhados, porque uma cultura simplesmente não tem o mesmo referente que a outra. Nesse caso, a discordância deve ser resolvida não com a aceitação do outro valor, ou sua incorporação, mas apenas com a sua compreensão.[80] A tolerância – no sentido de reconhecimento – parte do diálogo com o outro, de modo a permitir que as duas culturas compreendam uma a outra, ainda que não concordem sobre determinados pontos. A "Regra de Ouro", segundo Appiah, é levar em consideração a ideia dos outros, sua concepção de mundo, seus interesses. É importante que as pessoas conheçam essa realidade alternativa, e experimentem, ainda que na imaginação, como seria vive-la.[81]

No caso em exame, o preconceito, o racismo e a xenofobia que transparecem a partir do Acordo UE-Turquia não pode ser vencido por uma ideia abstrata de tolerância para com o estrangeiro apenas porque são todos – europeus e sírios – da mesma espécie humana, nem por uma ideia que encerre possibilidade de diálogo em torno de diferenças culturais invencíveis.[82] Entre os dois extremos, o cosmopolitismo propõe que um saiba calçar os sapatos do outro, e procurar entender suas necessidades, suas urgências. No caso dos refugiados sírios, o que também se aplica aos demais que buscam asilo na Europa, a luta pela própria sobrevivência é algo que transparece de sua própria existência pessoal, e precisa ser compreendida pelo povo europeu, precisa ser conhecida em concreto. Como bem assinala Appiah, "quando o estrangeiro não é mais imaginário, mas real e presente, compartilhando uma vida humana social, você pode gostar ou desgostar dele, pode concordar ou discordar; mas, se é o que vocês dois querem, vocês podem fazer sentido um do outro ao final".[83]

Dentro dessa proposta cosmopolita, Fachin propõe uma concepção de tolerância como fundamento inarredável para o diálogo entre as culturas, e superação do preconceito. No plano intrínseco a um sistema cultural, a tolerância permitiria reconhecer a validade das tradições culturais de um lado, e a autonomia individual de se submeter ou não a elas.[84] No plano extrínseco, a tolerância representa o pressuposto para o diálogo intercultural a fim de evitar a imposição de um padrão cultural hegemônico.[85]

Heller e Feher também se ocuparam da necessidade de identificação de virtudes cívicas a serem desenvolvidas na vida em sociedade, precisamente a fim de permitir uma vida em comum diante das mais diversas cultu-

78 RORTY, R. **Contingência, Ironia e Solidariedade**. Trad. Vera Ribeiro. São Paulo: Martins Fontes, 2007, p. 326.

79 APPIAH, Kwame Anthony. *Cosmopolitanism: Ethics in A World of Strangers.* (e-book) New York: Penguin, 2007, p. 15.

80 APPIAH, Kwame Anthony. *Cosmopolitanism: Ethics in A World of Strangers.* (e-book) New York: Penguin, 2007, p. 102. Em outro trecho, o mesmo autor enfatiza que o relativismo cultural não leva ao diálogo: "Porque se o relativismo sobre ética e moralidade for verdadeiro, então, ao final de muitas discussões, cada um de nós acabaria dizendo: 'Do meu ponto de vista, estou certo. Do seu ponto de vista, você está certo'. E não haveria mais nada a dizer. [...] As pessoas sempre recomendam o relativismo porque entendem que ele levará à tolerância. Mas, se não pudermos aprender com o outro o que é certo pensar e sentir e fazer, então, a conversa entre nós será sem objeto. Relativismo deste tipo não é uma forma de se encorajar a conversa; é só uma razão para ficar em silêncio." (Tradução livre). P. 77.

81 APPIAH, Kwame Anthony. *Cosmopolitanism: Ethics in A World of Strangers.* (e-book) New York: Penguin, 2007, p. 130.

82 FACHIN, Melina Girardi. **Fundamentos dos Direitos Humanos:** Teoria e práxis na cultura da tolerância. Rio de Janeiro: Renovar, 2009, p. 271.

83 APPIAH, Kwame Anthony. *Cosmopolitanism: Ethics in A World of Strangers.* (e-book) New York: Penguin, 2007, p. 187.

84 Nesse sentido, recebem melhor acolhida no mundo ocidental pessoas que fogem dos sistemas islâmicos porque não desejam se submeter a eles, como no caso narrado por Khadija Kafir, que se insurgiu contra a tradição islâmica de sua família e logrou sobreviver com a ajuda de ocidentais, trocando de identidade. KAFIR, Khadija; JAMES, Sabatina. Por que minha mãe me quer morta. In Ex-muçulmanos. 1 set. 2015. Disponível em: < http://www.exmuculmanos.com/por-que-minha-mae-me-quer-morta/>. Acesso em 12 ago. 2016.

85 FACHIN, Melina Girardi. **Fundamentos dos Direitos Humanos:** Teoria e práxis na cultura da tolerância. Rio de Janeiro: Renovar, 2009, p. 280-281.

PIOVESAN, Flávia Cristina; OLSEN, Ana Carolina Lopes. Tolerância e refugio: Um ensaio a partir do acordo EU-Turquia. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 215-235

ras. Propõem o conceito de tolerância radical, partindo da premissa de que todas as pessoas devem ter iguais oportunidades de vida.

Assim, a partir do reconhecimento de que todas as necessidades humanas merecem indistintamente ser atendidas (afastadas aquelas que usam outras pessoas como meios e podem impedir de se reconhecer necessidades para todos), também merecem reconhecimento diferentes formas de vida.[86] Esse reconhecimento vai além da tolerância liberal (pela qual cada um pode perseguir individualmente seu ideal de felicidade, num sentido de não ingerência na liberdade alheia), pois tem uma conotação positiva, na medida em que determina uma relação ativa com o outro. A tolerância radical não aceita a força, a violência da dominação, autorizando o combate a todas as leis que negam o reconhecimento das formas de vida. Essa modalidade de tolerância vai além do "isso não é da minha conta" para implicar o "eu me importo".[87]

É precisamente a ideia de se importar com o outro que motiva a solidariedade. Ela deve estar relacionada com a tolerância radical e a coragem cívica, sendo informada pelos valores universais da vida e liberdade, igualdade e racionalidade comunicativa. A solidariedade enquanto virtude deve ser traduzida em atos concretos de apoio aos grupos, movimentos sociais, comunidades, a fim de reduzir o nível de violência, dominação ou força nas instituições sociais e políticas. Não se trata de apoio irrestrito ao grupo, justamente exclui essa ideia na medida em que impõe condições: solidariedade a todos os grupos que reduzem a dominação, a força e a violência e ampliam o espaço de liberdade para todos.[88] Nessa linha, não se falaria em solidariedade para com o Estado Islâmico (ISIS), mas sim para com suas vítimas.

A fim de instrumentalizar a solidariedade, Appiah defende que as necessidades básicas de sobrevivência devem ser supridas, primeiramente, pela estrutura dos estados, de modo que os cidadãos têm responsabilidade de tomar providências para que esses estados atendam às necessidades de seus próprios nacionais. Indo além, na medida em que se aceita a estrutura política dos estados-nação, necessário reconhecer que as pessoas também têm um papel a cumprir na garantia de que outros estados garantam as necessidades de seu próprio povo, sem que isso signifique que cada um deva levar nas costas o peso da ineficiência, da corrupção ou mesmo da tirania alheia.[89] A grande dificuldade está precisamente em determinar esse papel.

É certo que a solidariedade para com estrangeiros não pode inviabilizar a solidariedade/responsabilidade que cada um tem para com sua própria família, para com as pessoas que dele dependem ou procuram. Também não pode exigir que, em nome do cuidado para com o outro, alguém abandone os cuidados para consigo próprio.[90]

O cosmopolitismo exige que as pessoas se preocupem com os outros no sentido de procurar se informar sobre soluções razoáveis para os problemas. Não basta o engajamento, mas é preciso ter curiosidade, afinal é possível que certos cidadãos sejam coniventes com políticas que estão causando morte a outros, distantes de seus olhos. É preciso investigar por que grandes montantes financeiros são enviados para países pobres e não se vê melhora alguma na condição de vida de seus cidadãos. Como diz Appiah, "ele envolve não apenas ver uma pessoa sofrendo, mas uma vida humana desperdiçada".[91]

A solidariedade para com os estrangeiros não exige heroísmo, mas bom senso. Como fora salientado pela Conferencia de Direitos Humanos de 1993, trata-se de compartilhar responsabilidades, de modo que a comunidade internacional adote um planejamento abrangente a fim de coordenar atividades e promover uma maior cooperação com países envolvidos nas crises de refugiados[92]. Para Appiah, trata-se de exigir dos representantes

86 Nesse mesmo sentido, a solidariedade para com estrangeiros, como observado por Appiah, não exige que se nutra por eles o mesmo sentimento de simpatia que se tem pelos vizinhos, ou familiares e amigos. Partindo do princípio de que esse sentimento não está presente na maior parte das vezes, a solidariedade se dirige ao reconhecimento de que todas as pessoas têm necessidades básicas, como alimentação, abrigo, saúde, educação. APPIAH, Kwame Anthony. *Cosmopolitanism: Ethics in A World of Strangers*. (e-book) New York: Penguin, 2007, p. 279.

87 HELLER, Agnes; FEHÉR, Ferenc. **A condição política pós-moderna**. Trad. Marcos Santarrita. Rio de Janeiro: Civilização Brasileira, 1998, p. 122-124.

88 HELLER, Agnes; FEHÉR, Ferenc. **A condição política pós-moderna**. Trad. Marcos Santarrita. Rio de Janeiro: Civilização Brasileira, 1998, p. 126.

89 APPIAH, Kwame Anthony. ***Cosmopolitanism**: Ethics in A World of Strangers*. (e-book) New York: Penguin, 2007, p. 288-289.

90 APPIAH, Kwame Anthony. ***Cosmopolitanism**: Ethics in A World of Strangers*. (e-book) New York: Penguin, 2007, p. 292.

91 APPIAH, Kwame Anthony. ***Cosmopolitanism**: Ethics in A World of Strangers*. (e-book) New York: Penguin, 2007, p. 297.

92 PIOVESAN, Flávia. Refugiados sob a Perspectiva dos Direitos Humanos. In: **Seminário Internacional "Fronteiras em**

PIOVESAN, Flávia Cristina; OLSEN, Ana Carolina Lopes. Tolerância e refugio: Um ensaio a partir do acordo EU-Turquia. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 215-235

políticos que eles se lembrem dos estrangeiros, não porque estejamos chocados com seu sofrimento – até podemos estar – mas porque a sociedade responde à razão, a princípios, à consciência. Por mais distante, ou próximo, que os estrangeiros estejam, eles merecem viver.[93]

6. Considerações finais

Diante do exposto, é possível verificar, como já afirmara Zizek, que vivemos em tempos interessantes[94]. Tempos em que instrumentos normativos foram criados para vincular os Estados ao valor ético da pessoa humana, à sua dignidade. Como se depreende do Direito Internacional dos Refugiados, interpretado à luz dos direitos humanos, toda pessoa que se vê forçada a abandonar seu país em razão de perseguição, de medo da morte, da tortura, tem o direito de ser acolhida por comunidades estrangeiras, e protegida na qualidade de refugiada.

Todavia, a previsão abstrata de que todos partilhamos a mesma raça humana não foi motivo suficiente para que a Europa – conhecida mundialmente como berço dos direitos humanos – vencesse o preconceito em relação a grupos profundamente diferentes do seu ideal de bem viver. Quando as fronteiras europeias se viram assediadas por milhares de refugiados sírios, iraquianos, afegãos, o choque de civilizações falou mais alto, dando lugar ao preconceito, ao racismo e à xenofobia. O Acordo firmado pela União Europeia com a Turquia é talvez a expressão mais evidente dessa realidade, admitindo a devolução de refugiados que chegam às ilhas gregas para a Turquia. O princípio básico do Direito dos Refugiados, o *non-refoulement* parece ter sido esquecido. O Acordo prevê ajuda financeira dos países europeus para que a Turquia, ela própria enfrentando graves problemas políticos internos, inclusive de origem religiosa, acolha as massas de refugiados sírios. Ainda que preveja a possibilidade de reassentamento de refugiados legalmente instalados em solo turco nos países europeus, os números acabam por mostrar que a intenção da União Europeia de cumprimento de sua parte no acordo é, no mínimo, duvidosa.

Nesse sentido, a tolerância universal, idealizada, abstrata que deveria marcar as relações sociais entre povos diferentes mostrou-se um conceito de baixa operacionalidade. Os choques culturais entre refugiados sírios e o povo europeu são gritantes e concretos, além de terem sido agravados por atentados terroristas que apenas colocaram a Europa ainda mais "fortificada", para usar a expressão de Lehne. O Acordo UE-Turquia evidencia o fechamento de fronteiras em razão da intolerância, não apenas para com os terroristas em si, ou para com o Estado Islâmico (ISIS), mas também para com suas vítimas.

Diante desse quadro, sugere-se pensar a tolerância dirigida a sujeitos concretos, reconhecidos em sua historicidade, sua existência cultural e, nesta seara, sua dignidade. A partir das lições de Rorty, com seu conceito alargado de "nós" e Appiah, para quem os abismos culturais podem não se resolver pela aceitação, mas por um diálogo de compreensão. Urge pensar nos refugiados como pessoas concretas, com histórias que impõe a responsabilidade daquele a quem chegam, pela sua gravidade e premência.

Não se exige do europeu que ele abandone suas convicções para compreender as necessidades dos refugiados; sua estrutura ético-jurídica fornece um instrumental adequado para tanto na medida em que defende a liberdade religiosa, os direitos básicos essenciais à sobrevivência. Ele só precisa ser utilizado com sinceridade. A partir do respeito às normas de direitos humanos, conhecer o outro e nele reconhecer um sujeito de direitos. O preconceito, como bem colocado por Bobbio, nasce na cabeça dos homens, e só pode ser nela combatido, a partir da construção de uma consciência voltada para a tolerância.[95]

Tolerância radical, como defendem Heller e Fehér, que assume uma feição ativa para além do ideal liberal, defensor de uma liberdade plena para se nutrir convicções e com base nelas pautar uma existência. Uma feição ativa que se dirija ao outro e compreenda suas razões, suas necessidades, e em função desse encontro paute condutas de respeito e de acolhimento.

Movimento: Deslocamentos e outras Dimensões do Vivido", Diversitas – Núcleo de Estudos das Diversidades, Intolerâncias e Conflitos, Universidade de São Paulo, São Paulo: 2013.

93 APPIAH, Kwame Anthony. ***Cosmopolitanism**: Ethics in A World of Strangers.* (e-book) New York: Penguin, 2007, p. 307-308.

94 ZIZEK, Slavoj. In the Wake of Paris Attacks the Left Must Embrace Its Radical Western Roots. In These Times. 16 nov. 2015. Disponível em: http://inthesetimes.com/article/print/18605/breaking-the-taboos-in-the-wake-of-paris-attacks-the-left-must-embrace. Acesso em 08 ago. 2016: "*We definitely live in interesting times.*"

95 BOBBIO, Norberto. **Elogio da serenidade e outros escritos morais**. Trad. Marco Aurélio Nogueira. São Paulo: UNESP, 2002, p. 117.

PIOVESAN, Flávia Cristina; OLSEN, Ana Carolina Lopes. Tolerância e refugio: Um ensaio a partir do acordo EU-Turquia. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 215-235

É certo que a realidade vivida hoje desafia a praticidade dessas noções. O contingente de refugiados é imenso, talvez sua acolhida implique sacrifícios para a Europa. O medo do terrorismo é igualmente avassalador. Não há caminhos fáceis para solucionar o choque de intenções, pois os europeus dificilmente conseguirão se isolar diante do grande contingente de necessitados. E ao fazê-lo, estariam negando a si mesmos. Ciente dessas limitações, o próprio Direito Internacional dos Refugiados sugere que se combatam as causas do refúgio, mediante ações solidárias que possam impedir/punir perseguições dos nacionais em seus próprios estados, e permitir que eles sejam devolvidos aos seus lares.[96] Medidas contra o terrorismo devem ser tomadas com investigações dedicadas, e punições seguras, não com exclusão de pessoas por presunções que só se sustentam enquanto manifestações racistas e xenofóbicas.

Se a dificuldade é grande, maior há de ser a superação. Como sugere o cosmopolitismo, não há necessidade de heróis, mas de efetivamente nos ocuparmos em enxergar os outros, cobrar dos Estados ações concretas e senão ética, juridicamente comprometidas com os direitos humanos. Em tempos de individualismo, talvez aí já haja uma boa dose de heroísmo. De fato, tempos interessantes.

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O tratamento do apátrida na nova lei de migração: Entre avanços e retrocessos

The treatment of stateless persons in the new law of migration: Between progress and retrocession

Jahyr-Philippe Bichara

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O tratamento do apátrida na nova lei de migração: Entre avanços e retrocessos*

The treatment of stateless persons in the new law of migration: Between progress and retrocession

Jahyr-Philippe Bichara**

Resumo

A nova Lei de Migração, nº 13.445, de 24 de maio de 2017, apresenta inovações relativas ao tratamento do apátrida em solo brasileiro, de modo a alinhar-se às convenções internacionais pertinentes à matéria e vigentes no ordenamento interno. Aponta-se, nesse artigo, que as obrigações assumidas pelo Brasil, no plano internacional, em relação aos apátridas devem ser implementadas pela administração pública mediante adaptações legais. Todavia, ao apreciar as contribuições da nova legislação, constata-se que algumas pendências administrativas subsistem no que concerne ao órgão competente para atender às demandas de apatridia e de naturalização. Por outro lado, observa-se que a Lei nº 9.474/97, conhecida como Lei do Refúgio, também comporta suas próprias lacunas sobre essa questão. Chega-se à conclusão acerca da permanente inadequação do ordenamento jurídico interno quanto às responsabilidades internacionais do Estado brasileiro para com os apátridas, e subsequente necessidade de aperfeiçoamento. Não obstante os notáveis avanços da nova Lei de Migração, entende-se que uma reforma da Lei do Refúgio seria o mais apropriado para que as competências do Comitê Nacional dos Refugiados (CONARE) ampliem-se de forma a abarcar, também, os direitos dos apátridas.

Palavras-chaves: Apátridas. Direito Internacional. Lei de Migração. CONARE.

Abstract

The new Brazilian Law of Migration, nº 13.445, of may 24 of 2017, presents innovations relating to the treatment of stateless persons within Brazilian soil, in a way to align the national standards with the relevant international conventions currently in effect in national law. This study indicates that the obligations undertaken by Brazil in the international scenario with relation to stateless persons must be implemented by the public administration through legal adaptations. However, by analyzing the contributions brought by the new legislation, it can be observed that there are still some gaps concerning which would be the competent organ to respond to statelessness demands and requests for naturalization filed by stateless persons. On the other hand, one can notice that the Law nº 9.474/97, known as Re-

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fugee Law, also harbors its own gaps regarding to the issue. In conclusion, it is possible to detect the permanent inadequation of the national law as to the international obligations assumed by the Brazilian state with respect to stateless persons, and the subsequent need of constant improvement. Notwithstanding the remarkable advances of the new Law of Migration, it is understood that a reform of the Refugee Law would be the most appropriate course of action, in order to broaden the competencies of the National Committee for Refugees (CONARE) so as to encompass the rights of the stateless persons as well.

Keywords: Stateless persons. International Law. Law of Migration. CONARE.

1. Introdução

A Declaração Universal dos Direitos Humanos, aprovada pela Assembleia Geral da Organização das Nações Unidas (ONU) em 10 de dezembro de 1948, estabelece em seu artigo 15 que todo ser humano tem direito a uma nacionalidade e que "ninguém pode ser arbitrariamente privado de sua nacionalidade, nem do direito de mudar de nacionalidade". A referência ao instituto da nacionalidade enquanto direito humano justifica-se pelas consequências advindas do vínculo jurídico que se cria entre um indivíduo e seu Estado. Assim, o direito à nacionalidade, geralmente definido constitucionalmente, gera para o Estado a obrigação de proteger seus súditos, garantindo, sob sua jurisdição, o respeito aos seus direitos fundamentais. O direito à nacionalidade, nesse aspecto, constitui um dos primeiros direitos subjetivos que um indivíduo recebe ao nascer ou ao ser naturalizado, e do qual depende o exercício dos demais, como por exemplo, o direito à saúde, à educação ou à moradia.

O problema surge quando um indivíduo não recebe a proteção do seu Estado de origem, por ter dele fugido, ou não querer a ele regressar, seja em razão do fundado temor de perseguição ou risco a sua própria vida, ou ainda, por não ter adquirido ou por ter perdido sua nacionalidade em razão dos termos da legislação de um Estado reivindicado como sendo o seu. A ausência do laço jurídico da nacionalidade decorrente do refúgio ou de uma incongruência legal caracteriza uma pessoa como "apátrida" pelo direito internacional.

De acordo com o último levantamento do Alto Comissariado das Nações Unidas para Refugiados (ACNUR), a apatridia já atingia quase quatro milhões de pessoas no final de 2015. Contudo, o fenômeno e seu enfrentamento não são novos. A comunidade internacional tem prestado assistência a essas pessoas juridicamente vulneráveis por meio de um sistema protetivo promovido pela ONU, com o objetivo de garantir os direitos fundamentais de pessoas sem pátria. Para tanto, foram adotados vários instrumentos internacionais, dentre os quais destacamos essencialmente a Convenção de Genebra de 28 de julho de 1951[1], a Convenção de Nova York, concluída em 28 de setembro de 1954[2], relativa ao Estatuto dos Apátridas, e a Convenção de 30 de agosto de 1961, sobre os Mecanismos de Redução de Apatridia.[3]

> O sistema de proteção internacional dos apátridas estabelecido por esse complexo normativo requer uma atuação dos Estados partes para alcançar o objetivo central de garantia de uma vida digna às pessoas que solicitam uma tutela que não conseguem obter no seu Estado de origem. Essa cooperação constitui uma obrigação para o Estado brasileiro, que celebrou todos os tratados acima mencionados. Logo, espera-se do Brasil, o fiel cumprimento dos dispositivos convencionais, no sentido de reconhecer aos solicitantes da condição de apátrida o direito de permanecer em território brasileiro, recebendo um tratamento jurídico não menos favorável do que aquele outorgado a outro estrangeiro ou nacional brasileiro.
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> Considerando que a República Federativa do Brasil conduz suas relações internacionais pelo princípio da prevalência dos direitos humanos, de conformidade com o disposto no art. 4°, II, da Constituição, o cerne da questão, aqui, é saber como o direito interno tem se ajustado às prescrições internacionais protetoras dos direitos dos apátridas. Observa-se que as principais leis federais antes da promulgação da nova Lei de Migração eram imprecisas e silentes. Nota-se, assim, que a recentemente revogada Lei nº 6.815, de 19 de agosto de 1980, que instituía o

1 Para maiores informações sobre a Convenção de Genebra, de 28 de julho de 1951 sobre o Estatuto dos Refugiados, como as declarações e reservas dos Estados signatários, visita-se: <http://www.unhcr.org/1951-refugee-convention.html>. Acesso em: 16 mar. 2017.

2 Estados signatários da Convenção de Nova York, de 28 de setembro de 1954, sobre o Estatuto dos Apátridas, disponíveis em: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3bbb0abc7&query=1954%20convention>. Acesso em: 16 mar. 2017.

3 Outras informações sobre a Convenção sobre a redução da apatridia, de 30 de agosto de 1961, disponíveis em: <http://www.unhcr.org/protection/statelessness/3bbb286d8/convention-reduction-statelessness.html>. Acesso em: 16 mar. 2017.

> Estatuto do Estrangeiro, tratava o apátrida como caso excepcional, junto com os refugiados e asilados, a quem se poderia atribuir um "passaporte para estrangeiro", de acordo com o que dispunha seu artigo 55. Todavia, em nenhum momento se fazia referência à modalidade de atribuição desses passaportes ou ao atendimento das demandas de *status* de apátrida no território brasileiro. Do mesmo modo, a Lei nº 9.474, de 22 de julho de 1997, que ainda regulamenta os pedidos de concessão da condição de refugiado ante o Comitê Nacional para os Refugiados (CONARE), aparece como insatisfatória quanto à resolução dessas questões relativas à apatridia.[4]

Com o intuito de ajustar o direito interno pátrio às exigências internacionais de proteção dos direitos dos migrantes, foi promulgada, em 24 de maio de 2017, a Lei nº 13.445, que institui a "Lei de Migração", que só entrará em vigor em novembro deste ano, após decorridos os 180 dias de sua publicação oficial, conforme posto no seu art. 125.[5] No que atine especificamente ao tratamento dos apátridas, a nova Lei de Migração pretende avançar nas garantias dos seus direitos. Contudo, a análise dos dispositivos relativos à matéria deixa claro que ainda persiste uma lacuna quanto à determinação do órgão competente para atender aos pedidos de *status* de apátrida no Brasil.

Em face disso, apresenta-se uma possível solução a esse impasse jurídico, com a proposta de reforma da Lei n° 9.474/97, que poderia aplicar-se aos apátridas por meio de uma ampliação das competências do Comitê Nacional dos Refugiados (CONARE). Mas antes de chegar a tal opção, se faz necessário abordar as nuances do conceito de apátrida do ponto de vista do direito internacional para entendermos melhor quais são as obrigações internacionais e internas do Estado brasileiro.

2. O conceito de "apátrida" no direito internacional e o seu reconhecimento na nova Lei de Migração

A figura do apátrida aparece no cenário internacional como uma preocupação da comunidade interestatal de proteger as pessoas que não gozavam da proteção do seu Estado de origem, abarcando refugiados e apátridas indistintamente nos anos 1920.[6] Essa primeira perspectiva, posta pelo direito internacional, levou a considerar o apátrida na condição de refugiado, em um primeiro momento. Entretanto, nem sempre a pessoa sem pátria cumula a condição de refugiado, na medida em que a perda da nacionalidade não está necessariamente vinculada a uma situação de perseguição por motivos políticos, raciais ou de origem, assim como nem sempre uma pessoa com pátria pode ser considerada nacional efetivo de um país. Desse modo, depois da Segunda Guerra Mundial, a problemática passa a ser enfrentada especificamente em relação às pessoas que não têm nacionalidade, nem proteção de algum Estado.[7] Essa evolução conceitual do apátrida, que se depreende das Convenções de 1951 e 1954, não aparece com clareza na nova Lei de Migração, como será visto mais adiante. Assim, o conceito de apátrida pode ser entendido em contexto de deslocamento forçado ou não, isto é, em situação de não migração conforme Convenção de 1954 que visa uma pessoa que pode se tornar apátrida sem deixar o seu país. A literatura jurídica sobre a matéria costuma apresentar a apatridia sob duas qualificações para discernir as situações acima descritas: *de facto* e *de jure*.[8] Essa dicotomia, contudo, não encontra consagração nos tratados internacionais pertinentes, tendo apenas uma função didática na compreensão do fenômeno jurídico.

2.1. O apátrida de facto

A Convenção relativa ao Estatuto dos Refugiados, de 28 de julho de 1951, constituiu instrumento de proteção de suma importância para as pessoas que, ao fugirem de seus países de origem, buscam refúgio em outros territórios. Do ponto de vista do direito internacional, o termo "refugiado" designa diversas situações, inclusive, nos termos do art. 1º, A, (2), da Convenção de 1951, qualquer pessoa:

4 A Lei nº 6.815/80, foi publicada no Diário Oficial da União (DOU) de 21 de agosto de 1980, e a Lei nº 9.474/97 foi publicada no DOU de 23 de julho de 1997.

5 Lei nº 13. 445, de 24 de maio de 2017, publicada no DOU do dia 25 de maio de 2017.

6 GOODWIN-GILL, Guy. *Convention Relating to the Status of Stateless Persons. United Nations* Audiovisual Library of International Law. United Nations, 2010, p. 1. No mesmo sentido, BATCHELOR, Carol. A. Stateless Persons: some gaps in international protection. *International Journal of Refugee Law*, 1995, v. 7, n. 2, pp. 239 e 240.

7 MASSEY, Hugo. *UNHCR and De Facto Statelessness*: Legal and Protection Policy Research Series. Geneva: 2010, pp. 1 e 2. Disponível em: <http://www.unhcr.org/4bc2ddeb9.html>. Acesso em: 19 abr. 2017.

8 ALTO COMISSARIADO DAS NAÇÕES UNIDAS PARA REFUGIADOS. *Manual de Proteção aos Apátridas de acordo com a Convenção de 1954 sobre o Estatuto dos Apátridas*. Genebra: Alto Comissariado das Nações Unidas para Refugiados, 2014, p. 5.

> Que em consequência dos acontecimentos ocorridos antes de 1º de janeiro de 1951 e, temendo ser perseguida por motivos de raça, religião, nacionalidade, grupo social ou opiniões políticas, encontra-se fora do país de sua nacionalidade e que não pode ou, em virtude desse temor, não quer valer-se da proteção desse país ou que, se não tem nacionalidade, encontra-se fora do país no qual tinha sua residência habitual em consequência de tais acontecimentos, não pode ou, devido ao referido temor, não quer voltar a ele.

O dispositivo em comento refere-se (também) a um outro tipo de refugiado, que seria aquele sem nacionalidade. De modo que, ainda, é considerado refugiado o migrante que, além de sofrer perseguição por uma das causas enumeradas, não tem nacionalidade comprovada e não quer (ou não pode) voltar ao país onde tinha sua residência habitual, conforme dispõe o artigo supracitado (1º, A, (2)). Trata-se, aqui, do que poderíamos denominar de "refugiado apátrida".[9]

Frisa-se que este conceito de apátrida também foi afetado pelos efeitos corretivos do Protocolo sobre o Estatuto dos Refugiados, concluído em 31 de janeiro de 1967. Isto porque a restrição geográfica e temporal que se aplicava aos refugiados nos termos do artigo 1º, A, (2) da Convenção de 1951, ao deixar de ser adotada com a vigência do Protocolo de 1967, também deixou de se destinar aos apátridas, por força do art. 1º, § 2º deste último diploma legal. A partir disto, reconhece-se a figura do refugiado que cumula a condição de apátrida nos termos da Convenção relativa ao Estatuto dos Refugiados.[10]

A caracterização desse tipo de apátrida encontra-se duplamente reconhecida pelo ordenamento jurídico brasileiro. Em primeiro lugar, em virtude das incorporações da Convenção de 1951 e seu Protocolo de 1967, e, em segundo lugar, pela regulamentação interna destes tratados por meio da Lei nº 9.474/97. O art. 1°, II, da Lei n° 9.474/97 prevê, com efeito, a situação do refugiado que, sendo perseguido por qualquer um dos motivos mencionados no inciso I do mesmo artigo, "não possui mais nacionalidade e estando fora do país onde antes teve sua residência habitual, não possa ou não queira regressar a ele (...)". Esse dispositivo apresenta uma preocupação expressa pela comunidade internacional no art. 1°, A, (2), do Estatuto dos Refugiados de 1951, ao contemplar o refugiado que, além de sofrer perseguição por motivos de raça, religião, nacionalidade, grupo social ou opiniões políticas, não tem nacionalidade comprovada e não quer, ou não pode, voltar ao país onde tinha sua residência. Sendo assim, o refugiado se torna apátrida de fato, conforme definição oferecida pelo ACNUR ao considerar os apátridas *de facto*: "pessoas fora de seu país de nacionalidade que devido a motivos válidos não podem ou não estão dispostas a pedir proteção a este país".[11]

Por outro lado, a sociedade internacional teve de se debruçar com outro tipo de apatridia, advinda do não reconhecimento, por um Estado, de uma pessoa que reivindica a sua nacionalidade. Nessa perspectiva, a apatridia não resulta de uma situação de perseguição, mas de uma situação de direito.

2.2. O apátrida de jure

Nos termos do art. 1°(1) da Convenção relativa ao Estatuto dos Apátridas de 1954, o vocábulo "apátrida" designa "toda pessoa que não seja considerada seu nacional por nenhum Estado, conforme sua legislação". Essa definição convencional refere-se à condição de um indivíduo que não é reconhecido legalmente como sendo o nacional de nenhum Estado. Em outras palavras, a condição de apátrida surge da constatação, pelo Estado acolhedor, da inexistência ou da impossibilidade de comprovar o vínculo jurídico de nacionalidade entre uma pessoa e um Estado, nos termos da legislação aplicável do Estado de origem. Essas pessoas são consideradas apátridas *de jure* segundo o ACNUR. [12] Sendo

9 LAMBERT, Hélène. *Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness within the Context of Article 1A(2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees*. Legal and Protection Policy Research Series. Geneva: 2014, pp. 15 e 16. Disponível em: <http://www.unhcr.org/protection/globalconsult/5433f0f09/33-refugee-status-arbitrary-deprivation-nationality-statelessness-context.html>. Acesso em: 17 abr. 2017.

10 GOODWIN-GILL, Guy. *Convention Relating to the Status of Refugees, Protocol Relating to the Status of Refugees*. United Nations Audiovisual Library of International Law. United Nations, 2008, p. 3.

11 ACNUR. *O Conceito de Pessoa Apátrida segundo o Direito Internacional*. Resumo das Conclusões. Reunião de especialistas organizada pelo escritório do Alto Comissariado das Nações Unidas para Refugiados, Prato, Itália, 27-28 de maio de 2010, p. 7. Disponível em: <http://www.acnur.org/portugues/quem-ajudamos/apatridas/>. Acesso em: 16 jan. 2017.

12 ACNUR. *O Conceito de Pessoa Apátrida segundo o Direito Internacional*. Resumo das Conclusões. Reunião de especialistas organizada pelo escritório do Alto Comissariado das Nações Unidas para Refugiados, Prato, Itália, 27-28 de maio de 2010, pp. 3 e 4. Disponível em: http://www.acnur.org/t3/portugues/a-quem-ajudamos/apatridas. Acesso em: 16 jan. 2017.

assim, se uma pessoa atende a essa definição, o Estado parte da Convenção de 1954 obriga-se a protegê-la.

Essa acepção do apátrida remete a uma variedade de situações que vai exigir do Estado de acolhimento um trabalho de averiguação dos fatos para determinar se um indivíduo possui uma nacionalidade ou não, em aplicação da legislação relativa à nacionalidade do Estado de origem. Tal tarefa não é simples. Com o intuito de auxiliar os Estados partes a cumprirem suas obrigações, o ACNUR publicou recentemente o *Manual de Proteção aos Apátridas,* que estabelece os procedimentos de determinação da condição de apátridas que devem ser realizados, isto é, regras administrativas comuns aos Estados partes da Convenção de 1954.[13] Trata-se de documento não constringente de extrema valia, constitutivo de orientações para os Estados partes no tratamento das demandas de apatridia pelas suas instâncias administrativas incumbidas de aplicar a Convenção de 1954. Desse modo, ao órgão encarregado de determinar se há apatridia ou não, é recomendado que aprecie a lei de nacionalidade do Estado do requerente da condição de apátrida para saber se adquiriu a nacionalidade de forma automática ou não.[14] Em outros termos, se o Estado aplicou o critério do direito do solo, *jus soli*, ou critério do direito da filiação, *jus sanguinis,* que seria a forma automática. Já a forma não automática seria pela naturalização.

Em seguida, deve ser identificada, no Estado de origem, a autoridade competente para outorgar ou retirar a nacionalidade das pessoas, o que envolve o reconhecimento do direito aplicável à matéria. A partir daí, seria possível estabelecer uma cooperação entre autoridades competentes de cada Estado na determinação da existência de uma nacionalidade ou de sua perda. O ofício investigativo de determinação de apatridia consistiria, portanto, na apreciação de provas da concessão automática de nacionalidade, da naturalização ou da perda por simples incidência da lei de nacionalidade.[15] Assim sendo, se um Estado de origem se nega a aplicar a legislação relativa à aquisição automática de nacionalidade a um individuo por motivos de discriminação racial ou étnica, este indivíduo deve ser considerado apátrida, nos termos da definição do art. 1°(1) da Convenção de 1954. Também será considerado apátrida nos termos da lei do Estado de origem, quando a autoridade competente se recusa em responder, permanece silente diante de uma solicitação de informação sobre a nacionalidade ou se sua resposta demonstra inconsistência.[16] Do mesmo modo, apatridia *de jure* pode advir de uma aquisição de nacionalidade por erro do órgão competente ou por má fé numa solicitação fraudulenta de aquisição de nacionalidade não automática. Enfim, merece menção para fins da definição do art. 1°(1) da Convenção de 1954, o caso da renúncia voluntária da nacionalidade por declaração verbal ou escrita.[17] Essa situação ocorre quando a lei de nacionalidade de um Estado exige a renúncia expressa da primeira nacionalidade como condição de aquisição da sua.

Como se vê, os casos de apatridia *de jure* são numerosos e o Manual do ACNUR apenas constitui uma ferramenta que permite apreender o fenômeno a partir de uma sistemática analítica das legislações nacionais de nacionalidade realizadas pelos órgãos competentes para apreciar as demandas de *status* de apátrida.

A leitura da definição do apátrida consignada no art. 1°(1) sugere que bastaria uma pessoa declarar a ausência de nacionalidade para reivindicar o *status* de apátrida e, portanto, servir-se deste artigo para receber proteção do Estado onde se encontra. Todavia, a análise da elegibilidade das pessoas candidatas ao *status* de apátrida sofre restrições mencionadas também na Convenção relativa ao Estatuto do Apátrida de 1954. De acordo com as limitações impostas pelo texto convencional, estão excluídas do alcance da definição posta pelo art. 1°(1) do Estatuto as pessoas que já beneficiam da proteção de uma agência das Nações Unidas diferente do ACNUR e aquelas que tiverem acesso à nacionalidade do país em que residem.[18] Também são excluídas e não elegíveis à proteção da Convenção relativa ao Estatuto dos Apátridas as pessoas que cometeram um delito contra a paz, um delito de guerra, um delito contra a humanidade, um delito grave fora do seu país de residência, ou as pessoas que cometeram atos contrários aos princípios das Nações Unidas[19].

Por sua vez, a decisão de acolher a demanda de apatridia de uma pessoa, que poderá valer-se dos direitos

13 ALTO COMISSARIADO DAS NAÇÕES UNIDAS PARA REFUGIADOS. *Manual de Proteção aos Apátridas de acordo com a Convenção de 1954 sobre o Estatuto dos Apátridas*. Genebra: Alto Comissariado das Nações Unidas para Refugiados, 2014.

14 *Ibidem*, p. 13.

15 *Ibidem,* p. 15.

16 *Ibidem,* p. 18.

17 *Ibidem,* p. 21.

18 Art. 1°, (2), i) e ii) do Estatuto dos Apátridas de 1954.

19 Art. 1°, (2), iii), a), b) e c) do Estatuto dos Apátridas de 1954.

humanos garantidos no Estatuto dos Apátridas, é tomada pelo Estado contratante, em conformidade com os procedimentos administrativos adotados por ele no afã de cumprir os dispositivos da Convenção.

Na prática, a distinção entre apátrida *de facto* e apátrida *de jure* se revela irrelevante, vez que a consequência obrigacional para os Estados partes das Convenções de 1951 e 1954 resultam na proteção dos direitos humanos do solicitante dessa condição. É o que indica Batchelor ao afirmar que tanto o refugiado quanto o apátrida se caracterizam pela falta de proteção no seu Estado de origem, de sorte que o apátrida deve ser considerado como um tipo de refugiado passível de proteção internacional.[20] Importa dizer que o objetivo fundamental do Estado acolhedor é de pôr fim a uma situação de vulnerabilidade decorrente da ausência de pátria, devendo cooperar para a redução do fenômeno de apatridia no seu território com medidas de facilitação de atribuição de nacionalidade. Esse ponto de vista foi confirmado na Ata final da Conferência das Nações Unidas sobre a Eliminação ou Redução da Apatridia no Futuro, reunida em 15 de agosto de 1961, onde foi decidido que as pessoas apátridas *de fato* deveriam ser tratadas, na medida do possível, como apátridas *de jure*.[21] De acordo com Weis, apesar da insistência de alguns Estados em persistir com tal distinção na Conferência, muitos consideravam que devia prevalecer o aspecto humanitário.[22] Aduz o autor que, na prática, tal distinção pode se revelar complicada, de tal maneira que pode afetar a efetividade da Convenção relativa a Redução da Apatridia de 1961.

2.3. Um reconhecimento limitado da figura do apátrida na nova Lei de Migração

A Lei de Migração apenas consagra o conceito de apátrida tal como formulado pelo 1°(1) da Convenção de 1954 , ao definir, no seu art. 1º, § 1º, VI, o apátrida como:

> pessoa que não seja considerada nacional por qualquer Estado, segundo a sua própria legislação, nos termos da Convenção sobre o Estatuto dos Apátridas, de 1954, promulgada pelo Decreto n° 4.246, de 22 de maio de 2002, ou assim reconhecido pelo Estado brasileiro.

Sendo assim, não se opera uma distinção entre apátrida que cumula a condição de refugiado e aquele que simplesmente não adquiriu ou perdeu a sua nacionalidade por uma incongruência jurídica na aplicação das leis de nacionalidade dos Estados. Deve-se então considerar que a definição do art. 1º,§ 1º, VI, da nova Lei de Migração não contempla a situação do apátrida *de facto*? É bem verdade que a Lei de Migração padece de clareza nesse ponto. Poderia ser mais contundente e contemplar o refugiado apátrida. Contudo, se o dispositivo parece privilegiar a definição da Convenção de 1954, por outro lado, o art. 121 da mesma Lei impõe a observação das disposições da Lei n° 9.474/97, nas situações que envolvem solicitantes de refúgio. Desse modo, os parâmetros conceituais da Convenção sobre os direitos dos refugiados de 1951, reiterados na Lei n° 9.474/94, poderão ser levados em consideração na determinação de uma apatridia. Essa interpretação normativa encontra respaldo no art. 26, § 2º da Lei de Migração, vez que demanda a incidência, durante a tramitação, do processamento de reconhecimento do pedido da condição de apátrida, de todas as garantias, mecanismos protetores e de facilitação de inclusão social que constam da Convenção sobre o Estatuto dos Apátridas, de 1954, promulgada pelo Decreto n° 4.246/2002, da Convenção relativa ao Estatuto dos Refugiados de 1951, promulgado pelo Decreto n° 50.215, de 1961, e da Lei n° 9.474/97. Esse silogismo não deve ocultar, contudo, a falta de clareza da nova Lei de Migração na conceituação do apátrida, não obstante a menção feita a um futuro regulamento que poderá esclarecer esse ponto, conforme menção no *caput* do art. 26. À data do presente estudo, todavia, não se tem previsão da edição desse regulamento, de modo que fica-se à mercê da imprecisão da Lei.

De qualquer forma, ao reconhecer a figura do apátrida, mesmo que de forma limitada na Lei de Migração, o Estado brasileiro admite a sua obrigação de assegurar direitos mínimos de tais indivíduos. Destarte, a Lei prevê que à pessoa que requerer o *status* de apátrida seja garantido o direito de residir no Brasil até a obtenção da resposta ao seu pedido.[23] Nesse aspecto, reconhece-se um avanço significativo do direito interno. Acrescenta-se ainda que a Lei alinha-se ao *standard* internacional no que concerne à facilitação de aquisição de naciona-

20 BATCHELOR, Carol. A. Stateless Persons: some gaps in international protection. *International Journal of Refugee Law*, 1995, v. 7, n. 2, pp. 239, 240 e p. 245.

21 WEIS, P. The United Nations Convention on the Reduction of Statelessness, 1961. *International and Comparative Law Quarterly*, v. 11, n. 4, 1962, p. 1086.

22 Idem.

23 Art. 31, § 4°, da Lei de Migração.

lidade do país de acolhimento. É o que se depreende do art. 26, § 6º ao estabelecer que a pessoa solicitante de tal condição será consultada sobre o desejo de adquirir a nacionalidade brasileira. Contudo, a referida Lei não informa qual é o órgão administrativo competente para outorgar o *status* de apátrida, tampouco o órgão competente para conduzir o processo de naturalização, limitando-se a se referir ao "órgão competente do Poder Executivo".[24]

Por fim, o Estado brasileiro manifesta sua preocupação em relação à proteção dos refugiados e apátridas quando estabelece, no art. 120 da nova Lei, uma Política Nacional de Migrações, Refúgio e Apatridia. Significa dizer que o Estado brasileiro entende assumir as obrigações internacionais decorrentes do reconhecimento do apátrida, isso de forma coordenada, entre o Poder Executivo Federal, os Estados, o Distrito Federal e os Municípios.

3. As obrigações do Estado brasileiro em relação aos apátridas

A participação do Estado brasileiro na promoção e proteção dos direitos humanos no cenário internacional manifesta-se pela celebração da grande maioria dos tratados internacionais hoje em vigor internacionalmente. Entretanto, a celebração de um tratado não tem o condão de torná-lo exequível internamente se ele não for sancionado por um ato jurídico que lhe confira tal força. Sendo assim, o estudo da inserção do *status* de apátrida no ordenamento jurídico brasileiro, não obstante seu reconhecimento na nova Lei de Migração, requer a verificação da entrada em vigor das principais Convenções que tratam do apátrida no ordenamento jurídico brasileiro. Essa questão preliminar merece ser examinada, vez que a Lei de Migração remete ao cumprimento de obrigações do Estado brasileiro em relação às pessoas que solicitam esse tipo de assistência no plano interno.

3.1. Obrigações decorrentes da Convenção de 28 de julho de 1951 sobre o Estatuto dos Refugiados

Conforme visto anteriormente, a importância da Convenção sobre o Estatuto dos Refugiados, de 28 de julho de 1951, para a temática da apatridia, provém do seu artigo 1º, A, (2), que prevê sua incidência para aqueles que, sem nacionalidade, encontram-se fora do país no qual tinham sua residência habitual e temem perseguição por motivos de raça, religião, nacionalidade, grupo social ou opiniões políticas. Além de sua validade no ordenamento jurídico brasileiro em virtude da promulgação do Decreto nº 50.215, de 28 de janeiro de 1961, a Convenção foi regulamentada pela Lei nº 9.474/97, conhecida como a Lei do Refúgio, que prevê diversas garantias e explicita os mecanismos de conferência das mesmas pelo CONARE. Essa Lei só se aplica, então, no que se refere aos apátridas, àqueles que cumulavam também a condição de refugiados.

Constatada essa configuração, as obrigações internacionais assumidas pelo Estado brasileiro na Convenção de 1951 consistem, primeiramente, em apreciar os pedidos de outorga da qualidade de refugiado ou refugiado apátrida pelos requerentes e, se preenchidos os requisitos, acolhê-los em seu território. Sendo consentida a permanência do refugiado apátrida, cabe ainda ao Estado brasileiro prover os direitos consignados no referido tratado, dos quais destacamos o respeito à liberdade de religião (artigo 4º), o direito à propriedade móvel e imóvel (artigo 13), o direito à propriedade intelectual (artigo 14), o direito de associar-se (artigo 15), o direito de acesso ao Judiciário (artigo 16), o direito ao exercício de atividade remunerada (artigo 17), o direito à moradia (artigo 21), e o direito à educação (artigo 22), com o objetivo de facilitar a inclusão social do refugiado.[25]

Cumpre reiterar, na perspectiva da nossa reflexão sobre o direito aplicável ao apátrida que se encontra em território brasileiro, que a Convenção sobre Refugiados de 1951 comporta dispositivos que têm vocação para serem aplicados a pessoas que solicitam refúgio e que, por força das circunstâncias, também perderam sua nacionalidade e não podem ou não querem voltar ao território onde residiam habitualmente. Essa faceta do refugiado não aparece claramente na nova Lei de Migração, que se satisfaz com uma menção à aplicação da Convenção de 1951.

24 Art. 26, § 7°, da Lei de Migração.

25 SCHNYDER, Félix. Les aspects juridiques actuels du problème des réfugiés. *Recueil des Cours de l´Académie de Droit International de la Haye,* 1965, t. 114, pp. 382 a 387.

3.2. As obrigações decorrentes da Convenção de 28 de setembro de 1954 sobre o Estatuto dos Apátridas

No que tange à celebração da Convenção sobre o Estatuto dos Apátridas de 1954, observa-se que a sua aprovação, no âmbito do processo legislativo, não sofreu nenhum vício de forma. Contudo, deve-se destacar que a sua força executória decorre do Decreto presidencial n° 4.246, de 22 de maio de 2002, emanado 48 anos após a assinatura da Convenção pelo Brasil, em 28 de setembro de 1954. Tamanho lapso temporal advém do rito constitucional de incorporação (ou internalização) de tratados internacionais (arts. 49, I, e 5º, § 3º, da Constituição Federal de 1988) – que, nesse caso, prolongou-se consideravelmente.

A assinatura da Convenção sobre o Estatuto dos Apátridas pelo Brasil, em 28 de setembro de 1954, configurou um ato de adoção do texto final em Nova York, merecendo ainda manifestação de consentimento em obrigar-se internacionalmente por ratificação – que veio a ser realizada pelo Estado brasileiro após o Decreto-Legislativo n° 38, de 5 de abril de 1995, conforme ato de ratificação registrado junto à ONU em 13 de agosto de 1996.[26] Esse momento de celebração do tratado não implicou sua incorporação ao ordenamento jurídico brasileiro, mas apenas a expressão do engajamento internacional do Brasil na defesa dos direitos dos apátridas mediante ratificação. De fato, foi preciso aguardar a promulgação do Decreto n° 4.246/2002 para obrigar o Brasil internamente a respeitar e prover os direitos fundamentais garantidos na forma do Estatuto dos Apátridas de 1954.

Concretamente e conforme determina o Estatuto dos Apátridas de 1954, a primeira obrigação do Estado brasileiro consiste na aplicação das disposições da Convenção em comento, sem praticar atos de discriminação por motivos de raça, religião ou país de origem[27]. Não é fruto do acaso a afirmação do princípio da não discriminação logo no início do instrumento normativo. Visa-se, logo na entrada no território brasileiro e, depois, na permanência dos candidatos ao *status* de apátrida, coibir comportamentos de autoridades públicas que possam constituir um processo de seleção dos requerentes fundado em critérios discriminantes, como a cor da pele ou o país de procedência.

O Estado hospedeiro deve oferecer os direitos e vantagens previstos na Convenção, de conformidade com o ordenamento jurídico do país do domicílio ou da residência do apátrida.[28] Sendo assim, o Estado brasileiro tem as seguintes obrigações em relação ao apátrida: permitir a aquisição da propriedade móvel ou imóvel com todos os direitos conexos; proteger a propriedade intelectual e industrial; permitir a participação em associações sem fim lucrativo ou político e sindicatos profissionais; facilitar o acesso aos tribunais e conceder um tratamento não menos favorável do que aquele proporcionado aos estrangeiros no acesso e exercício de profissões assalariadas, como não assalariadas (agricultura, indústria ou artesanato).[29] Além dessas regras, que vão determinar a condição jurídica do apátrida no Brasil, o Estatuto estabelece que o Estado hospedeiro deve garantir o respeito de direitos fundamentais, a saber, o direito à moradia, o direito à instrução pública, o direito à assistência pública e o benefício da legislação do trabalho e previdência social[30]. Para que o apátrida possa exercer todos esses direitos, o Estado parte da Convenção sobre os Apátridas compromete-se a expedir documento de identidade, assim como qualquer outro documento de viagem destinado a permitir-lhe viajar para fora do território do Estado hospedeiro, assegurando, desta forma, o direito fundamental de ir e vir, relembrado no art. 26 do Estatuto[31].

Todos esses direitos devem ser concedidos em condições não menos favoráveis do que aquelas asseguradas, nas mesmas circunstâncias, ao estrangeiro em geral ou aos nacionais do Estado de acolhimento. Essa preocupação por parte dos redatores da Convenção em comento tinha como propósito não gerar algum tipo de injustiça, ao dar preferência a uma categoria de pessoas mais necessitadas. Para tanto, os direitos fundamentais garantidos no Estatuto do Apátrida estão fixados no princípio da igualdade administrativa entre os componentes da população, seja qual for a sua origem.

26 ONU. Disponível em: <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=IND&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en>. Acesso em: 3 abr. 2017.

27 Art. 3° do Estatuto dos Apátridas de 1954.

28 Arts. 7° e 12 do Estatuto dos Apátridas de 1954.

29 Arts. 13 a 19 do Estatuto dos Apátridas de 1954.

30 Arts. 21 a 24 do Estatuto dos Apátridas de 1954.

31 Dispositivos relativos à obrigação do Estado brasileiro em prestar serviço de expedição de documentos administrativos, de identidade e de viagem: arts 25, 27 e 28 do Estatuto dos Apátridas de 1954.

A atuação do Estado, nesse sentido, deve ser isenta de qualquer forma de discriminação positiva ou negativa quanto à efetivação dos direitos fundamentais ou às prestações de serviços administrativos. Esse aspecto aparece notadamente no art. 29 do Estatuto, que dispõe que os Estados contratantes não sujeitarão os apátridas a direitos, taxas, impostos ou quaisquer outros encargos mais elevados do que são geralmente cobrados aos seus nacionais em situações análogas.

Por outro lado, se comprovada uma transgressão à ordem pública ou à segurança nacional, cabe ao Estado contratante adotar medidas de expulsão do apátrida, o que só ocorrerá em razão de decisão proferida por autoridade competente, sendo garantido o devido processo legal.[32] Contudo, o Estado contratante não poderá expulsar um apátrida sem previamente ter dado ao mesmo a oportunidade de encontrar outro país de acolhimento, conforme determina o art. 31 do Estatuto. Apesar de não ser previsto o princípio do *non-refoulement* expressamente nesta Convenção, ao contrário do que ocorre na de 1951 referente aos refugiados, a nova Lei de Migração previu, em seu § 10º do art. 26, que àqueles que forem negados o *status* de apátrida, será vedada sua devolução para país onde sua vida, integridade pessoal ou liberdade estejam em risco.[33] Nisso, a Lei de Migração apresenta um aspecto de modernidade conforme ao Direito Internacional.

A Convenção relativa ao Estatuto dos Apátridas de 1954 não estabelece regras específicas para definir que tipo de procedimento administrativo deve ser executado para apreciar os pedidos de outorga do *status* de apátrida. Consequentemente, é da responsabilidade do Estado contratante adotar os mecanismos de execução dos compromissos assumidos na Convenção em apreço.

No caso do Brasil, não há necessidade de adoção de uma nova legislação, vez que o tratamento legal da figura do apátrida consta do Decreto n° 4.246, de 22 de maio de 2002, tendo como consequência jurídica para o Estado o cumprimento dos seus dispositivos. O problema surge, contudo, quando uma pessoa pretende apresentar um pedido de *status* de apátrida. Qual seria o órgão competente no Brasil? Entende-se que o Comitê Nacional para os Refugiados – CONARE, criado pela Lei n° 9.474, de 22 de junho de 1997, relativa ao Estatuto dos Refugiados de 1951, teria competência para cuidar dos pedidos de outorga de condição de apátrida, mas as lacunas e imprecisões legais parecem comprometer tal possibilidade, já que os dispositivos que visam à situação do apátrida nessa Lei são praticamente inexistentes e a nova Lei de Migração não apresenta nenhuma clarificação quanto a essa lacuna.

3.3. Obrigações decorrentes da Convenção de 30 de agosto de 1961, para a Redução dos Casos de Apatridia

Adotada em Nova York em 1961, o Estado brasileiro aderiu a esta Convenção em 25 de outubro de 2007, depois da sua aprovação pelo Congresso Nacional por meio do Decreto-Legislativo n° 274, em 4 de outubro de 2007.[34] Tendo sido promulgada pelo Decreto nº 8.501, de 18 de agosto de 2015, a Convenção relativa à Redução dos Casos de Apatridia de 1961, juntamente com o Estatuto dos Apátridas de 1954, passaram a incorporar o acervo normativo brasileiro, criando efeitos jurídicos imediatos para todos os seus destinatários, gerando obrigações para a administração pública brasileira e direitos para os apátridas.

Os dispositivos da Convenção relativa à Redução dos Casos de Apatridia, de 1961, consubstanciam obrigações para os Estados no intuito de prevenir a perda de nacionalidade e facilitar a outorga de sua nacionalidade.[35]

A primeira obrigação do Estado brasileiro decorrente da Convenção para Redução de Casos de Apatridia, de 30 de agosto de 1961, está posta no seu art. 1°, que estabelece que os Estados contratantes devem conceder a nacionalidade aos indivíduos que de outro modo seriam apátridas, quando nasceram no seu território ou mediante requerimento de uma pessoa que se prevalece da apatridia. De acordo com a Convenção, o requerente à naturalização brasileira deve apresentar sua demanda à autoridade competente, segundo os requisitos indicados no art. 1°(2). Esses requisitos tendem a facilitar a aquisição da nacionalidade do Estado hospedeiro para o apá-

32 Art. 31 do Estatuto dos Apátridas de 1954.

33 Nos termos do art. 33, §1º da Convenção relativa ao Estatuto dos Refugiados, de 1951, "nenhum dos Estados Partes expulsará ou rechaçará, de maneira alguma, um refugiado para as fronteiras dos territórios em que a sua vida ou a sua liberdade seja ameaçada em virtude de sua raça, religião, nacionalidade, grupo social ou opiniões políticas".

34 Publicado no DOU, Seção 1, em 5 de outubro de 2007, p. 5.

35 Para uma análise dos principais dispositivos, WEIS, Paul. The United Nations Convention on the reduction of statelessness, 1961. *International Comparative Law Quarterly*. Vol. 11, n° 4, pp. 1080 a 1085.

trida menor de idade, para o apátrida que tenha sempre vivido sob esta condição e para o interessado que tenha residido habitualmente no Estado hospedeiro. Em contrapartida, de acordo com tais requisitos, a nacionalidade não seria concedida ao interessado que teria sido condenado por crime contra a segurança nacional ou sentenciado à prisão por 5 anos ou mais em virtude de ilícito penal. Desse modo, o Estado contratante estaria cumprindo com a sua obrigação perante a comunidade internacional ao atribuir sua nacionalidade e, em consequência desse laço jurídico, oferecendo sua proteção.

Além dessa obrigação central, vale ressaltar que a Convenção sobre a Redução de Casos de Apatridia busca orientar os Estados partes na resolução de problemáticas específicas. Faz-se referência, assim, às crianças que nasceram em um determinado Estado hospedeiro e vieram a ser apátridas por não terem preenchido os requisitos de residência ou terem passado da idade de apresentação de requerimento, mas algum dos pais apresenta a nacionalidade do Estado contratante, nos termos do art. 1°(4). Neste último caso, conforme o texto convencional, o Estado contratante deve estender a nacionalidade ao menor. Contudo, conforme o art. 1°(5), essa concessão específica ainda pode ser subordinada a algumas condições: a apresentação do requerimento antes de uma determinada idade, a residência habitual do interessado por um determinado período, a apatridia desde o nascimento.

Ainda na busca da proteção de menores, diz a Convenção que um menor abandonado é considerado como nascido no território do Estado contratante onde foi encontrado e aquele que nascer em um navio ou aeronave adquirirá a nacionalidade do território do Estado da bandeira do navio ou em que a aeronave estiver matriculada.[36] Por fim, a criança que se tornaria apátrida por nascer em território que aplica o *jus soli*, filha de pais nacionais de Estados que aplicam o critério *jus sanguinis* e tenham se obrigado pela Convenção, ficaria protegida pelo art. 4º(1), que obriga esses últimos a conceder-lhe sua nacionalidade. Caso os pais sejam de Estados contratantes diferentes, a legislação nacional determinará qual nacionalidade prevalecerá, aduz o mesmo dispositivo.

Outra medida de redução de apatridia que consubstancia uma obrigação convencionada consiste no impedimento da perda de nacionalidade por mudança no estado civil de uma pessoa, nos termos do art. 5º. Outrossim, a perda da nacionalidade de um dos cônjuges, do pai ou da mãe de uma pessoa nunca acarretará na mudança da nacionalidade do outro cônjuge ou do filho quando isso os tornar apátridas, conforme posto no art. 6º.

A presente convenção representa, sem sombra de dúvida, uma evolução significativa do direito internacional na proteção de pessoas sem pátria, vez que ela se debruça diretamente sobre as causas da apatridia, trazendo medidas corretivas concretas e vinculantes para os Estados signatários desse instrumento. Segundo Goodwin-Gill, essa problemática se resume à adoção de duas regras: a primeira concerne à questão de que, se nenhuma nacionalidade é atribuída ao nascimento, a pessoa deve ter a nacionalidade do território em que nasceu; a segunda, por sua vez, refere-se ao entendimento de que a perda da nacionalidade após o nascimento deve ser condicionada à aquisição de outra nacionalidade.[37]

Para o Estado brasileiro, que incorporou em 2015 a seguinte convenção, fica evidente o desafio que vem pela frente para a Administração pública. Não obstante o art. 12 da Constituição Federal, que versa sobre nacionalidade primária e secundária, percebe-se que o direito internacional aqui apresentado, no que atine à naturalização de apátrida, deverá ser contemplado pelo direito interno, o que de fato acontece na nova Lei de Migração, que aborda a questão no seu art. 26, sob o título: "Da Proteção da Pessoa Apátrida e da Redução da Apatridia".

O legislador demonstra, nesse dispositivo, um esforço expressivo de adequação aos padrões internacionais de tramitação do reconhecimento da condição de apátrida. Nota-se, com efeito, que o órgão habilitado a apreciar a demanda deverá assegurar todas as garantias, mecanismos protetivos de direitos humanos e facilitação de inclusão social, assim como verificar se o solicitante é considerado nacional pela legislação de qualquer Estado.[38] Para tanto, deverá coletar informações, provas documentadas, declarações, inclusive com a participação de órgãos de outros Estados ou organismos internacionais.

36 Arts. 2º e 3º da Convenção para a Redução dos Casos de Apatridia de 1961.

37 GOODWIN-GILL, Guy. *Convention on the Reduction of Statelessness*. United Nations Audiovisual Library of International Law. United Nations, 2011, p. 2.

38 Art. 26, § 2°, § 4° e §5º da Lei de Migração.

No que diz respeito aos mecanismos de redução de apatridia no Brasil, a Lei de Migração formaliza precisamente qual seria a contribuição do Estado brasileiro em um sistema global de proteção dos apátridas. Concretamente e nos termos dos § 6° e § 8º do artigo 26 da Lei em comento, é dito que uma vez reconhecida a condição de apátrida, de acordo com a definição consagrada na Convenção de 1954, o solicitante poderá optar pela nacionalidade brasileira por meio de um processo de naturalização facilitado ou optar por residir no Brasil em caráter definitivo.[39] No caso do processo de naturalização, a decisão de reconhecimento do apátrida deve ser encaminhada ao órgão competente do Poder Executivo encarregado de publicar os atos necessários à efetivação da naturalização, num prazo de trinta dias.[40] Esse último ponto suscita inquietação na medida em que não se define quais são os órgãos públicos competentes para processar os pedidos de apatridia e naturalização.

4. As lacunas administrativas no tratamento dos apátridas no direito brasileiro

Decorre do que precede que a Lei de Migração avançou significativamente na questão da proteção dos apátridas em solo brasileiro, ao buscar se adequar às principais normas internacionais convencionais. Contudo, como já sinalizado, existem lacunas administrativas quanto à determinação do órgão responsável para atender aos pedidos de apatridia e, eventualmente, encaminhar os pedidos de naturalização em regime simplificado, conforme posto no artigo 26 da Lei. No silêncio da nova Lei de Migração, uma opção possível seria de ampliar o alcance da Lei n° 9.474/97, que poderia precisar o conceito de apátrida e aumentar as competências do CONARE.

4.1. O retrocesso em relação ao Anteprojeto de Lei de Migrações e Promoção dos Direitos dos Migrantes no Brasil de 2014

Preliminarmente, cumpre lembrar que em 31 de julho de 2014, um Anteprojeto de Lei de Migrações e Promoção dos Direitos dos Migrantes no Brasil foi apresentado ao Ministério da Justiça como resultado do trabalho de uma Comissão de Especialistas instituída por meio da Portaria n° 2.162/2013.[41] O Anteprojeto determinava que aos imigrantes deveriam ser assegurados seus direitos fundamentais, incluindo aqueles decorrentes de tratados de que o Brasil fosse parte (art. 4°,§ 1), prevendo, inclusive, a concessão de um visto temporário em caso de acolhida humanitária (art. 15, I). Quanto à proteção dos direitos do imigrante refugiado especificamente, o Anteprojeto, no seu art. 2°, se limitava a remeter ao cumprimento do direito interno e internacional pertinente, isto é, a Lei nº 9.474/97 e a Convenção sobre o Estatuto dos Refugiados de 1951.

A figura do apátrida era visada pelo art. 1º, VI, como sendo: "toda pessoa que não seja considerada por qualquer Estado, segundo sua legislação, como seu nacional, nos termos da Convenção sobre o Estatuto dos Apátridas, promulgada pelo Decreto n° 4.246, de 22 de maio de 2002". Conforme visto anteriormente, a qualidade de apátrida advém da constatação, pelo Estado acolhedor, da dificuldade de comprovar o vínculo jurídico de nacionalidade entre uma pessoa e um Estado. Essa concepção foi mantida na atual Lei de Migração.

O parágrafo 1º do art. 25 garantia ao requerente de *status* de apátrida uma proteção referente ao seu direito de residência provisória no momento em que formularia sua demanda junto ao CONARE. Nesse sentido, e nos termos do art. 23, II, do Anteprojeto, os imigrantes que comprovassem a condição de refugiado ou apátrida teriam a residência no Brasil concedida pelas autoridades competentes. Na mesma esteira, o parágrafo 2º do art. 25 determinava que ficasse legalmente estabelecido que todas as garantias, mecanismos protetores e de facilitação da inclusão social previstos na Convenção sobre o Estatuto dos Refugiados e na Lei nº 9.474/97 passariam a valer também em relação aos apátridas durante a tramitação da apreciação do seu pedido. Esse último dispositivo foi mantido na Lei de Migração, por meio do seu art. 26, § 2º.

Quanto ao órgão competente para se pronunciar sobre o pedido de permanência por motivo de apatridia,

39 O processo simplificado de naturalização é mencionado no caput do art. 26 da Lei de Migração.

40 Art. 26, § 7°, da Lei de Migração.

41 MINISTÉRIO DA JUSTIÇA. Anteprojeto de Lei de Migrações e Promoção dos Direitos dos Migrantes no Brasil. Disponível em: <http://www.brasil.gov.br/cidadania-e-justica/2014/08/nova-lei-de-migracoes-devera-substituir-estatuto-do-estrangeiro>. Acesso em: 16 jan. 2017.

o Anteprojeto trazia uma resposta precisa e salutar. Assim, o seu art. 25 previa a competência administrativa do CONARE, no contexto de um processo de naturalização, ao prescrever: "A pessoa apátrida será destinatária de instituto protetivo especial, consolidado em mecanismo de naturalização expressa, tão logo seja determinada a condição de apátrida pelo Comitê Nacional para os Refugiados – CONARE". Desse modo, se reconhecia a competência do CONARE para apreciar as demandas de apatridia.[42] Esse avanço no tratamento do apátrida no Brasil, contudo, não foi perpetuado na Lei de Migração, de nº 13.445, promulgada em 24 de maio de 2017. Desse modo, mantém-se o vazio jurídico em relação ao órgão responsável pelos apátridas, na legislação atual, constituindo-se um significativo retrocesso em relação ao Anteprojeto, pois, por meio do art. 26, *caput*, e seu subsequente § 1º, a Lei de Migração explicitou os meios administrativos de proteção do apátrida que deverão ser prestados pelo Estado brasileiro, coincidentes, inclusive, com o art. 25 do antigo Anteprojeto, mas sem explicar qual instância seria responsável por fazê-lo, tornando todo o resto, então, irrelevante, na medida em que não oferece nenhum caráter prático para o apátrida que precisa de proteção e, ao chegar no Brasil, deve procurar o órgão responsável pela sua condição. Na nova Lei de Migração, fica totalmente ausente o órgão competente para atender o tratamento de uma demanda de um apátrida.

4.2. A necessária ampliação da competência do CONARE

O CONARE foi criado como órgão deliberativo por meio da Lei nº 9.474/97, no âmbito do Ministério da Justiça, para implementar a Convenção sobre os Refugiados de 1951 e o seu Protocolo de 1967. Concretamente, esse órgão deliberativo analisa os pedidos de refúgio à luz dos tratados pertinentes e se pronuncia sobre o reconhecimento da condição de refugiado, dentre outros aspectos[43]. Nada consta sobre a competência específica do CONARE no caso de solicitação do apátrida. Contudo, o fato de a Lei n° 9.474/97 não reger especificamente os pedidos de *status* de apátridas não significa que o CONARE não teria competência para atuar nessa circunstância. Já que a questão do refugiado é uma questão conexa a do apátrida, o mesmo poderia perfeitamente cuidar da aplicação do Decreto n° 4.246, de 22 de maio de 2002, que incorporou o Estatuto do Apátrida de 1954, bem como da nova Lei de Migração no que atine aos direitos dos apátridas. Esse posicionamento justifica-se pelo cumprimento do art. 48 da Lei n° 9.474/97, que prescreve:

> Os preceitos desta Lei deverão ser interpretados em harmonia com a Declaração Universal dos Direitos do Homem de 1948, com a Convenção sobre o Estatuto do Refugiado de 1951, com o Protocolo sobre o Estatuto dos Refugiados de 1967 e com todo dispositivo pertinente de instrumento internacional de proteção de direitos humanos com o qual o Governo brasileiro estiver comprometido.

Decorre deste dispositivo que o CONARE não pode se limitar a uma leitura superficial da Lei n° 9.474/97, mas atuar no intuito de cumprir todos os dispositivos que versam sobre os direitos humanos atinentes à admissão no território brasileiro de indivíduos que pedem abrigo por falta da proteção dos seus Estados de origem, sejam eles refugiados, sejam eles apátridas. Independentemente de uma situação de migração forçada, isso significa dizer que o Decreto n° 4.246, de 22 de maio de 2002, que promulgou o Estatuto dos Apátridas de 1954, deve ser levado em consideração pelo CONARE na análise dos pedidos que lhe são feitos, devendo cumprir, além da Convenção sobre o Estatuto dos Refugiados de 1951, outros tratados que cuidam de proteção dos direitos humanos.

O outro argumento jurídico que milita para uma atribuição de competência ao CONARE para atender aos pedidos de outorga de *status* de apátrida que lhe forem apresentados decorre da leitura que se faz do *caput* do art. 12 da Lei n° 9.474/97, que estabelece que o CONARE deve atuar: "em consonância com a Convenção sobre o Estatuto dos Refugiados de 1951, com o Protocolo sobre o Estatuto dos Refugiados de 1967 e com as demais fontes do direito internacional dos refugiados". Ao nosso ver, a referência às "demais fontes do direito internacional dos refugiados" sugere que devem ser considerados, no momento da análise dos pedidos de *status* de refugiados pelo CONARE, as normas internacionais que se aplicam aos refugiados que não se enquadram no Estatuto dos Refugiados de 1951, mas cujos casos se assemelham. É notadamente o que prescreve o art. 48 da Lei n° 9.474/97, como dito anteriormente. Essa

42 Para uma análise crítica do Anteprojeto de Lei, ver BICHARA, Jahyr-Philippe. Anteprojeto de Lei de Migrações e Promoção dos Direitos dos Migrantes no Brasil: tratamento jurídico dos refugiados e apátridas. *Revista de Informação Legislativa*, 2016. V. 209, pp. 7-30.

43 Art. 12 da Lei nº 9.474/97.

circunstância está expressamente prevista inclusive no Preâmbulo da Convenção relativa ao Estatuto dos Apátridas de 1954, que adverte que a Convenção sobre o Estatuto dos Refugiados de 1951 "compreende apenas os apátridas que são também refugiados, e que existem muitos apátridas aos quais a referida Convenção não se aplica". De modo que o Estatuto dos Apátridas veio, em 1954, complementar o Estatuto dos Refugiados de 1951, sendo dois instrumentos internacionais conexos, com a finalidade de proteger as pessoas cujo Estado de origem se mostra omisso quanto à garantia dos direitos humanos: o primeiro em razão de perseguições, o segundo pelo não reconhecimento de nacionalidade.

Mesmo que houvesse resistência por parte do CONARE em cumprir os arts. 12 e 48 da Lei n° 9.474/97 neste sentido, a simples observância das regras do direito internacional sobre a interpretação dos tratados deveria conduzi-lo à aplicação do Estatuto do Apátrida. A Convenção de Viena de 1969 sobre o direito dos tratados, com efeito, no intuito de diminuir o campo de interpretação e os riscos de equívocos quanto à aplicação dos tratados, regulamenta a matéria hermenêutica. Para tanto, estabeleceu a seguinte regra geral de interpretação: "um tratado deve ser interpretado de boa-fé segundo o sentido comum atribuível aos termos do tratado em seu contexto e à luz de seu objetivo e finalidade"[44]. Para auxiliar na compreensão do que é "o sentido comum atribuível aos termos do tratado em seu contexto e à luz de seu objetivo e finalidade", as disposições da Convenção de Viena de 1969 precisam que as partes contratantes devem levar em consideração o seu preâmbulo, anexos, tratados posteriores, práticas seguidas posteriormente na aplicação do tratado ou regras de direito internacional[45]. Diante do exposto, aponta-se que o CONARE seria o órgão administrativo competente para aplicar o direito internacional dos apátridas, em nome do Estado brasileiro, tendo que garantir a efetividade da Convenção relativa aos Apátridas, que compõe, doravante, o acervo jurídico nacional nesta matéria.

O terceiro fundamento jurídico que confere competência ao CONARE resulta da situação acima descrita, isto é, da compreensão que se tem do conceito de apátrida, agora constante inclusive na Lei de Migração. Essa compreensão não exclui a condição de refugiado definida pelos critérios de elegibilidade enunciados no art. 1° da Lei n° 9.474/97. De acordo com inciso II deste artigo, são passíveis da concessão de outorga do *status* de refugiado não só aquele que demonstra sofrer perseguição por motivos de raça, religião e nacionalidade, mas aquele que, "não tendo nacionalidade e estando fora do país de residência habitual, não possa ou não queira regressar a ele[...]". Percebe-se que, dependendo das circunstâncias, a linha que separa o conceito de refugiado do conceito de apátrida pode ser muito tênue, de maneira que a autoridade que analisa os pedidos dos refugiados deveria ser a mesma que analisa os pedidos de *status* de apátrida, cabendo-lhe a qualificação da situação exata.

Essa lógica pode ser observada notadamente no plano supranacional quando ao ACNUR foi delegado, pela Assembleia Geral das Nações Unidas, a responsabilidade de coordenar as ações que visam à implementação da Convenção relativa ao Estatuto dos Apátridas de 1954, da Convenção relativa à Redução de Casos de Apatridia de 1961, além da Convenção sobre os Refugiados de 1951.[46]

4.3. Do CONARE ao Comitê Nacional dos Refugiados e Apátridas (CONAREA)

Diante das imprecisões da Lei n° 9.474/97 e da nova Lei de Migração, que não dispõem de forma expressa sobre a competência do órgão competente para se pronunciar sobre os pedidos de *status* de apátrida, se faz necessário definir as modalidades administrativas para que se cumpram os tratados celebrados pelo Brasil nas questões relativas aos apátridas. Recorra-se, aqui, mais uma vez, ao *Manual de Proteção aos Apátridas de acordo com a Convenção de 1954 sobre o Estatuto dos Apátridas* do ACNUR, para entender em que consistiriam esses procedimentos administrativos de determinação de apatridia.

De acordo com o Manual do ACNUR, esses procedimentos devem auxiliar as pessoas que encontram dificuldade de provar a sua nacionalidade. Sendo assim,

44 Art. 31 (1), da Convenção de Viena de 1969 sobre o direito dos tratados.

45 Art. 31 (2) e 31 (3), da Convenção de Viena de 1969 sobre o direito dos tratados.

46 Com a adoção das Resoluções 50/152, de 21 de dezembro de 1995, e 61/137, de 19 de dezembro de 2006, da Assembleia Geral das Nações Unidas, o ACNUR passou a tutelar a proteção dos apátridas ao prestar assistência técnica aos Estados signatários da Convenção de 1954, no intuito de auxiliar na formulação de regras administrativas de tratamento das demandas, assim como de medidas que visam à redução da apatridia como a facilitação de acesso à nacionalidade do Estado acolhedor.

os Estados devem garantir aos requerentes, inclusive imigrantes, que reivindicam a condição de apátridas no território em que se encontrem, os seguintes direitos: direito à informação sobre os critérios de elegibilidade à condição de apátrida em várias línguas; direito de entrevista com um funcionário da autoridade competente; direito de requerer o estatuto do apátrida por escrito; direito à assistência de um tradutor na execução dos procedimentos administrativos; direito à assistência jurídica gratuita; direito a uma decisão administrativa fundamentada em um prazo razoável, com direito ao recurso judicial e acesso ao próprio ACNUR.[47] Se o Estado acolhedor não for capaz de demonstrar a existência do vínculo de nacionalidade, então deve acolher a demanda da pessoa, sem exercer qualquer tipo de discricionariedade para se recusar a cumprir a Convenção relativa ao Estatuto dos Apátridas e lhe atribuir a condição de apátrida, não importando se é refugiado ou não.

Defende-se que esses procedimentos poderiam ser implementados pelo CONARE por força dos arts. 1°, II, 12 e 48 da Lei n° 9.474/97, em consonância com o Decreto n° 4.246, de 22 de maio de 2002, relativo ao Estatuto do Apátrida de 1954, mas com a condição de reformar o dispositivo para lhe dar maior clareza. Esses ajustes legais, além de oferecerem maior segurança jurídica aos requerentes, proporcionariam eficiência nos serviços prestados pela autoridade administrativa responsável, cuja denominação poderia ser "Comitê Nacional dos Refugiados e Apátridas" – CONAREA, a exemplo do modelo francês com o *Office Français de Protection des Refugiés et Apatrides – OFPRA*.

Criado pela Lei de 25 de julho de 1952, o OFPRA, estabelecimento público administrativo sob a tutela do ministério dos assuntos internos (*Ministère de l'Intérieur*), tem como missão de cumprir as convenções internacionais celebradas pela França sobre a proteção internacional dos refugiados (Convenção de 1951) e apátridas (Convenção de 1954), assim como garantir o cumprimento dos direitos fundamentais inerentes a essas categorias de estrangeiros.[48] Nesse modelo de proteção interno aos apátridas, foi adotado, em 2004, um Código de Entrada e de Estadia de Estrangeiros e do Direito de Asilo (CEDESA), para disciplinar os aspectos administrativos dos pedidos dos refugiados e apátridas, dentre outros.[49]

No modelo pátrio, bastaria, em um projeto de reforma da Lei n° 9.474/97, para evacuar qualquer dúvida sobre a competência do CONARE, inserir um dispositivo que reconheceria como apátrida: "Toda pessoa que não seja considerada seu nacional por nenhum Estado, conforme sua legislação e nos termos da Convenção relativa ao Estatuto dos Apátridas, de 1954, promulgada pelo Decreto n° 4.246, de 22 de maio de 2002", a exemplo do que se fez na nova Lei de Migração. Em seguida, fixar que o CONARE é o órgão competente para "analisar o pedido e declarar o reconhecimento, em primeira instância, da condição de apátrida", de acordo com o que é definido como tal nas Convenções de 1951 e 1954. Desse modo, obter-se-ia um alinhamento do Estado brasileiro em relação ao seu comprometimento internacional na matéria.

5. Considerações finais

Com a entrada em vigor da nova Lei de Migração, em novembro de 2017, constata-se um avanço do ordenamento jurídico brasileiro em relação às obrigações internacionais assumidas com a promulgação das Convenções de 1951 sobre o Estatuto dos Refugiados, de 1954 sobre o Estatuto dos Apátridas e de 1961 sobre a Redução dos Casos de Apatridia. Ao analisar as modalidades de implementação desses instrumentos internacionais, viu-se, contudo, que a legislação pertinente ainda não contemplou com precisão as consequências administrativas da inserção da figura do apátrida no direito interno. Com a edição de um regulamento futuro, espera-se que essas lacunas administrativas sejam resolvidas. O órgão competente para apreciar as demandas da condição de apátrida não consta da Lei de Migração, o que constitui um retrocesso em relação ao Anteprojeto de Lei de Migrações e Promoção dos Direitos dos Migrantes de 2014, que atribuía tal prerrogativa ao CO-

47 ACNUR. Manual de Proteção aos apátridas de acordo com a Convenção de 1954 sobre o Estatuto dos Apátridas. ACNUR. Genebra, 2014, pp. 29 e 30. Disponível em: <http://www.acnur.org/t3/fileadmin/Documentos/Publicaciones/2014/Manual_de_protecao_aos_apatridas.pdf>. Acesso em: 29 jan. 2017

48 CHASSIN, Catherine Amélie. "Panorama du droit français de l'apatridie". *Revue Française de Droit Administratif - RFDA*, 2003, p. 326.

49 Ordonnance n° 2004-1248 du 24 novembre 2004, relative à la partie législative du code de l'entrée et du séjour des étrangers et du droit d'asile. Publicado no Jornal Oficial da República francesa, JORF n°0274 du 25 novembre 2004, p. 19924. Disponível em: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000624655>. Acesso em: 19 abr. 2017.

NARE. Diante do limbo criado por essa omissão legislativa que poderia colocar em risco o respeito à dignidade humana de pessoas cuja vulnerabilidade resulta da ausência de nacionalidade, defende-se uma reforma da Lei n° 9.474/97, de modo a ampliar as competências do CONARE, que não pode se abster de analisar os pedidos de apátridas, haja vista os dispositivos dos arts. 1, II, 12 e 48 da Lei n° 9.474/97. Esses dispositivos, apesar de não cuidarem expressamente do apátrida, dão subsídios legais sólidos e suficientes para conferir ao CONARE tal responsabilidade, por se tratar de matéria conexa à proteção dos refugiados.

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O caráter humanista da Lei de Migrações: avanços da Lei n. 13.445/2017 e os desafios da regulamentação

The humanistic character of the Migration Law: Advances in the Statue no. 13.445 / 2017 and the Regulatory Challenges

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The humanistic character of the Migration Law: Advances in the Statue no. 13.445 / 2017 and the Regulatory Challenges

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Resumo

Houve uma mudança de paradigma na forma como o Estado brasileiro compreende as migrações, a partir da Lei 13.445, de 24 de maio de 2017 (nova lei de migrações), com a valorização de uma ótica humanista, desburocratizante. Enquanto no Estatuto dos Estrangeiro, este era visto como alguém a ser controlado pela Polícia Federal em todos os momentos da sua permanência no país, a ideia prevalente na nova norma jurídica é de ampliar os mecanismos de controle, mas também de viabilizar a conquista da cidadania pelos estrangeiros que se integram de forma produtiva à vida do país. Para tanto, houve alterações com a simplificação dos procedimentos para obtenção de vistos; a alteração na forma de controle dos residentes estrangeiros no Brasil; a facilitação do recebimento de trabalhadores estrangeiros com capacidades estratégicas para o país e uma abertura para a imigração humanitária. Para avaliar os avanços e os desafios necessários durante a regulamentação, é preciso conhecer primeiro o perfil dos imigrantes no Brasil, para, posteriormente, avaliar a política pública com a) lógica dos novos procedimentos de obtenção de vistos; b) o novo regramento para a residência do estrangeiro e registro único de migrantes; c) o critérios para o recebimento de trabalhadores de alta qualificação; d) a abertura humanitária.

Palavras chave: Lei de migrações, humanismo, desafios

Abstract

There has been an important shift in the way the Brazilian State deals with migrations, namely with the Statute no 13,445 (New Statute on Migration), dated May 24, 2017. The Statute values a more humanistic and a less bureaucratic approach. In the precedent Statute, the foreigner was viewed as someone to be permanently controlled by the Federal Police. The new law maintains the mechanisms of control but facilitates the foreigners'access to citizenship in a way to integrate them in a productive way in the day-to-day

* Autores convidados. Os autores foram os responsáveis, pelo Ministério da Justiça, pela negociação do projeto de lei na Câmara e no Senado Federal, além de coordenarem a regulamentação do tema após sua aprovação

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life of the country. To this end, there have been changes with the simplification of visa procedures, in the way of controlling of foreign residentes in Brazil, in facilitating the reception of foreign workers with strategic capabilities for the country and an openness to immigration in terms of humanitarian assistance. To assess the progress and challenges required fot such regulation,

it is necessary to, first of all, map the profile of immigrants in Brazil, to later evaluate the public policy with a) the logic of the new procedures of visa obtention; b) the new residence rule of the foreigner and the single registration rule of migrants; c) the criteria for the reception of highly skilled workers; d) humanitarian opening.

Keywords: Migration Statute, humanistic, challenges

1. Introdução

Houve uma mudança de paradigma na forma como o Estado brasileiro compreende as migrações, a partir da Lei 13.445, de 24 de maio de 2017 (nova lei de migrações), com a valorização de uma ótica humanista, desburocratizante. Enquanto no Estatuto dos Estrangeiro, este era visto como alguém a ser controlado pela Polícia Federal em todos os momentos da sua permanência no país, a ideia prevalente na nova norma jurídica é de ampliar os mecanismos de controle, mas também de viabilizar a conquista da cidadania pelos estrangeiros que se integram de forma produtiva à vida do país. Para tanto, houve alterações com a simplificação dos procedimentos para obtenção de vistos; a alteração na forma de controle dos residentes estrangeiros no Brasil; a facilitação do recebimento de trabalhadores estrangeiros com capacidades estratégicas para o país e uma abertura para a imigração humanitária.

Em 2013, o Ministério da Justiça criou uma Comissão de Especialistas (Portaria MJ nº 2.162/2013) para elaborar proposta de "Anteprojeto de Lei de Migrações e Promoção dos Direitos dos Migrantes no Brasil (APL)". Tal Comissão apresentou o APL em meados de 2014. A proposta dos especialistas, ao ser absorvida pelos órgãos públicos envolvidos com a agenda, sofreu profundas alterações para compatibilização com as perspectivas do Ministério da Justiça, Ministério do Trabalho e Ministério das Relações Exteriores, além de ter recebido contribuições de movimentos sociais, organismos internacionais e outros setores. Ao longo do ano de 2014 e 2015, arranjos foram estabelecidos, inclusive, com a mediação da Casa Civil, para se chegar a um texto minimamente consensuado a ser discutido no Congresso Nacional.

Esses esforços impactaram a tramitação do Projeto de Lei do Senado nº 288/2013, de autoria do Senador Aloysio Nunes Ferreira (PSDB/SP). A partir do diálogo entre o Senado Federal (autor e Relator Senador Ricardo Ferraço (PSDB/ES) e o governo federal, chegou-se a um texto substitutivo que foi remetido à Câmara dos Deputados. O Projeto de Lei nº 2516/2015 recebeu a relatoria do Deputado Orlando Silva em Comissão Especial, que, mais uma vez abriu a interlocução, via audiências públicas e outras estratégias, com os atores interessados no tema. O texto aprovado na Câmara foi remetido ao Senado Federal em dezembro de 2016. O Substitutivo da Câmara dos Deputados nº 7/2016 foi aprovado com emendas em abril de 2017. Em maio do mesmo ano, foi sancionada a Lei nº 13.445/2017, com vetos parciais da Presidência da República.

A nova Lei foi recebida pelo Estado brasileiro, movimentos sociais e organismos internacionais como uma grande conquista para o arcabouço normativo nacional e para a garantia dos direitos dos migrantes. Ela representa um novo paradigma para a migração no país e traz profundas mudanças em institutos jurídicos relacionados aos migrantes.

Para viabilizar sua aprovação, entretanto, foi preciso construir os consensos possíveis, garantindo no texto da lei os direitos fundamentais e as diretrizes e o desenho geral da política. Em relação a temas como vistos e residência, por exemplo, muito se delegou para o poder regulamentador. Se, por um lado, uma lei enxuta favorece uma maior contemporaneidade ao conjunto de normas disciplinadoras ao longo do tempo, já que o processo de revisão de atos infralegais tende a ser mais rápido; por outro, torna maior o desafio da regulamentação, para que seja preservado o espírito da lei. A consolidação desse novo paradigma normativo migratório, depende, portanto, do regulamento a ser aprovado.

Como exemplo da repercussão internacional e da importância da Nova Lei, refere-se à Nota divulgada pela Embaixadora Maria Nazareth Farani Azevêdo, representante permanente do Brasil junto às Nações Unidas em Genebra que diz que *"A aprovação do projeto de lei sobre migração pelo Congresso Nacional foi bem recebida pelas Nações Unidas e por outras organizações internacionais.*

[...] A lei de migração consolida o Brasil como país aberto, diverso e responsável, garantidor do respeito aos direitos humanos e às liberdades fundamentais e promotor da inclusão social e da integração". O Secretário_Geral da ONU, Ban Ki Moon, parabenizou, publicamente, o Estado brasileiro pelos avanços da nova lei.

Para avaliar os avanços e os desafios necessários durante a regulamentação, é preciso conhecer primeiro o perfil dos imigrantes no Brasil, para, posteriormente, avaliar a política pública com a) lógica dos novos procedimentos de obtenção de vistos; b) o novo regramento para a residência do estrangeiro e registro único de migrantes; c) o critérios para o recebimento de trabalhadores de alta qualificação; d) a abertura humanitária.

2. O perfil dos imigrantes no Brasil

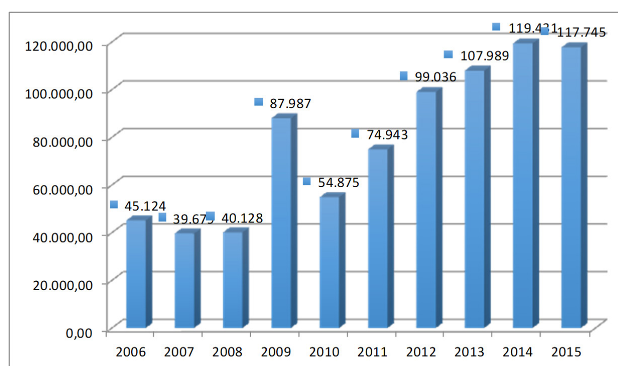
O perfil migratório brasileiro tem se alterado nos últimos cinco anos. Houve aumento do volume e concentração em alguns grupos populacionais que se interessam em vir para o Brasil, em função de diferentes motivos. Houve um aumento significativo do número de migrantes de países desenvolvidos, sobretudo da Itália (mais de 30 mil italianos entre 2000 e 2015, sobretudo desde 2010), dos Estados Unidos e de Portugal, o que tem sido denominado por especialistas como uma terceira onda migratória para o Brasil.[1] Houve, também, um aumento significativo do número de migrantes por questões humanitárias, sobretudo da Venezuela e do Haiti.

A grande maioria dos imigrantes que estava no Brasil em 2000 e 2010 é composta por brancos, com idade entre 40 e 64 anos, que se dirigiram para os Estados de São Paulo, Rio de Janeiro, Paraná e Rio Grande do Sul. Esses Estados detinham 71% dos imigrantes em 2000 e 63% em 2010. Com o aumento da imigração de países vizinhos, a expectativa é que o número de imigrantes se distribua melhor, sobretudo nas regiões Norte e Centro-Oeste do país. Desde 2000, houve uma aumento do número de imigrantes de países mais pobres, sobretudo negros e pardos, de menor nível de escolaridade.

Cor ou Raça	Anos	
	2000	2010
Total	**683.836**	**592.591**
Branca	539.451	425.684
Preta	7.782	13.910
Parda	38.491	76.626
Amarela	90.681	71.265
Indígena	4.482	5.106
Ignorado	2.949	-

Fonte: IBGE, Censos Demográficos de 2000 e 2010. Dados levantados por OLIVEIRA, A. T. O perfil geral dos imigrantes no Brasil a partir dos censos demográficos de 2000 e 2010 *in* Cadernos Obmigra. Revista de migrações internacionais, v. 1., n. 2 (2015).

No entanto, entre 2010 e 2015, houve aumento significativo da imigração no Brasil. Nos anos anteriores, havia uma média de 40 a 70 mil migrantes por ano. A partir de 2011, esse número aumentou para 100 a 120 mil migrantes por ano. Acredita-se que o aumento da imigração se deve ao crescimento econômico do país e às crises em países próximos.



Fonte: Polícia Federal, com dados tabulados por http://g1.globo.com/mundo/noticia/2016/06/em-10-anos-numero-de-imigrantes-aumenta-160-no-brasil-diz-pf.html

1 SUGIMOTO, Luiz. *País recebe 30 mil novos imigrantes italianos entre 2000 e 2015.*
Disponível em: <https://www.unicamp.br/unicamp/ju/675/pais-recebe-30-mil-novos-imigrantes-italianos-entre-2000-e-2015>.

3. A FACILIDADE E O DIRECIONAMENTO DE VISTOS PARA OS NOVOS MIGRANTES

A nova Lei de Migração simplifica e amplia as possibilidades de concessão de vistos aos estrangeiros. O Estatuto do Estrangeiro, editado ainda no período da ditadura militar, estabelecia exigências e procedimentos que dificultavam a vida daquele que quisesse vir ao Brasil, transparecendo uma visão do estrangeiro como potencial ameaça à segurança e aos interesses nacionais.

Há diversas diferenças essenciais entre a nova lei e a antiga: o direito de entrar no Brasil, na legislação anterior, era centrado sobretudo na pessoa que recebia o visto e estava submetido à lógica da necessidade do estrangeiro demonstrar sua regularidade às autoridades, periodicamente. Exemplo disso é a regra do Estatuto do Estrangeiro de validade de apenas 90 dias para a utilização de qualquer dos vistos, contados da data de sua concessão, prorrogáveis por igual período. No caso do visto permanente, que autorizava a residência no país, a antiga lei estabelecia a possibilidade de condicionar sua concessão ao exercício de atividade certa e à fixação em região determinada do território nacional por até cinco anos. Ademais, o controle sobre a situação do estrangeiro se estendia à discricionariedade do Ministério da Justiça para requisitar a estabelecimento hoteleiro, empresa imobiliária, proprietário, locador, sublocador ou locatário de imóvel e síndico de edifício os dados de identificação do estrangeiro admitido na condição de hóspede, locatário, sublocatário ou morador. Ainda que tais práticas pudessem ter caído em desuso, sua permanência no texto da lei denotam o caráter de controle que permeava a relação do Estado brasileiro com o imigrante.

Os vistos da Lei nº 6.815/1980 serviam a diferentes fins: podiam ser de trânsito, de turista, temporário, permanente, de cortesia, oficial ou diplomático. O visto, um único instituto, abarcava, portanto, situações de visita, de residência temporária e de permanência por prazo indeterminado. Na nova lei, o visto está mais claramente delimitado como um documento para ingresso no território nacional, e cria-se o instituto jurídico da residência para amparar aquele que pretende se estabelecer no país por período mais prolongado. Passa-se, portanto, da ótica do controle de entrada no país para a lógica do recebimento do migrante, que possui direitos claramente definidos no novo marco legal.

A partir de agora, há cinco tipos, que por sua vez se subdividem em vários outros: visita, temporário, diplomático, oficial e de cortesia. Em outras palavras, o visto permanente foi extinto, convertido em residência, com maior liberdade para o estrangeiro e sua família, como veremos abaixo.

3.1. Visto de visita

Na nova sistemática, os vistos de visita podem ser de: turismo, negócios, trânsito, atividades artísticas ou desportivas, além de outras hipóteses a serem previstas no regulamento. Em relação ao visto de turismo, a novidade principal é que regulamento definirá seu prazo de validade, abrindo a possibilidade de que seja superior ao limite estabelecido na antiga lei, de cinco anos.

O visto para atividades artísticas e desportivas tem tratamento bastante distinto em relação à nova lei, sendo previsto como subtipo tanto do visto de visita quanto do visto temporário, separando claramente as situações de estada de curta duração e de intenção de estabelecer residência. O Estatuto do Estrangeiro previa, para artistas e desportistas, visto temporário limitado a 90 dias, sendo necessário que o estrangeiro fosse parte em contrato de trabalho visado pelo Ministério do Trabalho, e satisfizesse às exigências especiais estabelecidas pelo Conselho Nacional de Imigração - CNIg. Ainda que a nova lei tenha mantido a vedação ao exercício de atividade remunerada por titular de visto de visita, este pode receber pagamento a título de diária, ajuda de custo, cachê, pró-labore ou outras despesas com a viagem, bem como concorrer a prêmios, inclusive em dinheiro, em competições desportivas ou em concursos artísticos ou culturais. Tais inovações são importantes dada a natureza da atividade artística e desportiva.

3.2. Férias-Trabalho

No tocante às inovações da Lei nº 13.445/2017, nota-se a inclusão da figura do visto temporário de "férias-trabalho", que já era objeto de diferentes tratados firmados pelo Brasil nos últimos anos[2]. A ideia é que um estudante estrangeiro possa permanecer durantes suas férias escolares no Brasil, com direito de exercer atividade remunerada, ainda que pretenda residir apenas temporariamente no país. Esses vistos são concedidos,

2 Um exemplo é o Tratado entre o Brasil e a França, assinado em Brasília, em 12 de dezembro de 2013;

em geral, por períodos curtos, de até três meses, e permitem a imersão do estudante estrangeiro na rotina de uma empresa no Brasil, a internacionalização de empresas com o acolhimento do empregado estrangeiro, e a valiosa troca de experiências. A partir da nova lei, é possível inclusive a aceitação de estudantes estrangeiros oriundos de diferentes países, independentemente de tratado. Parte-se da visão que receber o estudante estrangeiro, em geral um estudante universitário, é experiência positiva não apenas para o estudante, mas para aqueles que o recebem e com ele convivem no país. Há necessidade de reciprocidade, mas que pode ser demonstrada por comunicação diplomática, ou seja, a partir da demonstração da situação fática que o outro país garante tratamento similar aos estudantes brasileiros.[3]

3.3. Tratamento de saúde

Prevê-se, também, a recepção de estrangeiros que venham realizar tratamento de saúde no Brasil, com visto estendido aos seus acompanhantes, desde que o imigrante comprove ser capaz de prover sua subsistência. É o reconhecimento do país como um centro receptor de estrangeiros, de países vizinhos, que hoje entram provavelmente como turistas[4]. Na cidade de Corumbá-MS, fronteiriça com Porto Suarez, na Bolívia, por exemplo, a Santa Casa atendeu, entre 2010 e 2015, 1.557 estrangeiros, sendo cerca de 90% bolivianos[5]. Embora o fronteiriço tenha condições mais favoráveis de entrada no país, essa prerrogativa não se aplicaria, pelo marco legal atual, ao fronteiriço que pretenda vir para tratamento de saúde, devendo submeter-se ao visto temporário[6]. Contudo, na prática, emite-se o cartão de saúde ao fronteiro que declare residência no Brasil.

O visto temporário para tratamento de saúde é regulado em nível infra legal pela Resolução Recomendada nº 2/2000 do CNIg, cujas exigências para a emissão, além dos documentos comumente exigidos são: indicação médica para o tratamento; comprovantes de meios de subsistência para custear o tratamento e a manutenção no território nacional; seguro de saúde válido no país; certificado de prestação de serviço de saúde previsto em acordo internacional; outro meio de ressarcimento a tratamento efetuado pelo SUS. Todos os documentos devem ser consularizados e traduzidos por tradutor juramentado, o que implica elevado custo financeiro. Ou seja, há grande burocracia para concessão desse tipo de visto, o que acabou por torná-lo pouco efetivo.

Com a nova lei, como o tratamento pode ter prazos diferenciados, o estrangeiro ficará resguardado dos limites temporais do visto de turista. A inclusão dessa possibilidade explícita de visto temporário (Art. 14, inciso I, alínea b da Lei nº 13.445/2017) coaduna-se com os direitos e garantias fundamentais estabelecidos no art. 5º da Constituição Federal, que equipara brasileiros e estrangeiros residentes no país, o que já vinha sendo reconhecido em alguns julgados[7]. O desafio da regulamentação, nesse ponto, é evitar a criação de exigências acessórias que oneram o processo e terminam por inviabilizar sua concessão. A motivação do visto deve circunscrever-se à indicação médica e o prazo estimado para o tratamento. Não compete ao Estado brasileiro avaliar, previamente, se o tratamento será realizado pelo sistema público de saúde ou na rede particular, posto não se pode negar ao nacional de outro país o acesso ao tratamento no Brasil, por força da Constituição.

3.4. Visto de trabalho

Outra alteração com bastante impacto se refere ao visto de trabalho. Atualmente, o Brasil se esforça para dificultar a integração de imigrantes nos diferentes serviços profissionais no país. Pelo Estatuto do Estrangeiro, concede-se visto temporário ao estrangeiro "que pretenda vir ao Brasil na condição de cientista, pesqui-

3 Art. 14, §6º O visto temporário para férias-trabalho poderá ser concedido ao imigrante maior de 16 (dezesseis) anos que seja nacional de país que conceda idêntico benefício ao nacional brasileiro, em termos definidos por comunicação diplomática.

4 O próprio Conselho Federal de Medicina afirma que não lhe compete solicitar verificar a existência do visto (http://noticias.r7.com/saude/noticias/conselho-federal-de-medicina-diz-que-medicos-nao-tem-obrigacao-de-pedir-visto-20110812.html acesso em: 02 jun. 2017.

5 GALVÃO, Caline. *Pacientes bolivianos sobrecarregam atendimento no hospital de Corumbá*. Disponível em: <http://diarionline.com.br/?s=noticia&id=83168>. Acesso em: 02 jun. 2017.

6 BRANCO, Marisa Lucena. *O SUS na fronteira e o direito:* em que medida o estrangeiro tem direito ao SUS. 2009. TCC (Monografia) - Programa de Direito Sanitário da Fundação Oswaldo Cruz, Brasília, 2009. p. 34.

7 Vide TRF 4ª Região, AG 2005040132106/PR, Data de Julgamento: 29/08/2006; TRF-5 - AC: 103084920124058100, Relator: Desembargador Federal Emiliano Zapata Leitão, Data de Julgamento: 28/01/2014, Quarta Turma, Data de Publicação: 30/01/2014; TRF-4 - RHC: 751 PR 2006.70.00.000751-5, Relator: TADAAQUI HIROSE, Data de Julgamento: 25/04/2006, SÉTIMA TURMA, Data de Publicação: DJ 17/05/2006.

sador, professor, técnico ou profissional de outra categoria, sob regime de contrato ou a serviço do governo brasileiro" (art. 13, inciso V). No geral, o Estatuto trata o imigrante como ameaça ao trabalhador nacional. O visto só seria concedido mediante condições estabelecidas em ato infralegal pelo Conselho Nacional de Imigração - CNIg, que deveria, inclusive, visar ao contrato (art. 15).

Por essa regra, a obtenção de visto de trabalho exige uma série de documentos do empregador e sua análise, fora do Brasil, leva em torno de seis meses, considerando as exigências das diferentes resoluções do CNIg sobre o tema[8]. Exige-se que indivíduo consiga emprego no Brasil antes de pedir o visto, ou seja, enquanto está no exterior. O processo deve ser iniciado pela empresa contratante, pela internet, com uso do certificado digital. Somente após o deferimento do CNIg o MRE é informado e encaminha o processo para a repartição consular para a emissão do visto. Logicamente, na prática, torna-se muito difícil conseguir um emprego, mesmo tendo-se bom nível profissional, exceto quando as empresas interessadas são multinacionais com unidades no Brasil e capacidade internacional de recrutamento. Pela regra da Lei nº 6.815/1980, caso o imigrante decida mudar de emprego, ele deve solicitar autorização ao Ministério da Justiça, ouvido o Ministério do Trabalho. O Decreto nº 86.715, de 10 de dezembro de 1981, que regulamentou o Estatuto do Estrangeiro, foi além da exigência da lei e ainda estabeleceu necessidade de anuência da empresa contratante quanto à mudança de emprego, o que raramente acontecia. Esta exigência só deixou de existir com alteração promovida no Decreto em maio de 2016. Em outras palavras, pela regra antiga, em vigor até novembro de 2017, o imigrante deve encontrar novo empregador que esteja disposto a esperar mais seis meses pelo início do vínculo, o que é difícil conceber na prática. Por fim, a família do imigrante não tem direito a trabalho, o que certamente dificulta o período de residência, como veremos abaixo, no ponto específico sobre residência.

No primeiro trimestre de 2017, foram emitidas 1.592 carteiras de trabalho, comparadas com 2.141 no mesmo período em 2016. Embora tenha caído o número geral, os migrantes haitianos continuam sendo a maioria dos trabalhadores, tendo crescido o número de venezuelanos (de 270 para 1.107). São trabalhadores de escolaridade média[9], cuja busca pelo trabalho no Brasil decorre muito mais da condição de refúgio do que de migração deliberada. Em geral, considerando-se as autorizações de trabalho concedidas pela Coordenação Geral de Imigração, foram 6.415 no mesmo período, cerca de 5.000 para migrantes entre 20 e 49 anos, na maioria homens, com segundo grau completo ou superior completo, profissionais das ciências e das artes. São autorizações de até 90 dias (artista) ou 2 anos para prestação de serviço ao governo brasileiro, trabalhadores a bordo de embarcação ou plataforma, ou estrangeiro vinculado a grupo econômico cuja matriz situe-se no Brasil[10]. Apenas 621 foram autorizações de trabalho para profissional estrangeiro com contrato de trabalho no Brasil.

Na nova lei, foram criados subtipos específicos de visto para as múltiplas situações que o Estatuto do Estrangeiro incluía no visto temporário para profissionais "sob regime de contrato ou a serviço do governo brasileiro". Assim, surgem os vistos temporários para quem queira estabelecer residência por tempo determinado com finalidade de: pesquisa, ensino ou extensão acadêmica; trabalho; ou atividades artísticas ou desportivas com contrato por prazo determinado.

3.5. Visto de pesquisa

No caso do visto temporário para pesquisa, ensino ou extensão acadêmica, abre-se a possibilidade de que seja concedido ao imigrante sem vínculo empregatício. Para aqueles com vínculo com instituição de pesquisa ou de ensino brasileira, a lei exige comprovação de formação superior compatível ou equivalente reconhecimento científico, em um movimento que tanto pode ser entendido como um estímulo à "atração de cérebros", quanto como um mecanismo de proteção do mercado

8 Resoluções Normativas 01, 35, 61, 62, 69, 71, 72, 76, 79, 84, 87, 94, 98, 99, 103, 118, 121. Os procedimentos são disciplinados pela Resolução Normativa 104.

9 OBMigra. A movimentação do trabalhador estrangeiro no mercado de trabalho formal: CTPSCAGED, Relatório 1ºtrimestre 2017 (jan-mar)/ Observatório das Migrações Internacionais; Ministério do Trabalho/ Conselho Nacional de Imigração. Brasília, DF: OBMigra, 2017. Disponível em http://obmigra.mte.gov.br/index.php/admissoes-e-demissoes Acesso em: 02 jun. 2017.

10 OBMigra. Autorizações de trabalho concedidas a estrangeiros, Relatório 1ºtrimestre 2017 (jan - mar)/ Observatório das Migrações Internacionais; Ministério do Trabalho e Previdência Social/ Coordenação Geral de Imigração. Brasília, DF: OBMigra, 2017. Disponível em http://obmigra.mte.gov.br/index.php/relatorios-cgig-e-cnig. Acesso em: 02 jun. 2017.

de trabalho brasileiro nessa área.

No caso específico do visto temporário de trabalho, o imigrante com diploma de curso superior poderá obter visto para procurar emprego no país, ou seja, ele não precisará encontrar emprego à distância. Assim, poderá obter emprego em qualquer empresa brasileira, mesmo de pequeno porte, porque terá contato direto com os interlocutores no país, e poderá participar de entrevistas e processos seletivos. No caso de imigrantes sem curso superior, permanece a necessidade de comprovação de oferta de trabalho. Em ambos casos, será possível trocar de emprego sem anuência do empregador anterior, nem autorização prévia de órgãos governamentais.

Tais facilidades não significam que o país deseje estabelecer uma política deliberada de atração de trabalhadores estrangeiros. Ao contrário, nada indica tal influxo nas ações governamentais. Uma política desse tipo depende, primeiramente, de condições econômicas favoráveis, que tornem o país atraente aos migrantes, o que não é o caso em cenário de crise econômica e fiscal vivido nos últimos anos.

3.6. Vistos temporários

A Lei de Migração tem o mérito, também, de claramente explicitar a previsão de vistos temporários para casos de reunião familiar e de acolhida humanitária, temas silentes no Estatuto do Estrangeiro. Esta última situação será tratada em mais detalhe adiante.

O desafio do regulamento em relação a vistos não é trivial. A lei foi econômica ao tratar do tema, estabelecendo apenas, em linhas gerais, a responsabilidade por sua concessão, os tipos e subtipos, e as hipóteses de denegação e impedimento de concessão. Foi outorgado ao regulamento dispor sobre: requisitos de concessão de visto, e de sua simplificação; prazo de validade e forma de contagem; prazo máximo para a primeira entrada e para a estada; hipóteses e condições de dispensa de visto e de taxas e emolumentos; e solicitação e emissão de visto por meio eletrônico. A Lei de Migração sinaliza para avanços importantes a serem apenas operacionalizados na forma do regulamento -- como a inequívoca possibilidade de emissão, e não só solicitação, de vistos por meio eletrônico , ela, também, dá liberdade para que o regulamento seja mais ou menos restritivo -- caso do dispositivo que estabelece que "**observadas as hipóteses previstas em regulamento**, o visto temporário para trabalho poderá ser concedido ao imigrante que venha exercer atividade laboral [...]".

Seguindo a perspectiva acolhedora do imigrante presente na Lei de Migrações, o regulamento poderá estender o visto do titular aos seus familiares, para que todos possam trabalhar, como ocorre em outros países. Da mesma forma, pode-se permitir que o estudante exerça atividade remunerada, compatível com os estudos, para que possa se manter durante o período do curso.

Não há sombra de dúvida de que o detalhamento no regulamento de requisitos para obtenção de vistos deve ser suficiente para garantir a segurança nacional, por exemplo, pela indispensável apresentação de documento de viagem, para identificação do imigrante. Como é essencial que estejam comprovadas as hipóteses previstas na lei, caso de um diploma para comprovação de formação superior. Mas também pode-se facilitar a vida do solicitante de visto ao observar o princípio da boa-fé, utilizando declarações por ele assinadas em lugar de determinados comprovantes, especialmente em casos de acolhida humanitária.

Há muito espaço, também, para que o regulamento estabeleça procedimentos menos burocráticos, reduzindo o número de instâncias envolvidas, definindo claramente seus papeis, e prevendo ampla integração de sistemas eletrônicos, capazes de tornar o *back-office* completamente invisível, e limitar ao mínimo no número de interações do interessado com o serviço público.

4. Novo regramento para residência e registro único de migrantes

A Lei de Migração traz um cenário completamente novo na abordagem do imigrante que vem ao Brasil com o intuito de aqui se estabelecer, a partir da criação da autorização de residência, que poderá ser concedida, mediante registro, ao imigrante, ao residente fronteiriço ou ao visitante (art. 30). Inaugura-se, assim, um instituto jurídico próprio, inexistente no Estatuto do Estrangeiro. Além dessa singularidade, a lei inova de maneira importante ao permitir que a autorização de residência possa ser concedida independentemente da situação migratória (art. 31, § 5º), em contraposição ao antigo regramento, que vedava tanto a legalização da estada de clandestino e de irregular, quanto a transformação em permanente dos vistos de trânsito, de turista, de cortesia

e de boa parte dos vistos temporários.

São 17 as hipóteses para concessão de autorização de residência da nova norma, e ainda há abertura para que o regulamento estabeleça outras. A despeito da coincidência de 9 das hipóteses com as de concessão de visto temporário, não há restrição na lei para que essas sejam acessadas somente a partir do visto correspondente. Em decorrência de acordos internacionais, muitos são dispensados da obrigatoriedade do visto. As demais hipóteses de autorização de residência são a pessoa: ser beneficiária de tratado em matéria de residência e livre circulação; ser detentora de oferta de trabalho; já ter possuído a nacionalidade brasileira e não desejar ou não reunir os requisitos para readquiri-la; ser beneficiária de refúgio, de asilo ou de proteção ao apátrida; ser menor nacional de outro país ou apátrida, desacompanhado ou abandonado, que se encontre nas fronteiras brasileiras ou em território nacional; ter sido vítima de tráfico de pessoas, de trabalho escravo ou de violação de direito agravada por sua condição migratória; e estar em liberdade provisória ou em cumprimento de pena no Brasil. Como se vê, diversas dessas hipóteses foram previstas sob uma ótica de acolhida humanitária, e de abertura para a regularização migratória de grupos vulneráveis.

Diferentemente do visto, que, pela previsão da Lei nº 13.445/2017, continuará a ser concedido no exterior (salvo casos excepcionais de vistos diplomáticos, oficiais e de cortesia), a nova norma não trata do local de solicitação ou concessão da autorização de residência, de modo que o regulamento poderá definir que se realize no país ou fora dele. Com isso, cessará a absurda situação gerada pelo Estatuto do Estrangeiro e seu regulamento, que obrigava o imigrante que já se encontrava regularmente no Brasil a sair do país para solicitar novo visto, nos casos em que a lei não continha hipótese específica de transformação de seu visto. Pela Lei de Migrações, será possível, por exemplo, que o estrangeiro que estiver no Brasil ao amparo de um visto de turista solicite autorização de residência com finalidade de estudo ou trabalho, sem ter que se deslocar até a fronteira mais próxima, para na repartição consular obter novo visto.

Particularmente em relação ao residente fronteiriço, a nova lei, também, é mais aberta. O Estatuto do Estrangeiro permitia ao natural de país limítrofe a entrada nos municípios fronteiriços a seu país, e a possibilidade de obtenção de documento especial que autorizasse o exercício de atividade remunerada ou a frequência em estabelecimento de ensino. A Lei de Migração, também, prevê que o fronteiriço requeira autorização, porém com alcance muito mais amplo: valerá para a realização de atos da vida civil em geral e estenderá ao residente fronteiriço as garantias e os direitos assegurados pelo regime geral de migração (arts. 24 e 25).

Interessante notar que a nova lei trata especificamente da possibilidade de recurso da decisão que denegar a solicitação de autorização de residência e da garantia de contraditório e ampla defesa. No Estatuto do Estrangeiro, a segurança nacional e os interesses políticos, socioeconômicos e culturais do Brasil estavam acima de qualquer direito do imigrante, e não havia qualquer previsão de recurso nos processos relacionados a vistos.

Aos que argumentam que a nova lei abre as portas do Brasil a grupos terroristas ou traficantes, é importante fazer o contraponto de que, apesar de a nova lei favorecer uma abertura muito maior para o recebimento de imigrantes que pretendam se fixar no Brasil, a lei, também, traz as devidas restrições para preservação da segurança nacional. Está claramente estabelecido que não se concederá autorização de residência a pessoa condenada criminalmente por sentença transitada em julgado (Art. 30, §1º), ressalvados os casos de imigrantes: beneficiários de tratado em matéria de residência e livre circulação; cuja solicitação tenha por finalidade tratamento de saúde, acolhida humanitária ou reunião familiar; ou cujas condutas caracterizem infrações de menor potencial ofensivo. Além disso, a autorização de residência poderá ser negada: à pessoa anteriormente expulsa; que tenha praticado ato de terrorismo, ou cometido crime de genocídio, de guerra, de agressão ou contra a humanidade; condenada ou respondendo a processo em outro país por crime doloso; que tenha o nome incluído em lista de restrições; ou que tenha praticado ato contrário aos princípios e objetivos dispostos na Constituição Federal (hipóteses previstas nos incisos I, II, III, IV e IX do art. 45, também aplicáveis ao impedimento de ingresso).

4.1. Registro único do migrante

Tal qual o Estatuto do Estrangeiro, a Lei de Migração prevê a necessidade de que o imigrante proceda ao registro perante as autoridades brasileiras, para identificação civil. Aliás, a nova lei é até mais ampla que a antiga

na exigência, abrangendo todo imigrante titular de visto temporário ou de autorização de residência, enquanto que o Estatuto do Estrangeiro deixava de fora alguns grupos[11]. Quanto aos titulares de vistos diplomático, oficial e de cortesia, o Estatuto do Estrangeiro categoricamente requeria que fosse realizado seu registro, no Ministério das Relações Exteriores, quando a estada fosse superior a 90 dias. A nova norma deixa para o regulamento "a identificação civil, o documento de identidade e as formas de gestão da base cadastral dos detentores de vistos diplomático, oficial e de cortesia".

Assim, diferentemente do Estatuto do Estrangeiro, que previa um registro separado para os titulares de visto diplomático, oficial e de cortesia, uma grande vantagem da nova lei em relação ao registro é que ela abre margem para a criação de um registro único do migrante, ainda que com nuances específicas para o processo de identificação e para a gestão da base de alguns grupos.

Tal qual o que foi sugerido para vistos, seria salutar que o regulamento estabelecesse para o registro procedimentos menos burocráticos e mais ágeis, limitando ao número de interações do interessado com o serviço público. Por exemplo, caso integrado o registro único com o sistema de concessão de vistos, abre-se a possibilidade de que os dados biográficos do imigrante, comprovados no ato da solicitação do visto, já constituam a primeira etapa de seu registro, que pode ser concluído, com a coleta biométrica, no ato da fiscalização migratória, na fronteira. Aliás, ainda que requeira maior expertise e portanto a qualificação adequada do pessoal consular, no futuro todo o registro poderia vir a ser realizado no exterior, de modo que o imigrante pudesse ingressar no Brasil já de posse de sua autorização de residência.

Da mesma forma, é preciso simplificar os mecanismos de controle, que hoje exigem a presença anual do estrangeiro perante a Polícia Federal para demonstrar que exerce atividade lícita no país. Ideal talvez seja que o estrangeiro, apenas, tenha de prestar informações à Polícia Federal em caso de alteração da sua situação, ou seja, quando troca de empregador, por exemplo.

5. Atração de Profissionais de Alto Nível

A concessão de visto de trabalho no Brasil não tem a característica da acolhida do profissional qualificado que deseja estabelecer residência, pelas próprias dificuldades de alguém obter o visto na legislação até então em vigor.

Nesse sentido, é notória a diferença na política pública de atração de profissionais de alto nível entre o Brasil e os países desenvolvidos. Nos Estados Unidos, na França, no Reino Unido, no Canadá existe uma política ativa de busca de talentos em todo mundo. Não apenas as autoridades públicas e privadas são abertas a profissionais de alto nível, como os buscam nos demais países, com uma política declarada de importação de cérebros. Em determinados anos, o número de estudantes estrangeiros de doutorado em ciências e engenharia nos Estados Unidos chegou a 55% e 80% dos estudantes de pós-doutorado em química ou engenharia de materiais, com forte política de absorção dos melhores[12]. Em determinados centros, que reúnem números expressivos de estrangeiros, há, inclusive, políticas públicas direcionadas para viabilizar o trabalho dos familiares do estrangeiro, de tal modo que os vínculos com o país estejam além do próprio trabalhador e abranjam toda a família. O Canadá, por sua vez, desde 1945 redirecionou sua política migratória diante de mudanças econômicas favoráveis no pós-guerra, buscando atrair trabalhadores qualificados, o que teve efeito benéfico na melhoria da qualificação dos trabalhadores nato-canadenses[13].

No Brasil, com as dificuldades para atrair profissionais mais bem formados, houve uma redução do nível de instrução dos novos imigrantes desde 2000.

11 Pelo Estatuto do Estrangeiro, não estavam obrigados ao registro os titulares dos seguintes vistos temporários: viagem de negócios e artista/ desportista (ambos vistos de curta duração, semelhantes em característica ao visto de visita da nova lei); ministros de confissão religiosa ou membro de instituto de vida consagrada e de congregação ou ordem religiosa; e beneficiário de bolsa vinculada a projeto de pesquisa, desenvolvimento e inovação concedida por órgão ou agência de fomento (nova modalidade de visto temporário, criada pela Lei 13.243/2016).

12 https://en.wikipedia.org/wiki/Foreign_born_scientists_and_engineers_in_the_United_States

13 WHY did Canadian Immigration Policy Change After 1945. Disponível em: <http://faculty.marianopolis.edu/c.belanger/quebechistory/readings/Whytheimmograpationpolicychangedafter1945.html>. Acesso em: 31 maio 2017.

Nível de Instrução	Anos	
	2000	2010
Total	**683.836**	**592.591**
Sem instrução e fundamental incompleto	302.615	226.279
Fundamental Completo e Médio incompleto	117.100	79.571
Médio completo e Superior incompleto	114.810	144.474
Superior Completo	149.311	139.910
Não determinado	0	2.357

Fonte: IBGE, Censos Demográficos de 2000 e 2010. Dados levantados por OLIVEIRA, A. T. O perfil geral dos imigrantes no Brasil a partir dos censos demográficos de 2000 e 2010 *in* Cadernos Obmigra. Revista de migrações internacionais, v. 1., n. 2 (2015).

Grupos ocupacionais	Anos	
	2000	2010
Total	**283.216**	**265.080**
Ocupação mal definida	7.645	28.053
Diretores e gerentes	62.523	33.146
Profissionais das ciências e intelectuais	54.311	62.132
Tec. e prof. nível médio	26.819	19.148
Trab. apoio administrativo	11.945	8.288
Trab. serviços e vendedores	64.679	44.782
Trab.qualif agrop. caça	13.847	8.490
Trab. qual. oper. artesão	33.073	18.698
Oper. Instal e máquinas	3.111	23.099
Ocup. Elementares	4.968	18.972
Membros forças armadas	295	272

Fonte: IBGE, Censos Demográficos de 2000 e 2010. Dados levantados por OLIVEIRA, A. T. O perfil geral dos imigrantes no Brasil a partir dos censos demográficos de 2000 e 2010 *in* Cadernos Obmigra. Revista de migrações internacionais, v. 1., n. 2 (2015).

Na nova lei de migrações, tenta-se reverter o quadro. Enquanto que no Estatuto do Estrangeiro, apenas era possível com um contrato prévio de trabalho, autorização do antigo empregador e necessidade de sair do país por longo período para mudar de emprego, proibição da família trabalhar, na nova lógica, tudo se altera. A ideia da nova lei é o Governo Brasileiro, via CNIG, determinar quais as áreas estratégicas em que há carência de profissionais habilitados, com nível superior. Nesse caso, a entrada do imigrante será bastante facilitada. Portadores de diplomas ou habilidades desejadas poderão vir para o Brasil, mesmo sem contrato prévio de trabalho, para procurar emprego. Os familiares passam a ter direito de residência por motivo de reunião familiar e podem trabalhar normalmente. Toda a família pode e é incentivada a trabalhar no país e ganhar cidadania, integrando-se completamente. É livre a mudança de emprego, sem a necessidade de autorizações dos órgãos de controle, do antigo empregador ou mesmo a saída do país.

6. A abertura humanitária

A nova Lei promove uma ambiência favorável para o tratamento do imigrante acolhido pelo Brasil por razões humanitárias. O Estatuto do Estrangeiro era silente no que tange à acolhida humanitária. Havia, apenas, previsão de emissão de visto ou autorização de residência para reunião familiar (inserida somente pela Lei nº 13.344/2016), de asilo político e de concessão de passaporte para asilado, refugiado e apátrida admitidos no Brasil. Tais previ-

sões, por si só, não habilitavam o país a promover a acolhida humanitária de forma adequada e de acordo com as demandas que chegavam ao poder público.

Tal acolhida, quando feita, era com base em tratados internacionais e atos infralegais, de maneira desordenada e muitas vezes trazendo soluções inseguras e casuísticas. Como exemplo, tem-se a situação dos imigrantes haitianos que não se enquadram nos requisitos para solicitação de refúgio e que foram acolhidos com respaldo em atos do Conselho Nacional de Imigração - CNIg e do Conselho Nacional para os Refugiados (CONARE), como, por exemplo, as antigas Resolução Recomendada CNIg nº 08/2016[14], Resolução Normativa CONARE nº 13/2017[15] e Resolução Normativa CNIg nº 97/2012[16]. Ou seja, atos normativos fragmentados regulavam até o momento a acolhida humanitária, sem o respaldo legal e ainda sob a égide da discricionariedade. A nova Lei sana essa situação de insegurança jurídica e promove a qualificação da acolhida humanitária no país.

A partir de dados do Governo Federal, sabe-se que entre 2010 e 2015 houve um aumento de 2.868% de solicitações de refúgio. No mesmo período, houve aumento de 127% do número de refugiados no Brasil, de 79 nacionalidades diferentes. Em março de 2016, de acordo com o Departamento de Polícia Federal, havia cerca de 90 mil refugiados no Brasil. Com relação aos haitianos, houve a regularização migratória definitiva de mais de 43.000 imigrantes por meio de decisões do CONARE[17].

De acordo com o relatório anual do Alto Comissariado das Nações Unidas para os Refugiados (ACNUR), em 2015, 65,3 milhões de pessoas foram forçadas a deixar o seu país por razões de perseguição, conflito, violência generalizada ou violação de direitos humanos, sendo que 21,3 milhões eram refugiados[18]. Em relação a essas pessoas deslocadas, apenas 35.790 foram acolhidas pelo Brasil no ano de referência. Devido as suas proporções territoriais e à inexistência de guerras ou de grandes tragédias ambientais, o Brasil poderia ser um país mais colaborador no que tange à acolhida humanitária, o que os organismos internacionais, especialmente a Organização Internacional de Migração (OIM) e o ACNUR, demandam às autoridades brasileiras.

A Lei nº 13.445/2017 estabelece, de forma inédita, princípios e diretrizes para a política migratória brasileira (art. 3º). Nesse rol, há a previsão da acolhida humanitária (inciso VI) e da garantia do direito à reunião familiar (inciso VIII), além do repúdio à xenofobia (inciso II) e da não discriminação em razão dos critérios ou procedimentos pelos quais a pessoa foi admitida no país (inciso IV).

Para ingresso no país, é possível a emissão de visto temporário com a finalidade de acolhida humanitária (art. 14, I, c e § 3º). Nos termos da Lei, o visto poderá ser concedido ao apátrida ou ao nacional de qualquer país em situação de grave ou iminente instabilidade institucional, de conflito armado, de calamidade de grande proporção, de desastre ambiental ou de grave violação de direitos humanos ou de direito internacional humanitário. O texto legal, também, de que, em regulamento, outras hipóteses sejam arroladas para a concessão de abre a possibilidade visto temporário de acolhida humanitária.

Para aqueles imigrantes que já estejam em solo brasileiro, é possível obter a residência para fins de acolhida humanitária (art. 30, I, c). O solicitante de refúgio, asilo ou proteção aos apátridas, também, fará jus a autorização de residência até a obtenção de resposta ao seu pedido pelo governo federal (art. 31, § 5º).

Mesmo que a pessoa seja condenada criminalmente no Brasil ou no exterior, ela pode receber autorização de residência (art. 30, § 1º, III). Nesse caso, nada impede de se aplicar medidas de cooperação jurídica internacional (Capítulo VIII), se forem atendidas as exigências para sua aplicação. A transferência de pessoas condena-

14 "Dispõe sobre pedidos de refúgio apresentados ao Comitê Nacional para os Refugiados - CONARE, que a critério deste, possam ser analisados pelo Conselho Nacional de Imigração - CNIg como situações especiais".

15 "Dispõe sobre o encaminhamento, a critério do Comitê Nacional para Refugiados – CONARE, ao Conselho Nacional de Imigração, de casos passíveis de apreciação como situações especiais, nos termos da Resolução Recomendada CNIg nº 08, de 19 de dezembro de 2006".

16 "Dispõe sobre a concessão do visto permanente previsto no art. 16 da Lei nº 6.815, de 19 de agosto de 1980, a nacionais do Haiti" (Prorrogada pela Resolução Normativa CNIG nº 113, até 30 de outubro de 2015)

17 Dados extraídos de "Sistema de Refúgio Brasileiro: Desafios e Perspectivas" (CONARE, Ministério da Justiça, 2016). http://www.acnur.org/t3/fileadmin/Documentos/portugues/Estatisticas/Sistema_de_Refugio_brasileiro_-_Refugio_em_numeros_-_05_05_2016.pdf

18 ACNUR. "Global Trends - Forced displacement in 2015". Link para a versão em inglês: https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf

das, por exemplo, pode ser executada para fins humanitários, uma vez que pode facilitar a reinserção social do beneficiado se ele cumprir sua pena em solo pátrio.

Com relação aos institutos de acolhida humanitária, destaca-se que, na nova Lei, há capítulos e seções que integrados, e alinhados à Lei de Refúgio (Lei nº 9.474/1997), criam um verdadeiro sistema nacional de acolhimento por razões humanitárias. No Capítulo III, que versa sobre a condição jurídica do migrante, há seções inteiras sobre proteção do apátrida, asilo político e reunião familiar, dispositivos em sua maioria inexistentes no Estatuto do Estrangeiro.

As medidas de retirada compulsória (repatriação, deportação e expulsão), após o advento da nova Lei, deverão observar a Lei de Refúgio, as disposições legais, tratados, instrumentos e mecanismos que tratem da proteção aos apátridas e de outras situações humanitárias antes de serem efetivadas (art. 46). Ademais, ainda nos princípios da política migratória brasileira, há o repúdio a práticas de expulsão ou de deportação coletivas (art. 3º, XXI), que se materializa em vedação explícita no art. 61, incluindo a repatriação coletiva, práticas geralmente contrapostas ao acolhimento humanitário. Há, apenas, uma ressalva com relação à repatriação de menor de 18 anos desacompanhado ou separado de sua família, em situação de refúgio ou de apátrida, que poderá ser repatriado caso tal medida se demonstrar favorável para a garantia de seus direitos ou para a reintegração a sua família (art. 49, § 4º).

Um aspecto importante que deriva da acolhida humanitária é a simplificação do registro e da identificação civil do imigrante. Nos termos do art. 20, a identificação civil de solicitante de refúgio, de asilo, de reconhecimento de apátrida e de acolhimento humanitário poderá ser realizada com a apresentação dos documentos de que o imigrante dispuser. Sabe-se que muitas vezes o imigrante acolhido por razões humanitárias chega ao país em condições penosas e sem documentos de viagem formalmente aceitos.

Com relação à regulamentação, o desafio maior, quando se fala em acolhida humanitária, é garantir o embasamento normativo para a simplificação procedimentos, uma vez que se está lidando com imigrantes vulneráveis. A diminuição das instâncias institucionais que devem avaliar a situação do solicitante promoveria desburocratização, bem como a automação dos processos. A sofisticação dos sistemas e o fomento a sua interoperabilidade facilitariam a vida dos imigrantes, além de diminuir os custos para o poder público.

Um outro desafio é garantir ao imigrante acolhido a possibilidade do livre exercício de atividade laboral ou de estudos, para que ele consiga se integrar da melhor forma possível ao novo país. Também é importante prever formas de acesso facilitado ao país e aos serviços públicos, como flexibilização de requisitos para emissão de visto temporário de acolhida humanitária e discricionariedade para emissão desse tipo de visto em situações não previstas, mas que geram deslocamentos migratórios consideráveis.

Para além de aspectos normativos, o novo *status* da acolhida humanitária no Brasil terá como consequência a adequação de políticas públicas, especialmente no que tange às políticas sociais, para atendimento da população imigrante. Entre os princípios da nova Lei, há também a inclusão social, laboral e produtiva do migrante por meio de políticas públicas (art. 3º, X), além do acesso igualitário e livre do migrante a serviços, programas e benefícios sociais, bens públicos, educação, assistência jurídica integral pública, trabalho, moradia, serviço bancário e seguridade social. Adicionalmente, entre o rol dos direitos e garantias do migrante, há a previsão de acesso a serviços públicos de saúde e de assistência social e à previdência social, sem discriminação em razão da nacionalidade ou condição migratória (art. 4º VII), à assistência jurídica gratuita, quando houver hipossuficiência (inciso IX) e direito à educação pública (inciso X).

Atualmente, há iniciativas da rede de atendimento para adequar alguns serviços a esse público-alvo. Por meio de convênios com a Secretaria Nacional de Justiça do Ministério da Justiça e Segurança Pública, hoje já há dois Centros de Referência e Acolhida de Migrantes e Refugiados (Rede CRAI) em São Paulo e há um esforço de se estabelecer outros centros em parcerias com Estados e Municípios.

No que tange à inserção no mundo do trabalho do imigrante acolhido por razões humanitárias, já há a descentralização da emissão de carteiras de trabalho pelos Estados, especialmente aqueles que recebem fluxo migratório maior. O Programa Nacional de Acesso ao Ensino Técnico e Emprego (Pronatec) inseriu em seu catálogo de cursos o curso de Língua Portuguesa e Cultura Brasileira para Estrangeiros em nível básico

e intermediário[19] e, em parceria com o Ministério da Justiça e Segurança Pública e órgãos estaduais, já promoveu turmas em São Paulo e Rio de Janeiro, com foco em refugiados. O Serviço Brasileiro de Apoio às Micro e Pequenas Empresas (Sebrae), em parceria com o CONARE e com o apoio do ACNUR organizou o projeto Refugiado Empreendedor na Escola de Negócios do Sebrae São Paulo, com o objetivo de capacitar refugiados e imigrantes deslocados em técnicas e temas referentes à abertura de empresa no Brasil[20].

Apesar dos esforços pontuais para inserção dos imigrantes nas políticas sociais nacionais, o desafio, ainda, é grande. Temas como revalidação de diplomas, reassentamento de refugiados, acesso à moradia via programas sociais como Minha Casa, Minha Vida, acesso ao Benefício de Prestação Continuada da Assistência Social - BPC, entre outros, estão postos na agenda migratória brasileira e deverão ser enfrentados para que a acolhida humanitária não seja veículo de revitimização de imigrantes vulneráveis.

Com a nova Lei, o arcabouço normativo estimula a inclusão social dos imigrantes e a promoção dos seus direitos por meio da implementação de políticas públicas em igualdade com os brasileiros ou, quando for o caso, com o recorte necessário para esse público específico.

7. Considerações finais

A nova lei de migrações consolida uma nova visão, mais humanista e integradora, dos cidadãos brasileiros. procura-se construir por meio de uma política pública, mecanismos para facilitar a entrada e a integração dos estrangeiros que desejem vir ao Brasil. Facilita-se a concessão de vistos, para públicos desejados, a residência e mesmo a naturalização como brasileiro.

O desafio agora é criar mecanismos de simplificação, transparência e controle dos novos imigrantes. A partir de quando todos os estrangeiros que vierem viver no país estiverem com identificação biométrica nacional, com CPF, será possível realizar um controle muito mais efetivo de suas vidas e viabilizar a sua integração produtiva do que a simples exigência de sua presença de tempos em tempos em um posto da polícia federal. A nova lei garante liberdade, ao mesmo tempo que viabiliza segurança, por meio de controles eletrônicos de vínculos de trabalho, que até então não existiam. A facilitação, transparência e simplificação devem contribuir, também, para que o Brasil receba um número maior de imigrantes qualificados, que podem suprir lacunas estratégicas para o desenvolvimento nacional.

19 De acordo com Guia Pronatec de Cursos de Formação Inicial e Continuada - Eixo Tecnológico: Desenvolvimento Educacional e Social. Carga horária mínima: 160 horas.

20 Maiores informações na Agência Sebrae de Notícias: http://www.agenciasebrae.com.br/sites/asn/uf/NA/empreendedorismo-e-opcao-para-refugiados,488a1923a03d3510VgnVCM1000004c00210aRCRD

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Reform of the United Nations Security Council: The Emperor Has No Clothes*

Reforma do Conselho de Segurança das Nações Unidas: O Imperador nu

Ljubo Runjic**

'When all the world as it is today, at war – piecemeal though that war may be – a little here, a little there, and everywhere – there is no justification – and God weeps. Jesus weeps.'

Pope Francis[1]

Abstract

Although the United Nations General Assembly included the issue of the Security Council's reform on its agenda in 1992, the negotiations on this vital issue haven't broken the impasse even after a quarter of a century. At the same time we have testified to a series of major armed conflicts worldwide. This article emphasizes the need for an urgent reform of the Security Council, i.e. unacceptability of its further postponement, because the Council has largely failed in performing its main function – maintenance of international peace and security. Furthermore, the Security Council has no longer the necessary credibility, legitimacy and representativeness for the enactment and implementation of key decisions. The article analyzes key issues of the reform of the Security Council and proposes some possible solutions regarding the composition of the Council and the issue of veto. Finally, the article reviews the unsuccessful efforts to reform the Council with a special emphasis on the events on the eve of the 70th anniversary of the United Nations.

Keywords: United Nations. Security Council. Reform.

Resumo

Embora a Assembleia Geral das Nações Unidas tenha incluído a questão da reforma do Conselho de Segurança em sua agenda em 1992, as negociações sobre essa questão vital não lograram êxito, mesmo depois de um quarto de século. Ao mesmo tempo, testemunhamos uma série de grandes conflitos armados no mundo todo. Este artigo enfatiza a necessidade de uma reforma urgente da Conselho de Segurança, ou seja, a inaceitabilidade de seu adiamento adicional, porque O Conselho falhou em grande parte na execução de sua principal função, a manutenção da paz e da segurança in-

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POPE, Francis. The Lord weeps for the sins of a world at war. 2015. Available at: http://en.radiovaticana.va/news/2015/11/19/pope_francis_the_lord_weeps_for_the_sins_of_a_world_at%20_%20war_/1187974
Accessed on: 11 nov. 2016.

1 POPE, Francis. *The Lord weeps for the sins of a world at war.* 2015. Available at: <http://en.radiovaticana.va/news/2015/11/19/pope_francis_the_lord_weeps_for_the_sins_of_a_world_at%20_%20war_/1187974> Access on: 11 nov. 2016.

ternacionais. Além disso, o Conselho de Segurança não tem mais a credibilidade, a legitimidade e a representatividade necessárias para a promulgação e a implementação de decisões-chave. O artigo analisa as importantes questões da reforma do Conselho de Segurança e propõe algumas possíveis soluções relativas à composição do Conselho e à questão do veto. Finalmente, o artigo analisa os esforços infrutíferos para reformar o Conselho com uma ênfase especial nos eventos na véspera do 70º aniversário de as Nações Unidas.

Palvras-chave: United Nations, Security Council, Reform

1. Introduction

If we look at the Article 1 of the United Nations Charter,[2] we will see that the main purpose of the United Nations is to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace. Article 24 of the Charter entrusts the Security Council with the primary responsibility for the maintenance of international peace and security, thus making it the most important body within the United Nations. Furthermore, Article 25 of the Charter stipulates the binding effect of the Security Council's decisions for all United Nations Member States, while Article 39 specifies that the Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression.[3] Finally, Article 41 provides that the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, while Article 42 enables the Security Council to use force as may be necessary to maintain or restore international peace and security. In this way, considering that the use of force is prohibited in the international law,[4] except in the case of self-defence,[5] the states have given the monopoly on the use of force to the Security Council, which has thus become the key player in the United Nations' collective security system. Moreover, the founders of the United Nations gave the right to veto the Council's decisions in the previously mentioned cases only to the five permanent members of the Security Council, thus making them morally most responsible for the maintenance of international peace and security.

Unfortunately, in its seven decades of existence, the United Nation's most powerful body – the Security Council – has largely demonstrated inefficiency in

2 For the text of the Charter see: UNITED NATIONS. *Charter of the United Nations*. Available at: <http://www.un.org/en/charter-united-nations/> Access on: 11 nov. 2016.

3 Although there is no definition of aggression (initiation of war) in the current international law, we can emphasize Resolution 3314 (XXIX) of the United Nations General Assembly, which approves the definition of aggression. Article 1 of the Resolution defines aggression as the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or the use of armed force in any other manner inconsistent with the UN Charter. Article 2 specifies that the first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may conclude that such a determination would not be justified in the light of other relevant circumstances. Article 3 enumerates acts which could be qualified as acts of aggression, while Article 4 stipulates that the enumerated acts are not exhaustive and that the Security Council may determine that other acts constitute aggression under the provisions of the Charter. See: UNGA Res. 3314 (XXIX) (14 December 1974). See also CASSESE, Antonio. *International Law*. Oxford: Oxford University Press, 2001. p. 256-259; BROWNLIE, Ian. *Principles of Public International Law*. 7. ed. Oxford: Oxford University Press, 2008. p. 591-592, 735-737; DINSTEIN, Yoram. *War, Aggression and Self-Defence*. 5. ed. Cambridge: Cambridge University Press, 2012. p. 124-162. The other two concepts – 'threat to peace' and 'breach of peace' – have never been defined, and depend on the discretionary decision by the Security Council, depending on the case.

4 For centuries, the right to war was one of the fundamental rights of every sovereign country. However, after the adoption of the Kellogg-Briand Pact from 1928, war was prohibited, and the right to start a war (aggression) became prohibited for the first time in the international customary law. Article 1 of the Kellogg-Briand Pact stipulates: 'The High Contracting Parties solemly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.' See: LEAGUE OF NATIONS. General Treaty for Renunciation of War as an Instrument of National Policy (signed 27 August 1928) 94 LNTS 57. Available at: <https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2094/v94.pdf> Accessed on: 18 nov. 2016.

Article 2(4) of the UN Charter stipulates: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

5 Article 51 of the UN Charter stipulates: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

performing its main function. It is enough to mention the recent armed conflicts which took place on the territory of Afghanistan, Iraq, Sudan, Libya and Syria, to understand that the existing collective security system of the United Nations led by the Security Council does not function. It was adapted to the circumstances from 1945, but since then the picture of the world has changed completely.[6] Instead of massive ground, air and naval attacks, threats to international peace and security have assumed another, entirely new and different dimension which the authors of the Charter obviously could not have envisaged.[7] Threats are no longer posed by wars among states alone; now they are a lot more subtle, more sophisticated, more vicious and more dangerous. We are living in a time when bloody civil wars are raging around the globe, usually concealing genocide and ethnic cleansing. Furthermore, we are also faced with the problem of terrorism which knows no state boundaries and pays no heed to the casualties and consequences. Closely related to terrorism is the proliferation of weapons of mass destruction. If we continue to list the new threats such as humanitarian crises, poverty, hunger, environmental pollution and non-democratic regimes, we will come to realize that the existing Security Council is inadequate for the 21st century. This is partially due to the fact that, unlike the threats to international peace and security which have changed considerably over the past seven decades, the Security Council as the key player in the collective security system of the United Nations remained the same, trapped in the past of Dumbarton Oaks and Yalta.

Precisely for this reason, a reform of the Security Council is a priority, not only for the Organization whose primary purpose is the maintenance of international peace and security, but for all its Member States as well, which entrusted the Security Council with the primary responsibility of accomplishing that purpose, and ultimately for the humanity itself, which bears the consequences of the Security Council's functioning.[8] Although the topic of the Security Council's reform was first raised at the summit of the non-aligned countries in Jakarta in 1992,[9] and the same year the United Nations General Assembly included the issue of the Security Council reform on its agenda,[10] we testify to the unfortunate fact that negotiations on this vital issue are still at an impasse, even after almost a quarter of a century. Moreover, an institutional reform of the United Nations, whose main focus is the reform of the Security Council, represents one of the main elements of the overall reform of the United Nations which was presented in 2004 in the Report of the High-Level Panel on threats, challenges and changes, entitled *A More Secure World: Our Shared Responsibility*.[11] Any efforts to transform the United Nations into a strong and efficient organization, which will be able to face challenges, threats and changes of the 21st century, primarily depends on the institutional capacity of the United Nations to adapt to the new circumstances. Therefore, the key, and certainly the most controversial issue regarding the overall reform of the United Nations is the reform of the Security Council – the keeper of the international peace and security.

2. Twenty-first century: world at war

According to the Uppsala Conflict Data Program (UCDP), which is one of the world's leading data providers regarding armed conflicts,[12] in 2001 – 2015 period the recorded number of armed conflicts per year ranged between 31 to 50.[13] Moreover, precisely in 2015 UCDP recorded 50 armed conflicts – second largest number

6 See e.g. YOO, John C. Force Rules: UN Reform and Intervention. *Chicago Journal of International Law*, v. 6, n. 2, p. 644-645, 2006.

7 See e.g. FRANCK, Thomas M. Collective Security and UN Reform: Between the Necessary and the Possible. *Chicago Journal of International Law*, v. 6, n. 2, p. 600, 2006.

8 See e.g. SPAIN, Anna. The U.N. Security Council's Duty to Decide. *Harvard National Security Journal*, v. 4, p. 320, 2013.

9 See: NON-ALIGNED COUNTRIES. Tenth Conference of Heads of State or Government of Non-Aligned Countries, 'The Jakarta Message: A Call for Collective Action and the Democratization of International Relations' (6 September 1992) NAC 10/Doc 12/Rev 1. Available at: <s://disarmament-library.un.org/UNODA/Library.nsf/2b805de29c38b2fa85257631004b2105/a716c283e6ce532a8525779200672575/$FILE/A-47-675-S-24816_Indonesia-Jakarta%20msg-10th%20Conf%20of%20NAM.pdf> Accessed on: 26 nov. 2016.

10 See: UNGA Res. 47/62 (11 December 1992).

11 See: UNITED NATIONS. *A More Secure World:* Our Shared Responsibility. New York: United Nations, 2004.

12 An armed conflict is defined by the UCDP as a contested incompatibility that concerns government or territory or both where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths in a year. UCDP definitions can be found at <http://www.pcr.uu.se/research/ucdp/definitions/> Access on: 3 dec. 2016.

13 MELANDER, Erik; PETTERSON, Therése; THEMNÉR, Lotta. Organized Violence, 1989-2015. *Journal of Peace Research*, v. 53, n. 5, p. 729, 2016.

of armed conflicts in the entire post World War II period.[14] If we examine a broader time span, from 1946 to 2015, we will get an even clearer insight into the number of armed conflicts in the 21st century. By the 1950s and 1960s, the average number of armed conflicts per year was under 20, after which it started to increase, having reached the number of 30 armed conflicts a year in the mid 1970s.[15] During the 1980s and 1990s, the number of armed conflicts per year was mainly over 40. Although the number of armed conflicts in the course of the last fifteen years is smaller than those recorded in the 1980s and 1990s, it is still relatively high with regard to the entire observed period from 1946 to 2015. Data from the Conflict Barometer – another program which collects and systematizes data on conflicts – also confirm this constatation.[16] According to the Conflict Barometer data, 20 wars were recorded in 2011, which at the time represented the largest number of wars since 1945.[17] This number was repeated in 2013, which again recorded 20 wars, while 2014 marked a new record with as many as 21 wars.[18] In 2015, the number of wars remained high at 19.[19]

Armed conflicts in the 21st century resulted in numerous consequences, however, the worst one of them are millions of human lives lost. Despite that, it is impossible to determine the exact number of armed conflict-related deaths in this century, because the majority of parties involved in conflicts do not provide full and accurate information on the matter, and because of difficulties in obtaining data from the areas in which the conflicts are taking place. Additionally, various research studies dealing with the number of casualties in armed conflicts also use different methodologies, which in turns leads to different estimates of the number of casualties in certain conflicts. Nonetheless, the aim of this article is not to determine the exact figures, but to use some of the relevant studies to examine and present at least approximate estimates of the number of human lives lost in the most significant armed conflicts of this century, and to indicate the current trends, which will in turn help us form a clearer picture of the international peace and security in the 21st century. According to one of the studies, based on field research, the war in Iraq has resulted in the loss of 654 965 human lives since the beginning of the invasion in March 2003 until June 2006.[20] Another study, also based on field research, estimates that 461 000 deaths in the period between March 2003 and June 2011 can be attributed to the war in Iraq.[21] Finally, in their research based on a comprehensive overview of the main studies and data on the number of casualties in Iraq, Afghanistan and Pakistan, the Nobel Peace Prize winner – International Physicians for the Prevention of Nuclear War (IPPNW) – published their own assessment in 2014, according to which there were approximately one million casualties of war in Iraq, 220 000 casualties of war in Afghanistan, and 80 000 in Pakistan; in other words, a total of approximately 1,3 million people were killed in the period between 2001 and 2013.[22] Moreover, this is a conservative assessment according to the IPPNW, considering the fact that the total number of casualties in these three countries could amount to two million.[23] Another significant armed conflict, the one in Syria, has been taking a grave human toll in the past several years. According to a study commissioned by the United Nations Office of the High Commissioner for Human Rights (UNHCR),

14 MELANDER, Erik; PETTERSON, Therése; THEMNÉR, Lotta. Organized Violence, 1989-2015. *Journal of Peace Research*, v. 53, n. 5, p. 729, 2016.

15 MELANDER, Erik; PETTERSON, Therése; THEMNÉR, Lotta. Organized Violence, 1989-2015. *Journal of Peace Research*, v. 53, n. 5, p. 729, 2016.

16 HEIDELBERG INSTITUTE FOR INTERNATIONAL CONFLICT RESEARCH. *Conflict Barometer 2014*. Heidelberg: HIIK, 2015. p. 15-16.

17 HEIDELBERG INSTITUTE FOR INTERNATIONAL CONFLICT RESEARCH. *Conflict Barometer 2011*. Heidelberg: HIIK, 2012. p. 2.

18 HEIDELBERG INSTITUTE FOR INTERNATIONAL CONFLICT RESEARCH. *Conflict Barometer 2014*, Heidelberg: HIIK, 2015. p. 15.

19 HEIDELBERG INSTITUTE FOR INTERNATIONAL CONFLICT RESEARCH. *Conflict Barometer 2015*. Heidelberg: HIIK, 2016. p. 13.

20 BURNHAM, Gilbert et al. Mortality After the 2003 Invasion of Iraq: A Cross-sectional Cluster Sample Survey. *The Lancet*, v. 368, p. 1421, 2006.

21 HAGOPIAN, Amy et al. Mortality in Iraq Associated with the 2003-2011 War and Occupation: Findings from a National Cluster Sample Survey by the University Collaborative Iraq Mortality Study. *PLOS Medicine*, v. 10, n. 10, p. 10, 2013.

22 INTERNATIONALE ÄRZTE FÜR DIE VERHÜTUNG DES ATOMKRIEGES/ÄRZTE IN SOZIALER VERANTWORTUNG; PHYSICIANS FOR SOCIAL RESPONSIBILITY; PHYSICIANS FOR GLOBAL SURVIVAL. *Body Count* – Casualty Figures after 10 Years of the 'War on Terror' – Iraq, Afghanistan, Pakistan. Washington DC, Berlin, Ottawa: IPPNW, 2015. p. 15.

23 INTERNATIONALE ÄRZTE FÜR DIE VERHÜTUNG DES ATOMKRIEGES/ÄRZTE IN SOZIALER VERANTWORTUNG; PHYSICIANS FOR SOCIAL RESPONSIBILITY; PHYSICIANS FOR GLOBAL SURVIVAL. *Body Count* – Casualty Figures after 10 Years of the 'War on Terror' – Iraq, Afghanistan, Pakistan. Washington DC, Berlin, Ottawa: IPPNW, 2015. p. 15.

from the beginning of conflicts in March 2011 until April 2014, 191 369 conflict-related deaths were recorded in Syria,[24] while the Syrian Centre for Policy Research (SCPR), non-governmental organization based in Syria, published their assessment according to which 470 000 people were killed in the conflicts in Syria by the end of 2015.[25] Finnaly, in April 2016, Staffan de Mistura, United Nations Special Envoy for Syria, estimated that some 400 000 people had been killed in the past five years of war in Syria.[26]

One of the most significant armed conflicts which marked the beginning of the **21st century is certainly the conflict in Darfur** (Sudan). Although the conflict which started in February 2003 is still ongoing, having entered its 15th year, the available research and data on the number of casualties refer only to the first several years of conflict. On the basis of the conducted field research, back in April 2005 the Coalition for International Justice published that the number of casualties in Darfur in the first two years of conflicts was approximately 400 000,[27] which is the number mentioned by other researches, such as Reeves.[28] Certain authors had different opinions: on the basis of a field research conducted by the World Health Organization and Médecins Sans Frontières, in 2006 Hagan and Palloni offered their assessment according to which approximately 200 000 people were killed in the first 31 months,[29] while Degomme and Guha-Sapir estimated that 298 271 people were killed in the period from the early 2004 to the end of 2008, thereby not taking into consideration the entire year 2003, which has so far been the most violent year of the conflict.[30] In 2008, the United Nations published their assessment according to which approximately 300 000 people were killed in Darfur.[31] Despite the various assessments, it is obvious that it involved hundreds of thousands of casualties; moreover, because the conflicts in the area of Darfur, although reduced in intensity, are still ongoing, it is likely that the number of casualties has already exceeded half a million. Finally, apart from the previously mentioned figures regarding human lives lost in the major armed conflicts of the 21st century, also alarming is the pronounced tendency towards an increase in the overall number of casualties of armed conflicts over the past several years. According to an assessment by UCDP, 70 451 people were killed in the armed conflicts in 2013, which represents an increase of 85% with regard to 2012, when 37 992 people were killed.[32] Moreover, in the course of 2014, there were 101 406 casualties of armed conflicts, which represents an increase of 44% with regard to the previously mentioned year 2013.[33] In September 2016, UCDP published their last assessment according to which over 97 000 deaths incurred in armed conflicts in 2015, the third--worst year in the post-Cold War period.[34]

One of the consequences of 21st century armed conflicts, which has assumed cataclysmic proportions over the past several years, are tens of millions of forcibly displaced persons. Thus, four years ago, UNHCR announced that there were 45,2 million forcibly displaced persons in 2012, which represents the largest number of displaced persons since 1994, in which 47 million of forcibly displaced persons were registered.[35] Within this number, as many as 15.4 million people were refugees. Moreover, according to the UNHCR data, as many as 51,2 million of forcibly displaced persons were recorded in 2013, from which there were 16,7 million

24 PRICE, Megan; GOHDES, Anita; BALL, Patrick. *Updated Statistical Analysis of Documentation of Killings in the Syrian Arab Republic*. 2014. Available at: <http://www.ohchr.org/Documents/Countries/SY/HRDAGUpda tedReportAug2014.pdf> Access on: 7 jan. 2017.

25 SYRIAN CENTRE FOR POLICY RESEARCH. *Confronting Fragmentation!* 2016. p. 61. Available at: <http://scprsyria. org /publications/policy-reports/confronting-fragmentation/> Access on: 7 jan. 2017.

26 See: <http://www.unmultimedia.org/radio/english/2016/04/syria-envoy-claims-400000-have-died-in-syria-con flict/#.WHNbJPkrKUk> Access on: 7 jan. 2017.

27 COALITION FOR INTERNATIONAL JUSTICE. *Chronology of Reporting on Events Concerning the Conflict in Darfur, Sudan*. Washington DC, The Hague: CIJ, 2006. p. 336.

28 REEVES, Eric. How Many Dead in Darfur? *The Guardian*, London, 20 Aug. 2007.

29 HAGAN, John; PALLONI, Alberto. Death in Darfur. *Science*, v. 313, 2006. p. 1579.

30 DEGOMME, Olivier; GUHA-SAPIR, Debarati. Patterns of Mortality Rates in Darfur Conflict. *The Lancet*, v. 375, p. 294, 2010.

31 FARLEY, Maggie. U.N. Puts Darfur Death Toll at 300,000. *Los Angeles Times*, Los Angeles, 23 Apr. 2008.

32 PETTERSSON, Therése; WALLENSTEEN, Peter. Armed Conflicts, 1946-2014. *Journal of Peace Research*, v. 52, n. 4, p. 538, 2015.

33 PETTERSSON, Therése; WALLENSTEEN, Peter. Armed Conflicts, 1946-2014. *Journal of Peace Research*, v. 52, n. 4, p. 538, 2015.

34 MELANDER, Erik; PETTERSON, Therése; THEMNÉR, Lotta. Organized Violence, 1989-2015. *Journal of Peace Research*, v. 53, n. 5, p. 727, 2016.

35 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES. *UNHCR Global Trends 2012:* Displacement, The New 21st Century Challenge. 2013. Available at: <http://www.unhcr.org/statistics/countr y/51bacb0f9/unhcr-global-trends-2012.html> Access on: 14 jan. 2017.

refugees.[36] In 2014 the number of forcibly displaced persons reached 59,5 million – a level which has not been recorded since the Second World War, while the number of refugees reached 19,5 million.[37] Finally, in 2015 the number of forcibly displaced persons reached an all-time high for a fourth consecutive year. UNHCR recorded unprecedented 65,3 million forcibly displaced persons, including 21,3 million refugees.[38] Unfortunately, much like the number of persons killed in armed conflicts, also alarming is the pronounced tendency towards a sharp increase in the number of forcibly displaced persons in the past few years. Thus, only in the period 2012-2015, the number of forcibly displaced persons increased by 44%, while at the same time the number of refugees increased by 38%. Moreover, it is expected that new negative records will be set in 2016 with regard to the number of forcibly displaced persons, considering the fact that armed conflicts have continued at the same or even higher intensity in 2015, and some conflicts which were thought to be over (e.g. Lybia) have been re-activated.

So far presented dana are more than enough to illustrate the real picture of international peace and security in the 21st century. In fact, they are the key evidence that the Security Council does not perform its main task, at least not with much success. To say that we are currently living in a peaceful and safe world, after everything we have previously mentioned, would be a lie. Considering the fact that the existing collective security system is based on the Security Council, an urgent reform of this body of the United Nations imposes itself as an imperative for the entire international community.

3. Key issues of the reform of the security council

Over the past 25 years, several issues related to the reform of the Security Council have become apparent: categories of membership, the question of the veto, regional representation, size of an enlarged Security Council and working methods of the Council, and the relationship between the Council and General Assembly.[39] Unfortunately, the problem of the Council's functioning is much more complex, because the essence of the problem lies in the contrasting interests of the five permanent members of the Security Council.[40] Nonetheless, solving these issues could certainly help improve the functioning of the Council, and therefore the maintenance of international peace and security. Although it is obvious that the primary goal of the reform is to extend the membership of the Security Council, all five issues are interconnected, and a comprehensive solution which would encompass other issues apart from the structural ones, like, for example, the decision-making process, could increase the capability and efficiency of the Council.

Extension of the membership of the Security Council stems from the criticism of the Council's current membership. The foundations of its present-day membership were laid at the Dumbarton Oaks Conference in 1944. It was then that the representatives of China, the Soviet Union, the United Kingdom and the United States agreed that the Security Council shall consist of five permanent and six non-permanent members, which was afterwards approved by the other United Nations founder states at the San Francisco Conference in June 1945.[41] The five permanent seats were shared between China, France, the Soviet Union, the United Kingdom and the United States. Considering the fact that the number of United Nations Member States grew rapidly, amendments to the Charter were adopted in 1965, anticipating 10 non-permanent members along with the

36 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES. *UNHCR Global Trends 2013: War's Human Cost*. 2014. Available at: <http://www.unhcr.org/statistics/country/5399a14f9/unhcr-global-trends-2013.html> Access on: 14 jan 2017.

37 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES. *UNHCR Global Trends 2014: World at War*. 2015. Available at: <http://www.unhcr.org/statistics/country/556725e69/unhcr-global-trends-2014.html> Access on: 14 jan. 2017.

38 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES. *UNHCR Global Trends: Forced Displacement in 2015*. 2016. Available at: <http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html> Access on: 14 jan. 2017.

39 See: UNITED NATIONS. *Resolutions and Decisions adopted by the General Assembly during its sixty-second session*. 23 December 2007 – 15 September 2008. New York: United Nations, 2008. v. 3. p. 106-107.

40 See e.g. BUTLER, Richard. Reform of the United Nations Security Council. *Penn State Journal of Law & Internationl Affairs*, v. 1, n. 1, p. 34, 2012.

41 US DEPARTMENT OF STATE. *Dumbarton Oaks Documents* on *International Organization*. Washington: US Department of State, 1944. p. 12.

five permanent ones.[42] Unlike the five permanent members of the Council, which were individually specified in the Charter, the election of non-permanent members is based on two criteria. Thus, Article 23 of the Charter stipulates that the General Assembly shall elect the 10 non-permanent members of the Security Council by paying special regard, in the first instance to their contribution to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution. According to the usual practice, the 10 non-permanent members are elected from five regions: five from Africa and Asia, one from the Eastern Europe, two from Latin America, and two from the Western Europe and 'the rest of the world'. Non-permanent members are elected for two-year terms, without the possibility for immediate re-election.

The current membership of the Security Council was perhaps suitable for the time of Dumbarton Oaks in 1944, however, it is completely incongruous with the time in which we live.[43] Geopolitical, military, demographic and economic picture of the world has changed utterly in comparison with the one in the aftermath of the Second World War. In the past 71 years, primarily due to decolonization, the number of United Nations members has quadrupled in comparison with the number of founding members in 1945.[44] At the same time, also due to decolonization, former colonial powers (France, United Kingdom) lost significant parts of their territories, on which their power was based. On the other hand, new military powers such as India have emerged,[45] while Japan and Germany, which rose like a phoenix from the ashes of the Second World War, today represent the third and the fourth largest economy in the world respectively.[46] Moreover, due to the economic power of Japan and Germany, it was decided that they shall contribute with 9,68% and 6,38%, respectively, to the regular United Nations' budget for the period 2016-2018.[47] If we compare this to other Member States, it becomes clear that their contributions are the second and third largest one. The largest contribution is made by the United States – 22%, while China contributes with 7,92%, France with 4,85%, the United Kingdom with 4,46%, and Russia with 3,08%.[48] Furthermore, thanks to the demographic growth, populations of India, Indonesia, Brazil and Pakistan combined make up one fourth of the total world population,[49] while soldiers from those countries contribute significantly to the United Nations' peacekeeping operations worldwide.[50] It is obvious that some countries, with regard to their financial and military contributions to the United Nations as well as to their military force, economic power and population size, are not adequately represented in the United Nations, and especially in its most important body – the Security Council. Also, there is the issue of the permanent African seat in the Council, as it is unfair that not a single permanent member of the Council comes from the continent whose countries make up more than one fourth of the total United Nations membership.[51]

On the basis of the previously mentioned observations, we can say that the Security Council no longer has the necessary credibility, legitimacy and representativeness which are necessary for the enactment and implementation of key decisions.[52] As Giegrich rightly

42 UNGA Res 1991 (XVIII) (17 December 1963).

43 See e.g. BLUM, Yehuda Z. Proposals for UN Security Council Reform. *American Journal of International Law*, v. 99, n. 3, p. 637-638, 2005; ANDERSON, Kenneth. United Nations Collective Security and the United States Security Guarantee in an Age of Rising Multipolarity: The Security Council as the Talking Shop of the Nations. *Chicago Journal of International Law,* v. 10, n. 1, 2009. p. 83.

44 Currently there are 193 Member States of the United Nations. After the decolonization process and admission of the former colonies into the membership of the United Nations, the last significant expansion took place after the end of the Cold War when the countries which emerged after the fall of the Soviet Union, former Yugoslavia and Czechoslovakia became United Nations Member States. The last admitted Member States were Switzerland and East Timor (2002), Montenegro (2006) and South Sudan (2011).

45 See: <http://www.globalfirepower.com/> Access 18 jan. 2017.

46 See: WORLD BANK. *World Development Indicators 2015*. Washington: World Bank Group, 2015. p. 24-28.

47 See: UNGA Res 70/245 (23 December 2015).

48 See: UNGA Res 70/245 (23 December 2015).

49 According to the 2016 data, India, as the second largest population in the world, has 1,3 billion inhabitants, while Indonesia has 260 million, which puts it in the fourth place on the global scale in terms of population. Brazil is in the fifth place with 209 million people, and Pakistan is the sixth with 193 million people. See: <http://www.geohive.com/> Access on: 18 jan. 2017.

50 See e.g. BLUM, Yehuda Z. Proposals for UN Security Council Reform. *American Journal of International Law*, v. 99, n. 3, p. 638-639, 2005; see also <http://www.un.org/en/peacekeeping/resources/statistics/contributor s.shtml > Access on: 20 jan. 2017.

51 The distribution of permanent seats in the Security Council indeed does not comply with the democratic standards of the 21st century. Five permanent seats in the Security Council are distributed between Europe (3), Asia (1) and North America (1). In this distribution, Central and South America, Africa and Australia were left empty-handed. See e.g. Anderson (n 61) 83.

52 UNITED NATIONS. *A More Secure World:* Our Shared Responsibility. New York: United Nations, 2004. p. 64.

observed, 'the Security Council is no longer representative of the international community as a whole nor of today's geopolitical realities'.[53] Precisely for this reason, it is becoming increasingly difficult to attribute the Security Council's decisions to those countries which are not represented in it (88% of the United Nations membership) and their population which amounts to approximately two thirds of the world population.[54] This can be changed only if all main players on the global scene, as well as other more important countries from the broader United Nations membership – which would ensure an equitable geographic representation in the Council – are included in the Council's decision-making process through the permanent membership in the Council. Furthermore, according to the recommendations of the Panel, when extending the membership, it is necessary to take into consideration the countries which contribute the most to the Organization in terms of finances, military and diplomacy.[55] The previously mentioned criteria should serve as the guidelines for electing new permanent members of the Security Council. If any new category of membership in the Council is introduced (e.g. long-term non-permanent membership), it is necessary to define the election criteria for that category. An expansion of the existing membership categories, or introduction of new ones, will define the size of the Council, which is important with regard to the Council's working methods (e.g. the number of votes required for adoption of decisions).

The issue of the veto has been one of the most controversial issues since the establishment of the United Nations. At the Yalta Conference in 1945 – the meeting of the 'Big Three' heads of state – the Soviet Union, the United Kingdom and the United States – a consensus was reached on the decision-making process in the Security Council. According to the so-called 'Yalta formula', the five permanent members of the Council were given the right to veto the Council's decisions on all non-procedural matters, including those decisions regarding actions to be undertaken in case of threats to the peace, breaches of the peace, and acts of the aggression.[56] At that time, it was believed that only those countries were able to guarantee peace and security, primarily due to their military potential.[57] By giving the right of veto to the five permanent members of the Security Council, one of the greatest contradictions regarding the existence of the United Nations was created. The very idea of establishment and functioning of the United Nations was based on a sovereign equality of nations.[58] It is difficult to speak of sovereign equality or of the much proclaimed democracy, when in certain cases the opinion of one permanent member of the Security Council is worth more than 188 opinions of the United Nations Member States which do not have a permanent seat in the Security Council. The claims that this was necessary in order to maintain international peace and security were tested over the seven decades of existence of the United Nations. The Middle East, Vietnam, Cambodia, Afghanistan, Rwanda, Congo, Iraq, Sudan, Lybia and Syria represent examples in which the permanent Member States used their conflicting policies and the right of veto to prevent the Council from performing its primary task, thus allowing bloody campaigns which resulted in tens of millions of dead, wounded and displaced persons. Moreover, the Cold War division completely paralyzed the work of the Security Council, thus allowing numerous countries to exploit the institutional weakness and shortcomings of the collective security system. For example, during the Cold War period, the right of veto was exercised 90 times by the Soviet Union, 68 times by the United States, 28 times by the United Kingdom, 16 times by France, and once by China.[59] At the same time, Article 2(4) of the UN Charter, which prohibits the threat or use of force, was subject to numerous violations. According to one study, the said provision was violated 200 times, while another study mentions as many as 680 violations of the said Article through the use of force in interstate conflicts.[60]

53 GIEGERICH, Thomas."A Fork in the Road" – Constitutional Challenges, Chances and Lacunae of UN Reform. *German Yearbook of International Law*, v. 48, p. 34, 2005.

54 GIEGERICH, Thomas."A Fork in the Road" – Constitutional Challenges, Chances and Lacunae of UN Reform. *German Yearbook of International Law*, v. 48, p. 34, 2005.

55 UNITED NATIONS. *A More Secure World:* Our Shared Responsibility. New York: United Nations, 2004. p. 66-67.

56 See: UN Charter Article 27.

57 See e.g. FASSBENDER, Bardo. *UN Security Council Reform and the Right of Veto:* A Constitutional Perspective. Hague: Kluwer Law International, 1998, p. 165; BUTLER, Richard. Reform of the United Nations Security Council. *Penn State Journal of Law & Internationl Affairs*, v. 1, n. 1, p. 28-29, 2012. p. 28-29.

58 The Preamble of the Charter emphasizes the equality of nations both large and small, while the Article 2(1) of the Charter stipulates that the Organization is based on the principle of sovereign equality of all its members.

59 See: <http://www.un.org/depts/dhl/resguide/scact_veto_table_en.htm> Access on: 23 jan. 2017.

60 GLENNON, Michael J. Platonism, Adaptivism and Illusion in UN Reform. *Chicago Journal of International Law*, v. 2, n. 2, p. 619,

On the other hand, the Security Council approved the use of force only once (the Korean War).[61] When the Cold War ended, it seemed that the main reason for the obstruction of work of the Council would disappear. However, although the Security Council's activities intensified, reflected primarily in an increased number of resolutions,[62] including those which contain the authorization for use of military force,[63] its main task – maintenance of international peace and security – remained largely unfulfilled. At the same time, the Security Council remained a political arena in which the major forces used the right of veto to protect their own interests, as well as those of their allies.[64] Moreover, Butler emphasizes that the use of the right of veto represents one of the most significant forms of violation of the privilege of permanent membership in the Council.[65] Although a further analysis of the problem of the functioning of the collective security system led by the Security Council would take us far beyond the topic of this article, it is important to highlight that the said problem resulted in 'taking on' the role of the Security Council by certain players. These players, which have been using force without an approval of the Security Council in an effort to become the 'global policemen', primarily include certain countries (e.g. the United States and about forty other countries allied in the so-called 'Coalition of the Willing' invaded Iraq in 2003), as well as two regional international organizations – Economic Community of West African States (ECOWAS) and NATO. On the basis of its Protocol relating to the Mechanism for Conflict Prevention Management, ECOWAS conducted military interventions in Liberia in 1990 and in Sierra Leone in 1997 by its military forces (*ECOWAS Cease-fire Monitoring Group* – ECOMOG), without prior approval of the Security Council.[66] However, Security Council subsequently approved the intervention in Liberia – Resolution S/788(1992), and the intervention in Sierra Leone – Resolution S/1132(1997).[67] Unlike the previously mentioned interventions, ECOWAS conducted an intervention in Mali in 2013 on the basis of a prior approval of the Security Council contained in Resolution S/2085(2012). On the other hand, in 1999, NATO attacked the Federal Republic of Yugoslavia without a prior, or subsequent, approval of the Security Council. The said attack, which was justified by the so--called 'humanitarian intervention' in Kosovo, constituted a gross violation of international law by NATO and a dangerous precedent which threatens to fully undermine the current collective security system, as provided in the Charter of the United Nations.[68]

It is obvious that the right of veto is fully inconsistent with the principles on which the United Nations are based, as well as with the democratic standards of the 21st century. Moreover, the right of veto was the main instrument by which permanent members prevented the Security Council from performing its main task over the last seven decades. However, at the same time, the right of veto was the main instrument by which Member States protected their national interests, as well as the interests of their allies. Precisely for that reason,

2006; see also generally FRANCK, Thomas M. Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States. *American Journal of International Law*, v. 64, n. 5, 1970.

61 By Resolution S/83(1950), the Security Council authorized the use of force for the first time, having recommended to United Nations Member States to offer 'all necessary help' to South Korea in repelling the armed attacks of North Korea, in order to restore peace and security in the area.

62 See e.g. SCEWCZYK, Bart MJ. Variable Multipolarity and U.N. Security Council Reform. *Harvard International Law Journal*, v. 53, n. 2, p. 454, 2012.

63 The Security Council authorized its Member States to use military force by the following resolutions: Resolution S/678(1990) in Kuwait; Resolution S/836(1993), Resolution S/844(1993) and Resolution S/1031(1995) in Bosnia and Herzegovina; Resolution S/837(1993) and Resolution S/929(1994) in Somalia; Resolution S/929(1994) in Rwanda; Resolution S/940(1994) in Haiti; Resolution S/1101(1997) in Albania; Resolution S/1264(1999) in East Timor; and Resolution S/1973(2011) in Libya. From these previously mentioned Security Council resolutions, two resolutions authorize one regional international organization to use force – the North Atlantic Treaty Organization (NATO). By Resolution S/1031(1995), the Security Council has authorized the forces led by NATO in Bosnia and Herzegovina (*Implementation Force* – IFOR) to undertake all necessary measures in order to implement the so-called Dayton Agreement, while Resolution S/1973(2011) authorized Member States and regional international organizations (in reality, NATO) to undertake 'all necessary measures' in order to protect civilians and areas populated by civilians in Libya.

64 FRANCK, Thomas M. Collective Security and UN Reform: Between the Necessary and the Possible. *Chicago Journal of International Law*, v. 6, n. 2, p. 609, 2006.

65 BUTLER, Richard. Reform of the United Nations Security Council. *Penn State Journal of Law & Internationl Affairs*, v. 1, n. 1, p. 34, 2012.

66 See: Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security. *Journal of Conflict & Security Law*, v. 5, n. 2, p. 231-259, 2000.

67 Cf. KUWALI, Dan. *The Responsibility to Protect: Implementation of Article 4(h) Intervention*. Boston, Leiden: Martinus Nijhoff Publishers, 2010. p. 144.

68 Cf. CASSESE, Antonio. *International Law*. Oxford: Oxford University Press, 2001. p. 298; see also SIMMA, Bruno. NATO, the UN and the Use of Force: Legal Aspects. *European Journal of International Law*, v. 10, p. 1, 1999.

it is unrealistic to expect that the permanent members will renounce this powerful tool or grant it to potential new permanent members of the Council.

At this point, the only realistic option in terms of mitigating the negative effects of the right of veto is the reform of the Council's decision-making process related to procedural matters. Unlike the decision-making process related to non-procedural (substantive) matters, permanent members of the Council cannot exercise the right of veto when making decisions on procedural matters. The fact that the Council decisions on procedural matters are made by an affirmative vote of nine members of the Council (theoretically, this is possible even without affirmative votes of all five permanent members of the Council) opens up the possibility of a successful reform of this part of the decision-making process of the Council. An additional argument in favour of the reform of the decision-making process of the Council is the fact that the Council's rules of procedure have not been changed since 1982.[69] It was pointed out by Malaysia, which emphasized that 'it has been 30 years since provisional rules have been amended. They are a relic of the Second World War and the Cold War. The United Nations Security Council has refused to move with the times.'[70] Therefore, it is necessary to consider procedural changes by which the Security Council would be 'forced' to face the threats to peace, breaches of peace and acts of aggression 'more actively'. Apart from that, it is also necessary to consider an improvement of transparency and publicity of the decision-making process, thus creating an additional pressure for the members of the Council to make decisions which will be compliant with the interests of the entire international community. Also, countries which are not members of the Council as well as other United Nations bodies (the General Assembly in particular) should be indirectly included in the decision-making process. For example, Spain advocates the introduction of three new procedural duties whose purpose would be to improve the Council's decision-making process: 'the duty to decide' would require the Council to affirmatively decide whether or not it will take action in crises within the scope of its authority, but if the Council takes no decision, 'the duty to disclose' would require it to publicly state its reasons for not doing so, and finally 'the duty to consult' would obligate the Council to engage in broader dialogue with affected parties before taking serious action.[71] On the other hand, at this point, any other proposals for the reform of the decision-making process of the Security Council which advocate abolition, restriction or extension of the right of veto are unfortunately doomed, since there aren't even the slightest indications of a consensus on this matter among the five permanent Council members.[72]

4. An overview of efforts to reform the Security Council

Ever since 1992, when the General Assembly included the issue of the reform of Security Council on its agenda,[73] we have testified to several unsuccessful attempts at reform of the Council. In the late 1993, the General Assembly established the Open-Ended Working Group on the Question of Equitable Representation of and Increase in the Membership of the Security Council and Other Matters Related to the Security Council.[74] In 1997, Ismail Razali, the Chairman of the Working Group and the President of the General Assembly, presented the plan for Council reform which anticipated an expansion of the Council from 15 to 24 members by adding five permanent members without the right of veto and four non-permanent members.[75] The Razali's plan also contained the election procedure of new permanent members according to which two thirds of votes of the members of the General Assembly were required for their election. Although Razali's plan was not supported by the United Nations Member States, it is interesting to observe that one year later the General Assembly adopted Resolution 53/30, which stipulates that any decision regarding the expansion of membership of the Security Council and related issues

69 See: UNITED NATIONS. *Provisional Rules of Procedure of the Security Council*. New York: United Nations, 1983.

70 SPAIN, Anna. The U.N. Security Council's Duty to Decide. *Harvard National Security Journal*, v. 4, p. 367, 2013.

71 SPAIN, Anna. The U.N. Security Council's Duty to Decide. *Harvard National Security Journal*, v. 4, p. 326, 2013.

72 See e.g. FRANCK, Thomas M. Collective Security and UN Reform: Between the Necessary and the Possible. *Chicago Journal of International Law*, v. 6, n. 2, p. 609, 2006; SCEWCZYK, Bart MJ. Variable Multipolarity and U.N. Security Council Reform. *Harvard International Law Journal*, v. 53, n. 2, p. 500-501, 2012.

73 See: UNGA Res 47/62 (11 December 1992).

74 See: UNGA Res 48/26 (3 December 1993).

75 For the Razali's plan see: <https://www.globalpolicy.org/security-council/security-council-reform/41310-razali -refor m-paper.html> Access on: 2 feb. 2017.

cannot be made without two thirds of votes of the members of the General Assembly.[76]

In 2004, High-level Panel, appointed by the United Nations Secretary-General, presented a comprehensive reform of the United Nations which also contained proposals for the reform of the Security Council. The Panel's recommendation was that those with the most significant financial, military and diplomatic contributions to the Organization should be included in the decision-making process in the Security Council.[77] Furthermore, the Panel also recommended that more representatives of the broader United Nations membership, especially those of the developing countries, should participate in the Council's decision-making process as well.[78] In this way, the Panel created a balance between the two main criteria for membership of the new Council: 'contribution' to the Organization (financial, military, and diplomatic) and overall 'representativeness'.[79] According to the Panel, these changes should not impair the effectiveness of the Council, but rather, they should increase the democratic and accountable nature of the Council.[80] Pursuant to this, the Panel suggested two models of reform of the Security Council. The very fact that the Panel proposed two models clearly illustrates how difficult and sensitive the issue was.[81] Model A envisaged an expansion of the Council to 24 members by adding six new permanent seats without the right of veto, and four new non-permanent seats.[82] Model B also envisaged the expansion of the Council to 24 members, but without the introduction of new permanent seats. Instead, it proposed the introduction of eight semi-permanent seats without the right of veto (to be elected for four-year terms with the possibility of re-election), and one new non-permanent seat.[83] In its report, the Panel opposed any expansion of the right of veto onto potential new members of the Security Council, but it urged the permanent members to refrain from exercising their right of veto, especially in cases of violation of human rights and genocide. It was clearly emphasized that the right of veto plays an important role in the preservation of interests of the most powerful Member States, as well as the fact that the institution of the veto has an anachronistic character that is unsuitable to the modern-day democratic world, and that its use should therefore be limited.[84]

After the expansion proposed by the Panel, three main groups of countries emerged with their own proposals regarding the expansion of the Security Council. The first group consists of Brazil, India, Japan and Germany (The Group of Four or G-4), which are also the candidates for new permanent seats in the Security Council. The G-4's proposal from 2005 was closest to the model A, anticipating expansion of the Security Council with six new permanent seats without the right of veto, and four non-permanent seats; in other words, according to their proposal, the Council would consist of 25 members.[85] According to the G-4's proposal, two permanent seats would be awarded to African States, two to Asian States (India and Japan), one to Latin American and Caribbean States(Brazil), and one to Western European and other States (Germany).

76 See: UNGA Res 53/30 (23 November 1998).

77 UNITED NATIONS. *A More Secure World:* Our Shared Responsibility. New York: United Nations, 2004. p. 66-67.

78 UNITED NATIONS. *A More Secure World:* Our Shared Responsibility. New York: United Nations, 2004. p. 67.

79 BLUM, Yehuda Z. Proposals for UN Security Council Reform. *American Journal of International Law*, v. 99, n. 3, p. 634, 2005.

80 UNITED NATIONS. *A More Secure World:* Our Shared Responsibility. New York: United Nations, 2004. p. 67.

81 In his letter to the United Nations Secretary-General of 2004, Anand Panyarachun, the Chair of the Panel, highlighted that the members of the Panel have not reached an agreement regarding the proposed expansion of the Security Council. Some members of the Panel strongly believed that only the expansion of the Security Council with new permanent members, which will not have the right of veto, would allow the Security Council to cope with new threats successfully. Other members of the Panel, however, equally strongly believed that only the expansion of the Security Council with semi-permanent members was the right path for its reform. See: UNITED NATIONS. *A More Secure World:* Our Shared Responsibility. New York: United Nations, 2004. p. 6-7.

82 From the six new permanent seats, one would be awarded to Europe and America respectively, while Asia and Africa would each receive two. See: UNITED NATIONS. *A More Secure World:* Our Shared Responsibility. New York: United Nations, 2004. p. 67.

83 UNITED NATIONS. *A More Secure World:* Our Shared Responsibility. New York: United Nations, 2004. p. 67.

84 UNITED NATIONS. *A More Secure World:* Our Shared Responsibility. New York: United Nations, 2004. p. 68.

85 The only difference between the G-4 proposal and the proposal of the Panel, i.e. the Panel's Model A is reflected in the increase of the number of members of the new Council, from 24 to 25 (instead of three, another four non-permanent seats were proposed). For the G-4 proposal, which was also supported by Afghanistan, Belgium, Bhutan, Czech Republic, Denmark, Fiji, France, Georgia, Greece, Haiti, Honduras, Iceland, Kiribati, Latvia, Maldives, Nauru, Palau, Paraguay, Poland, Portugal, Solomon Islands, Tuvalu and Ukraine see: UNITED NATIONS. General Assembly. *UN Doc A/59/L64*. Question of equitable representation on and increase in the membership of the Security Council and related matters, 6 July 2005. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N05/410/80/PDF/N0541080.pdf?OpenElement> Access on: 5 feb. 2017.

The second group – United for Consensus (UFC) – which emerged as a reaction to G-4 and their proposal, among others consists of Argentina, Italy, South Korea and Pakistan – regional rivals of the members of the G-4 group.[86] The UFC group opposes the introduction of new permanent seats in the Security Council and proposes 10 new non-permanent seats in the Council.[87] The UFC's proposal is reminiscent of Model B, as it includes the possibility of re-election of the non-permanent members of the Council. According to the UFC proposal, the expanded Security Council would consist of 25 members – the five current permanent members and 20 non-permanent members. From the remaining 20 non-permanent seats, six would be awarded to the African States, five to Asian States, four to Latin American and Caribbean States, three to Western European and other States, and two to Eastern European States.

Finally, the third group consists of African countries gathered in the African Union (AU). Their proposal, based on the so-called 'Ezulwini Consensus' – the common position adopted by the AU Member States,[88] anticipates an expansion of the Security Council with six new permanent seats with the right of veto, and five new non-permanent seats. In other words, according to their proposal, the Council would consist of 26 members.[89] From 11 new seats, African States would be awarded two permanent seats and two non-permanent seats; Asian States would receive two permanent seats and one non-permanent seat; East European States would receive one non-permanent seat; Latin American and Caribbean States would receive one permanent seat and one non-permanent seat; while Western European and other States would be awarded one permanent seat.

The clearly conflicting proposals presented by the G-4 countries, UFC and African countries testified to a deep division between Member States with regard to the Security Council's reform. Moreover, it is symptomatic that only France and the United Kingdom supported the G-4 proposal, while other permanent members, without whose approval the Charter cannot be amended nor the Council reformed, did not support any of the proposals.[90] Despite the fact that 170 heads of state, gathered at the 2005 World Summit at the United Nations' headquarters in New York, unanimously supported 'an early reform of the Security Council',[91] the only possible consequence of the deep division between Member States was the continuation of the status quo in the reform of the United Nations' most powerful body. This again confirmed that there is a general consensus among Member States on the necessity of a reform of the Security Council, but it also showed significant disagreements on how to do it.[92] Nonetheless, after 15 years of futile search for a solution to this pressing issue within the Working Group, on the last day of the 62nd Session of the General Assembly, after tough negotiations, the Decision 62/557 was unanimously adopted on the beginning of intergovernmental negotiations in the early 2009.[93] Although the progress was merely

86 The other members of the UFC are Canada, Colombia, Costa Rica, Malta, Mexico, San Marino, Spain and Turkey.

87 For the UFC proposal see: UNITED NATIONS. General Assembly. *UN Doc A/59/L68*. Question of equitable representation on and increase in the membership of the Security Council and related matters, 21 July 2005. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N05/434/76/PDF/N0543476.pdf?OpenEleme nt> Access on: on: 5 feb. 2017.

88 For the 'Ezulwini Consensus' see: <http://www.un.org/en/africa/osaa/pdf/au/cap_screform_2005.pdf> Access on: 5 feb. 2017.

89 For the proposal supported by Algeria, Angola, Botswana, Burkina Faso, Cameroon, Cape Verde, Chad, Congo, Côte d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Tunisia, Uganda, United Republic of Tanzania, Zambia and Zimbabwe see: UNITED NATIONS. General Assembly. *UN Doc A/59/L67*. Question of equitable representation on and increase in the membership of the Security Council and related matters, 18 July 2005. Available: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N05/421/67/PDF/N0542167.pdf?OpenElement> Access on: 5 feb. 2017.

90 Article 108 of the UN Charter stipulates: 'Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.'

91 'We support early reform of the Security Council - an essential element of our overall effort to reform the United Nations - in order to make it more broadly representative, efficient and transparent and thus to further enhance its effectiveness and the legitimacy and implementation of its decisions. We commit ourselves to continuing our efforts to achieve a decision to this end and request the General Assembly to review progress on the reform set out above by the end of 2005.' See: UNGA Res 60/1 (24 October 2005).

92 FREISLEBEN, Jonas von. Reform of the Security Council. In: CENTER FOR UN REFORM EDUCATION (ed). *Managing Change at the United Nations*. New York: Center for UN Reform Education, 2008. p. 1; see also SCHRIJVER, Nico. Reforming the UN Security Council in Pursuance of Collective Security. *Journal of Conflict & Security Law*, v. 12, n. 1, p. 127, 2007.

93 See: UNITED NATIONS. *Resolutions and Decisions adopted by*

symbolic and procedural, many diplomats prematurely assessed this 'success' as historical.[94]

Unfortunately, despite the euphoria which gripped the East River, intergovernmental negotiations on the reform of the Security Council, which officially started in February 2009, proved to be equally unsuccessful as the previous attempts to solve the issue within the Working Group. Under the presidency of Zahir Tanin (2009-2014), the Afghan permanent representative to the United Nations, ten rounds of intergovernmental negotiations were held, which haven't broken the impasse of the Security Council's reform process, due to the fact that the three main groups of countries – G-4, UFC, African countries – did not budge from their initial positions. Apart from confirming the significant discord among Member States regarding the reform of the Council, the negotiations also showed a sharp disagreement of Member States regarding the rules of procedure of intergovernmental negotiations. On the one hand, G-4 countries believe that decision-making in intergovernmental negotiations should be based on voting, while on the other hand, UFC maintains that decisions should be made on the basis of a consensus.[95] Moreover, soon it became obvious that UFC – which enjoys the least support from Member States – was trying to slow the negotiations down, while G-4 countries – which enjoy a considerable, yet insufficient support of Member States – were trying to speed the negotiations up.[96] In the late 2014, Courtney Rattray, the permanent representative of Jamaica to the United Nations, was appointed as the Chair of intergovernmental negotiations, with the task of moving the intergovernmental process towards text-based negotiations.

On 26 March 2015, the Chair circulated a framework document on the reform of the Security Council to all Member States, with the request to complete the document with their own views and proposals regarding the five key issues of the reform: categories of membership, regional representation, the size of an enlarged Security Council and working methods of the Council, the question of the veto and the relationship between the Council and General Assembly.[97] On the basis of the collected opinions and proposals of member states, a negotiating text was drafted which Sam K. Kutesa, President of the 69th Session of the General Assembly, described as a 'sound basis' for the following stage of intergovernmental negotiations.[98] The text and its accompanying Annex,[99] which was presented on 31 July 2015, also allows us to see Member States' most recent views on the reform of the Security Council on the eve of the 70th anniversary of the United Nations. Our overview of the negotiating text once again confirmed that there was no convergence of opinions regarding the reform of the Security Council among Member States – especially with regard to new permanent seats and the issue of veto. Thus, G-4 still advocates the introduction of six new permanent seats without the right of veto – four for G-4 members and two for African countries.[100] Basing their attitude on the 'Ezulwini Consensus', African countries advocate the introduction of six new permanent seats with the right of veto, at least two of which would be awarded to African countries.[101] The Arabic group, which consists of 23 Member States, demands a permanent Arab seat in case of any future expansion of permanent seats in the Council.[102] On the other hand, UFC continues to oppose the introduction of new permanent seats in the Council, and proposes the introduction of a new category of seats – long-term non-permanent seats.[103] However, it should be noted that the vast majority of Member States which completed the framework document agree that it is necessary to expand the Council by introducing new permanent

the General Assembly during its sixty-second session. 23 December 2007 – 15 September 2008. New York: United Nations, 2008. v. 3. p. 106-107.

94 See: <http://www.reuters.com/article/2008/09/16/us-un-council-expansion-idUSN1533301720080916?pageNumber=1&virtualBrandChannel=0> Access on: 8 feb. 2017.

95 SWART, Lydia. *Countries Welcome Work Plan as Security Council Reform process Commences New Phase*. 24 February 2009. Available at: <http://www.centerforunreform.org/?q=node/386> Access on: 13 feb. 2017.

96 See e.g. HANSEN, Mie. *Update on Security Council Reform*. 5 April 2011. Available at: <http://www.centerforunreform.org/?q=node/435> Access on: 13 feb. 2017.

97 For the framework document see: <http://www.un.org/pga/wp-content/uploads/sites/3/2015/03/270315_interg overnmental-negotiations-sc-reform.pdf> Access on 14 feb. 2017.

98 For the negotiating text and the accompanying letter by the President Kutesa see: <http://www.un.org/pga/wp-content/uploads/sites/3/2013/11/Security-Council-reform-IGN-31-July-2015.pdf> Access on: 14 feb. 2017.

99 For the ANNEX Part I see: <http://www.un.org/pga/wp-content/uploads/sites/3/2013/11/Security-Council-refor m-IGN-31-July-2015-ANNEX_Part1.pdf> Access on 14 feb. 2017; for the ANNEX Part II see: <http://www.un.org/pga/wp-content/uploads/sites/3/2013/11/Security-Council-reform-IGN-31-July-2015-ANNE X_Part2.pdf> Access on 14 feb. 2017.

100 ANNEX Part I, p. 3.

101 ANNEX Part II, p. 63.

102 ANNEX Part II, p. 116.

103 ANNEX Part II, p. 123.

seats. Also, the majority of Member States believes that the right of veto should be abolished. Because it is an unrealistic expectation, a part of them, such as African and Caribbean countries, believe that, so long as the right of veto exists, it should be extended to all members of the permanent category of the Security Council, which must enjoy all the prerogatives and privileges of permanent membership including the right of the veto. Furthermore, G-4 is willing to renounce the right of veto for new permanent members, while several countries propose a voluntary limitation or restraint of the use of the veto in specific situations (e.g. genocide, crimes against humanity and war crimes), while others propose a mandatory restriction of the use of the veto in the said situations.

Finally, it is interesting to examine the attitudes of the five permanent members of the Security Council, without whose mutual consent a reform of the Council is not possible. Thus, France supported the introduction of new permanent seats for members of G-4 and African countries, thereby emphasizing that they 'would not oppose extension of the veto to new permanent members if the candidates to such permanent membership were to pursue such an extension'.[104] The United Kingdom also supports the introduction of new permanent seats for members of G-4 and African countries, but it opposes the extension of the veto to new permanent members.[105] On the other hand, China refused to complete the framework document, holding that, according to the Decision 62/557 adopted by the General Assembly as well as the consensus of Member States, intergovernmental negotiations on Security Council reform should be driven by Member States, and the positions of Member States should form the basis of the negotiations.[106] According to China, the said principles and the consensus are not reflected in the framework document, which simplified and reduced the views of Member States without their approval. Therefore, China hasn't modified its initial views according to which it generally supports the extension of the Council, but without specifying the categories of the new seats or referring to the extension of the right of veto. Apart from that, China also believes that all five key issues of the reform should be solved as a whole, i.e. it opposes the 'piecemeal' or 'step-by-step' approach, thereby clearly emphasizing that 'no solution on which Member States are seriously divided or approach that may cause division among Member States will have China's support'. Russia, which also hasn't completed the framework document, but merely sent an official letter instead, also supports the extension of the Council, but it does not specify the categories of new permanent seats, except it considers that the number of seats in the new extended Council should not exceed a reasonable level of low twenties.[107] However, Russia emphasizes that 'the prerogatives of the current permanent members of the Security Council, including the use of veto, should remain intact under any variant of the Council reform'. Additionally, Russia also believes that, in case of a lack of consensus among Member States with regard to the reform of the Council, it is necessary to ensure support by the overwhelming majority of Member States – a substantially greater number than the legally required two thirds of votes at the General Assembly. Finally, the United States, which also haven't completed the framework document, but sent an official letter instead, are willing to support a modest expansion of both permanent and non-permanent members, but consideration of new permanent members must be country-specific in nature.[108] Regarding the issue of the veto, the United States remains opposed to 'any alteration or expansion of the veto'.

Despite an obvious disagreement between Member States regarding both material and procedural matters of the reform of the Security Council, on 14 September 2015, the General Assembly decided to 'immediately continue intergovernmental negotiations on Security Council reform, building on the positions of and proposals made by Member States reflected in the text and its annex circulated by the President of the General Assembly in his letter dated 31 July 2015'.[109] It is difficult to predict the further course of events, although one thing is certain: this endless game between Member States enters into its 25 year, while the answer from the East River to the question – When will the reform of the Security Council finally take place? – remains un-

104 ANNEX Part I, p. 35.

105 ANNEX Part II, p. 67.

106 ANNEX Part II, p. 101.

107 ANNEX Part II, p. 109.

108 ANNEX Part II, p. 114.

109 For the Decision see: UNITED NATIONS. General Assembly. *UN Doc A/69/L92*. Question of equitable representation on and increase in the membership of the Security Council and related matters, 11 September 2015. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/278/16/PDF/N1527816.pdf?Open Element> Access on: 23 feb. 2017.

changed: Godot will certainly come tomorrow.

5. Final conclusions

The world is changing, but not the Security Council. While humanity is helpless in the face of armed conflicts raging across our planet, United Nations Member States have been, for almost a quarter of a century, unsuccessfully trying to reform the body which they themselves entrusted with the primary responsibility of maintaining international peace and security. 25 years have been wasted, thousands of meetings were held, miles of paper and oceans ink were spent for the purpose of the reform of the United Nations' most powerful organ, and yet there is still no sign of a final solution. Moreover, an overview of the previous attempts to reform the Security Council leads us to the only possible conclusion – 'the emperor has no clothes'. Although merely a drop in the ocean of academic attempts to contribute to the solution of the problem, this article is trying to draw attention to the need for an urgent reform of the Security Council, i.e. to unacceptability of its further delay, supporting it with, among other things, inefficiency of the Council in performing its main task – maintenance of international peace and security. Furthemore, some countries, with regard to their financial and military contributions to the United Nations as well as to their military force, economic power and population size, must be included in the Council's decision--making process through the permanent membership in the Council. Since it is unrealistic to expect that the permanent members will give up the right of veto, the only realistic solution in terms of mitigating the negative effects of the right of veto is the reform of the Council's decision-making process related to procedural matters. Finally, it is high time to reach a political compromise among all Member States regarding the reform of the Security Council on the basis of previous views and proposals expressed by Member States. This particularly refers to the five permanent members of the Security Council, which hold the key to the amendments to the Charter, and consequently also to the reform of the Council, in their hands. We can only hope that Member States will fulfill their moral obligation towards humanity, which deserves to live in a better and safer world, and undertake an urgent reform of the Security Council. Otherwise, prophetic words spoken by the American president Harry S. Truman during the signing the Charter on 26 June 1945 in San Francisco might come true: 'If we fail to use it, we shall betray all those who have died in order that we might meet here in freedom and safety to create it. If we seek to use it selfishly, for the advantage of any one nation or any small group of nations, we shall be equally guilty of that betrayal.'[110]

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A ideia de que os latino-americanos preferem o autoritarismo à democracia à luz da reinterpretação dos critérios do Programa das Nações Unidas para o Desenvolvimento

The idea that Latin Americans prefer authoritarianism to democracy in the light of the reinterpretation of the criteria of the United Nations Development Program

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A ideia de que os latino-americanos preferem o autoritarismo à democracia à luz da reinterpretação dos critérios do Programa das Nações Unidas para o Desenvolvimento*

The idea that Latin Americans prefer authoritarianism to democracy in the light of the reinterpretation of the criteria of the United Nations Development Program

Gina Marcilio Pompeu**

Ana Araújo Ximenes Teixeira***

Resumo

Mediante este artigo almeja-se aferir a correção da ideia de que os latino-americanos preferem o autoritarismo à democracia, levantada pelo Compêndio Estatístico do Programa das Nações Unidas para o Desenvolvimento – PNUD - de 2004. Trata-se de pesquisa bibliográfica e documental que utiliza o método hipotético-dedutivo na elaboração de uma reinterpretação dos critérios usados pelo PNUD. São apresentadas inicialmente as estatísticas nas quais embasa-se a conjectura a ser metodologicamente falseada. Posteriormente, faz-se o cotejo da conjectura com outros dados empíricos, dentro de um roteiro de desvelamento crítico, em duas fases, sobre quem é o povo latino-americano e como são suas democracias. Na primeira fase, aborda-se o impacto da pobreza e da desigualdade sobre a construção da democracia na América Latina. Na segunda fase, faz-se uma análise da ideia enfocada perante fatores históricos e culturais advindos do corte epistemológico nas realidades do Brasil e do México. Por fim, elabora-se a crítica acerca da viabilidade da refutação da conjectura, ocasião na qual conclui-se que a pretensa tendência dos cidadãos latino-americanos a preterirem a democracia em prol do autoritarismo baseia-se numa interpretação elaborada sobre dados empíricos incompletos. A originalidade da pesquisa reside: na demonstração de que o descrédito da democracia verificado não recai sobre regimes que garantem acesso do povo ao poder político; na inferência de que, no caso do Brasil, o regime político cujo apoio tem diminuído sequer consiste numa democracia formal; e na verificação de que os critérios utilizados pelo PNUD, sem uma reinterpretação que amplie da base de dados, são insuficientes.

Palavras-chave – Democracia. Autoritarismo. Democracia brasileira. Democracia mexicana. Democracia na América Latina.

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Abstract

This paper seeks to correct the idea that Latin Americans prefer authoritarianism to democracy, as compiled by the UNDP-UNDP Statistical Compendium of 2004. It is a bibliographical and documentary research that Uses the hypothetical-deductive method in the elaboration of a reinterpretation of the criteria used by the UNDP. We present initially the statistics on which the conjecture is based to be methodologically distorted. Subsequently, the conjecture is compared with other empirical data, within a critical unveiling script, in two phases, about who the Latin American people are and their democracies. The first phase addresses the impact of poverty and inequality on the construction of democracy in Latin America. In the second phase, the idea is compared to historical and cultural factors arising from the epistemological cut in the realities of Brazil and Mexico. Finally, the criticism is made about the feasibility of refuting the conjecture, at which time it is concluded that the alleged tendency of Latin American citizens to preach democracy in favor of authoritarianism is based on an interpretation of incomplete empirical data. The originality of the research lies in the demonstration that the discredit of the democracy verified does not fall on regimes that guarantee the people's access to political power; In the case of Brazil, the political regime whose support has diminished does not even consist of a formal democracy; And in proving that the criteria used by UNDP, without a reinterpretation that broadens the database, are insufficient.

Keywords: Democracy. Authoritarianism. Brazilian democracy. Mexican democracy. Democracy in Latin America.

1. Introdução.

Os cidadãos latino-americanos preferem viver sob regimes políticos autoritários que em democracias liberais? Tal questionamento paira sobre as mentes de políticos, sociólogos, juristas e historiadores desde a divulgação, em abril de 2004, do relatório 'A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos' do Compêndio Estatístico do Programa das Nações Unidas para o Desenvolvimento – PNUD.

Os resultados da aludida pesquisa surpreendem pela adoção, por parte dos cidadãos latino-americanos, nas perguntas constantes dos questionários utilizados, de posições incompatíveis com postulados tradicionais da democracia liberal. No mesmo sentido, ao longo dos anos seguintes, institutos de pesquisa igualmente reconhecidos pela comunidade mundial, a exemplo da Corporação Latinobarômetro, têm confirmado as conclusões inicialmente propaladas pelo PNUD acerca do desprestígio da democracia na América Latina.

Ademais, a ascensão eleitoral de líderes carismáticos com mediação simbólica de partidos políticos, a imposição da ideia de reeleições sucessivas do chefe do poder executivo, *v.g.*, na Bolívia e na Venezuela, dentre outras bandeiras incongruentes com relação à democracia moderna contribuem para a sedimentação da ideia da preferência latino-americana pelo autoritarismo em detrimento da organização social democrática.

Por tais motivos, de um lado é possível afirmar provisoriamente que o exercício das liberdades políticas na América Latina, no mínimo, não tem resultado no desenvolvimento de uma cultura de respeito às instituições democráticas consagradas pelo liberalismo político. E, de outro, existem dúvidas crescentes na comunidade científica e nos organismos internacionais sobre o compromisso dos povos latino-americanos com a moderna ideia de democracia.

No estágio em que se apresenta a integração econômica, cultural e política mundial, há vários atores distintos dos Estados Nacionais que contribuem para a construção do direito no âmbito de seus territórios. Tais instituições influem na condução da política mundial e das políticas nacionais dentro do processo de internacionalização do direito - por alguns denominado constitucionalização do direito internacional e pelos mais idealistas tratado como construção da democracia global ou república mundial.[1]

1 DELMAS-MARTY, Mireille. **Por um direito comum.** Tradução de Maria Ermantina de Almeida Prado Galvão. São Paulo: Martins Fontes, 2004, p. 87-89. Para uma visão abrangente e profunda do fenômeno da constitucionalização do direito internacional, ver também: VARELLA, Marcelo D. **Internacionalização do direito: direito internacional, globalização e complexidade.** 2012. 606f. Tese (Livre-Docência em Direito Internacional). Faculdade de Direito da USP. Universidade de São Paulo. São Paulo, p. 567-575. Sobre a interação dialética progressiva entre direito constitucional e direito internacional: CANOTILHO, J.J.Gomes. **Brancosos e a interconstitucionaldade: itinerários dos discursos sobre a historicidade constitucional.** 2 ed. Lisboa: Almedina, 2008, p. 285-286. Ver também: BUSTOS GISBERT, Rafael. *Diálogos jurisdiccionales en escenarios de pluralismo constitucional: la protección supranacional de*

Nessa ordem de ideias, verificar a exatidão da interpretação das estatísticas que concluem pela progressiva diminuição de adesão ou baixo suporte dos latino-americanos ao regime democrático é tarefa de importância evidente na conjuntura geopolítica da globalização, haja vista o risco que implica para a liberdade dos cidadãos latino-americanos a retirada de suporte à construção de democracias na América latina por parte de organismos internacionais, organizações não governamentais e demais instituições de governança global.

Realmente, a globalização tem conferido destaque a um fato descortinado há décadas por Bobbio: a existência de diferentes tipos de sistemas jurídicos acima do Estado (supraestatal ou internacional), abaixo do Estado (ordenamentos infraestatais) e paralelos ao Estado (transnacionais, como o da Igreja Católica).[2] Mas o impacto da integração mundial de mercados não se limita a evidenciar a coexistência desses sistemas e a influência recíproca que partilham.

Com efeito, se antes o reflexo do xadrez político-econômico mundial sobre os Estados nacionais – e pois sobre as democracias existentes - era velado, devido à globalização as fronteiras do direito constitucional e do direito internacional têm tornado-se mais tênues a cada ano, movimento impulsionado em larga medida pelas interações desenvolvidas entre o subsistema do direito internacional voltado à proteção dos direitos humanos e o direito constitucional.[3]

Eis porque, no âmbito do tradicional debate sobre a universalização dos direitos humanos, o subsistema do direito internacional referente a esses valores influiu de maneira decisiva na constitucionalização de direitos humanos e na adoção de regimes democráticos ao redor do mundo, dada a relação de implicação recíproca entre ambos os temas na qual a democracia é condição de possibilidade de concretização dos direitos humanos.

Ciente da interdependência entre democracia e proteção de direitos humanos, o Programa das Nações Unidas para o Desenvolvimento – PNUD - realiza estudos simultâneos ou sucessivos nas duas áreas. Nesse diapasão, diante da relevância do respaldo internacional para a manutenção das jovens democracias latino-americanas é assaz pertinente problematizar a correção da ideia de que os cidadãos da América Latina rechaçam a democracia liberal.

Sob o prisma do subsistema da proteção dos direitos humanos, verifica-se que a submissão da ideia de que os latino-americanos preferem o autoritarismo à democracia ao crivo de uma investigação é indispensável, dentre outros fatores, também no que concerne à possibilidade de contribuição para o estabelecimento do que Marcelo Varella denomina uma gramática comum mundial, no caso, em tema de democracia.

Com efeito, Varella defende – como uma das ferramentas para edificação da república mundial ou democracia global em oposição ao surgimento do imperialismo globalizado - a construção de uma gramática universal. Enquanto instrumento dessa gramática comum, o aprofundamento que a presente pesquisa empreende acerca de conceitos utilizados pelo relatório do PNUD de 2004, é extremamente relevante para o direito internacional.[4]

Realmente, mediante este trabalho, o aclaramento de conceitos e o entendimento das diferenças históricas e culturais que porventura interfiram na construção e na compreensão da democracia liberal na América Latina pode auxiliar na elaboração da gramática comum apta a ensejar, seja a tomada de providências para retomada do processo de democratização, seja a tolerância para com a rejeição latino-americana à implantação de democracias liberais.

los derechos em Europa. In: MAC-GREGOR, Eduardo Ferrer; LELO DE LARREA, Arturo Zaldívar (Coord.). **La ciencia del derecho constitucional: estudios em homenaje a Héctor Fix-Zamudio em sus cincuenta años como investigador del derecho.** México: UNAM, 2008, p. 753 e segs.. NEVES, Marcelo. **Transconstitucionalismo.** São Paulo: Martins Fontes, 2009, p. 100-127.

2 BOBBIO, Norberto. **Teoria do Ordenamento Jurídico.** Tradução de Maria Celeste Cordeiro Leite dos Santos. 10 ed. Brasília: Editora UNB, 1999, p. 161- 173.

3 GOMES, Eduardo Biachi. *Integração econômica no mercosul: opiniões consultivas e a democratização no acesso ao tribunal permanente de revisão.* **Revista de Direito Internacional**, Brasília, v. 10, n. 1, p. 128-136, número especial de Direito Internacional Econômico, 2013, p. 130. Gomes – precisamente no sentido do presente artigo – situa o início do aumento da influência do direito internacional nas ordens jurídicas internas dos Estados no contexto do final da Segunda Guerra mundial, devido à luta pela universalização dos direitos humanos, e seu recrudescimento no contexto atual da globalização, o que potencializa a relevância da defesa da democracia, para manutenção da agenda do direito internacional no subsistema dos direitos humanos e nos demais subsistemas. Gomes também aponta como decorrência da maior normatividade do direito internacional contemporâneo, diante da ausência de capacidade jurídica dos cidadãos para dele utilizarem-se, o surgimento do problema do *deficit democrático* mitigado desse ramo do direito.

4 VARELLA, Marcelo D. **Internacionalização do direito: direito internacional, globalização e complexidade.** 2012. 606f. Tese (Livre-Docência em Direito Internacional). Faculdade de Direito da USP. Universidade de São Paulo. São Paulo, p. 558-575.

Assim, os resultados obtidos por esta investigação - se não estimularem o aprimoramento da elaboração e interpretação dos critérios utilizados para aferir a adesão à democracia, bem como uma reação eficaz da comunidade internacional a retrocessos autoritários - podem lastrear o reconhecimento da autonomia dos povos latino-americanos para conduzirem sua organização política fora do modelo tradicional da democracia liberal, ante a constatação de que a evolução histórica e política latino-americana não permite edificar, com autenticidade, organizações sociais democráticas e liberais nos moldes europeu e norte-americano.

O presente artigo, por conseguinte, almeja aferir a correção da ideia de que os latino-americanos preferem o autoritarismo à democracia, levantada pelo Compêndio Estatístico do Programa das Nações Unidas para o Desenvolvimento – PNUD – de 2004, mediante pesquisa bibliográfica e documental que utiliza o método hipotético-dedutivo, onde a proposição amparada em dados estatísticos cuja cientificidade visa-se atestar desempenha o papel de conjectura a ser metodologicamente falseada ou corroborada pelo confronto com outros dados empíricos e demais elementos que a infirmem ou confirmem.

Nessa ordem de ideias, ao tentar falsear a retromencionada conjectura, torna-se inescapável empreender uma reinterpretação dos critérios adotados pelo PNUD no relatório 'A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos', de modo que, por via de consequência, objetiva-se verificar igualmente a adequação dos critérios usados pelo citado relatório.

Para esse fim, apresenta-se, no primeiro tópico, juntamente com a ideia tratada metodologicamente como conjectura a ser falseada, dados extraídos do retromencionado relatório de 2004 do PNUD, assim como estatísticas sobre apoio à democracia na América Latina elaboradas em 2016 pelo Latinobarômetro (entidade parceira do PNUD na confecção do relatório de 2004). Nos tópicos dois e três, faz-se o cotejo da conjectura com outros dados empíricos pertinentes, embora desconsiderados pela pesquisa do PNUD, dentro de um roteiro de desvelamento crítico, em duas fases, sobre quem é o povo latino-americano e como são suas democracias.

Assim, no tópico dois, aborda-se o impacto da pobreza e da desigualdade sobre a construção da democracia e da cidadania na América Latina, com fundamento em dados estatísticos atualizados e elaborados pelas mesmas instituições cujas pesquisas são mencionadas no tópico um. Em seguida, no terceiro tópico, mediante o corte epistemológico materializado no enfoque das realidades do Brasil e do México, são analisadas todas as estatísticas mencionadas em confronto com fatores históricos e culturais pertinentes à democracia.

2. Desprestígio da democracia latino-americana em números.

Antes de adentrar a investigação propriamente dita que consiste no objeto deste artigo, é importante frisar que a conclusão do relatório 'A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos' do Compêndio Estatístico do Programa do Programa das Nações Unidas para o Desenvolvimento – PNUD -, publicado em abril de 2004, assim como as de todos os seus demais estudos - por exemplo, aqueles sobre desenvolvimento humano -, não encerra afirmações categóricas sobre a natureza ou características intrínsecas de nenhum povo ou economia.

> Foi o que o PNUD fez com o Índice de Desenvolvimento Humano e assim conseguiu que esse modo de avaliar, independente do parcial e insuficiente PIB, fosse assu- mido na sociedade. Na mesma linha inovadora, hoje se pretende que a melhora democrática não seja simplesmente uma expressão retórica, sempre questioná- vel, mas sim uma realidade sobre a qual se atua, registrando avanços e retrocessos que possam ser vistos com objetividade. Esses avanços, essas buscas respondem à idéia de que democracia e desenvolvimento humano são apenas duas caras da mesma moeda.[5]

A afirmação cuja refutação é objetivada pelo presente artigo encontra-se, no segundo capítulo, da segunda seção do relatório cujo título é 'Como os latino-americanos vêm a sua democracia' e que se desenvolve - mediante o emprego do índice de apoio à democracia (IAD) e de gráficos (p.139-157), assim como na nota explicativa acerca do IAD, (p. 220 – 237), e, ainda, sinteticamente, no resumo do relatório em epígrafe, segundo o qual:

5 ONU. Organização das Nações Unidas. Relatório do Compêndio Estatístico do Programa do Programa das Nações Unidas para o Desenvolvimento – PNUD - A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos. Publicado em abril de 2004, p.204. Disponível em < http:www.dominiopublico.gov.br>. Acesso em 08/06/2017.

Os dados obtidos indicam que:

■ A preferência dos cidadãos pela democracia é relativamente baixa.

■ Grande parte das latino-americanas e dos latino-americanos dá mais valor ao desenvolvimento do que à democracia e, inclusive, retiraria seu apoio a um governo de- mocrático se ele fosse incapaz de resolver os seus problemas econômicos.

■ Os não-democratas pertencem, geralmente, a grupos com menor educação, cuja socialização ocorreu, fundamentalmente, em períodos autoritários, que têm baixas ex- pectativas de mobilidade social e uma grande desconfiança das instituições democráticas e dos políticos.[6]

Logo, não se objetiva neste trabalho falsear as afirmações do relatório de 2004 do PNUD, que ao fim e ao cabo fomenta rico e necessário debate sobre democracia na América Latina, como aliás é o propósito declarado em suas conclusões. O foco consiste, isto sim, em refutar parcela do relatório que afirma que *a preferência dos cidadãos pela democracia é relativamente baixa*. Cumpre lembrar que o relatório adota os critérios do recém-criado IAD, e índices elaborados em parceria com o Latinobarômetro especificamente para o referido estudo de 2004. Verifica-se, pois, que se trata de uma ferramenta estatística testada sobre o tema da democracia na América Latina e não de um índice seguidamente colocado à prova, ainda que em outras áreas.

Não se conhecem estudos prévios que tenham aplicado esta metodologia para estudar o respaldo dos cidadãos à democracia. A análise das tendências em relação à democracia não pode ser replicada na série de tempo do Latinobarômetro. Algumas das variáveis empregadas para a análise pertencem ao segmento regular do Latino- barômetro, mas não são incluidas todos os anos; outras perguntas foram elaboradas especificamente para o segmento proprietário do PNUD na pesquisa; por isso, não há observações prévias.[7]

Feitas essas considerações metodológicas, as quais são retomadas adiante, percebe-se que, no âmago desta investigação reside a seguinte pergunta: há realmente uma predisposição do povo latino-americano a rejeitar a liberdade política granjeada pela democracia e escolher o autoritarismo? A resposta a essa questão demanda que sejam expostos primeiramente os dados empíricos que fundamentam a resposta afirmativa colocada. Requer a observação das assertivas que alternam, de modo velado e expresso, nos supramencionados trechos do relatório 'A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos' do Compêndio Estatístico do Programa do Programa das Nações Unidas para o Desenvolvimento – PNUD.

Consoante o Relatório de Abril de 2004 do Compêndio Estatístico do Programa das Nações Unidas para o Desenvolvimento – PNUD -, o Brasil alcançou em 1997 e o México em 2002 o índice máximo de democracia eleitoral - IDE. Os países latino-americanos em geral apresentam IDE iguais ou superiores a 0,80 numa escala em que a ausência de democracia equivale a 0 e a máxima democracia corresponde a 1.

TABELA 2

REFORMAS E REALIDADES

	Índice de Reforma Econômica (1)	Índice de Democracia Eleitoral (1)	Crescimento do PIB Real per capita anualizado (3) %	Pobreza (2) %	Indigência (2) %	Coeficiente de Gini (2)	Desemprego Urbano (1)
Sub-Região "Cone Sul" (Argentina, Chile, Paraguai, Uruguai)							
1981-90	0,66	0,44	-0,8%	25,6	7,1	0,502	8,8
1991-97	0,82	0,88	1,3%	21,2	5,7	0,527	8,7
1998-02	0,84	0,91	1,0%	32,3	12,9	0,558	12,1
Brasil							
1981-90	0,52	0,70	1,7%	48,0	23,4	0,603	5,2
1991-97	0,75	1,00	0,4%	40,6	17,1	0,638	5,3
1998-02	0,79	1,00	1,1%	37,5	13,1	0,640	7,1
Sub-Região Andina (Bolívia, Colômbia, Equador, Peru, Venezuela)							
1981 - 90	0,53	0,83	-0,6%	52,3	22,1	0,497	8,8
1991 - 97	0,76	0,86	0,9%	50,4	18,1	0,544	8,3
1998 - 02	0,82	0,83	0,1%	52,7	25,0	0,545	12,0
México							
1981-90	0,61	0,31	1,7%	47,8	18,8	0,521	4,2
1991-97	0,78	0,70	0,4%	48,6	19,1	0,539	4,0
1998-02	0,81	1,00	2,2%	42,5	15,4	0,528	2,6
Sub-Região América Central (C. Rica, El Salvador, Guatemala, Honduras, Nicarágua, Panamá, Rep. Dom.)							
1981-90	0,55	0,59	4,1%	55,3	35,6	0,532	9,1
1991-97	0,80	0,89	-3,5%	52,0	27,8	0,524	9,1
1998-02	0,85	0,97	2,8%	54,0	29,7	0,546	8,8
Região Latino-americana							
1981-90	0,58	0,64	0,7%	46,0	20,4	0,551	8,4
1991-97	0,79	0,87	0,6%	42,8	18,3	0,574	8,8
1998-02	0,83	0,92	1,2%	42,8	17,7	0,577	10,4

(1) Média simples.
(2) Ponderada por população.
(3) De período a período.
O índice de reforma econômica é composto por cinco componentes: políticas de comércio internacional, políticas impositivas, políticas financeiras, privatizações e contas de capitais. O índice vai de o, que indica uma falta de reformas orientadas para o mercado, a 1, que indica a aplicação de reformas fortemente orientadas para o mercado.
O "Índice de Democracia Eleitoral" vai de o (igual a falta de democracia eleitoral) a 1 (indica que os requisitos de democracia eleitoral são cumpridos).

Fonte: Relatório do Compêndio Estatístico do Programa do Programa das Nações Unidas para o Desenvolvimento – PNUD - A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos. Publicado em abril de 2004, p.42. Disponível em < http:www.dominiopublico.gov.br >. Acesso em 08/06/2017.

6 ONU. Organização das Nações Unidas. Relatório do Compêndio Estatístico do Programa do Programa das Nações Unidas para o Desenvolvimento – PNUD - A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos. Publicado em abril de 2004, p.30. Disponível em < http:www.dominiopublico.gov.br>. Acesso em 08/06/2017.

7 ONU. Organização das Nações Unidas. Relatório do Compêndio Estatístico do Programa do Programa das Nações Unidas para o Desenvolvimento – PNUD - A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos. Publicado em abril de 2004, p. 236. Disponível em < http:www.dominiopublico.gov.br>. Acesso em 08/06/2017. Na mesma página o relatório consigna que algumas perguntas empregadas para as tendências têm limitações que influem na medição. As perguntas com escalas de resposta de duas ou três alternativas não se ajustam plenamente aos requisitos de uma análise de conglomerados. Além disso, nes- sas variáveis, o desvio padrão foi superior ao das outras variáveis. Essas dificuldades são particularmente palpáveis no caso das perguntas da dimensão de apoio às instituições da democracia representativa, cujas escalas de resposta são binárias. Apesar dessas limitações, como foi explicado, os resultados obtidos foram sólidos.

Mediante convênio celebrado em 2002 entre o Programa das Nações Unidas para o Desenvolvimento e o Latino Barômetro – uma organização não-governamental sem fins lucrativos com sede em Santiago no Chile - é criado, a partir de uma fusão conceitual e metodológica, e utilizado no âmbito do Relatório A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos, o índice de apoio à democracia – IAD.[8]

Consoante as medições do IAD expostas no referido relatório, pessoas identificadas como apoiadoras da democracia – dentre outros fatores por haverem respondido afirmativamente à pergunta "A democracia é preferível a qualquer outra forma de governo"- surpreendentemente foram responsáveis pela montagem da seguinte tabela:

QUADRO 3

PROPORÇÃO DE PESSOAS QUE APÓIAM A DEMOCRACIA COM RESPOSTAS "INESPERADAS" EM RELAÇÃO AO APOIO A MEIOS AUTORITÁRIOS PARA RESOLVER PROBLEMAS

		P32ST
Pergunta	O(A) senhor(a) está de acordo...?	Porcentagem que apóia sistema democrático e que está de acordo com...
P28UA	Com que o presidente não se limite às leis	38.6
P28UB	Com que o presidente imponha ordem pela força	32.3
P28UC	Com que o presidente controle os meios de comunicação	32.4
P28UD	Com que o presidente deixe de lado o Congresso e os partidos	32.9
P38STB	Não me importaria que um governo não democrático chegasse ao poder, se resolvesse os problemas do país	44.9

Notas:
Não foram incluídas respostas NS/NR.
No caso das pessoas que manifestam apoiar um sistema democrático, foram somadas as respostas "em desacordo" e "muito em desacordo" com cada uma das afirmações.

Fonte: Relatório do Compêndio Estatístico do Programa do Programa das Nações Unidas para o Desenvolvimento – PNUD - A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos. Publicado em abril de 2004, p.225. Disponível em < http:www.dominiopublico.gov.br>. Acesso em 08/06/2017.

Os cidadãos adotam uma posição inicial em relação à ideia de viver numa democracia. Todavia, a resposta afirmativa à questão "A democracia é preferível a qualquer outra forma de governo" não indica, *de per si*, uma adesão profunda ao ideário democrático liberal ou, conforme aborda-se adiante, aos tipos de democracias liberais instaladas em seus países.

Realmente, quando cruzadas as respostas à pergunta-chave acima mencionada com outras que medem o apoio a instituições e tradições democráticas, surgem resultados intrigantes pois uma expressiva parcela daqueles que dizem apoiar a democracia concordam igualmente com posturas contrárias ao funcionamento de instituições democráticas essenciais – a exemplo do Congresso e dos partidos políticos.

Esse quadro harmoniza-se com outros dados que indicam existir uma grande desconfiança com relação à classe política na América Latina. Conforme enfatizam analistas do Instituto de Pesquisas Econômicas Aplicadas – IPEA - acerca do Relatório A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos - PNUD de 2004, apenas 2,3% dos cidadãos dos 18 países latino-americanos acredita que os políticos cumprem as promessas de campanha.[9]

Existe ainda o alarmante percentual daqueles que apoiam governantes que utilizem meios autoritários desde que aptos para resolver os problemas econômicos e sociais do país. O apoio declarado à democracia da pergunta-padrão "A democracia é preferível a qualquer outra forma de governo" é desafiado novamente quando apresenta-se ao entrevistado a alternativa entre desenvolvimento sócioeconômico e democracia.

QUADRO 4

PROPORÇÃO DE PESSOAS QUE APÓIAM A DEMOCRACIA COM RESPOSTAS "INESPERADAS" EM RELAÇÃO A SUA AVALIAÇÃO SOBRE A OPÇÃO ENTRE DEMOCRACIA E DESENVOLVIMENTO

Pergunta 35ST	Pergunta 32ST Porcentagem que apóia sistema democrático e que está de acordo com...
Democracia mais importante	32.8
Ambas por igual	20.7
Desenvolvimento mais importante	46.4

Fonte: Relatório do Compêndio Estatístico do Programa do Programa das Nações Unidas para o Desenvolvimento – PNUD - A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos. Publicado em abril de 2004, p.226. Disponível em < http:www.dominiopublico.gov.br>. Acesso em 08/06/2017.

O interesse pelas amostragens empíricas acerca da democracia formal e substancial latino-americana marca a produção acadêmica de juristas comprometidos com a efetivação da Constituição de 1988, o documento da redemocratização que encarta os mecanismos aptos à construção da cidadania liberal no Brasil. Nesse sentido, a análise crítica sobre o IDE e demais instrumentos do relatório do PNUD de abril

8 ONU. Organização das Nações Unidas. Compêndio Estatístico do Programa das Nações Unidas para o Desenvolvimento. Relatório A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos, p.221-237. Disponível em < http:www.dominiopublico.gov.br >. Acesso em 08/06/2017.

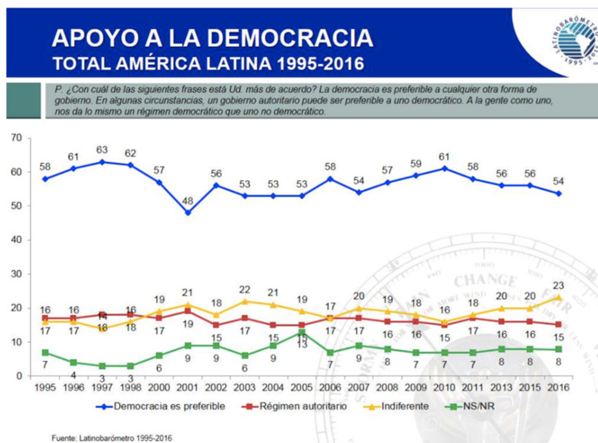
9 WOLFFENBÜTTEL, Andréa. *Construindo a democracia na América Latina.* **Revista do Instituto de Pesquisas Econômicas Aplicadas – IPEA** -, Seção Política, Ano 2 , edição 6, 1 de janeiro de 2005. Disponível em <http:www.ipea.gov.br>. Acesso em 08/06/2017.

de 2004 vem sendo desenvolvida desde sua publicação por doutrinadores nas searas do direito e da ciência política, dentre os quais destaca-se pela atualidade o posicionamento de que a satisfatória cidadania política medida pelo IDE nesse documento é contrabalançada pela pouca cidadania social, que é a causa dos resultados obtidos pelo IAD.[10]

Tendo em vista que desde 2004, o Programa das Nações Unidas para o Desenvolvimento – PNUD – não elabora um relatório geral sobre democracia na América Latina, procede-se à atualização dos dados mediante o Informe 2016 da Corporação Latinobarômetro, principalmente porque essa instituição foi parceira do PNUD na elaboração do multicitado relatório de 2004 e na criação do índice de apoio à democracia (IAD).

Diferentemente do que ocorre no relatório de 2004 do PNUD, porém, inexiste no Informe 2016 do Latinobarômetro uma relação e descrição minuciosa das perguntas utilizadas, metodologia, clusters, variáveis consideradas etc., o que impede a análise neste trabalho dos critérios usados nas perguntas do Informe 2016, as quais apenas introduzem indiretamente os gráficos apresentados.[11]

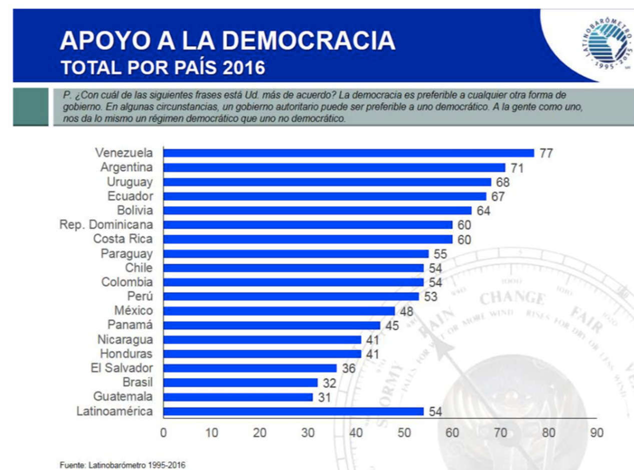
Consoante o Informe 2016 do Latinobarômetro, pelo quarto ano consecutivo, o apoio à democracia não tem melhorado, havendo sido registrada uma queda de dois pontos porcentuais no suporte ao regime democrático desde 2015, razão pela qual o percentual desce em 2016 a 54%.



Fonte: Informe 2016 da Corporação Latinobarômetro, p. 9. Disponível em: <http:www.latinobarometro.org> . Acesso em 08/06/2017.

Conforme análise inserida no Informe 2016, depois de 21 anos de monitoramento do apoio à democracia, a América Latina encontra-se em situação pior do que no início. O suporte à democracia na América Latina tem três momentos baixos nestes 21 anos em que a Corporação Latinobarômetro tem medido esse indicador: a crise asiática em 2001, quando atingiu 48%, a crise das bolsas internacionais em 2007 e o ano de 2016, com a marca nestes últimos do percentual de 54% de apoio.

Cidadãos que se declaram indiferentes ao tipo de regime chegam ao percentual de 23%, o maior desde 1995. Os partidários do autoritarismo mantêm-se praticamente estáveis com o percentual de 15% relativamente à posição de 1995. A adesão ao autoritarismo, todavia, encontra-se em declínio quando analisado o gráfico acima a partir do ano de 2011.



Fonte: Informe 2016 da Corporação Latinobarômetro, p. 11. Disponível em: <http:www.latinobarometro.org> . Acesso em 08/06/2017.

Na evolução individualizada de cada país, existem 5 países onde o apoio à democracia aumenta: Paraguai, Costa Rica, Panamá, Argentina e Honduras. No México não há variação.[12]

Em cinco países houve fortes quedas em apoio à democracia entre 2015 e 2016. São eles: Brasil, que caiu 22 pontos percentuais, Chile (11 pontos), Uruguai (8 pontos) Venezuela e Nicarágua (7 pontos percentuais cada). No Uruguai – que atingiu o seu ponto mais baixo

10 POMPEU, Gina. **Direito à educação: controle social e exigibilidade judicial.** Rio – São Paulo – Fortaleza: ABC editora, 2005, p. 235-236.

11 CORPORAÇÃO LATINO BARÔMETRO. Informe 2016. Disponível em: <http:www.latinobarometro.org> . Acesso em 08/06/2017.

12 Panamá aumenta em 11 pontos percentuais o apoio à democracia. Essa é a exceção de 2016. Costa Rica aumenta três pontos percentuais com significância estatística, e os outros 3 sem significância estatística. Cf.: CORPORAÇÃO LATINOBARÔMETRO Informe 2016 da Corporação Latino Barômetro, p. 11. Disponível em: <http:www.latinobarometro.org> . Acesso em 08/06/2017.

no suporte à democracia em 21 anos (o percentual de 68% de apoio) - a queda é significativa porque tem sido historicamente o país latino-americano onde o apoio à democracia é maior.[13]

Revela-se, portanto, um fenômeno estatisticamente comprovado de abalo de confiança dos cidadãos nas democracias latino-americanas. Realmente, com ênfase na abrupta perda percentual de suporte à democracia identificada em 2016 na América Latina, para a qual o Brasil contribui com a impressionante queda de 22% no total de cidadãos que apoiam a democracia, verifica-se mediante a análise dos dados o aumento na insatisfação dos latino-americanos com os regimes democráticos onde vivem, visto que menos pessoas passam a entender que a democracia é preferível a qualquer outra forma de governo.

O que precisa ser examinado, todavia, é se essa desconfiança ou desvalorização dirige-se às liberdades cívicas, ao direito de participação na formação da vontade governamental, ou seja, se tal comportamento decorre de uma predisposição latino-americana a viver sob regimes autoritários.

Logo, em ordem a aferir se o repúdio latino-americano dirige-se à democracia liberal é preciso delinear minimamente em que consiste esse tipo de democracia e, posteriormente, investigar se os regimes democráticos dos 18 países da América Lato correspondem, na concretude dos fatos, a democracias liberais.

Nessa ordem de ideias, não se adentra a complexa tarefa de fornecer um conceito perfeito e acabado para a democracia liberal. Aborda-se, contudo, o que existe de essencial na democracia moderna que possibilita a caracterização de monarquias parlamentaristas, repúblicas presidencialistas, federações e estados centralizados como democracias modernas consolidadas.

Assim, importa mencionar a lição de Sartori de que a palavra democracia possui inúmeras acepções conforme se esteja abordando o sentido político, social, econômico (e como subespécie desta uma democracia industrial).[14] A amplitude da ideia, o alcance do sentido do termo de democracia acarreta, inclusive, que ela consista em instituto tratado no âmbito do Direito Internacional Humanitário como um dos objetivos essenciais do denominado *jus post bellum*.[15]

Cumpre lembrar que Schumpeter define a democracia como sistema de organização política no qual as elites disponíveis competem pelo governo, numa visão que presta-se a englobar as democracias meramente eleitorais mas que tem pouca conexão com as características essenciais do governo do povo construídas pela clássica e pela moderna teoria da democracia.[16]

Robert Dahl aprofunda o tema da democracia, ou antes, da miríade de formas que pode assumir, ao elaborar – considerando a necessidade de responsividade do governo aos cidadãos, bem como vários níveis de participação política e evolução institucional - o conceito de quase poliarquia como estágio superior à oligarquia, o de poliarquia plena como fase de desenvolvimento político superior à quase poliarquia e a definição de democratização da poliarquia, a qual é o ponto máximo da ordenação democrática da sociedade ainda não alcançado na prática.[17]

Tendo em vista o objeto deste artigo, porém, faz-se necessário centrar a caracterização da democracia liberal em um ou alguns aspectos centrais sem os quais resta descaracterizado a ideia rousseauniana de governo do povo. Conforme sintética proposição de Friedrich Müller há algo simples e essencial na ideia de democracia que permite seja identificada sua existência ainda que sob formatos diferentes. Realmente, consoante Müller, *"a ideia fundamental da democracia é a seguinte: determinação normativa do tipo de convívio de um povo pelo mesmo povo"*.[18]

Marcelo Varella, ao expor a impossibilidade atual de criação de uma república mundial, igualmente segue

13 O Informe 2016 da Corporação Latinobarômetro atribui a queda de 22 pontos percentuais no apoio à democracia no Brasil à grave crise política que o país está atravessando, diretamente ligada à luta contra a corrupção. Cf.: CORPORAÇÃO LATINO BAROMETRO. Informe 2016 da Corporação Latino Barômetro, p. 11. Disponível em: <http:www.latinobarometro.org> . Acesso em 08/06/2017.

14 SARTORI, Giovanni. **Democrazia: cosa é.** Milano: RCS Libri S.p.A., 2000, p. 60.

15 ALVES, Lucas Garcia. *A necessidade de regulamentação nos conflitos armados para restabelecimento da democracia.* **Revista de Direito Internacional**, Brasília, v. 9, n. 2, p. 45-67, jul./dez. 2012, p. 62.

16 SCHUMPETER, Joseph A. **Capitalismo, socialismo e democracia.** Tradução de Ruy Jungmann. Rio de Janeiro: Editora Fundo de Cultura, 1961, p. 321-325.

17 DAHL, Robert. **Poliarquia, participação e oposição.** Tradução de Celso Mauro Paciornik. São Paulo: Edusp, 1997, p. 189-210.

18 MÜLLER, Friedrich. **Quem é o povo: a questão fundamental da democracia.** Tradução de Peter Naumann. 3 ed. São Paulo: Max Limonad, 2003, p. 57.

a ideia basilar da participação do povo na escolha, no controle e, portanto, na formação da vontade política como o ingrediente democrático essencial, independentemente da forma mediante a qual traduza em normas no ordenamento jurídico.[19]

Logo, no âmago do conceito de democracia está a participação popular na elaboração de normas, decisões sobre programas governamentais, diretrizes macroeconômicas etc. – seja pelo mecanismo da participação direta (pouco desenvolvido no Brasil, por exemplo), seja pela via representativa.

> A democracia representativa é um princípio segundo o qual órgãos representativos, eleições periódicas, pluripartidarismo e separação de poderes possam oferecer ao povo a garantia de sua soberania. A democracia participativa é uma estruturação que oferece a participação do cidadão no processo de decisão de forma efetiva, na possibilidade de aprender sobre a Democracia, o exercício crítico na divergência de opiniões, como também produzir *inputs* político-democráticos, tudo a fim de uma autodeterminação do homem, somente alcançada na participação política.[20]

Para Rawls, o princípio da liberdade igual, quando aplicado ao procedimento político definido pela constituição, deve ser denominado princípio de igual participação e exige que todos os cidadãos tenham um direito igual de participar do processo político, da formação das leis etc, no exercício daquilo *que Constant chamava a liberdade dos antigos* e que Isaiah Berlin chama liberdade positiva.[21]

Habermas entende-a, sob o viés da liberdade-autonomia, como a compatibilização entre liberdade positiva (autonomia pública) e liberdade negativa (autonomia privada). Sustenta, destarte, que são politicamente autônomos aqueles que se podem ver conjuntamente como autores das leis e como destinatários individuais dessas mesmas normas.[22]

Guillermo O'Donnel, por seu turno, sustenta que *"nenhum conjunto único de instituições ou regras específicas define por si mesmo a democracia, nem mesmo os mais proeminentes"*. Aduz ainda que instituições hoje distintivamente tidas como inerentes à democracia foram criadas inicialmente com outros propósitos, bem como que outras instituições atualmente consideradas menos essenciais ou até mesmo experimentais podem amalgamar-se no futuro à ideia de democracia.[23]

Portanto, assentado que a participação – direta ou indireta – do povo no governo da nação é a característica essencial da democracia, assim como que não existe uma receita universal para a criação de um regime político democrático, torna-se necessário descortinar que espécies de regimes democráticos os cidadãos latino-americanos tinham em mente ao responderem as perguntas dos pesquisadores transformadas nas estatísticas elencadas no presente tópico.

3. A pobreza e a desigualdade como critérios indissociáveis da interpretação de dados estatísticos sobre democracia na América Latina.

Verificado, por conseguinte, o elevado percentual de descrédito que os cidadãos dos países da América Latina, notadamente no Brasil, votam aos regimes democráticos de seus países, bem como assentada a ideia da participação popular na formação da vontade política como o elemento essencial da democracia liberal, aborda-se em linhas gerais quem é o cidadão latino-americano e como são, na prática, as democracias latino-americanas.

A correta interpretação dos dados estatísticos mencionados no tópico 1 requer uma incursão no perfil do povo e dos regimes democráticos latino-americanos, pois a apreensão do significado das respostas aos questionários utilizados torna-se mais precisa e profunda quando se descortina o contexto político e social no qual foi realizada a pesquisa de campo.

Nessa lógica, para responder à questão acerca da existência de um repúdio ao direito de participação na

19 VARELLA, Marcelo D.. *Internacionalização do direito: direito internacional, globalização e complexidade*. 2012. 606f. Tese (Livre-Docência em Direito Internacional). Faculdade de Direito da USP. Universidade de São Paulo. São Paulo, p 568-570.

20 ALVES, Lucas Garcia. A necessidade de regulamentação nos conflitos armados para restabelecimento da democracia. **Revista de Direito Internacional,** Brasília, v. 9, n. 2, p. 45-67, jul./dez. 2012, p. 64.

21 RAWLS, John. **Uma teoria da justiça.** Tradução de Jussara Simões. 3 ed. São Paulo: Martins Fontes, 2008, p. 247-273.

22 HABERMAS, Jurgen. *A reconciliação por meio do uso público da razão.* In: ______. A inclusão do outro: estudos de teoria política. 2. ed. São Paulo: Edições Loyola, 2004, p. 123.

23 O'DONNEL, Guillermo; SCHMITTER, Philippe C. **Transições do regime autoritário: primeiras conclusões.** Tradução de Adail U. Sobral. São Paulo: Vértice/Editora Revista dos Tribunais, 1988, p.25.

formação da vontade política de suas nações, por parte dos homens e mulheres latino-americanos, em prol da expectativa de serem satisfeitos em seus interesses por sistemas políticos autoritários é necessário desvelar em linhas gerais quem é o povo na América Latina e quais modelos de democracia liberal lá existem.

Em razão da relação entre o respeito mínimo aos direitos sociais e a efetivação de direitos políticos, o mesmo Relatório do Compêndio Estatístico Programa do Programa das Nações Unidas para o Desenvolvimento – PNUD - de 2004 mencionado no tópico 1, consubstancia a seguinte tabela:

TABELA 1

DEMOCRACIA, POBREZA E DESIGUALDADE

Região	Participação eleitoral (1)	Desigualdade (2)	Pobreza	PIB per capita
América Latina	62,7	0,552 (3)	42,8 (6)	3792 (9)
Europa	73,6	0,290 (4)	15,0 (7)	22600 (10)
EUA	43,3	0,344 (5)	11,7 (8)	36100

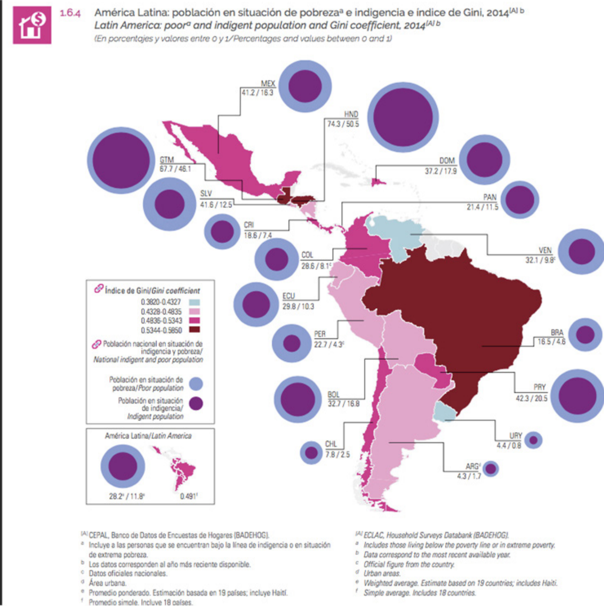
Notas:
(1) Votantes com base na população com direito a voto 1990-2002. Ver tabela 8.
(2) Coeficiente de Gini. As cifras mais altas do coeficiente de Gini correspondem a um grau mais alto de desigualdade.
(3) Média simples para a década de 90. Perry et al., 2004, p.57.
(4) Eurostat PCM-BDU, dezembro de 2002.
(5) Fontes: OCDE 2002, Social Indicators and Tables.
(6) Média ponderada por população dos dados de pobreza entre 1998-2002, CEPAL, 2004.
(7) Eurostat PCM-BDU, dezembro de 2002.
(8) Fonte: US Census Bureau 2001, Poverty in the United States 2002.
(9) Elaboração própria com base nos dados da CEPAL, 2004 (em dólares constantes).
(10)Europa ocidental (EU15) e EUA, PIB per capita 2002. Fonte: OCDE (em dólares correntes)
Dada a multiplicidade de fontes e as diversas metodologias de elaboração de dados sugere-se usar os dados desta tabela como referências indicativas.

Fonte: ONU. Organização das Nações Unidas. Relatório do Compêndio Estatístico Programa do Programa das Nações Unidas para o Desenvolvimento – PNUD - A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos. Publicado em abril de 2004, p. 40. Disponível em < http:www.dominiopublico.gov.br>. Acesso em 08/06/2017.

Dentro da realidade acima registrada, diretamente pertinente ao trinômio crescimento econômico - desenvolvimento humano – democracia, resta demonstrado que mesmo nos dias atuais inexiste liberdade real suficiente na América Latina para embasar a edificação de regimes democráticos. As condições econômicas para construção da cidadania liberal são assaz desfavoráveis quando comparadas com as existentes nos países europeus ou nos Estados unidos.

De acordo com o Anuário Estatístico 2016 da Comissão Econômica para a América Latina e o Caribe - CEPAL – o percentual de cidadãos em situação de pobreza e indigência ainda são muito altos. Destaque-se no gráfico abaixo que, em se tratando do Índice GINI, indicador que mede a desigualdade social – o qual oscila entre 0 (nenhuma desigualdade) e 1 (máxima desigualdade) –, a posição do Brasil (entre 0,534 e 0,585) é pior que a da América Latina (0,491).

Não por acaso, é exatamente na nação brasileira que a democracia perdeu o maior percentual de apoio, conforme demonstrado no tópico anterior por gráficos do Informe Latinobarômetro 2016.



Fonte: Anuário Estatístico da América Latina e Caribe 2016 da Comissão Econômica para a América Latina e o Caribe – CEPAL -, p. 27. Disponível em: <http:www.cepal.org>. Acesso em 08/06/2017.

Deve ser levado em consideração, diante do gráfico acima, que, em comparação com o anuário da CEPAL de 2011, houve uma pequena melhora nos percentuais de pobreza da região – que era de 31,4% da população em 2011 e, consoante os dados de 2016, passou a ser de 28,2%.

Igualmente, com base no cotejo dos referidos anuários, os percentuais de indigência diminuíram de 12,3% da população em 2011 para 11,8% em 2016.[24] Progressos praticamente insignificantes perante a expectativa lógica e justificada no sentido de que a ordem democrática modificaria sensivelmente para melhor as condições de vida.

Verifica-se, portanto, que a vivência democrática tem causado pouco impacto na melhoria da qualidade de vida dos cidadãos latino-americanos. A interpretação doutrinária de Gina Pompeu a respeito das estatísticas sob enfoque - mormente porque debruça-se sobre o Brasil, detentor do maior índice de concentração de renda dentre os países latino-americanos - esclarece:

> Nesse triângulo – democracia eleitoral, pobreza e desigualdade – coabitam liberdades políticas com

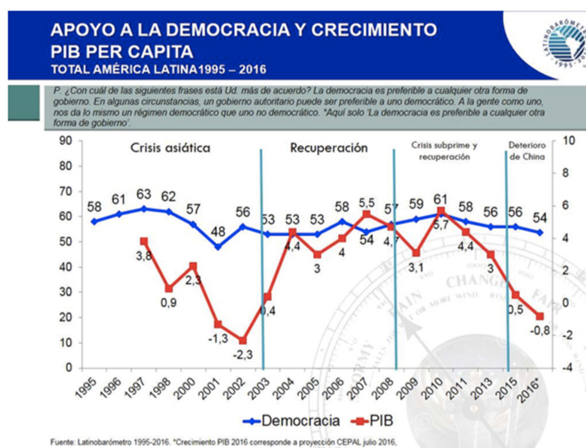
24 ONU. Organização das Nações Unidas. Anuário Estatístico da Comissão para a América Latina e o Caribe 2011. Disponível em < http:www.dominiopublico.gov.br >. Acesso em 08/06/2017. ONU. Organização das Nações Unidas. Anuário Estatístico da Comissão para a América Latina e o Caribe 2016. Disponível em < http:www.dominiopublico.gov.br >. Acesso em 08/06/2017.

> severas privações materiais, onde, dificilmente, consolidam-se direitos civis e sociais. Alcançar maiores níveis de desenvolvimento é uma aspiração tão forte, que leva muitos cidadãos brasileiros à afirmação de que estão dispostos a apoiar um regime autoritário, se este regime der resposta às suas demandas de bem-estar.[25]

Desvelar, ainda que em linhas gerais, quem é o povo latino-americano e como são seus modelos de democracia, corresponde e demonstrar o impacto negativo da pobreza e da desigualdade sobre a construção da democracia e da cidadania. O exame dos dados sobre crescimento econômico e desenvolvimento humano sob regimes democráticos latino-americanos revela igualmente que tais modelos de organização política não têm sido capazes de reverter a pobreza e a extrema desigualdade econômica.

Logo, à primeira vista vislumbra-se na América Latina um panorama geral em que cidadãos carentes de liberdade real suficiente para aquisição da cidadania sobrevivem sob formas de democracia cujo grau de participação popular na formação da vontade política igualmente não é bastante para modificar as estruturas econômicas e sociais responsáveis pela concentração de renda e pela pobreza.

Releva mencionar, antes de adentrar-se o tópico seguinte, dado contido no Informe 2016 do Instituto Latinobarômetro e uma reflexão nele realizada sobre a relação entre o baixo crescimento econômico (declínio da taxa de crescimento econômico regional desde 2010) e a perda de apoio da democracia.



Fonte: Informe 2016 da Corporação Latinobarômetro, p. 10. Disponível em: <http:www.latinobarometro.org> . Acesso em 08/06/2017.

Realmente, diante do conjunto de informações agregadas no gráfico acima, o Informe 2016 do Latinobarômetro questiona:

> O que aconteceu com a região, além de entrar num período de baixo ou nenhum crescimento econômico? Será que o ciclo econômico impede avançar o processo de consolidação da democracia? Os dados sugerem algo diferente uma vez que o apoio à democracia aumenta durante a crise de em 2008/2009, quando a economia estava em direção oposta, e atinge um pico em 2010, com 61%. Apenas a partir de 2010 a baixa do apoio ocorre, o que indicaria que a economia não é o único fator que o afeta.[26]

Consoante a leitura que Sérgio Antônio Ferreira Victor faz do magistério de Isaiah Berlin, tratando-se de liberdade (e, pois, de democracia) é preciso ver ideias e dados *"com os olhos de um competente empirista e perspicaz observador da história"*, conectá-los às suas origens, pois os equívocos do idealismo que tende a isolar informações complexas em tubos de ensaio que os simplificam artificialmente somente pode ser neutralizado pelo empirismo capaz de inserir o material observado na moldura da realidade que lhe completa o sentido.[27]

Na América Latina, as repúblicas estabelecidas descumprem desde sua criação o segundo princípio de justiça de Rawls – segundo o qual as desigualdades sócio-econômicas devem propiciar o máximo benefício aos menos favorecidos e serem estabelecidas de modo a possibilitar o acesso a uma condição de vida melhor a todos em condições de igualdade de oportunidades -, pois a desigualdade implantada nos países latino-americanos escraviza, e é concentradora de renda e riqueza, impeditiva da mobilidade social e, portanto, da conciliação entre liberdade e igualdade que viabiliza o exercício dos direitos políticos.[28]

Nesse sentido, afigura-se bizantina, no Brasil e na América Latina, a questão suscitada por Sérgio Antônio Ferreira Victor acerca de uma mudança na postura de Rawls, em sua obra Liberalismo Político, a respeito do embate entre liberdade positiva e liberdade negativa abordado n'Uma Teoria da Justiça, na qual o professor

25 POMPEU, Gina Vidal Marcílio; SIQUEIRA, Natércia Sampaio. **Democracia Contemporânea e os critérios de justiça para o desenvolvimento socioeconômico: direito constitucional nas relações econômicas.** Rio de Janeiro: Lumen Juris, 2017, p. 181.

26 CORPORAÇÃO LATINOBAROMETRO. Informe 2016 da Corporação Latino Barômetro, p. 8. Disponível em: <http:www.latinobarometro.org> Acesso em 08/06/2017.

27 VICTOR, Sérgio Antônio Ferreira. *Liberalismo versus democracia: os conceitos de liberdade de Berlin e o diálogo entre Rawls e Habermas.* **Revista de Direito Internacional**, Brasília, v. 8, n. 2, p. 1-18, jul./dez. 2011, p. 2-3.

28 RAWLS, John. **Uma teoria da justiça.** Tradução de Jussara Simões. 3 ed. São Paulo: Martins Fontes, 2008, p. 100 e 250-251.

de Harvard teria resgatado a liberdade negativa da posição subalterna em que a colocara n'Uma Teoria da Justiça. Trata-se de elucubração que repercute na discussão sobre democracia – pois a liberdade positiva é a liberdade de participação política -, porém com pouca base empírica, dentro de um texto que valoriza o empirismo de Isaiah Berlin, que aliás viveu e escreveu no contexto europeu.[29]

Diante do fato de que a América Latina está longe de atingir o nível de liberdade positiva (participação política) suficiente até mesmo para que seus países organizem-se como democracias liberais, o bom empirista que trate do tema da liberdade, deve considerar que as condições fáticas de exercício de ambos os tipos de liberdade na realidade na qual está inserido. Mesmo porque a relação entre liberdade positiva e negativa, conforme posição efetivamente assumida por Rawls n'O Liberalismo Político é de interdependência e não a relação de competição afirmada, ainda que sob vieses distintos, por Habermas e Isaiah Berlin.

Realmente, Rawls esclarece em O Liberalismo Político em asserções mais incisivas a que já defende desde Uma Teoria da Justiça, segundo a qual existe, isto sim, uma relação interna entre autonomia pública e autonomia privada na qual uma pressupõe a outra, de maneira que as liberdades iguais dependem a liberdade igual de participação política e vice-versa.[30]

Diferentemente dos países centrais do capitalismo, onde prosperam teorias que identificam democracia com a preservação da liberdade em face da intervenção estatal ou liberdade negativa, poucos cidadãos latino-americanos podem racionalmente dar-se ao luxo de escolher entre o absenteísmo estatal e o intervencionismo. As necessidades básicas do povo latino-americano requerem a implementação de programas sociais para reduzir a concentração de renda, a pobreza e a marginalização social.

Em outras palavras, o cidadão latino-americano médio carece de liberdade positiva, traduzida em inclusão econômica e social, como pressuposto para o exercício efetivo de seus direitos políticos. Como sustentado por Amartya Sen, não somente a tirania ditatorial mas também a pobreza é uma fonte inegável de privação de liberdade.[31] Como podem, então, existir democracias onde o povo não é livre da pobreza extrema?

Desde que não assegurado um patamar mínimo de vida a todos os cidadãos, a pobreza e a ignorância excessivas impedem o exercício da liberdade formalmente prevista em costumes ou leis. Nesse sentido, Rawls discorre acerca da complementariedade entre liberdade e igualdade ao aduzir que a liberdade formal (liberdade como liberdade igual) é a mesma para todos, todavia, o valor da liberdade (liberdade real) não é igual para todos. Alguns têm mais autoridade e riqueza e, portanto, mais recursos para atingir seus objetivos, de maneira que o organização social deve tentar maximizar o valor da liberdade dos menos favorecidos, mediante a promoção e proteção de sua participação política em condições de 'um eleitor um voto', ou seja, velando para que o voto daqueles cuja liberdade tem menor valor tenha o mesmo peso do voto daqueles cuja liberdade tem maior valor.[32]

Consoante estudos direcionados especificamente ao crescimento econômico e desenvolvimento humano, parcela significativa da população dos países latino-americanos passa fome, não possui moradia digna, não usufrui de saneamento básico nem de educação de qualidade. O desemprego ou subemprego também atingem faixas populacionais expressivas, num quadro que propicia uma cidadania de baixa qualidade pelo nível deficiente de informação e pela susceptibilidade a pressões econômicas no exercício das liberdades políticas.[33]

Em outras palavras, a realidade dos cidadãos latino-americanos é caracterizada pela escassez de meios materiais para a satisfação das necessidades básicas, situação potencializada pela concentração dos meios existentes. Nesse cenário, regimes democráticos que garantem somente a liberdade negativa, ou nos quais a intervenção estatal não tem produzido a inclusão econômica e social, afiguram-se como atavios cívicos que nada somam à vida das pessoas.

29 VICTOR, Sérgio Antônio Ferreira. *Liberalismo versus democracia: os conceitos de liberdade de Berlin e o diálogo entre Rawls e Habermas*. **Revista de Direito Internacional**, Brasília, v. 8, n. 2, p. 1-18, jul./dez. 2011.

30 RAWLS, John. **Liberalismo político.** Tradução de Álvaro de Vita. São Paulo: Martins Fontes, 2016, p.484-487; **Uma teoria da justiça.** Tradução de Jussara Simões. 3 ed. São Paulo: Martins Fontes, 2008, p. 250-274.

31 SEN, Amartya. **Desenvolvimento como liberdade.** Tradução de Laura Teixeira Mota. São Paulo: Companhia das Letras, 2010, p. 16.

32 RAWLS, John. **Uma teoria da justiça.** Tradução de Jussara Simões. 3 ed. São Paulo: Martins Fontes, 2008, p. 100 e 250-275.

33 ONU. Organização das Nações Unidas. Anuário Estatístico da América Latina e Caribe 2016 da Comissão Econômica para a América Latina e o Caribe – CEPAL -, p. 27. Disponível em: <http:www.cepal.org>. Acesso em 08/06/2017.

Diante do panorama geral acima exposto, empreende-se a seguir o corte epistemológico consistente no enfoque do México e do Brasil para que, ao tornarem-se mais nítidos os contextos político e social no qual foram realizadas as pesquisas de campo mencionadas no tópico 1, possa-se esclarecer porque os regimes democráticos latino-americanos padecem da supramencionada deficiência no nível de participação popular e, nesse viés, oferecer elementos para a resposta à questão central sobre haver uma preferência latino-americana por regimes políticos autoritários.

4. A democracia no Brasil e no México.

As reflexões finais do relatório 'A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos' do Compêndio Estatístico do Programa do Programa das Nações Unidas para o Desenvolvimento – PNUD - de 2004 iniciam com uma famosa citação de Isaiah Berlin contra o idealismo, elaborada em ensaio sobre a liberdade, segundo a qual *"há mais de cem anos, o poeta alemão Heine advertiu os franceses de que não deviam subestimar o poder das idéias: os conceitos filosóficos alimentados no silêncio do escritório de um acadêmico podiam destruir toda uma civilização"*.[34]

Liberdade é a matéria prima da democracia. Não se pode tratar de liberdade e tampouco de democracia sem submeter a avaliação das ideias, conceitos e informações à realidade fática que lhes pertine. Em razão do método utilizado neste trabalho, a presente análise a respeito da conjectura de desapego latino-americano à democracia pretende-se empírica seja no ponto de partida – com a reprodução dos dados que a embasam – seja no falseamento ou confirmação daquela mediante material igualmente empírico.

Nesse diapasão, consoante a metodologia aplicada pelo relatório 'A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos', no qual PNUD e Latinobarômetro criam e utilizam o Índice de Apoio à Democracia – IAD -, as unidades de análise para o estudo do tema de apoio à democracia - em particular, o Índice de apoio à democracia (IAD) e seus componentes -, foram obtidas mediante a divisão da América Latina (18 países) em três sub-regiões: (a) México, República Dominicana e América Central (que inclui Guatemala, El Salvador, Honduras, Nicarágua, Costa Rica e Panamá; (b) Região Andina (Venezuela, Colômbia, Equador, Peru e Bolívia); (c) Mercosul e Chile (Brasil, Uruguai, Argentina, Paraguai e Chile).

Conforme explicita a 'nota técnica sobre os índices derivados na análise da pesquisa Latinobarômetro 2002 – A construção do Índice de Apoio à Democracia (IAD) –', os valores do IAD mencionados no tópico 1 expressam médias do grupo de países dentro da América Latina, considerando cada país como uma unidade com o mesmo peso. A mencionada nota técnica acerca da metodologia empregada para criar o IAD aduz ainda que:

> Se, para efeito de estudo, fosse ponderada a amostra pela população para obter tendências a nível latino-americano, basicamente seriam refletidas as opiniões e avaliações de brasileiros e mexicanos (aproximadamente 60% da população total).[35]

Eis porque, dentro do viés empírico que pretende-se imprimir à avaliação das estatísticas decorrente outrossim da adoção do método hipotético-dedutivo, opta-se neste artigo pelo estudo individualizado – mediante um corte epistemológico na realidade - dos maiores representantes populacionais e econômicos de duas das três regiões usadas para aferição do IAD, a saber, México e Brasil: para obter tendências a nível latino-americano

4.1. Democracia no México: nem Porfírio nem Madero ou porque as melhores lições democráticas vêm de Zapata.

Em novembro de 1871, na província de Noria, Porfirio Diaz discursa como líder de uma rebelião contra o então ditador Benito Juarez. Nessa ocasião, contrapõe-se veementemente às sucessivas reeleições da ditadura de Juarez e coloca a aplicação da Constituição de 1857 – que preconiza a realização de eleições periódicas – como prioridade de sua plataforma política.

Todavia, quando chega ao poder em 1877, Diaz engaveta o discurso de Noria, mantém-se no poder du-

34 ONU. Organização das Nações Unidas. Compêndio Estatístico do Programa das Nações Unidas para o Desenvolvimento. Relatório A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos, p.203. Disponível em < http:www.dominiopublico.gov.br >. Acesso em 08/06/2017.

35 ONU. Organização das Nações Unidas. Compêndio Estatístico do Programa das Nações Unidas para o Desenvolvimento. Relatório A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos, p.221. Disponível em < http:www.dominiopublico.gov.br >. Acesso em 08/06/2017.

rante 33 anos sucessivos, durante os quais beneficia principalmente os grandes proprietários de terras, ricos industriais e banqueiros, grandes empresários nacionais e estrangeiros. Em 1906 essa classe dominante corresponde a 0,6% da população de cerca de 14 milhões de mexicanos, a classe média a cerca de 8,3% e os pobres a 91% da população.[36]

A classe dominante no porfirismo – muito semelhante em todos os países latino-americanos e cujas práticas possuem transcendência temporal, visto que, conforme demonstram os gráficos que ilustram o tópico 2, a desigualdade social e a concentração de renda na América Latina chegou incólume ao século XXI – é dona de latifúndios, e hodiernamente também de grandes conglomerados empresariais, despreza suas raízes nacionais e latino-americanas, busca do solo natal apenas extrair o máximo lucro possível para dele viver alhures, preferencialmente em alguma capital da Europa e, atualmente, também nos Estados Unidos.[37]

A produção nacional mexicana cresce 15% durante o porfirismo, todavia esse fato pouco reverte em bem-estar para o povo mexicano. O sistema produtivo torna-se moderno e o país enriquece sob o jugo de Porfírio Diaz sem que a imensa maioria dos cidadãos tenha com isso benefício algum. Muito pelo contrário, a construção das estradas de ferro e os interesses dos grandes latifundiários aliados do governo acarretam a desapropriação de mais de 44 milhões de hectares de terras, a maioria pertencentes a comunidades de lavradores descendentes das tribos pré-colombianas de índios mexicanos.[38]

Farta documentação e literatura atesta que durante o porfirismo a imensa maioria dos mexicanos trabalha somente para comer feijão, tortilha e peixe podre, é surrada frequentemente, trancafiada à noite após o trabalho e caçada se tentasse fugir.[39] Nesse contexto, em 1908, Francisco Madero, um rico proprietário rural de Coahuila, insurge-se contra a ditadura de Porfírio Diaz, com ideário político liberal pautado na defesa de eleições livres e periódicas.

Insurreições armadas ocorrem em inúmeras províncias. Dentre os comandantes dos sublevados destacam-se Francisco Villa em San Andrés e Emiliano Zapata em Morelos. Em fevereiro de 1911, Madero – que fugira da prisão em San Antônio de Potosí e refugiara-se em San António no Texas – retorna ao México, vence algumas batalhas contra o porfirismo e celebra um tratado de paz com Diaz.

Em outubro do mesmo ano, Madero vence as eleições presidenciais, mas põe em prática uma gestão econômica em nada distinta daquela de seu antecessor, razão pela qual perde o apoio dos líderes revolucionários camponeses. Além disso, faz concessões à oposição porfirista que possibilitam o golpe militar em 1913, no qual ele e o vice-presidente eleito são assassinados.

Inicia-se, assim, a Revolução Mexicana. Os camponeses destituídos das terras donde tiravam sua subsistência desde antes da derrubada do império Asteca, pegam em armas em quase todas as províncias do país. Conscientes de que nem a opressão ditatorial de Porfírio Diaz que os reduzira à miséria nem a liberdade civil para passar fome concedida pelo governo Madero os socorreria, os zapatistas divulgam em agosto de 1914 o seguinte manifesto:

> O camponês tinha fome, era miserável, sofria exploração; e se empunhou armas foi para obter o pão que a avidez do rico lhe negava; para apossar-se da terra que o latifundiário, egoisticamente, guardava para si; para reivindicar sua dignidade ultrajada, perversamente, todos os dias. Lançou-se à revolta não para conquistar **ilusórios direitos políticos que não matam a fome**, mas para conseguir um pedaço de terra que lhe possa proporcionar alimentação e liberdade, um lar feliz, e um futuro de independência e engrandecimento.
>
> (...)
>
> Todas essas belezas democráticas, todas essas grandes palavras com que nossos avós e nossos pais se deleitaram perderam seu poder mágico de atração e sua significação para o povo. Ele já percebeu que com eleições ou sem eleições, com sufrágio universal ou sem ele, com ditadura porfiriana ou com democracia maderista, com imprensa amordaçada

36 BRUIT, Héctor H. **Revoluções na América Latina: o que são as revoluções? México, Bolívia, Cuba e Nicarágua.** 2 ed. São Paulo: Atual, 1988, p. 15-16.

37 RAMOS, Jorge Abelardo. **História da nação latino-americana.** Tradução de Marcelo Hipólito López, Maria de Fátima Jardim e Flávio José Cardozo. 2 ed. Florianópolis: Editora Insular, 2012. E-book kindle. ISBN 987-85-7474-552-7. Disponível em <http:www.amazon.com.br>. Acesso em 08/06/2017. Posição 6519-6520 de 11892.

38 BRUIT, Héctor H. **Revoluções na América Latina: o que são as revoluções? México, Bolívia, Cuba e Nicarágua.** 2 ed. São Paulo: Atual, 1988, p. 16-17.

39 RAMOS, Jorge Abelardo. **História da nação latino-americana.** Tradução de Marcelo Hipólito López, Maria de Fátima Jardim e Flávio José Cardozo. 2 ed. Florianópolis: Editora Insular, 2012. E-book kindle. ISBN 987-85-7474-552-7. Disponível em <http:www.amazon.com.br>. Acesso em 08/06/2017. Posição 6526-6527 de 11892.

> ou com libertinagem na imprensa, sempre e de todas as formas, ele continua ruminando suas amarguras, sofrendo misérias, engolindo humilhações infindáveis... (Grifo nosso). [40]

Eis, nesse panfleto de quase 103 anos de existência, resumida a visão do povo latino-americano diante de regimes democráticos que – assim como o presidido por Francisco Madero – não conseguem saciar a fome, permitir ao cidadão adquirir o emprego ou meio de vida digno por meio do qual possa satisfazer as necessidades mínimas para se ter *um lar feliz e um futuro de independência*.

Está, por conseguinte, explícito no manifesto zapatista de agosto de 1914 o que representam para o povo as democracias formais nas quais inexiste a liberdade fática mínima para o exercício efetivo de direitos políticos. O pragmatismo do movimento zapatista, pautado em reivindicações concretas, simples, nascidas da vivência dos camponeses explorados, sem o refinamento ou a ambição de largo alcance de teorias científicas de nenhum jaez foi o maior oponente que a classe econômica dominante no México – e quiçá em outras nações latino-americanas, caso houvesse vencido a revolução – enfrentou.

A força da sublevação popular comandada por Zapata, e em alguma medida também por Villa, foi tamanha que, apesar de haver sido derrotada pelas armas, ensejou a criação da Constituição mexicana de 1917 e motivou a construção do projeto político de dominação mais poderoso da América Latina: a democracia mexicana, denominada por Mario Vargas Llosa "a ditadura perfeita".[41]

Caracterizada principalmente pela existência de um único partido político e pelo fato de que os presidentes eram sucessivamente indicados por seus antecessores, esse regime manteve-se durante 80 anos, sempre sob o lema "mudar para não mudar", assumir retoricamente as bandeiras populares e burlá-las na prática, o que inclui até mesmo as eleições, tradicionalmente fraudadas pelo governo.

Na América Latina, as expectativas frustradas de melhoria da qualidade de vida sob governança democrática, os altos índices de corrupção que sobreviveram à redemocratização e a fragilidade dos partidos políticos provocam *"em relação à democracia, a sensação de que dela não resulta qualquer impacto positivo na qualidade econômica de suas vidas e na diminuição da extrema concentração de renda."*[42]

Coincidentemente, a transição democrática do Brasil, assim como a do México, é pacífica e inicia-se em 1977. Enquanto a ditadura brasileira encerra-se em 1990, com a posse do primeiro presidente da república eleito democraticamente após o golpe de 1964, a transição mexicana para a democracia completa-se somente em 2000 com a eleição de Vincent Fox.

A apatia dos mexicanos com relação à ideia de democracia a partir da conclusão do ciclo da redemocratização deita raízes no passado aqui exposto e na incapacidade revelada pela sua recente forma de organização política dotada de eleições periódicas para solucionar os graves problemas sociais e econômicos do país.[43]

Para além das teorias políticas e econômicas que polarizaram o século XX, a construção da democracia no México - e na América Latina - perpassa a finalização da negociação que Zapata almejou fazer com a elite econômica: distribuição de meios de produção de maneira estrutural para que todo cidadão possa dignamente satisfazer suas necessidades básicas e as de sua família com o fruto de seu trabalho.

É nesse sentido que a democracia – caso mediasse tal negociação nas nações latino americanas - interessaria e poderia ser defendida como uma conquista inegociável pelos cidadãos.

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40 BRUIT, Héctor H. **Revoluções na América Latina: o que são as revoluções? México, Bolívia, Cuba e Nicarágua.** 2 ed. São Paulo: Atual, 1988, p. 23-25.

41 VALENZUELA, Rubén Aguilar. *A democracia no México.* Revista da USP, n. 109, abril-maio-junho/2016, p. 89.

42 POMPEU, Gina Vidal Marcílio; SIQUEIRA, Natércia Sampaio. **Democracia Contemporânea e os critérios de justiça para o desenvolvimento socioeconômico: direito constitucional nas relações econômicas.** Rio de Janeiro: Lumen Juris, 2017, p. 173.

43 Em janeiro 1994, logo antes da redemocratização do México havida em 2000, o Exército Zapatista de Libertação Nacional (EZLN) – formado clandestinamente em 1983 - liderou a revolução zapatista de Chiapas que ocupou as grandes cidades dessa província e instalou uma organização política mediante conselhos populares, com forte participação indígena. Seguiram-se doze dias de combate com o governo mexicano, mas há 23 anos a convivência da província zapatista com as autoridades é uma trégua negociada e fundamentada, dentre outros fatores, na desmobilização do EZLN, na despretensão desde o início assumida pelo movimento de expandir o regime político zapatista criado em Chiapas e na política de tolerância da democracia mexicana. Cf.: CUSSET, François. Em Chiapas, a revolução continua. **Le Monde Diplomatique Brasil.** São Paulo, v. 119, ano 10, p.24-26, junho/2017.

4.2. Democracia à brasileira.

Não há consenso acerca da data de término da ditadura brasileira. Muitos historiadores fixam o ano de 1985 devido à eleição do primeiro presidente civil, Tancredo Neves. Haja vista, porém, que este foi eleito pelo Colégio Eleitoral moldado pelo Pacote de Abril, vale dizer, indiretamente e sob a égide da Constituição de 1969, adota-se no presente trabalho a posição do cientista social Ruy Mauro Marini no sentido de que o regime ditatorial brasileiro finda em 1990 com posse do primeiro presidente da república eleito diretamente na vigência da Constituição de 1988. [44]

Independentemente, porém, do ano no qual situe-se o fim da Ditadura civil-militar desencadeada pelo golpe de 1964, o processo de redemocratização no Brasil começa com o Pacote de Abril de 1977. Falido, marcado de muitas maneiras pelo atraso sócio-econômico, o debate político que emerge após o período ditatorial induz a uma exaltação - sem paralelo na história do país - dos instrumentos básicos da democracia representativa, como o voto direto.

Mercê da campanha pelas eleições diretas realizada em 1984, a democracia no Brasil ressurge identificada principalmente como o direito a votar para presidente da república. Assim, a conquista e preservação desse regime democrático fundado predominantemente no direito de votar para presidente da república é alçada ao topo das prioridades nacionais, numa espécie de amnésia - induzida pelo regime que findava - acerca dos demais mecanismos de participação política e da necessidade de remodelar democraticamente as instituições e poderes da república.

Desde os albores do processo de redemocratização, apenas os redatores do Pacote de Abril de 1977 mostram-se aquinhoados da noção de que o regime democrático compreende muito mais que o direito de votar em mandatários do Poder Executivo. Não por acaso, uma das mudanças impostas por Geisel de maneira preambular à redemocratização foi instituir que um terço dos senadores fosse eleito indiretamente para cumprir mandato de oito anos, uma perversão da natureza democrática da instituição Senado da República.

Após quase vinte e cinco anos de moldagem antidemocrática das instituições republicanas, a preocupação do ditador no apagar das luzes do regime totalitário é tornar essas mesmas instituições ainda mais impermeáveis ao poder político democraticamente constituído.

O Pacote de Abril de 1977 foi baixado pelo governo Geisel em reação à vitória expressiva da oposição nas eleições realizadas em 1974. Seu objetivo estratégico era cumprir a agenda de retorno gradual à democracia sem deixar, todavia, de impedir ou dificultar ao máximo a ascensão ao poder político das lideranças e partidos alijados da vida pública pela ditadura.

Dentro dessa lógica, não sendo possível fazer a distensão do regime e simultaneamente impedir eleições, era necessário evitar que estas resultassem na democratização das instituições de poder, visto que – diferentemente do que ocorre em ditaduras - são as instituições e não os indivíduos os verdadeiros protagonistas no cenário político da democracia.

Um análise desse conjunto de medidas que pavimentou o retorno à democracia – v.g., eleições indiretas para governador, eleições indiretas para um terço do Senado Federal, autorização de criação de sublegendas do mesmo partido para que vários candidatos filiados ao partido do governo pudessem concorrer simultaneamente aos mesmos cargos, ampliação de bancadas parlamentares de estados menos desenvolvidos mas que eram dominados pelo partido governista, extensão da lei Falcão à propaganda política estadual e federal, bem como a reforma do Poder Judiciário implementada pela Emenda Constitucional n. 7/1977 – demonstram que a tática utilizada pelo Poder Executivo ditatorial consistia tanto em moldar estruturalmente os demais poderes – Legislativo e Judiciário – quanto em retardar a realização de eleições diretas para presidente da república.

Se é certo que são as instituições que moldam um regime como autoritário ou democrático, é igualmente correto que aquelas são feitas por cidadãos e que serão tanto mais democráticas quanto mais abertas à participação de homens e mulheres todas as classes sociais, etnias, religiões etc. Não se constrói uma democracia sem que seja garantido acesso e participação popular a

44 MARINI, Ruy Mauro. *Brasil: da ditadura à Democracia*, 1964-1990. Archivo de Ruy Mauro Marini/ Ruy Mauro Marini – Escritos. Março 1991. Disponível em <http:www.marini-escritos.unam.mx.>. Acesso em 05/06/2017. Filomeno de Moraes, por seu turno, considera que a transição política para a democracia tem seus primórdios em 1974 e que, a partir daí, houve um primeiro período de transição para a democracia findo em 1985, bem como um segundo período de transição para o qual não atribuiu termo final. Cf., nesse sentido: MORAES FILHO, José Filomeno de. A construção democrática. Fortaleza: Universidade Federal do Ceará/Casa de José de Alencar Programa Editorial, 1998, p. 180.

todos os estamentos sociais no âmbito dos três poderes da república e de suas instituições.

O Pacote de Abril, porém, criou entraves sólidos à democratização das instituições e poderes da república, mantendo-os por longo tempo inacessíveis a propostas de mudanças políticas e econômicas repudiadas pelo *status quo* ditatorial. Como não houve ruptura institucional ou revolucionária entre o fim da ditadura e a retomada da democracia no Brasil, Geisel elaborou um intrincado e extenso xadrez institucional na Constituição de 1969, no Poder Legislativo e no Poder Judiciário para garantir a permanência do poder político nas mãos de quem o detinha desde o golpe de 1964.

Nesse sentido, o Brasil inicialmente agregou a outras dificuldades para a implantação de uma ordem democrática, a continuidade da governança nas mãos da elite política e econômica que apoiou a ditadura, espraiada em várias instituições e poderes. Quando paulatinamente a presença militar foi tornando-se rarefeita nos centros de poder, verificou-se a permanência "não vislumbrada de maneira tão extensiva e renitente em qualquer dos outros países citados – das elites civis que detiveram posições de mando nos governos militares".[45]

Para Bresser-Pereira - que classifica a democracia brasileira de 1946 a 1964 uma 'democracia de elites' e o modelo democrático atual implantado no Brasil uma 'democracia de opinião pública' - teria havido uma ruptura da aliança entre a burguesia industrial e o regime militar a partir de 1977.[46] Os fatos, porém, contradizem claramente a ocorrência de qualquer descontinuidade para além do encerramento do ciclo de presidentes com patentes militares.

Realmente, dentre inúmeros outros fatos políticos exemplificativos do equívoco de análise de Bresser-Pereira, vale lembrar que Tancredo Neves, primeiro presidente civil eleito indiretamente para conduzir a transição para a democracia com a elaboração de uma nova Constituição, morreu antes de tomar posse em 1985. Consoante a Constituição vigente de 1969, deveria assumir a presidência da república o presidente da Câmara de Deputados, então o deputado Ulisses Guimarães, liderança política maior da oposição ao regime que findava.

Num último ato – inconstitucional e autoritário – mas coerente com a lógica de assegurar o continuísmo, ou seja, a manutenção do poder nas mãos da parcela da sociedade que dera suporte ao regime ditatorial, o General Leônidas Pires, dirigiu-se ao hospital de base onde Tancredo falecera para garantir que Sarney - que havia se desligado do PDS, partido de sustentação do regime militar, para apoiar Tancredo - assumisse o cargo de presidente da república.

O general citou no hospital o parágrafo único do artigo 76 da Constituição de 1969, que dizia: "Se, decorridos dez dias da data fixada para a posse, o presidente ou o vice-presidente, salvo motivo de força maior, não tiver assumido o cargo, este será declarado vago pelo Congresso Nacional". A hermenêutica do general desconsiderou contudo que a interpretação sistemática do caput do referido dispositivo inadmite a posse do vice-presidente sem posse anterior ou simultânea do candidato eleito a presidente da república.[47]

Como efeito do continuísmo, salienta Filomeno Moraes:

> Detentor de um estilo de fazer política marcado por um substancial componente patrimonialista e clientelista, esse subconjunto das elites políticas marcaria profundamente o sistema político brasileiro, contribuindo fortemente para impedir a consolidação das instituições representativas (ora colocando obstáculos ao avanço da cidadania, ora impedindo as reformas políticas necessárias ao desenvolvimento da democracia política) e fazendo com que o Brasil seja um caso de transição do autoritarismo para a democracia de longuíssima demora.[48]

Com uma leitura diversa da realizada no presente trabalho acerca dos acontecimentos políticos a partir da redemocratização até as manifestações de rua de junho de 2013, merece destaque pelo notável otimismo a visão de Bresser-Pereira, segundo o qual a democracia brasileira é viva e forte, pois tem uma sociedade coesa que testemunha uma participação política popular crescente. Conforme Bresser-Pereira, 'a democracia brasileira é

45 MORAES FILHO, José Filomeno de. **A construção democrática.** Fortaleza: Universidade Federal do Ceará/Casa de José de Alencar Programa Editorial, 1998, p. 44.

46 BRESSER-PEREIRA, Luiz Carlos. **A construção política do Brasil. 3** ed. São Paulo: Editora 34, 2016, p. 287-290.

47 ARRUDA, Roldão. General conta como garantiu a posse de Sarney na Presidência. **Estadão**, São Paulo, 14/01/2015. (Seção Blogs). Disponível em <http.www.politica.estadao.com.br>. Acesso em 09/06/2017.

48 MORAES FILHO, José Filomeno de. **A construção democrática.** Fortaleza: Universidade Federal do Ceará/Casa de José de Alencar Programa Editorial, 1998, p. 44.

algo tão concreto no Brasil quanto sua crítica'.[49]

Mais uma vez em desacordo com a posição desse grande cientista político, aduz-se que, mesmo as conquistas realizadas pela Constituição de 1988 foram impactadas pelo Pacote de Abril, dentre outros fatores, para citarmos apenas um exemplo, pela retro mencionada ampliação das bancadas dos estados-membros menos desenvolvidos, nos quais o partido que apoiava a ditadura costumava ter êxito em eleições.

Como se pode observar pelo leque de medidas atinentes ao Poder legislativo, o Congresso Nacional foi modelado estruturalmente para permitir o mínimo acesso possível a representantes das camadas populares e a líderes oposicionistas, o que evidentemente repercutiu na composição e nas votações da Assembleia Constituinte de 1987.

O Poder Judiciário, igualmente, em que pese os esforços para implementar a Constituição de 1988, ainda não se desvestiu completamente da moldura que lhe foi imposta pelos quase trinta anos de arbítrio, pelos ritos de acesso aos cargos de cúpula previstos no Pacote de Abril, cujos traços remanescem parcialmente e impedem que a composição dos tribunais reflita numa proporção razoável todas as classes sociais, cores e gêneros de brasileiros.

Nesse sentido, o êxito do projeto de distensão política de 1977 em permitir uma retirada honrosa ou - mais adequadamente descrita - uma saída impune aos violadores da Constituição de 1946 foi completo. O sistema político montado sobre essa base consistiu num simulacro duradouro de democracia, cujas lacunas e distorções porém ficam a cada dia mais evidentes. Nessa ordem de ideias, a crise da democracia representativa no Brasil afigura-se como o esgotamento da democracia meramente formal que teve como útero o Pacote de Abril de 1977.

Aspectos relevantes de um sistema político-eleitoral democrático como a garantia da transparência, fortalecimento e ética nas agremiações partidárias em questões como fidelidade e coligações; a busca da maior medida de representatividade possível de todas as classes sociais nas casas legislativas, no Poder Executivo e nos órgãos da cúpula do Poder Judiciário; o estabelecimento de mecanismos para possibilitar o exercício da capacidade eleitoral passiva por qualquer cidadão brasileiro, independentemente de sua condição econômica e social; a remodelação das normas sobre coeficiente eleitoral, dentre tantas outras providências que poderiam conferir legitimidade substancial à democracia brasileira passam ao largo das bienais leis eleitorais que tratam de frivolidades como a quantidade de centímetros que pode ter um cartaz.

A concentração de renda mantida por estruturas macroeconômicas intocadas pela democracia e o desrespeito pelo sistema político-eleitoral ao ideal de ampliação e aprofundamento da participação dos cidadãos na formação da vontade política – fatores negativos comuns aos demais modelos de democracia da América Latina – comprometem a formação e desenvolvimento de democracias autênticas liberais, vale dizer, de democracias substanciais.

Acresce que, paralelamente a uma legislação eleitoral e partidária indiferente à garantia da democracia substancial, verifica-se o esmagamento do autêntico sufrágio popular e a quase inviabilidade de candidaturas não atreladas a milionários esquemas de financiamento empresarial. A falta de mecanismos legais voltados a neutralizar o mais possível as inegáveis vantagens que o poder econômico franqueia no pleito eleitoral, dentre muitas outras lacunas e equívocos – como, por exemplo, uma legislação partidária que favorece a multiplicação de legendas de aluguel – induz à conclusão de que a violação do sufrágio popular por abuso de poder econômico, no Brasil, é sistêmica.

O Brasil lançou-se com entusiasmo na vivência de uma democracia representativa praticamente destituído de uma estrutura legal e partidária capaz de impedir a desnaturação do sufrágio popular pelo poder econômico. Nesse panorama, dentro do atual sistema político eleitoral, é tarefa superior às forças do Ministério Público e do Poder Judiciário, por mais aparelhados que sejam, realizar um controle jurídico eficaz sobre o abuso de poder econômico que corrói o sufrágio popular.

Fatos recentemente comprovados apontam para um quadro de muito maior gravidade no que tange à crise da democracia no Brasil. Esse sistema que inicialmente apenas mantinha o poder político sob o controle da elite econômica transformou-se no berço de bilionários esquemas de corrupção. Denúncias amparadas em farto material probatório revelam que o abuso de poder econômico no Brasil não é praticado como exceção dentro do sistema eleitoral e alimenta poderosas estruturas de desvio de recursos públicos.

49 BRESSER-PEREIRA, Luiz Carlos. **A construção política do Brasil. 3** ed. São Paulo: Editora 34, 2016, p. 292-293.

Prova da delicada situação da democracia brasileira na qual a corrupção e o abuso de poder econômico esmagaram o sufrágio popular é a AIJE - n.0001943-58.2014.6.00.0000 - Ação de Investigação Judicial Eleitoral- Brasília - Protocolo: 372082014 - 18/12/2014, na qual há provas infindáveis de que as eleições presidenciais de 2010 e 2014 e as eleições municipais de 2012 foram largamente financiadas por dinheiro não declarado e por propinas milionárias.[50]

Planilhas apreendidas pela Polícia Federal durante a 23ª fase da Operação Lava Jato – cujas provas foram parcialmente trasladadas para a referida AIJE - demonstram a completa desnaturação do sufrágio popular pela corrupção e pelo abuso de poder econômico. Tabelas apreendidas mostram doações a mais de 200 políticos de 24 partidos, entre doações legais - que todavia podem caracterizar pelo montante e outros fatores o abuso de poder econômico - ou ilegais como o caixa dois de campanha.

UF	PARTIDO	ODB			IT	HS	TOTAL
		Realizado	A Realizar	Total			
RIO DE JANEIRO	PMDB		1.825	1.825	4.525	-	6.350
	PSDB		100	100	-	-	100
	PV		650	650	500	-	1.150
	PR		1.000	1.000	500	-	1.500
	PT		450	450	300		750
	DEM		750	750			750
	PSC		500	500			500
	PP		300	300			300
	PSD	-	150	150	-	-	150
TOTAL			5.725	5.725	5.825	-	11.550

Fonte: Foto reprodução da Planilha apreendida com presidente da Odebrecht Infraestrutura mostra doações a partidos políticos. Cf. SALOMÃO, Lucas. PF apreende planilhas da Odebrecht com valores destinados a políticos. **G1**. Brasília, 24 de março de 2016. Disponível em http//:www.g1.com/PF-apreende-planilhas-da-Odebrecht-com-valores-destinados-a –políticos . Acesso em 07/06/2017.

UF	MUN.	CARG.	NOME	CODINOME	LOCAL	FUNÇÃO	PARTIDO	SPONSOR							VALOR TOTAL
								BRK	ETH	ODT	OR	FOZ	OTP	INFRA	
RS	Porto Alegre	PREF.	Pablo Mendes Ribeiro		POA	SAR	PMDB	x						x	50,00
			Mauro Zaquia		POA	SAR	PMDB	x						x	40,00
	Gravatai	PREF.	Marco Alba		GRA	CAP	PMDB							x	50,00
	Rio Grande	PREF.	Fabio Branco	COLORIDO	RGR	CAP	PMDB							x	25,00
SP	São Paulo	PREF.	Gabriel Chalita		SÃO	CAP	PMDB	x			x			x	3.000,00
	Santos	PREF.	Sergio Aquino		SAN	CAP	PMDB				x		x	x	800,00
	Santo André	PREF.	Nilson Bonome		SAD	CAP	PMDB	x			x				400,00
	Maua	PREF.	Vanessa Damo		MAU	CAP	PMDB	x				x			500,00
	Paulinea	PREF.	Edson Moura		PAU	CAP	PMDB	x						x	400,00
BA	Salvador	PREF.	Mário Kertesz	ROBERVAL	SSA	CAP	PMDB	x			x			x	1.100,00
		CAM.	Dep Fed Artur Maia	Tuca	SSA	SAR	PMDB				x			x	100,00
			Pedro Godinho		SSA	SAR	PMDB				x			x	100,00
		PREF.	Dinha		SFI	CAP	PMDB	x							20,00
PE		PREF.	Jarbas Vasconcelos Filho	Viagra	REC	SAR	PMDB					x	x	x	100,00
AL	Historicos	BSB	Renan	Atleta	MAC	COR	PMDB							x	50,00
RN	Historicos	BSB	Henrique Alves		NAT	COR	PMDB	X						X	1.000,00
MA	Historicos	BSB	José Sarney	Escritor	SLZ	COR	PMDB							x	100,00
RJ	Rio de Janeiro	PREF.	Eduardo Paes	NERVOSINHO	RJO	CAP	PMDB							X	5.000,00
		CAM.	Jorge Felipe		RJO	SAR	PMDB							X	100,00
			Antonio Guarana		RJO	SAR	PMDB							X	300,00
	Historicos	Part	Sergio Cabral	PROXIMUS	ERJ	COR	PMDB							X	500,00
			Eduardo Cunha	CARANGUEIJO	ERJ	COR	PMDB	X				X		X	500,00
			Jorge Picciani	GREGO	ERJ	COR	PMDB							X	500,00
															14.735,00

Fonte: Foto reprodução da Planilha apreendida com presidente da Odebrecht Infraestrutura mostra doações a candidatos, alguns com apelidos. Cf. SALOMÃO, Lucas. PF apreende planilhas da Odebrecht com valores destinados a políticos. **G1**. Brasília, 24 de março de 2016. Disponível em http//:www.g1.com/PF-apreende-planilhas-da-Odebrecht-com-valores-destinados-a –políticos . Acesso em 07/06/2017.

Em todo caso ocorre o estabelecimento de uma relação entre empresa financiadora e candidato financiado que geralmente transforma esse último em representante da empresa e não do eleitorado. Este é o sistema político-eleitoral de compra de eleições por grandes empresas e empreiteiras que alguns denominam democracia no Brasil. É a isso, por conseguinte, que se dirige o repúdio dos brasileiros identificado por estatísticas como o Informe 2016 do Latino Barômetro e não à participação popular efetiva e eficaz na formação da vontade política no âmbito dos três poderes da república.

Uma das expectativas com a democracia frustradas na América Latina é a da construção de uma cidadania garantida pela atuação normativa e institucional do Estado. No Brasil, a simbiose de altos índices de corrupção, tibieza da estrutura partidária e políticas públicas de inclusão ineficazes no sentido de fomentar a autonomia não permitem que Estado e governo democrático cumpram o papel que lhes incumbe na realidade brasileira, o que resulta na postura dúbia dos brasileiros, que alimentam a percepção de que a democracia em nada influi para a melhoria de suas condições de vida.[51]

José Álvaro Moisés sustenta – em análise sobre a democracia brasileira - que a qualidade da democracia influencia a experiência, a avaliação e a percepção dos cidadãos sobre as instituições democráticas e, portanto, sobre o regime democrático em si, reflexão aplicável igualmente à observação dos dados relativos ao México e aos demais países latino-americanos. O ponto no qual, todavia, equivoca-se Moisés, muito provavelmente em razão da época na qual elaborou a mencionada avaliação, na qual os dados acima eram desconhecidos, é aquele em que afirma que está em jogo nas democracias eleitorais como o Brasil apenas sua qualidade e não sua existência.[52]

50 BRASIL. Tribunal Superior Eleitoral. Ação de Investigação Judicial Eleitoral n.0001943-58.2014.6.00.0000. Pleno. Relator Ministro Herman Benjamin. Brasília, DF, julg. em 09/06/2017. Essa ação judicial tinha como pedido a cassação da chapa presidencial Dilma Roussef-Michel Temer.

51 LINZ, Juan J.; STEPAN, Alfred. **A transição e consolidação da democracia: a experiência do sul da Europa e da América do Sul.** Tradução de Patrícia de Queiroz Carvalho Zimbres. São Paulo: Paz e Terra, 1999.

52 MOISÉS, José Álvaro. *Cultura política, instituições e democracia: lições da experiência brasileira.* **Revista Brasileira de Ciências Sociais.** São Paulo, v. 23, n. 66, p. 11-42, fevereiro/2008, p. 12-13. A constatação deste artigo, assim como nas demais obras do mesmo autor, dirige-se especificamente ao Brasil.

Mesmo que se restrinja a exemplificação ao que consta da AIJE - n.0001943-58.2014.6.00.0000 - Ação de Investigação Judicial Eleitoral- Brasília - Protocolo: 372082014 - 18/12/2014, não há duvida razoável acerca do fato de que as eleições de 2014 para presidente da república foram financiadas fora dos parâmetros legais e com dinheiro oriundo da corrupção. A compra de eleições no Brasil mediante caixa dois e abuso de poder econômico desnatura o regime brasileiro até mesmo enquanto mera democracia eleitoral, de maneira que a perda de adesão por parte dos brasileiros, demonstrada nas estatísticas aqui expostas, não se dirige ao regime político pautado e regido pela liberdade concreta de cada cidadão.

Embora em grau de apuração incipiente com relação ao Brasil, há fortes indícios de que muitos sistemas políticos de países da América Latina foram igualmente infiltrados pelo crime organizado. Em razão das investigações da Operação Lavajato e de acordos de cooperação internacional, a Odebrecht admitiu ter distribuído 788 milhões de dólares em propinas em 12 (doze) países de 2001 a 2016, dos quais 9 (nove) são países latino-americanos.[53]

Como repercussão internacional da operação Lavajato, há outrossim investigações em andamento para apurar financiamento ilegal por parte da empreiteira OAS ao candidato derrotado às eleições presidências do Chile, Marco Enríquez-Ominami, e também à candidata vencedora, Michele Bachelet. Além disso, políticos e autoridades governamentais da Colômbia, Argentina, Chile, República Dominicana, Venezuela, Panamá, México, Guatemala e Equador, além de três presidentes peruanos estão sob investigação em seus países em razão de indícios de recebimento de financiamento eleitoral irregular pelas Odebrecht ou OAS, celebração de contratos ou dispensa de licitações fraudulentos em favor dessas mesmas empreiteiras, numa genuína reprodução continental da derrocada da democracia formal havida no Brasil[54].

Verifica-se portanto a plausibilidade crescente da ideia de que – além da ausência da democracia substancial - a desnaturação da democracia formal ou eleitoral pela compra de mandatos eletivos é uma realidade não somente brasileira, mas latino-americana. Por conseguinte, revela-se primeiramente a necessidade de que as estatísticas enfocadas pela Organização das Nações Unidas agreguem ambos os fenômenos – ausência de democracia substancial e perversão da democracia formal - nas suas análises de dados. Em segundo lugar, afigura-se no mínimo inadequado tratar um processo social de desconfiguração da democracia moderna dessa proporção sob enfoque que não seja o do direito internacional ou que não ceda ao direito internacional a primazia da análise.

No panorama traçado acima, em que o crime organizado serve-se dos sistemas pseudo-democráticos latino-americanos (sem democracia eleitoral nem substancial) para desviar recursos públicos, não resta muito espaço para que o cidadão exerça sua liberdade e concretize seus direitos. Segue, portanto, intacta a lição de Rawls, para quem "*a história demonstra que os homens desejam ser livres sempre que não tenham se resignado à apatia e ao desespero, ao passo que aqueles que são livres jamais querem abdicar de sua liberdade*".[55]

5. Conclusão.

Acerca da reinterpretação dos critérios do PNUD para análise do apoio popular à democracia na América Latina, verifica-se a necessidade de agregar a tais critérios ferramentas que permitam inserir o contexto no qual os dados empíricos são colhidos. É mister, portanto, introduzir, na equação metodológica da pesquisa de campo nessa área, instrumentos aptos a possibilitar o enriquecimento das respostas básicas com informações mínimas sobre como vivem as pessoas que respondem aos questionários e quais características da democracia liberal realmente conhecem, quiçá – e esta parece uma das sendas mais óbvias – pelo aumento e incremento das perguntas.

Em outras palavras, se a reinterpretração dos critérios utilizados pelo PNUD na avaliação dos dados

53 SERRANO, Filipe. Odebrecht virou símbolo de "corrupciòn" na América Latina. **Revista Exame.** São Paulo, 10 de abril de 2017. Disponível em http//:www.exame.abril.com.br/Odebrecht-virou-símbolo-de-corrupcion-na-America-Latina . Acesso em 18/09/2017.

54 BBC BRASIL. Ex-presidente do Peru tem prisão decretada; Lava Jato avança no exterior e põe governos da América Latina sob suspeita. **BBC.** Brasilia, 10 de fevereiro de 2017. Disponível em http//:www.bbc.com/Ex-presidente-do-Peru-tem-prisão-decretada-Lava-Jato-avança-no-exterior-e-põe-governos-da-América-Latina-sob-suspeita. Acesso em 18/09/2017.

55 RAWLS, John. **Uma teoria da justiça.** Tradução de Jussara Simões. 3 ed. São Paulo: Martins Fontes, 2008, p. 258-259.

apresentados no tópico 1 implica na observação de dados estatísticos sobre a realidade econômica e social da América Latina igualmente trazidos à luz pela Organização das Nações Unidas, mediante, v.g., os anuários estatísticos da CEPAL, segue que – mesmo desconsiderada a etapa seguinte de cotejo dos dados com fatores históricos e culturais dos dois países mais populosos da América Latina - a elaboração do IAD e o desenvolvimento da metodologia constante das páginas 220 a 237 do relatório 'A Democracia na América Latina: rumo a uma democracia de cidadãs e cidadãos' do Compêndio Estatístico do Programa do Programa das Nações Unidas para o Desenvolvimento de 2004 são insuficientes para cumprir a finalidade imediata a que se propõem, qual seja a de medir o apoio dos latino-americanos à democracia.

O IAD é um índice elaborado pelo PNUD em parceria com o Latinobarômetro especificamente para a pesquisa sobre democracia na América Latina encetada em 2004. Sua eficácia não havia sido submetida a nenhuma verificação anterior e sua aplicação numa base de dados incompleta produziu o resultado que ora se questiona. Trata-se, portanto, de uma ferramenta estatística que foi testada sobre o tema do compromisso dos latino-americanos com suas recém-inauguradas democracias, e não de um índice seguidamente colocado à prova.

Em suma, a reinterpretação aqui realizada revela que a metodologia descrita no relatório de 2004 do PNUD peca principalmente pela redução artificial da base de dados. Assim como a liberdade fática (mensurada por informações sobre desenvolvimento econômico e humano) é necessária à liberdade política (medida por dados sobre eleições, liberdade de imprensa etc.) a aferição empírica do apoio à democracia deve trabalhar com informações advindas de ambas as áreas e, se possível, introduzir também fatores históricos e culturais impactantes para a liberdade no continente.

Pode-se, nesse sentido, parafrasear a asserção de Isaiah Berlin, e aduzir que não se deve subestimar o poder das interpretações de estatísticas sobre democracia - alimentadas no silêncio das salas dos analistas de entidades internacionais - fundadas em critérios e dados empíricos incompletos, pois elas podem destruir a liberdade na América Latina.

Cumpre frisar, outrossim, que o presente artigo auxilia na construção da gramática comum mundial em tema de democracia, uma vez que ajuda a esclarecer o que os cidadãos latino-americanos têm vivenciado em termos de democracia liberal, assim como elucida algumas das razões pelas quais aceitam a tomada de medidas autoritárias no intuito de resolverem os graves problemas sociais e econômicos com os quais lidam no cotidiano.

Essa contribuição para a gramática universal pode aprimorar as discussões substantivas sobre democracia na América Latina, dentro do universalismo plural, consensual, construído progressivamente, apto a lastrear a edificação paulatina da república mundial e o repúdio ao surgimento do imperialismo globalizado.

Assim é porque, sob a perspectiva do direito internacional, a hegemonia da democracia no planeta assiste tanto à causa da paz mundial quanto à agenda de todos os seus subsistemas, dentre os quais o dos direitos humanos, direito penal internacional, direito ambiental, direito humanitário etc.

Nessa ordem de ideias, somente por meio da prevalência consensual e não imposta da democracia liberal na ordem política mundial será possível – com o estabelecimento e uso da gramática comum que elimina desacordos substanciais desnecessários - alcançar o consenso em torno de mínimos comuns que progressivamente avancem de maneira dialógica e não coercitiva rumo à constitucionalização do direito internacional e, por conseguinte, ao ideal do contrato social global.

Especificamente sobre a ideia de que os latino-americanos preferem o autoritarismo à democracia liberal, é mister reconhecer que quinhentos e vinte e cinco anos depois de começada a história da escravidão dos índios pelos *encomenderos* nos países de língua espanhola e quinhentos e dezessete anos depois de iniciada a mesma história pelos bandeirantes no Brasil, a concentração de renda das nações latino-americanas, assentada em estruturas macroeconômicas defendidas violentamente pelas ditaduras do século XX, bem como não eficazmente combatidas pelas democracias do século XXI, impedem que os cidadãos da América Latina alcancem as condições mínimas de bem estar social indispensáveis à construção de democracias liberais.

A redemocratização havida na América Latina a partir do final dos anos setenta do século XX inaugura um ciclo que conduz os países latino-americanos, com a adoção de regimes democráticos, da esperança de solução dos seus graves problemas sociais e econômicos ao

sentimento de decepção com a inaptidão dos modelos de democracia que construíram para resolvê-los.

Essa incapacidade dos regimes democráticos para promover as mudanças estruturais necessárias estabeleceu um ciclo vicioso no qual a liberdade política depende da liberdade fática obtida mediante o desenvolvimento humano, o qual não se tem realizado, em larga medida pelo não aprofundamento da liberdade política. Em suma, a elevada concentração de renda, a pobreza, a fome, o analfabetismo, o desemprego, o subemprego etc. comprometem a edificação da democracia liberal na América Latina.

Nessa lógica, a Revolução Mexicana foi um grande esforço de construção da autonomia econômica e da participação política popular por pessoas que mal tinham o que comer. Todavia, o ideal de libertação econômica e política dos mexicanos foi devorado pela mais sólida ditadura burocrática da América Latina.

Nos dias de hoje, mesmo sob o pálio das democracias formais, persiste, tanto no México quanto no restante da América Latina, o alijamento do povo com relação aos meios econômicos que impede a formação de democracias liberais.

O povo mexicano, assim como os demais latino-americanos, ao eliminar a tirania explícita das ditaduras, pensara estar trilhando o caminho da inclusão econômica e social, porém, a formalização de democracias eleitorais não implantou as reformas estruturais tendentes a diminuir a concentração de renda e a pobreza, de maneira que a frustração com a democracia formal fez-se sentir nas pesquisas de campo enfocadas por este artigo.

O equívoco das interpretações estatísticas que afirmam haver uma preferência do povo latino americano pelo autoritarismo em detrimento da democracia ocorre em razão da análise dos dados desacompanhada de uma reflexão sobre o arcabouço histórico, econômico e social da América Latina, bem como devido ao menoscabo, em tais avaliações, da posição do continente latino-americano no contexto econômico e político global.

Nessa ordem de ideias, as forças sem pátria e sem rosto da globalização têm abalado fortemente o Estado nacional e a democracia latino-americana, sem o aparato da universalização de valores preconizada pelo direito internacional para modelar a transição de um mundo politicamente polarizado em estado de guerra para o ideal da democracia global - possibilitada pela democratização das nações e pelo respeito universal aos direitos humanos.

Como se pode ver, o questionamento cuja resposta constitui o cerne deste artigo nasce da comprovação empírica não de que os cidadãos na América Latina querem menos liberdade política, mas sim de que estão sofrendo duplamente os efeitos da globalização para a qual não estão preparados a resistir os Estados nacionais e os modelos tradicionais de organização política democrática.

O modelo de democracia liberal importado dos países centrais não tem gerado - na América Latina - o desenvolvimento humano indispensável à construção da autonomia própria do liberalismo político. E a liberdade para passar fome, não ter moradia digna nem a saneamento básico, para não poder educar os filhos e para carecer de atendimento básico de saúde declaradamente não interessa aos latinos americanos desde a Revolução Mexicana.

A América Latina precisa desenvolver uma matriz democrática própria, adequada às suas demandas e peculiaridades. Assim como a democracia liberal é uma adaptação da democracia ateniense às necessidades dos países capitalistas centrais, as nações da periferia latino-americana do capitalismo necessitam de uma receita democrática capaz de promover o desenvolvimento humano de suas populações, a fim de que a liberdade política justifique-se, sedimente-se e conduza – quiçá por uma rota diferente ou mais extensa - à autonomia almejada pelo liberalismo político.

A análise da situação brasileira, por seu turno, conduziu a rumos inesperados, de maneira a exigir uma reflexão à parte, embora útil para esclarecer a pergunta base do artigo sobre a diminuição do apoio dos latino-americanos à democracia.

O diagnóstico do modelo de democracia brasileiro requer, primeiramente, a reiteração dos argumentos acima desenvolvidos acerca da impossibilidade de construção de uma democracia liberal num quadro de profunda concentração de renda, dentre outros problemas sociais. Em segundo lugar, impõe o reconhecimento da concentração do poder político pela manutenção e elaboração de novos mecanismos de exclusão da participação popular desde o Pacote de Abril de 1977.

Importa destacar a tal respeito que a estratégia de Geisel para encerrar o regime ditatorial conduziu a um

tipo de democracia iniciado com o fechamento do Congresso Nacional e com um conjunto de medidas arbitrárias destinadas a manter a elite dominante no comando do país. Esse panorama levou à elaboração de um sistema político onde a participação popular na formação da vontade no âmbito de dois poderes – Executivo e Legislativo - consiste quase unicamente no direito de votar em eleições periódicas, ao passo que o acesso ao Poder Judiciário, mesmo na condição de parte em processos judiciais continua sendo um luxo em muitas regiões do país, salvo na condição de réus em processos criminais.

Assim, faz-se mister uma reflexão sobre a capacidade de um sistema político eleitoral cujos alicerces estão fincados no Ato Institucional n. 5 e na Constituição de 1969, dos quais o Pacote de Abril é um subproduto, para gerar uma ordem democrática substancial. Por conseguinte, revela-se inafastável empreender uma reforma política para que se possa alcançar o estágio da democracia institucionalizada que permeia todos os poderes da república e faz com que o povo participe na formação da vontade política governamental.

Mas a crise da democracia brasileira não é consequência somente dos obstáculos decorrentes da concentração de renda e demais problemas estruturais não resolvidos pela organização política implantada após a redemocratização. Tampouco decorre unicamente da concentração de poder político nas mãos da elite econômica que impede a solução dos óbices estruturais. O modelo de organização política brasileiro carece tanto da substância quanto da forma de democracia liberal.

Realmente, os dados constantes do relatório de abril de 2004 do Compêndio Estatístico do Programa das Nações Unidas para o Desenvolvimento – PNUD – acerca de o Brasil haver alcançado, entre 1997 e 2002, o índice máximo de democracia eleitoral (IDE), baseiam-se na premissa falsa de que houve eleições limpas em 2002.

Visto que sufrágio universal, eleições livres e eleições limpas são os três pilares de medição do IDE, as provas carreadas aos autos da supramencionada Ação de Investigação Judicial Eleitoral n. 0001943-58.2014.6.00.0000 derrubam dois desses três fatores, a saber, a lisura e a liberdade das eleições de 2002 (às quais o relatório do PNUD de 2004 refere-se indiretamente), pelo menos no tocante aos pleitos municipais. Eleições compradas, seja por corrupção, seja por abuso de poder econômico, evidentemente não são limpas e tampouco livres.

Igualmente graves são as evidências, desconsideradas pelo julgamento polêmico da referida AIJE n.0001943-58.2014.6.00.0000, no sentido de que as eleições presidenciais de 2010 e 2014 igualmente foram financiadas não somente com dinheiro de caixa 2, mas também com numerário oriundo de esquemas de corrupção gigantescos.

Essa realidade não somente desnuda a indigência em que se encontra a democracia formal no Brasil como explica sobejamente a queda de 22 pontos percentuais do apoio dos brasileiros à democracia identificada pelo Informe 2016 do Latinobarômetro.

Como resposta à pergunta-título deste trabalho, conclui-se, que no Brasil não se está retirando o apoio a uma democracia, mas a um sistema político-eleitoral no qual eleições são compradas a peso de ouro para em seguida serem desviados recursos bilionários em esquemas de corrupção – quadro que pode estar ocorrendo também em outros países do continente.

O sistema político-eleitoral brasileiro – pautado pela construção de obstáculos eficazes à participação popular desde o Pacote de Abril de 1977 e mais recentemente pela completa degradação do sufrágio popular e da lisura dos pleitos eleitorais - não configura sob nenhum aspecto uma democracia, de maneira a que se possa qualificar o repúdio a tal sistema como uma retirada de apoio ao regime democrático.

A perplexidade gerada pela análise da situação brasileira decorre não porque inexiste no Brasil uma democracia substancial na qual a participação popular na formação da vontade política no âmbito dos três poderes seja garantida institucionalmente por vários mecanismos – conforme o deficiente padrão latino-americano -, mas sim porque tampouco apresentam-se os requisitos básicos para caracterização do sistema de poder brasileiro como uma democracia formal ou eleitoral.

A colocação adequada da pergunta principal do artigo – com relação à população brasileira - impõe que se reconheça que o desprestígio exposto nas pesquisas sobre apoio à democracia denota uma rejeição, isto sim, à perversão do regime democrático ocorrida no Brasil sob o aspecto formal e material. Em outras palavras, a interpretação das respostas dos cidadãos brasileiros aos questionários de avaliação de suporte à democracia, bem como as conclusões acerca dos gráficos e tabelas elaborados devem considerar o fato de que é a esse sistema de compra e venda de mandatos eleitorais que se

POMPEU, Gina Marcilio; TEIXEIRA, Ana Araújo Ximenes. A ideia de que os latino-americanos preferem o autoritarismo à democracia à luz da reinterpretação dos critérios do Programa das Nações Unidas para o Desenvolvimento. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 285-311

volta o descrédito declarado.

A verificação do estágio terminal da doença que inquina a democracia brasileira, outrossim, aponta no sentido do contágio de vários outros sistemas políticos na América Latina. Realmente, os dados levantados até o presente momento permitem vislumbrar que a possibilidade de desnaturação de várias outras democracias eleitorais latino-americanas é concreta.

Nessa ordem de ideias, com relação às estatísticas elaboradas pela Organização das Nações Unidas sobre democracia no continente latino-americano aqui analisadas, sobreleva a conclusão de que os cidadãos na América Latina – pelo menos nos países atingidos pela atuação do crime organizado sobre eleições e contratos públicos - não têm retirado seu apoio à democracia liberal, mas sim a sistemas políticos que se pretendem democráticos mas que vêm sendo acossados, senão pelo esmagamento, no mínimo pelo esvaziamento crescente do instituto elementar da democracia formal, qual seja o sufrágio popular em eleições.

Outra inferência que se impõe é a de que os fenômenos de ausência de democracia substancial na quase totalidade de nações e de perversão da democracia formal em muitos dos países do continente latino-americano têm que pautar as análises de dados de qualquer instituição que pretenda elaborar um estudo sobre suporte dos cidadãos à democracia na América Latina.

Ademais, uma questão político-jurídica que transcende fronteiras dificilmente é equacionada com a descontextualização oriunda da sua análise sob a ótica limitada do Estado nacional e do direito constitucional. Nesse sentido, a feição continental do problema – baixo suporte dos latino-americanos a seus sistemas políticos devido à desnaturação da democracia moderna em sentido formal – denota a inadequação de submetê-lo a enfoque que não seja primordialmente, embora não exclusivamente, o do direito internacional, posto que é na seara internacional que se pode elaborar o debate mais profícuo.

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A proteção da orientação sexual e identidade de gênero diversas na corte penal internacional: Entre Realpolitiks E Os Direitos Humanos

Sexual orientation and gender identity protection in the international criminal court: Between Realpolitiks And Human Rights

Gustavo Bussmann Ferreira

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A proteção da orientação sexual e identidade de gênero diversas na corte penal internacional: Entre Realpolitiks E Os Direitos Humanos*

Sexual orientation and gender identity protection in the international criminal court: Between Realpolitiks And Human Rights

Gustavo Bussmann Ferreira**

Resumo

Tendo em vista o necessário cuidado que se deve dispensar às populações vulnerabilizadas, tratados, bem como os estigmas heteronormativos presentes no Estatuto de Roma, nos permite situar o problema e orientar este estudo para um segundo enfoque; verificar bem como a importante atuação do direito internacional para reverter situações de invisibilidade que acometem determinados nichos populacionais, o presente trabalho se propõe a analisar os limites e possibilidades da Corte Penal Internacional na proteção dos direitos da população LGBTTI. Para tanto, compreender o papel da *realpolitiks* na elaboração, assinatura e ratificação dos o Documento Programático do Gabinete do Procurador e o comprometimento da CPI em proteger pontualmente e especificamente essa população, no mesmo sentido, orientará as respostas do questionamento proposto para uma análise dos Crimes Contra a Humanidade e Genocídio desse grupo social que se reconhece nas pessoas não heterossexuais. Assim, na medida em que, ainda, não há consenso nem jurisprudência sobre o assunto e a proteção da população dos indivíduos em sua sexualidade, é premente e necessária no atual momento social em que nos encontramos, tratar de questões de política e direito internacional, reconhecimento da população LGBTTI e proteção de suas vulnerabilidades é imperioso para que se possa apontar novos rumos para que a CPI ultrapasse as barreiras formais de suas normas.

Palavras-Chave: Realpolitiks. Corte Penal Internacional. Orientação Sexual.

Abstract

Taking into consideration the adversities that exist in the elaboration, signature and ratification of international treaties, mostly when with regards to human rights and aspirations to harmonise diverse cultures and interests; universal and particular perspectives of rights, we can considerate that practices may face strong difficulties when referring to issues on gender and sexuality. In this way, the present work aims to analyse Realpolitiks in international human rights law, the Policy Paper on Sexual and Gender-Based

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Crimes of the Office of the Prosecutor of the International Criminal Court; also, to analyse how the Rome Statute may protect people of diverse sexual orientation and gender identities. From the norms referring to genocide and crimes against humanity, as persecution, the comprehension that there is a social group consistent of non heterosexual people seems essential to strengthen the protection of these citizens and to accomplish the intentions of international justice of value human rights and singularities of life.

Keywords: Realpolitiks. International Criminal Court. Sexual Orientation. Persecution.

1. Introdução

Diversos acontecimentos do último século deixaram um legado de insegurança e temor nas sociedades ocidentais em virtude das graves reiteradas violações a direitos humanos ocorridas. O regime nacional socialista alemão e suas vítimas, a guerra da Iugoslávia e o novo pânico de que o terror se espalhasse pelo mundo ocidental e o genocídio ruandês da década de 90 são, apenas, alguns exemplos de conflitos internacionais que marcaram o Direito contemporâneo. Essas marcas advêm das diversas (re)significações que se deram aos direitos individuais, às novas compreensões de um direito internacional para proteção dos cidadãos e, também, dos Tribunais *ad hoc* que criaram jurisprudência e estabeleceram uma nova forma de encarar o Direito e as identidades.

Tribunais de Nuremberg e do Extremo Oriente, tal como os Tribunais Penais Internacionais para a Ex-Iugoslávia e Ruanda, são a prova de que há um compromisso mundial com a intolerância à impunidade e com a robusta e consistente proteção que se intenta aos direitos humanos.

Sem tamanha projeção internacional, mas também relevante para o estudo que se propõe, podem-se destacar alguns pleitos sociais que, também, se mostram importantes para, contemporaneamente, possibilitar novas compreensões a direitos e identidades. Os movimentos raciais, por exemplo, que lutaram por políticas de igualdade e equidade; os movimentos feministas que, contundentemente, defenderam uma nova colocação social, econômica e política às mulheres; bem como os movimentos de proteção a direitos orientação sexual e identidade de gênero diversa[1], que de inúmeras formas fortaleceram as percepções particulares e sociais desse grupo.

O pleito de cidadãos homossexuais carrega estigmas e dificuldades de fortalecimento em disputas entre o pretenso universalismo dos direitos humanos em contraponto a um particularismo que respeita tradições culturais e religiosas.

Nos Estados Unidos da América, por exemplo, pouco ganhou notoriedade internacional o fundamento dos pleitos por reconhecimento e inclusão social — mesmo tendo sua luta tomado grandes proporções no âmbito doméstico. Muitas das vitórias conseguidas em juízo em relação à população homossexual advêm de analogias propostas com o movimento por direitos raciais[2], no seguinte sentido: as intenções de negar características homossexuais ou reconhecimento da população enquanto grupo foram sendo deixadas de lado para, em estratégias mais exitosas, apontar discriminações no ambiente de trabalho e ofensas à primeira emenda da constituição norte americana, dentre outros. Para isso, o caminho escolhido foi, então, o comparativo e alegações referentes aos precedentes de discriminação racial[3]. Relembra-se: a primeira emenda trata basicamente das proibições à limitação da liberdade de expressão e ao direito de livre associação pacífica[4]. Todavia, conforme se perceberá ao longo deste trabalho, é importante que se retomem questões relativas ao *que* determina a existência de um grupo social e *como,* objetiva ou subjetivamen-

1 Opção aqui se faz pela terminologia Orientação Sexual e Identidade de Gênero (SOGI) diversas, de modo a tentar englobar direitos de homossexuais (gays e lésbicas), bissexuais, transexuais, transgêneros, intersexuais, dentre outros. A proposta, portanto, para fugir de siglas muito extensas e deveras categorizantes, como LGBTTI, se faz no sentido de compreensão aberta e fluída, de modo a abarcar todos aqueles que não se encaixam nas possibilidades binárias que a sociedade oferece. Da mesma forma, o termo SOGI foi também a opção do Alto Comissariado das Nações Unidas em proposta semelhante, conforme se pode perceber nas documentações, orientações e informações oficiais. Conforme: Sexual Orientation and Gender Identity. Disponível em: <http://www.refworld.org/sogi.html>.

2 Nesse sentido verificar: KONNOTH, Craig J. Created in Its Image: the Race Analogy, Gay Identity, and Gay Litigation in the 1950s-1970s. *The Yale Law Journal*, v. 119, n. 2, Nov. 2009.

3 ESKRIDGE JUNIOR, William N. *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*. Yale: FacultyScholarship Series, 2002. p. 2161-2169.

4 CONSTITUIÇÃO dos Estados Unidos da América. Legal Information Institute. Cornwell University Law School. Disponível em: <https://www.law.cornell.edu/constitution/first_amendment>. Acesso em: 28 ago. 2016.

te, se percebem os indivíduos como parte desse grupo.

Também, os movimentos feministas, profunda e substancialmente, se relacionam com a pauta dos direitos de pessoas de SOGI diversa, na medida em que refutam uma compreensão binária da sociedade (homem e mulher, macho e fêmea, e assim por diante) no sentido de dar maiores garantias de direitos e igualdade social sem que isso signifique limitação de formas de viver. Da mesma forma, países do oriente médio têm os movimentos de proteção dos direitos das mulheres agidos de forma contundente na proteção dos direitos de pessoas não heterossexuais, visto que, normalmente, estas são colocadas em situação de extremos perigo e de vulnerabilidade.

Pelo exposto, recente e relevante a luta por reconhecimento e por direitos da população de SOGI diversa, bem como com substanciais similitudes com pleitos de muitos outros nichos populacionais, entende-se por importante a análise dos direitos dessas pessoas no atual momento político e social que se vive. Ainda, na medida em que o atual sistema internacional de proteção dos direitos humanos não se posicionou claramente sobre as possibilidades de resguardar e efetivar esta gama de direitos, a proposta que se faz é de apontar em que medida está a Corte Penal Internacional[5] apta a agir e consolidar novos entendimentos sobre o tema. A compreensão dos limites e possibilidades dessa corte para julgar crimes praticados contra a população não heterossexual, inclusive, permite novas perspectivas para sua atuação - o que se propõe a partir da interpretação de Crimes Contra a Humanidade e de Genocídio.

Dessa feita, o presente trabalho se dividirá em três etapas para compreender quais são as potencialidades guardadas pela Corte Penal Internacional em relação à proteção dos direitos de pessoas de SOGI diversa: em relação à declaração de 2014 do Gabinete do Procurador – considerando-se as intenções do legislador e questões de *realpolitiks*; do crime de genocídio a partir da compreensão de pessoas não heterossexuais como membros de um grupo identificável; e dos crimes contra a humanidade em se tratando de perseguição.

Acredita-se que, ao explorar essas possibilidades guardadas pela lei formal (Estatuto de Roma) e pelos documentos anexos que devem influenciar a interpretação da norma pelos legisladores, pode-se lançar luz sobre como o direito internacional poderá ser importante para a proteção desses direitos, ainda tão violados. Sob vulnerabilidades e invisibilidades, a confiança que se deposita no direito internacional dos direitos humanos, portanto, é a de que possa ser instrumento de novas significações e novas formas de proteção àqueles que pleiteiam o direito de viver as suas singularidades.

2. *Realpolitiks* e a Criação do Estatuto de Roma

Com a assinatura do Estatuto de Roma em 17 de julho de 1998, seguida do início da atuação da Corte Penal Internacional em Haia[6], na Holanda (doravante determinada CPI), o panorama mundial de proteção dos direitos fundamentais ganhou novos contornos. Também o pleito dos cidadãos pela proteção de suas identidades[7] ganhou novo corpo nos últimos vinte anos, de modo que posicionamentos positivos em relação a essa proteção se esperam dos atores políticos e dos institutos de proteção de direitos. Especificamente em relação à CPI, possui, também, um papel emblemático ao reproduzir uma mensagem de que a impunidade não mais será tolerada, reforçando a importância de se dispensar especial atenção aos direitos de identidade e reconhecimento – atrelados ao mais profundo significado dos direitos humanos.

Há que se considerar, nesse sentido, que a assinatura

5 O recorte que aqui se faz se deve ao formato deste trabalho, que não comportaria análise suficiente e adequado a todo o sistema internacional de proteção dos direitos humanos. Ainda, a opção pela Corte Penal Internacional se faz na medida em que se enxergam diversas potencialidades de proteção, como adiante se poderá perceber.

6 A nomenclatura de Corte, não Tribunal Penal Internacional é adotada desta forma devido ao seu caráter permanente e de não se tratar de uma jurisdição *ex post facto*, tal como seriam as instituições denominadas tribunais. UNITED Nations Research Guide. Disponível em: <research.un.org/en/docs/law/courts>. Acesso em: 23 jun. 2014. Sobre o assunto, consultar, também: FERREIRA, Gustavo Bussmann. *A Identificação das Vítimas para o Direito Internacional dos Direitos Humanos*: entre a universalidade dos direitos e a vida nua. Disponível em: <http://acervodigital.ufpr.br/bitstream/handle/1884/37933/R%20-%20D%20-%20GUSTAVO%20BUSSMANN%20FERREIRA.pdf?sequence=3>. Acesso em: 17 nov. 2016.

7 Aqui, desde logo se sublinha a ausência de intenção em reduzir a termo o que compreende uma percepção identitária e em que medida considera-se aquilo que remonta a identidade de um indivíduo. O termo é utilizado no sentido das aspirações dos cidadãos na defesa de direitos intimamente ligados com suas particularidades, singularidades e formas de vida.

de um tratado como o Estatuto de Roma (ER) envolve a acomodação de interesses e premissas de diversas nações. Assim, necessariamente, alguns direitos serão deixados de lado a fim de garantir que a intenção de criação de uma jurisdição internacional seja atingida. Por esse motivo, antes de se analisarem as especificidades da Corte Penal Internacional acerca dos crimes praticados contra a população de SOGI diversa, o conceito de *realpolitiks* deve ser perpassado na medida em que considera não apenas aspectos formais da política, mas suas adaptações e desvios para a preservação de interesses daqueles que a operam. Para além de considerações éticas ou compromissos com os direitos humanos e os cidadãos[8], há que se considerar a conjuntura que levou à realização de certos atos ou assinatura de determinados tratados (em detrimento do que seria esperado para que se atingissem os objetivos iniciais de uma corte ou da proteção dos direito humanos).

Ainda, é importante que, antes de se analisarem os limites e possibilidades de que a Corte Penal Internacional receba denúncias e julgue os crimes cometidos contra a população de SOGI diversa, que se analise o conteúdo do Estatuto de Roma em sua proposta original e a forma final que adquiriu a partir de discussões e interesses políticos dos países que o assinaram. Ainda, vale ressaltar que se possuísse forma e conteúdo diversos dos que se apresentam hoje em sua versão oficial, talvez o instrumento não fosse assinado e ratificado.

Posteriormente, apresentam-se considerações acerca da resolução do Gabinete do Procurador da CPI (*Office of the Prosecutor*) de Junho de 2014, *Policy Paper on Sexual and Gender-Based Crimes*, doravante denominado Documento Programático para Crimes Sexuais e de Gênero. Uma vez que tal documento não faz parte do Estatuto de Roma em sua via original e não se trata de algo similar a uma *emenda,* na medida em que não foi objeto de discussões e votação tal como o ER antes de sua assinatura, sua legitimidade poderá ser questionada quando vier a ser mencionado nas decisões dos juízes da CPI.

Assim, as considerações do presente capítulo seguirão a mencionada ordem, incursões em *realpolitiks*, o conteúdo do Estatuto de Roma em sua versão original e, no capítulo seguinte, sobre o conteúdo do Documento Programático de 2014 do Procurador da CPI na tentativa de esclarecerem-se alguns pontos e levantarem-se questionamentos sobre os limites e possibilidades de o documento assinado pelo procurador da Corte Penal Internacional seja efetivo na alteração do Estatuto de Roma e seja aplicado pelos julgadores da Corte.

Conforme já mencionado, tratar de *realpolitik* envolve questionar como as decisões foram tomadas e quais os interesses dos atores políticos preponderaram em determinadas situações. O termo foi cunhado, originalmente, em contraste à *idealpolitiks,* políticas ideais que acomodassem diplomacia internacional e aspirações democráticas[9]. Dessa forma, a análise de um tratado ou de determinada ação política deve envolver as manobras de coalizão existentes nos bastidores, os jogos de poder, as forças sociais e as possibilidades políticas que dão forma e conteúdo ao direito internacional dos direitos humanos.

Há que se reconhecer, portanto, que existem mecanismos reguladores que atuam sobre a população global na intenção de que seja gerida a partir de saberes específicos. Assim, por meio da segurança, da economia política, soberania e controle, dentre inúmeras outras variáveis, o direito internacional dos direitos humanos se constrói e se forja. Nesse sentido:

> O fato de que os homens essencialmente aplicam seu poder sobre outros homens dá ao conceito, na política, seu significado autêntico. O poder de um indivíduo é a capacidade de fazer, mas, antes de tudo, é a capacidade de influir sobre a conduta ou aos sentimentos dos outros indivíduos. No campo das relações internacionais, poder é a capacidade que tem uma unidade política de impor suas vontades às demais. Em poucas palavras, o poder político não é um valor absoluto, mas uma relação entre os homens[10].

Nesse esteio, não se pode esquecer de que as conquistas relacionadas aos direitos humanos no último século foram, também, produto de relações de poder e de intenções particulares; de relações entre os homens permeadas por anseios, disputas e pelo Direito. O exemplo norte-americano mencionado, acerca da conquista de direitos homossexuais a partir de analogias com pleitos de movimentos raciais, retrata as dificuldades de pleitearem-se direitos e como as estratégias de litigância se

8 ENCICLOPAEDIA Brittanica. Disponível em: <https://global. britannica. com/topic/realpolitik>. Acesso em: 10 nov. 2016.

9 KELLY, Duncan. *Realpolitik:* a history, by John Bew. Financial Times, 2016. Disponível em: <https://www.ft.com/content/802c822e-d0d6-11e5-831d-09f7778e7377>. Acesso em: 17 nov. 2016.

10 ARON, Raymond. *Paz e Guerra entre as Nações*. Brasília: Universidade de Brasília, Instituto de Pesquisa de Relações Internacionais; São Paulo: Imprensa Oficial do Estado de São Paulo, 2002. p. 99.

mostraram essenciais para que os pedidos fossem contemplados.

Justamente por isso, tem-se que os direitos humanos são conquistados, adquiridos, produto de luta e diálogos – o que fica ainda mais acentuado em um período de globalização e de intenções de um sistema normativo de larga escala. Considerar-se que há uma intenção global de governança, portanto, uma mundialização esperada em relação ao direito a ter direitos, implica transcender soberanias e repensar a autodeterminação dos povos[11]. Todavia, Essa construção dos direitos humanos coaduna-se com a busca pela efetivação de um mundo comum regulado por um Direito que igualmente proteja a todos.

Ainda, pensar a conquista de direitos envolve, também, ultrapassar as barreiras do formalismo legal. Tome-se como exemplo o caso da jurisprudência brasileira: o Poder Judiciário nacional, em primeiro e segundo graus ignora, diariamente, as normativas internacionais e os tratados assinados e ratificados pelo país ao promover julgamentos e tomada de decisões. A Suprema Corte (Supremo Tribunal Federal), por sua vez, também não possui histórico robusto ou coerente na utilização do aparato internacional de direitos humanos. Quando teve a oportunidade, inclusive, ao julgar a possibilidade de união civil entre pessoas do mesmo sexo (denominada homoafetiva pela literatura e jurisprudência), eximiu-se o relator de fundamentar sua decisão em princípios do direito internacional dos direitos humanos ou em diálogos inter-cortes; pelo contrário, o que se fez foi fundamentar a decisão em trechos literários e em uma construção lógica que deixou a desejar do ponto de vista jurídico e político.

Vale dizer que a utilização do termo homoafetividade, por exemplo, utilizada para evitar os preconceitos carregados pelo sinônimo homosexualidade, pode iludir que a simples alteração semântica seria suficiente para maior reconhecimento e inclusão; ora, algo que só se atinge com robusto trabalho de conscientização, ressignificação das relações e efetiva hospitalidade – para além da letra fria da lei e da jurisprudência. Ainda, é importante reconhecer que o voto do relator possui grande fundamentação em aspectos biológicos e se esquece de criar um fio condutor nas citações de doutrina, nacional e estrangeira, que se usa para justificar suas decisões[12].

Por outro lado, Não obstante a existência de diversas leis e tratados que se referem à proibição de discriminação em virtude de orientação sexual e identidade de gênero, a realidade, ainda, se mostra pouco favorável para a vida digna e segura dessa população. Se, por um lado, os standards internacionais reconhecem avanços na realidade nacional em virtude de inexistência de criminalização das condutas e da possibilidade de casamento entre pessoas do mesmo sexo, a realidade se mostra muito menos receptiva e celebratória dessa população. Claro exemplo que se aborda é a inexistência de criminalizado dos crimes de ódio praticados contra a população de orientação sexual e identidade de gênero diversas; assim, a cada 28 horas o país permite uma morte provocada por homo-lesbo-trans-fobia e se resguarda de investigar e julgar os motivos que possibilitam esta realidade[13].

Dessa forma, pensar em um Direito que se proponha global e igualmente protetor de todos os cidadãos onde quer que vivam, requer que sejam questionados a forma pela qual esse Direito passa a ser válido, como as normas são criadas e de que forma se pretendem neutras[14] o suficiente para que não sejam aplicadas de forma desigual; ainda, em que medida a aplicabilidade e a legitimidade desse Direito devem ser permanentemente objeto de atenção – seu enforcement em níveis nacionais e internacionais, sua validade, apesar da soberania e as (im)possibilidades de ser descartado em situações pontuais com justificativas na autodeterminação dos povos.

Vale ressaltar que o direito internacional em muito se baseia em valores globais e nas intenções de efetivação do previsto na Declaração Universal dos Direitos Humanos. A consciência que se propõe é a de união de todos os povos a partir do seu reconhecimento de uns

11 LAFER, Celso. *Reconstrução dos direitos humanos*: um diálogo com o pensamento de Hannah Arendt. Rio de Janeiro: Companhia das Letras, 2001. p. 127.

12 Ver mais informações em: BRITTO, Carlos Ayres. *O humanismo como categoria constitucional*. Belo Horizonte: Fórum, 2016; BRASIL. Supremo Tribunal Federal. *Voto do Ministro Carlos Ayres Britto no julgamento conjunto da ADPF 132 e ADI 4277*. Disponível em: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI4277revisado.pdf>.

13 Para mais informações sobre os dados mencionados nesta seção, consultar: PESQUISAS realizadas pelo Grupo Gay da Bahia: associação de defesa dos direitos da população de SOGI diversa no país desde 1980. Disponível em: <http://www.ggb.org.br/>. Acesso em: 8 fev. 2017.

14 Consultar: BASSIOUNI, M. Cherif. *Searching for Justice in the World of Realpolitik*: 12 Pace Int'l L, 2000. Disponível em: <http://digitalcommons.pace.edu/pilr/vol12/iss2/1>. Acesso em: 18 nov. 2016.

nos outros por laços comuns, de que todas as culturas têm por base uma herança partilhada. Assim, falar-se em pureza de normas se refere a valores, moralmente, neutros que podem ser utilizados para a proteção de quaisquer pessoas e países, igualmente aplicáveis por vítimas e acusados.

Nesse panorama, debruçar-se sobre a forma que os tratados são feitos e assinados rememora-nos que o direito internacional é tão forte quanto os estados que o criam e balizam pretendem que o seja[15]. A assinatura de um tratado ou a submissão a um sistema internacional de direitos pode advir do fato de que, simplesmente, por apoiar determinadas questões é politicamente válido e interessante; da mesma forma, não há uma "polícia internacional" ou um método de coerção e imposição de obrigatoriedade para que se cumpra com o disposto nos tratados. Nesse sentido:

> Todas as Nações são tentadas a vestir suas próprias aspirações e ações particulares com a roupagem dos fins morais do universo – e poucas foram capazes de resistir à tentação por muito tempo. Uma coisa é saber que as Nações estão sujeitas à lei moral, e outra, muito diferente, é pretender saber, com certeza, o que é bom ou mau no âmbito das relações entre Nações[16].

Referido trecho nos permite encarar com maior crítica e seriedade, por exemplo, o fato de o Conselho de Segurança das Nações Unidas possuir os Estados Unidos, Rússia, China como membros permanentes. Ao mesmo tempo, referido Conselho tem poder de denunciar ao Procurador qualquer situação em que haja indícios de ter ocorrido a prática de um ou vários desses crimes previstos no Estatuto de Roma. Ainda, os membros permanentes possuem poder de veto em relação às decisões tomadas pelo Conselho. Ou seja: apesar de não se submeterem à jurisdição da Corte Penal Internacional, os três mencionados países possuem papel determinante na decisão de quais países terão seus líderes levados a julgamento.

A jornada empreendida até a criação da Corte Penal Internacional, portanto, segue na tentativa de que seus propósitos iniciais sejam alcançados, pelo fim da impunidade e pela efetivação dos direitos humanos. Mas entre soluções políticas e valores morais, não se pode deixar de questionar cada um dos atos de interpretação dos seus instrumentos, tratados e princípios. Para além de interesses públicos e privados, de representantes de nações e de interesses políticos, de moralismos utópicos e interesses concretos[17], não se deve aceitar o direito e as cortes internacionais como livre de vícios e falhas. O que se propõe, em contrapartida, é um olhar atento e cuidadoso para que os freios e contrapesos constantes não deixem que o sistema internacional de proteção dos direitos humanos venha a se tornar um mero meio para se atingir resultados políticos[18].

Quando dos trabalhos preparatórios para a elaboração do Estatuto de Roma, inúmeras discussões perpassaram os procedimentos para que se chegasse a um consenso sobre o texto final – o suficiente para agradar a todos os 60 estados parte que o ratificaram em 1998. No preâmbulo de referido dispositivo, fez-se constar algumas premissas para a criação de uma Corte Penal Internacional. Nesse sentido:

> Conscientes de que todos os povos estão unidos por laços comuns e de que suas culturas foram construídas sobre uma herança que partilham, e preocupados com o fato deste delicado mosaico poder vir a quebrar-se a qualquer instante,Tendo presente que, no decurso deste século, milhões de crianças, **homens e mulheres** têm sido vítimas de atrocidades inimagináveis que chocam profundamente a consciência da humanidade [...][19]. (grifo nosso).

Reforçando a intenção de refletir certo grau de universalidade dos direitos humanos, por algum motivo, optou-se por deixar claro a intenção de proteger homens e mulheres. Considerando-se a intenção de proteger a humanidade como um todo, pode-se questionar o porquê de tal escolha em detrimento da proteção mais genérica 'de todos os seres humanos', por exemplo.

Em seu artigo 07º, ao elencar as previsões de crimes contra a humanidade, o parágrafo 03° assim dispõe: "Para efeitos do presente Estatuto, entende-se que o termo "gênero" abrange os sexos masculino e feminino,

15 BASSIOUNI, M. Cherif. *Searching for Justice in the World of Realpolitik*: 12 Pace Int'l L, 2000. Disponível em: <http://digitalcommons.pace.edu/pilr/vol12/iss2/1>. Acesso em: 18 nov. 2016.

16 MORGENTHAU, H. *A política entre as Nações*. Brasília: Funag/IPRI, EdUNB; São Paulo: Imprensa Oficial do Estado, 2003. p. 21.

17 KELLY, Duncan. *Realpolitik:* a history, by John Bew. Financial Times, 2016. Disponível em: <https://www.ft.com/content/802c822e-d0d6-11e5-831d-09f7778e7377>. Acesso em: 17 nov. 2016.

18 BASSIOUNI, M. Cherif. *Searching for Justice in the World of Realpolitik*: 12 Pace Int'l L, 2000. Disponível em: <http://digitalcommons.pace.edu/pilr/vol12/iss2/1>. Acesso em: 18 nov. 2016.

19 BRASIL. *Decreto n. 4.388, de 25 de setembro de 2002. Estatuto de Roma do Tribunal Penal Internacional.* Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/2002/D4388.htm>.

dentro do contexto da sociedade, não lhe devendo ser atribuído qualquer outro significado[20]". Ainda, o apego a essa forma restrita de interpretação das questões de identidade de gênero são reiteradas no artigo 21 do mesmo estatuto, quando assim prevê:

> A aplicação e interpretação do direito, nos termos do presente artigo, deverá ser compatível com os direitos humanos internacionalmente reconhecidos, sem discriminação alguma baseada em motivos tais como o gênero, definido no parágrafo 3o do artigo 7o, a idade, a raça, a cor, a religião ou o credo, a opinião política ou outra, a origem nacional, étnica ou social, a situação econômica, o nascimento ou outra condição.

De fato, se aparenta paradoxal um instrumento internacional de proteção que faz referências explícitas aos direitos humanos e a proibição de discriminação e ao mesmo tempo, por mais de uma vez, sublinha a impossibilidade de considerar gênero para além de conceitos estanques de masculino e feminino. Sobre essas delimitações binárias em relação à sexualidade humana, vale o questionamento sobre a possível redução das multiplicidades da vida a, apenas, duas possibilidades: sexo masculino e feminino. Em contrapartida, alocar interesses dos países da Europa, Oriente Médio, Extremo Oriente, Latino-Americanos..., com todas as suas particularidades, não se mostra tarefa fácil. Assim, trabalhar com o consolidado no instrumento legal é o que resta como possibilidade para os aplicadores e como esperança para as vítimas diárias de violações em razão de sua orientação sexual e identidade de gênero. Hannah Arendt assim tratou da dificuldade em se dar efetividade aos direitos humanos a partir da letra fria da lei:

> Os Direitos do Homem, supostamente inalienáveis, mostraram-se inexequíveis — mesmo nos países cujas constituições se baseavam neles — sempre que surgiam pessoas que não eram cidadãos de algum Estado soberano. A esse fato, por si já suficientemente desconcertante, deve acrescentar-se a confusão criada pelas numerosas tentativas de moldar o conceito de direitos humanos no sentido de defini-los com alguma convicção, em contraste com os direitos do cidadão, claramente delineados[21].

O paradoxo percebido é que a mesma pluralidade que fundamentou a criação dos direitos humanos foi os levou à sua insuficiência para os cidadãos. Ao serem tratados, tecnicamente, como iguais em todos os lugares do mundo, os cidadãos perdem em reconhecimento de suas culturas e em suas necessidades individuais; demonstram que a mera declaração de valores é insuficiente para a manutenção da dignidade que lhes é necessária. Ou seja, os cidadãos querem participar, mas querem, também, ser reconhecidos em sua individualidade, o que requer o afastamento da despersonalização dos povos e suas culturas[22]. Assim, questionar-se não apenas a insuficiência da terminologia empregada pelo Estatuto de Roma, mas também suas origens e suas potencialidades se afigura importante para a proteção efetiva dos direitos humanos e para a efetividade da Corte Penal Internacional.

Há que se analisar, também, para além das insuficiências contidas no texto legal e da problemática em se reduzir as proteções de gênero a "masculino e feminino", as discussões que perpassaram a elaboração do texto final. Por exemplo, é sabido que, em 11 de Julho 1998, nos trabalhos preparatórios para a elaboração do texto legal do Estatuto de Roma, Austrália, Bélgica, Canadá, Chile, Costa Rica, Finlândia, Grécia, França e mais doze países se posicionaram oficialmente para que o termo 'gênero' fosse mantido nos dispositivos legais. Já outros como Egito, Guatemala, Líbia, Qatar, Venezuela, dentre outros, solicitaram formalmente a retirada do termo[23]. Alguns problemas levantados eram concernentes às dificuldades de assinatura de um tratado que envolva a redefinição dos moldes culturais existentes em uma sociedade, bem como a impossibilidade de tradução do termo "gênero" para as seis línguas oficiais da Organização das Nações Unidas; nos documentos em árabe e francês, por exemplo, as referências são feitas aos "dois sexos"[24].

Ainda, há que se considerar a possibilidade de novos direitos serem garantidos às mulheres a partir de interpretações mais abrangentes do termo gênero e para além do que as legislações nacionais já possibilitassem.

20 BRASIL. *Decreto n. 4.388, de 25 de setembro de 2002. Estatuto de Roma do Tribunal Penal Internacional.* Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/2002/D4388.htm>.

21 ARENDT, Hannah. *As Origens do Totalitarismo*. São Paulo: Companhia das Letras, 1990. p. 326.

22 DELMAS-MARTY, Mireille; CASSESSE, Antonio. *Crimes Internacionais e Jurisdições Internacionais*. Barueri: Manole, 2004. p. 61-72.

23 OOSTERVELD, Valerie. *Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court:* Notes From Working Group on Applicable Law. 1998. p. 63. Disponível em: <http://www.legal-tools.org/uploads/tx_ltpdb/Oosterveld _Gender_HarvardArticle2005_02.pdf>. Acesso em: 20 nov. 2016.

24 OOSTERVELD, Valerie. *The Defintion of "Gender" in the Rome Statute of the International Criminal Court*: a Step Forward or Back for International Criminal Justice? Disponível em: <http://www.legaltools.org/uploads/tx_ltpdb/Oosterveld_Gender_HarvardArticle2005_02.pdf>. Acesso em: 20 nov. 2016.

Percebe-se, portanto, um claro exemplo de realpolitiks e do temor que um conflito entre legislações enfraquecesse a política nacional. Há maior valorização, portanto, da soberania e do modelo cultural vigente do que à proteção de determinada parcela da população. No mesmo sentido, considerar gênero para além dos clássicos significados, masculino e feminino, significaria "reestruturar drasticamente as sociedades ao redor do mundo vastas [...] o que raramente se enquadraria na agenda de uma Corte Penal (Internacional)[25]".

Por fim, antes de encaminhar nossas ponderações para o sopro de ar fresco que traz o Documento Programático do Gabinete do Procurador da CPI e em complementação ao que se expôs na referência bibliográfica de número 1 em que se explica nossa opção metodológica pelo termo SOGI, cabe apresentar algumas considerações sobre gênero e sexualidade. Primeiramente, posiciona-se no sentido de que a sigla LGBTTQI (lésbicas, gays, bissexuais, transexuais, transgêneros, queer e intersexuais) pode não representar todas as possibilidades a partir do que as pessoas lidam com suas próprias identidades, singularidades e sexualidades.

Ademais, deve-se considerar situações como a da Comissão de Direitos Humanos da cidade de Nova York que lançou uma lista exaustiva de 31 possíveis identidades sexuais e de gênero a serem reconhecidas. Assim, em vez das 07 letras representativas da população LGBTTQI, passamos a refletir sobre as 31 possibilidades trazidas pelo governo de NY, bem como sobre as muitas outras possibilidades pelas quais o ser humano poderia se identificar. Destarte, nenhuma lista de letras seria longa o suficiente para determinar as possíveis identificações fluídas do ser humano. Há que se ressaltar, no mesmo sentido, que a letra 'Q', em menção ao que seriam pessoas queer, não deve ser interpretada como uma forma de identidade, mas um conceito guarda-chuva que acoberta todas as possibilidades de viver as sexualidades para além dos tradicionais papéis dominantes hetero-cis[26].

Conforme documentado e partilhado pelo Centro de Pesquisa em equidade de Gênero da Universidade de Berkeley, concorda-se com a afirmação de que se identificar como *queer* é, também, um ato político no sentido de romper com concepções binárias e reconhecer orientação sexual e identidade de gênero como potencialmente fluídos - como um simples conceito que se propõe a acolher uma complexa gama de comportamentos e desejos sexuais. Na medida em que as intenções de proteção dos cidadãos em relação a suas sexualidades e singularidades perpassa o comprometimento em evitar rótulos e respeitar a potencialidade humana tanto quanto possível, reitera-se que o uso do termo SOGI é adequado uma vez que compreende todas as possibilidades existentes em relação à sexualidade humana.

Pelo exposto, confirmada a necessária compreensão da sexualidade em perspectivas flutuante e fluída, a negação de rótulos e do sistema binário de compreensões se reforça, assim como a insuficiência do texto legal do Estatuto de Roma. Assim, orienta-se a próxima seção para a análise do Documento Programático do Procurador da Corte Penal Internacional como possibilidade de novas formas de interpretação e, consequentemente, nova esperança para a população *queer* em situação de vulnerabilidade.

3. O Documento Programático do Gabinete do Procurador para Crimes Sexuais e de Gênero e Possíveis Interpretações do Estatuto de Roma

Para tentar driblar as dificuldades de promulgar alguma emenda ao Estatuto de Roma ou de meramente aguardar uma reinterpretação do texto legal pelos juízes da corte, em 2014 o Gabinete do Procurador publicou um Documento Programático para Crimes Sexuais e de Gênero. Não se trata, portanto, de uma alteração de competência ou de uma afronta à comunidade internacional em tentativa de desconstruir as previsões acordadas e positivadas no ER. Trata-se da explicitação de um comprometimento do Gabinete do Procurador em alçar questões de gênero e sexualidade a um de seus objetivos estratégicos de proteção internacional dos cidadãos, integrando à sua atuação perspectivas críticas,

25 KENNEDY, David M. *Center for International Studie*: What's the Argument for "Gender Justice?". Disponível em: <http://www.legal-tools.org/uploads/tx_ltpdb/Oosterveld _Gender_Harvard-Article2005_02.pdf>. Acesso em: 20 nov. 2016.

26 To further information, please refer to: *NEW York City Hall, Gender Identity/Gender Expression*: Legal Enforcement Guidance. Disponível em: <https://www1.nyc.gov/site/cchr/law/legal-guidances-gender-identity-expression.page#2>. Acesso em: 20 nov. 2016.

FERREIRA, Gustavo Bussmann. A proteção da orientação sexual e identidade de gênero diversas na corte penal internacional: Entre Realpolitiks E Os Direitos Humanos. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 312-329

maximizando a importância do efeito deterrance[27] e do desafio às sociedades hierárquicas, reivindicando, assim, as potencialidades da vida dos cidadãos.

A grande importância do texto concentra-se na possibilidade que se abre de interpretar todo e qualquer crime previsto no Estatuto de Roma como se de possível cometimento a partir de uma perspectiva de gênero. Diz o parágrafo 20 do Documento Programático:

> Within the scope of its mandate, and in a manner consistent with article 54(1)(a) of the Statute, the Office will apply a gender analysis to all of the crimes within its jurisdiction. This involves an examination of the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, it requires a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities. The approach by the Office will also encompass an understanding of the use of certain types of crimes, including acts of sexual violence, to diminish gender, ethnic, racial, and other identities[28].

A jurisprudência das Cortes Internacionais já vinha consolidando entendimento de que não apenas as violações previstas nos parágrafos de crimes sexuais estavam sujeitas ao exercício de sua jurisdição. A Corte Especial de Serra Leoa[29], por exemplo, ao compreender que o crime de casamento forçado deve ser considerado como possível objeto de sua jurisdição, permite que nova amplitude seja dada ao teor do Estatuto de Roma na questão de "outros atos desumanos". O Estatuto prevê em seu artigo 07(1)(g) a criminalização de "Agressão sexual, escravatura sexual, prostituição forçada, gravidez forçada, esterilização forçada ou qualquer outra forma de violência no campo sexual de gravidade comparável"[30]. Todavia, apesar de o legislador não ter sido específico em relação à prática de casamentos forçados, mulheres do mundo todo foram contempladas com esperança desde que a conduta passou a ser percebida como um crime contra a humanidade à luz do artigo 07(1)(k) do Estatuto de Roma[31], quando prevê "Outros atos desumanos de caráter semelhante, que causem intencionalmente grande sofrimento, ou afetem gravemente a integridade física ou a saúde física ou mental"[32].

À parte dos crimes de conotação sexual, cuja proteção legal remonta ao estatuto do Tribunal Penal Internacional para a ex-Iugoslávia[33] pelo caráter explorador

27 No sentido de dissuadir novos perpetradores que repitam crimes de mesma natureza, que novas violações venham a acontecer. KIM, Hunjoon; SIKKINK Kathryn. *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*. 2009. Disponível em: <http://iilj.org/courses/documents/Sikkink-Kim.HC2009Oct21.pdf>. Acesso em: 5 set. 2016.

28 Em tradução livre: No escopo deste documento, e de forma consistente com o artigo 54(1)(a) do Estatuto (de Roma), o Gabinete irá aplicar uma análise sob a perspectiva de gênero a todos os crimes sob sua jurisdição. Isso envolve o exame das diferenças sublinhadas e desigualdades entre mulheres e homens, e meninas e meninos; bem como do poder das relações afetivas e de outras dinâmicas que determinam e moldam os papeis de gênero em uma sociedade e permitem o estabelecimento de premissas e estereótipos. No contexto de seu trabalho, o Gabinete requer a consideração de como e de qual forma crimes, incluindo os sexuais e baseados em gênero, se relacionam com normas de gênero e desigualdades. A abordagem do Gabinete irá, também, englobar a compreensão do uso de certos tipos de crimes, incluindo atos de violência sexual, para diminuir identidades de gênero, étnicas, raciais e outras.

29 Trata-se de uma Corte Híbrida, que mescla lei nacional e costumes com o direito internacional; tipo de corte importante para o direito internacional dos direitos humanos uma vez que adaptada para uma situação em específico, levando em consideração as circunstâncias histórico-sociais e antropológicas do local onde ocorreram os crimes. Uma intervenção externa poderia levantar diversas questões de legitimidade aos cidadãos envolvidos em conflitos em regiões remotas e isoladas; no mesmo sentido, a sociedade civil poderia enfrentar inúmeros desafios ao julgar crimes dessa magnitude, pelo que a complementaridade partilhada (shared complementarity) se mostra uma maneira efetiva de junção de esforços entre Estados e organizações internacionais para a construção da paz. Os tribunais domésticos internacionalizados, portanto, são vistos como um caminho do meio para que se chegue à efetividade das cortes internacionais, pois possuem parâmetros internacionalmente reconhecidos como a presunção da inocência e o devido processo legal, bem como recursos financeiros que não estariam disponíveis em julgamentos em cortes domésticas. Consultar: BRINGING Justice: the Special Court for Sierra Leone. Reported at Human Rights Watch em tradução livre. Disponível em: <http://www.hrw.org/node/11983/section/2>. Acesso em: 24 out. 2014; ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Role of Civil Society in Post-Conflict Peace-Building*: 4993 encontro do Conselho de Segurança, Nova Iorque, 22 jun. 2004. Disponível em: <http://www.securitycouncilreport.org/ atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/PKO%20SPV %204993.pdf>. Acesso em: 10 out. 2014; SCHARF, Michael P. *Forward*: lessons from the Saddam Trial. Local: Faculty Publications; Case Western Reserve University, 2007. p. 7.

30 BRASIL. *Decreto n. 4.388, de 25 de setembro de 2002. Estatuto de Roma do Tribunal Penal Internacional.* Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/2002/D4388.htm>.

31 CLARK, James M. *Forced Marriage*: the Evolution of a New International Criminal Norm. Aberdeen: University of Aberdeen, 2013. v. 3.

32 BRASIL. *Decreto n. 4.388, de 25 de setembro de 2002. Estatuto de Roma do Tribunal Penal Internacional.* Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/2002/D4388.htm>.

33 TRIBUNAL Penal Internacional para a Ex-Iugoslávia. *Estatuto do Tribunal Penal Internacional para a Ex-Iugoslávia, de 25 de maio de 1993.*

de cumprir atividades domésticas e atividades sexuais[34], a corte considerou crime a conduta dos casamentos forçados devido à análise da gravidade que enseja e o grande sofrimento que inflige às vítimas também na questão psicológica[35]: não se considera, apenas, a questão sexual do ato, mas o fato de ser desumano também em seus demais aspectos (não sexuais). Enquanto a jurisprudência para a Ex-Iugoslávia considera os crimes sexuais na medida do sentimento de propriedade que possui o perpetrador[36], o crime de casamento forçado possui, além desse aspecto, o terror psicológico que as vítimas sofrem uma vez que a violência inclui manipulações intelectuais, obrigações domésticas e sexo/engravidamento não consensual[37].

Trata-se, portanto, de claro exemplo de interpretação sob uma perspectiva de gênero de uma norma que não foi necessariamente assim constituída. A Corte Interamericana de Direitos Humanos, no mesmo sentido, se pronunciou a respeito da problemática envolvendo "papeis sociais socialmente construídos" em sua jurisprudência relativa ao caso Karen Atala Riffo vs. Chile. Após o fim de sua relação com o esposo, a Juíza de Direito Karen Atala manteve a guarda das filhas. Todavia, ao comprometer-se em um relacionamento com outra mulher, tempos depois, Karen foi confrontada em juízo por seu ex-marido que pretendia reaver a guarda das filhas do casal unicamente em função de sua nova condição homossexual. Segundo alegado pelo pai e confirmado pela Suprema Corte Chilena, ao envolver-se em relacionamento afetivo com outra pessoa de seu mesmo sexo, a sra. Karen estaria pondo em risco a educação de suas filhas ao não cumprir com o papel social que deveria.

O caso foi submetido à Comissão Americana de Direitos Humanos (CIDH) e posteriormente encaminhado à Corte Interamericana de Direitos Humanos, a qual condenou o estado chileno pela clara discriminação institucional sofrida por Atala no curso do processo de guarda, violando os artigos 11 (proteção à honra e à dignidade), 17 (proteção à família), 19 (direitos da criança), 24 (igualdade perante a lei), 8 (garantias judiciais) e 25 (proteção judicial), todos combinados com o artigo 1 (obrigação de respeitar direitos), da Convenção Americana de Direitos Humanos (CADH).

Comprometer-se com a análise de todo o Estatuto de Roma sob uma perspectiva de gênero possibilita, portanto, o rompimento com algumas normas cuja potencialidade de aplicação houvesse sido eivada quando da escrita do Estatuto. Assim, não obstante as questões de realpolitiks já explicitadas, as dificuldades no estabelecimento de um consenso em relação ao que será positivado nos tratados e na impossibilidade de um direito internacional ser construído de forma a alterar, substancialmente, o sistema jurídico doméstico dos seus países signatários, o Documento Programático do Gabinete do Procurador para Crimes Sexuais e de Gênero reafirma as intenções de promoção e defesa dos direitos de uma população diariamente violada em sua honra, dignidade e identidades.

Dessa maneira, todas as previsões do Estatuto de Roma tornam-se sujeitas a análise sob uma perspectiva crítica e consideração de eventuais particularidades referentes a identidades de gênero e diversidade sexual. Todavia, duas formas de percepção de crimes contra a população de SOGI diversa se apresentam mais palpáveis, de modo que serão exploradas com mais cuidado, quais sejam: o crime de genocídio e os crimes contra a humanidade. O primeiro, em interpretação extensiva do caput quando trata de intenções de extermínio e destruição de um grupo. Já em relação aos crimes contra a humanidade, em compreensão de que perseguição pode em relação a grupo ou coletividade que possa ser identificado por motivos políticos, raciais, nacionais, étnicos, culturais, religiosos ou de gênero.

4. Crimes de Genocídio e Contra a Humanidade

Em relação ao crime de genocídio, considera-se que pode ocorrer em vertente física, biológica ou cultural[38], mas a preocupação que causa (e por isso a sua denominação como crime dos crimes) não se refere, apenas, ao

34 TRIBUNAL Penal Internacional para a Ex-Iugoslávia. Promotor vs. Kunarac (12 Prosecutor vs. Kunarac et al.). *Caso n. IT-96-23T & IT-96-23/1-T, Julgamento de 22 fev. 2001*. p. 742.

35 CORTE Especial para Serra Leoa. Promotor vs. Alex Tamba Brima. *Caso n. SCSL-2004-16-A. Julgamento de 3 mar. 2008*. p. 854.

36 TRIBUNAL Penal Internacional para a Ex-Iugoslávia. Promotor vs. Kunarac (12 Prosecutor vs. Kunarac et al.). *Caso n. IT-96-23T & IT-96-23/1-T, Julgamento de 22 fev. 2001*. p. 539.

37 CORTE Especial para Serra Leoa. Promotor vs. Alex Tamba Brima. Caso n. SCSL-2004-16-A. Julgamento de 3 mar. 2008. p. 61.

38 SCHABAS, William A. *An Introduction to the International Criminal Court*. 4. ed. New York: Cambridge University Press, 2011. p. 102.

sofrimento em larga escala impingido às vítimas diretas. Atenta-se, também, para a angústia que envolve os fundamentos da prática, que estão "acima da compreensão humana[39]", para a pretensa homogeneização das sociedades e a impossibilidade de partilhar o espaço social com aqueles que não compactuam com uma forma de vida determinada pelo poder hegemônico.

O crime de genocídio, ao identificar grupos por meio da estigmatização pelos ofensores[40] e promover a citada exclusão de alguns da vida em sociedade, é o mote de governos totalitários e retira dos cidadãos o acesso ao espaço público e o direito de pertencer a uma comunidade[41]. Esse sistema de organização da vida, portanto, retira de alguns seres humanos a cidadania, o direito a ter direitos, a igualdade e a liberdade essenciais a uma vida digna. Desta forma, considerando que o caput do art. 06° do Estatuto de Roma menciona grupos nacionais, étnicos, raciais ou religiosos, considerando o Documento Programático do Gabinete do Procurador, tem-se que o aplicador não pode se furtar de analisar o contexto da prática de crimes sob um viés crítico que perceba as violações existentes em relação às comunidades e pessoas de SOGI diversa.

Partindo-se do pressuposto de que cabe ao Estado não apenas medidas positivas de proteção ao cidadão, mas que, também, não se abstenha de empreender esforços para que as cartas constitucionais e tratados internacionais sejam materialmente cumpridos, há que se destinar especial atenção a duas das possibilidades previstas no artigo 06° do Estatuto de Roma. São elas: "b) Ofensas graves à integridade física ou mental de membros do grupo; c) Sujeição intencional do grupo a condições de vida com vista a provocar a sua destruição física, total ou parcial".

Ainda, vale dizer que o crime de genocídio pode ocorrer em duas fases: "a primeira consiste na destruição do modelo nacional do grupo oprimido e a segunda, na imposição de um modelo nacional de opressor sobre a população oprimida que ficou no território[42]". Vale ressaltar, novamente, a compreensão de que sexo e gênero são sujeitos a constituição social e que nisto podem se fundamentar os comportamentos de opressão e as justificativas genocidas contra aqueles que não se enquadram em uma "matriz de heterossexualidade compulsória". Dessa forma, as estruturas de significação do homossexual (e daqueles que não compreendem a parcela heterossexual desejada e hegemônica) resultam na criação de normas reguladoras que definem também as práticas e legitimidades desses indivíduos. Nas palavras de Judith Butler, há que se "compreender a identidade como uma prática, e uma prática significante, é compreender sujeitos culturalmente inteligíveis como efeitos resultantes de um discurso amarrado por regras, e que se insere nos atos disseminados e corriqueiros da vida lingüística[43]". Dessa forma, possível também que se reconheça o nicho populacional de pessoas de SOGI diversa como de necessária proteção específica e cautelosa por parte do direito internacional dos direitos humanos e, especificamente, da Corte Penal Internacional.

Ainda, não se pode esquecer de que essa compreensão das práticas, também, perpassa a noção de que a existência de uma identidade rígida, fixa, é meramente ilusória e perpetuada apenas discursivamente. As regulações se dão dentro de um contexto tempo-espacial, as interpretações dos corpos de modo cultural e, por fim, a partir de um olhar parcial e limitador, que compreende a sexualidade dentro do quadro da heterossexualidade, apenas[44]; uma análise cultural nos permite perceber que desde a medicina até os sistemas de ensino, desde a infância a realidade heterossexual é perpetuada como o padrão e o ideal a ser alcançado e sublinha, mais uma vez, a necessidade de reconhecimento da população LGBTTI como parte de um grupo, dotado de cultura, significação, instituições, vida social, etc., tal como se reconhece em relação a grupos religiosos com suas igrejas, hinos, tradições etc.

De acordo com a jurisprudência já consolidada pelo Tribunal Penal Internacional para Ruanda[45], considerar

39 ARENDT, Hannah. *Eichmann em Jerusalém*: um relato sobre a banalidade do mal. Tradução: José Rubens Siqueira. 5. reimpr. São Paulo: Companhia das Letras, 1999. p. 232.

40 Tribunal Penal Internacional para a ex-Iugoslávia, Prosecutor vs. Krstic, julgamento de 2 de agosto de 2001, parágrafo 557: "scientifically objective criteria" were considered "inconsistent with the object and purpose of the convention".

41 LAFER, Celso. A Reconstrução dos Direitos Humanos: a contribuição de Hannah Arendt. *Estud.av*, São Paulo, v. 11, n. 30, mayo/aug. 1997. Disponível em: <http://dx.doi.org/10.1590/S0103-40141997000200005>. Acesso em: 20 jun. 2014.

42 LEMKIN, Raphael. *American Scholar*: The crime of "genocide" defined in internation law. Disponível em: <http://www.preventgenocide.org/ genocide/officialtext.htm>. Acesso em: 05 dez. 2010.

43 BUTLER, Judith. *Problemas de gênero*: feminismo e subversão da identidade. Rio de Janeiro: Civilização Brasileira, 2010. p. 208.

44 BUTLER, Judith. *Problemas de gênero*: feminismo e subversão da identidade. Rio de Janeiro: Civilização Brasileira, 2010. p. 136.

45 ITERNATIONAL Criminal Tribunal for Rwanda.

um grupo nos termos do que prevê a norma da Convenção para Prevenção e Repressão do Crime de Genocídio (com texto copiado pelo Estatuto de Roma), deve-se considerar a sua estabilidade como um critério de reconhecimento – excluindo-se, portanto, grupos 'móveis' cuja aderência se daria de forma voluntária, como grupos políticos e econômicos. Ainda, decidiu o Tribunal que, nos casos analisados, a participação no grupo não deveria ser questionada, mas de participação automática e de maneira irremediável. No mesmo sentido, vale dizer que o pertencimento a um grupo deve ser percebido de maneira objetiva e subjetiva[46], considerando-se as evidencias do caso com base em contextos políticos, sociais e culturais. Tanto devem ser analisadas as particularidades circunstanciais quanto a percepção do autor dos crimes[47].

Pelo exposto, conclui-se pelo possível reconhecimento de um grupo social formado pelas pessoas de SOGI diversa, pela comunidade LGBTTI, pelos movimentos de orgulho queer etc., o que os qualifica para a proteção internacional à luz do Estatuto de Roma: a uma, pelo teor do artigo 06° no que concerne ao genocídio; a duas, pela interpretação do Estatuto a partir de uma perspectiva crítica de proteção de gênero, conforme o disposto do Documento Programático exarado pelo Gabinete do Procurador; e, por fim, de acordo com o já consolidado em outras cortes e tribunais internacionais, confirmando a dialogicidade das cortes e suas decisões.

Ainda, assevera-se opinião no sentido de compreender o genocídio para além de uma base biológica, mas social, considerando também a possibilidade de positivamente determinarem-se as identidades relativas à comunidade de cidadãos de SOGI diversa, ultrapassando-se leituras reducionistas do texto legal e intentando a proteção de cada cidadão em suas singularidades. Partindo-se de premissas de que as concepções de sexualidade e papeis sociais são temporalidades socialmente construídas[48], evitam-se divisões puramente binárias para reconhecer todas as potencialidades guardadas pelo indivíduo e o existir dos muitos silêncios que atravessam as estratégias e discursos de dominação e de violação de direitos.

Há que se falar, também, da possibilidade de proteção dos indivíduos de SOGI diversa a partir do artigo 07° do Estatuto de Roma, no que diz respeito a perseguições. Conforme o texto legal, assim se caracterizam:

> Artigo 7o. Crimes contra a Humanidade. 1. Para os efeitos do presente Estatuto, entende-se por "crime contra a humanidade", qualquer um dos atos seguintes, quando cometido no quadro de um ataque, generalizado ou sistemático, contra qualquer população civil, havendo conhecimento desse ataque: [...](h) Perseguição de um grupo ou coletividade que possa ser identificado, por motivos políticos, raciais, nacionais, étnicos, culturais, religiosos ou de gênero, [...], ou em função de outros critérios universalmente reconhecidos como inaceitáveis no direito internacional, relacionados com qualquer ato referido neste parágrafo ou com qualquer crime da competência do Tribunal;

Crimes contra a humanidade foram nomeados dessa forma na medida em que vitimizam não somente os indivíduos a quem o crime se orienta, mas igualmente todo e qualquer cidadão do mundo - qualquer pessoa em qualquer país é ofendida por esse tipo de crime simplesmente por possuir a condição humana[49]. Ainda, há que se considerar que os atos de violência, para que caracterizem este tipo de crime, devem empreendidos como parte de um ataque sistemático ou em larga escala, conforme caput do artigo acima citado, e dirigidos à população civil[50]. Assim, os perpetradores desses crimes se tornam inimigos de toda a população mundial[51]. No mesmo sentido, consolidou entendimento o Tribunal

Akayesu, (Trial Chamber), 2 Sept. 1998. p. 511; 516; 701-702. Ver mais nos parágrafos completos, conforme: "The Chamber relied on the travaux preparatoires of the Genocide Convention, which indicate that "the crime of genocide was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups." The Chamber stated that the four groups protected by the convention share a "common criterion," namely, "that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner." "[I]t was necessary . . . to respect the intent of the drafters . . . which, according to the travaux preparatoires, was clearly to protect any stable and permanent group". Ver tambem: INTERNATIONAL Criminal Tribunal for Rwanda. Musema, (Trial Chamber), 27 Jan. 2000. p. 160-163.

46 International Criminal Tribunal for Rwanda. Rutaganda, (Trial Chamber), 6 Dec. 1999. p. 57-58; 373.

47 International Criminal Tribunal for Rwanda. Semanza, (Trial Chamber), 15 Mayo 2003. p. 317.

48 BUTLER, Judith. *Problemas de gênero*: feminismo e subversão da identidade. Rio de Janeiro: Civilização Brasileira, 2010. p. 141.

49 DRUMBL, Mark A. *Atrocity, Punishment, and International Law*. New York: Cambridge University Press, 2007. p. 2.

50 BRASIL. *Decreto n. 4.388, de 25 de setembro de 2002. Estatuto de Roma do Tribunal Penal Internacional.* Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/2002/D4388.htm>.

51 LUBAN, David. *A Theory of Crimes Against Humanity*. Georgetown: Law Faculty Publications and Other Works, 2004. p. 90.

Penal Internacional para a ex-Iugoslávia, senão vejamos:

> Whilst rules proscribing war crimes address the criminal conduct of a perpetrator towards an immediate protected object, rules proscribing crimes against humanity address the perpetrator's conduct not only towards the immediate victim but also towards the whole of humankind … Because of their heinousness and magnitude they constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location[52].

Também, nesse esteio, é o que consta do Primeiro Relatório da Assembleia Geral das Nações Unidas sobre Crimes Contra a Humanidade. Ademais, sublinha que apesar de não se ignorar a evolução e as alterações temporais que ocorreram em relação a este crime, tendo em vista a Carta de Nuremberg, o Tribunal do Extremo Oriente e as alterações trazidas pela jurisprudência dos Tribunais para Ruanda e Iugoslávia, bem como as divergências doutrinarias que cercam este conceito, trata-se de um crime internacional – o que reitera a possibilidade de ser interpretado de acordo com os tratados relativos de direitos humanos e com o jus cogens. Quanto à sistematicidade, reforça que não é a intenção do legislador tratar crimes isoladamente cometidos com interesses particulares, mas que devem fazer parte de um plano pré-estabelecido. Ainda, que pode ser cometido dentro do território de um único Estado ou para além de suas fronteiras[53].

Por fim, conforme o texto legal do Estatuto de Roma, o crime tem como elementos a conduta como parte de um ataque generalizado ou sistemático (plano preconcebido) dirigido contra uma população civil e que o autor tenha tido a intenção de que a conduta faça parte de um ataque contra uma população civil. Em direito internacional, um ataque constitui um tipo aberto que inclui praticar proibidos pelo ordenamento jurídico e com a participação e intenção do acusado[54]. Não há necessidade do uso de força armada ou de ocorrer durante o contexto de uma guerra, apenas de ser direcionado à população civil[55] e com grande número de vítimas (natureza coletiva[56]), bem como de as práticas serem desumanas e ofensivas aos cidadãos em sua essência[57].

Tratam-se esses crimes, conforme opinio juris de M. Cheriff Bassiouni, de um crime internacional, também, protegido pelo direito costumeiro, vinculante a todos os Estados e integrante do conjunto de normas peremptórias de direito internacional e do jus cogens[58]. Quanto ao parágrafo específico que trata de perseguição de um grupo como meio de se praticar crimes contra a humanidade, há que se considerar que não foram previsto pelo legislador as razões que motivam a perseguição, os fundamentos daqueles engajados na prática e os meios utilizados[59]. O Estatuto de Roma, apenas, define a severa privação de direitos fundamentais (e não direitos humanos, em uma clara opção metodológica) contrária ao direito internacional; e é por esse motivo que se pretende justificar a possibilidade de identificação de um grupo de pessoas de SOGI diversa como possível alvo a quem se direcionam estes crimes – e, portanto, perseguição destas pessoas enquanto crime contra a hu-

52 Em tradução livre: Enquanto as regras prescrevendo crimes de guerra se referem a conduta criminosa de um perpetrador contra um objeto imediatamente protegido, regras prescrevendo crimes contra a humanidade não se referem a condutas praticadas pelo perpetrador contra a vitima em imediato, mas contra toda a humanidade ... devido ao seu caráter abominável e sua magnitude, constituem-se em ataques direcionados à dignidade humana como um todo, à toda a noção de humanidade. Estes crimes constantemente afetam, ou deveriam afetar, todo e cada membro da humanidade, não importando sua nacionalidade, grupo ético e local onde vive. In: International Criminal Court for the former Iugoslavia. Prosecutor v. Erdemović, Appeals Chamber, Judgment, ICTY Case No. IT-96-22-A, p. 21.

53 ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Special Rapporteur on Crimes Against Humanity:* International Law Commission. Sixty-seventh session. Geneva, mayo/jun.; jul./aug., 2015.

54 Estatuto de Roma da Corte Penal Internacional, Art.7(2)(a); Tribunal Penal Internacional para a Ex Iugoslávia. Prosecutor vs. Tadic, par.644; Tribunal Penal Internacional para Ruanda, Prosecutorvs.Akayesu, p. 205.

55 BOAS, Bischoff. *Elements of Crimes Under International Law*: the attack requirement. Cambridge: Cambridge University Press, 2008. p.41.

56 Tribunal Penal Internacional para a Ex Iugoslávia. Prosecutor vs. Tadic,par.644; Tribunal Penal Internacional para Ruanda, Prosecutorvs.Akayesu, p. 233, par.644.

57 Tribunal Penal Internacional para Ruanda. Prosecutor vs. Laurent Semanza. 97-20. Julgamento e Sentença, p. 327.

58 Conforme a Convenção de Viena sobre o Direito dos Tratados, de 23 de Maio de 1969, artigo 53."Tratado em Conflito com uma Norma Imperativa de Direito Internacional Geral (jus cogens): É nulo um tratado que, no momento de sua conclusão, conflite com uma norma imperativa de Direito Internacional geral. Para os fins da presente Convenção, uma norma imperativa de Direito Internacional geral é uma norma aceita e reconhecida pela comunidade internacional dos Estados como um todo, como norma da qual nenhuma derrogação é permitida e que só pode ser modificada por norma ulterior de Direito Internacional geral da mesma natureza". (grifos nossos).

59 BASSIOUNI, M. Cherif. *Expert Opinion on Scott Lively vs. SMUG. Civil Action 3:12 – CV – 30051*, nov. 2015. Disponível em:< https://docs.google.com/viewerng/viewer?url=http://files.eqcf.org/wp-content/uploads/2016/05/ Bassiouni-Expert-Opinion-Sexual-Minorities-Uganda-v-Lively..pdf>. Acesso em: 14 dez. 2016.

manidade. Nas palavras do mesmo autor, em documento relativo ao caso Scott Lively vs. Sexual Minorities in Uganda, assim percebemos:

> Primeiramente, (aqueles que não se enquadram estritamente em categorias heterossexuais ou de conformidade de gênero) é um grupo distinguível dentro de uma população civil; em segundo lugar, isolar ou retirar direitos sociais e proteção destes grupos, subjugando-os a processos criminais e prisão baseado em seu status ou identidade constitui violação de natureza física e psicológica. Ainda, quando esta conduta está prevista em lei, reveste-se de caráter sistemático e de larga escala[60].

Pelos motivos acima elencados, considerando o constante no Estatuto de Roma no que se refere a perseguição, bem como a possível identificação de pessoas de SOGI diversa como integrantes de um grupo, objetiva e subjetivamente, há que se sustentar sua proteção em termos de direito internacional e conforme o Estatuto de Roma, em seu texto legal e a partir da interpretação referida pelo Gabinete do Procurador no Documento Programático acima referenciado. Portanto, justificadas estão as possibilidades de pessoas de orientação sexual e identidade de gênero diversas serem contempladas pela proteção da Corte Penal Internacional não obstante o expressamente contido em seu código normativo.

Ora, as incursões conceituais pretendidas neste trabalho, portanto, pretendem que se possibilite dar início a uma nova realidade de litigância em busca de proteção e reconhecimento judicial às identidades de pessoas que não se enquadram na matriz heterossexual vigente. Os exercícios do poder, ao atravessar as relações e tomar por objeto os cidadãos em sua multiplicidade, alteram as percepções que se têm tanto de um nicho populacional de quem os compreende tanto da ideia que possuem de si mesmos, como comunidade e como indivíduo. E essa redução dos indivíduos e das comunidades por eles formadas, a objetos de Realpolitiks e a vítimas de crimes internacionais (como genocídio e crimes contra a humanidade) colocam em risco todos os tratados de direito internacional assinados no último século, bem como a dignidade e vida social de cada vivente do mundo.

5. Considerações Finais

Consideradas as adversidades existentes na elaboração, assinatura e ratificação de tratados internacionais, mormente, quando tratam de direitos humanos e de uma tentativa de harmonizar diversas culturas e interesses, perspectivas universais e particulares de direitos, percebemos que as práticas podem ganhar contornos ainda maiores de dificuldade quando se referem a questões envolvendo gênero e sexualidade.

Intensificam-se, ainda, os efeitos da Realpolitiks quando, por exemplo, o Estatuto de Roma da Corte Penal Internacional quando se propõe a acomodar interesses e premissas de mais de 60 países – europeus, orientais, liberais, conservadores etc. Na ânsia de consolidar o antigo projeto de criação de uma corte permanente e complementar às jurisdições domésticas que tantas vezes se mostraram insuficientes em processar e julgar graves violações de direitos humanos, algumas alterações na proposta original do Estatuto de Roma foram efetuadas para rearranjar os interesses de países tão diversos. Dessa forma, integrou-se ao ER a controversa ressalva de que "o termo 'gênero' abrange os sexos masculino e feminino, dentro do contexto da sociedade, não lhe devendo ser atribuído qualquer outro significado".

Para além de considerações éticas da elaboração desse trecho ou do abandono dos interesses originais da justiça internacional, de comprometimento com os direitos humanos e os cidadãos, tendo em vista os interesses particulares que levaram à positivação destas considerações em detrimento do que seria esperado para que se atingissem os objetivos iniciais de uma corte ou da proteção dos direito humanos, há que se refletir sobre as possíveis formas de elastecer a proteção dos cidadãos e prover maior justiça material a eles – principalmente quando consideramos a vulnerabilidade do grupo de pessoas em não conformidade com a heterossexualidade hegemonicamente dominante.

Oficialmente, um primeiro passo foi dado com o Documento Programático do Gabinete do Procurador para Crimes Sexuais e de Gênero, em um compromisso de análise crítica e direcionada de todos os crimes previstos no Estatuto de Roma a partir de uma perspectiva de gênero e sexualidade. Nesse sentido, compreender as diferenças e desigualdades existentes entre homens e mulheres, entre heterossexuais e todos aqueles que de outra forma se identificam, os exercícios de poder

60 BASSIOUNI, M. Cherif. *Expert Opinion on Scott Lively vs. SMUG. Civil Action 3:12 – CV – 30051*, nov. 2015. Disponível em:< https://docs.google.com/viewerng/viewer?url=http://files.eqcf.org/wp-content/uploads/2016/05/ Bassiouni-Expert-Opinion-Sexual-Minorities-Uganda-v-Lively..pdf>. Acesso em: 14 dez. 2016.

que perpassam as relações sociais e as construções de gênero e sexualidade que podem influenciar nas graves violações que preocupam ao direito internacional.

Portanto, é a partir dessa perspectiva que se propuseram duas possibilidades de pensar no Estatuto de Roma como um instrumento de proteção das populações de SOGI diversa. A partir do reconhecimento dessas pessoas como portadores de uma identidade a ser protegida e valorizada, possibilitando a vida e o exercício das singularidades de todos os cidadãos e evitando-se tentativas de homogeneização social, a intenção é que sejam reconhecidos como um grupo social. Ora, uma vez que a existência política de grupos populacionais se relaciona com controle, proteção, presunções e construções sociais – constituídos de forma política e jurídica, não biológica, não há motivo para que aqueles que não possuem a vida regida por uma matriz de heterossexualidade deixem de ser considerados como objeto de invisibilidades e vulnerabilidades e, portanto, merecedores de um olhar mais atento do direito internacional dos direitos humanos.

Pelo exposto, as diversas atitudes empreendidas no sentido de extinguir a população de SOGI diversa, de subjugá-la e inferiorizá-la, devem ser evitadas e punidas na medida em que reiteradamente causam ofensas graves à integridade física e mental dos cidadãos. Ainda, as diversas violações que instrumentalizam a tentativa de destruição desta população devem ser percebidas com especial atenção no sentido de que atos de genocídio não voltem a se repetir, que o horror das guerras do último século não ecoem ainda mais fortemente no presente, de que a paz e a justiça caminhem juntas à luz do direito internacional dos direitos humanos.

Da mesma forma, sendo o genocídio uma forma agravada dos crimes contra a humanidade, que violam a integridade, a segurança e a dignidade de todos os cidadãos do mundo, existindo ataques a este grupo populacional, em termos de direito internacional, e sendo ele generalizado ou sistemático, há que se subsumir os fatos à inteligência do artigo 07º do ER, no que concerne à perseguição. Sem que se olvide dos tratados de direito internacional que protegem os direitos humanos, das normas de direito cogente e do compromisso da Declaração Universal dos Direitos Humanos, ações e omissões estatais que isolem ou retirem direitos, afrontem identidades e causem violações de natureza física ou psicológica àqueles que não se enquadram estritamente em categorias heterossexuais ou de conformidade de gênero devem ser processadas e julgadas – se não em âmbito doméstico, sob a jurisdição da Corte Penal Internacional, como perfeitamente possível pela leitura do ER a partir de uma perspectiva crítica de gênero e do diálogo com as demais cortes e decisões internacionais que intentam a proteção dos direitos humanos.

Sugeridas novas formas de interpretação do Estatuto de Roma e duas possibilidades de proteção da população de SOGI diversa com base no referido dispositivo de normas, uma nova esperança se delineia no futuro do direito internacional dos direitos humanos. Confiar na proposta do Documento Programático analisado, bem como na efetivação das intenções da Corte Internacional Penal para além da política e dos interesses particulares, lança novos contornos para as pessoas vulnerabilizadas e inviabilizadas em razão de suas sexualidades.

Reitera-se que a proposta compreensão de pessoas de orientação sexual e identidade de gênero diversas como uma minoria civil em busca de direitos sociais não ocorre sem críticas, de forma linear ou natural. O que se sublinha, todavia, é a artificialidade de alocação deste grupo, desta forma, com base em explicações biológicas ou religiosas, mas sim na fluidez de como a percepção social se opera por intermédio das relações. Assim, o que se pretendeu demonstrar é que resta imprescindível a compreensão de pessoas em não conformidade heterossexual como um grupo social que necessita de especial atenção do Direito e das cortes internacionais, especialmente a CPI, para que graves violações deixem de se repetir – bem como ultrapassar as limitações do Direito como mera aplicação de normas e, ao fim, possibilitar sua existência como garantidor da multiplicidade e das diversas nuances do gênero e da sexualidade humana.

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A desnacionalização e as violações de direitos humanos na República Dominicana*

Denationalization and human rights violations in the Dominican Republic

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Resumo

O artigo se desenvolve diante das reflexões sobre o novo fenômeno jurídico denominado "desnacionalização", decorrente da sentença 168/13 proferida pelo Tribunal Constitucional da República Dominica que despojou a nacionalidade de milhares de dominicanos de origem haitiana, sob o pretexto de que seus ascendentes haitianos eram migrantes irregulares no país. A apatridia de pessoas que se veem envolvidas neste processo de desnacionalização, enseja a privação arbitrária da nacionalidade dominicana e da personalidade jurídica e gera uma nítida discriminação racial, privando-as, por consequência, do gozo e exercício de direitos civis, políticos, sociais e econômicos. O trabalho baseia-se no método de abordagem dedutivo e se utiliza da pesquisa bibliográfica e documental como método de procedimento.

Palavras-chave: Desnacionalização; Corte Interamericana de Direitos Humanos; Direitos Humanos; República Dominicana.

Abstract

The article develops in front of the reflections over the new legal phenomenon denominated "denationalization" originated of the 168/13 sentence issued by the Dominican Republic Constitutional Court that deprived the nationality of thousands of Dominicans with Haitian heritage under the pretext that their Haitians ascendants were irregular migrants on the country. The statelessness of people that see themselves involved on this process of denationalization enables the arbitrary privation of the Dominican nationality and the legal personality and generates a clear racial discrimination, depriving them, as a consequence, the enjoyment and the practice of Civil, Political, Social and Economic rights. The paper will use the method of deductive approach and bibliographic research and document as method of procedure.

Keywords: Denationalization; Inter-American Court of Human Rights; Human Rights; Dominican Republic.

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1. Introdução

Entre os maiores territórios do arquipélago das Antilhas localizado na América Central, está uma importante ilha nominada como Ilha de São Domingos ou Hispaniola, a qual é politicamente dividida em países, com a República Dominicana a leste e o Haiti a oeste.

A divisão da ilha deu-se em decorrência de acordos entre potencias internacionais que visaram sua exploração. Colonizados por países diferentes, as duas nações viveram histórias distintas. Deste contexto, principalmente a partir do século XIX, dispersando tradicional cordialidade e respeito, prosseguiram os conflitos de efeitos devastadores.

Desta conjuntura histórica, surgiram adversidades políticas, econômicas e culturais, que se domam ao fato de haver discrepância em seus níveis de desenvolvimento[1]. Ambos os países enfrentarem deficiências nos setores da saúde, educação etc., porém, ao se comparar indicadores sociais das duas nações caribenhas, verifica-se que há vantagens a favor da República Dominicana.

Como consequência, a República Dominicana sofre maciça e contundente pressão imigratória, o que também potencializa o atrito entre as duas nações, marcada pela triste realidade das ações expulsivas dos haitianos, de nítida conotação política e discriminatória, que acentuam o estigma de desprezo e degradação.

Esse processo de banimento acentuou-se a partir de setembro de 2013, quando o Tribunal Constitucional da República Dominica proferiu a Sentença 168/13, na qual interpretou as normativas vigentes nos textos constitucionais e determinou a desnacionalização de filhos de estrangeiros sem residência legal permanente nascido em território dominicano. Com eficácia retroativa à 1929, a decisão despojou, assim, a nacionalidade de milhares de dominicanos de origem haitiana, sob o pretexto de que seus ascendentes haitianos são migrantes irregulares no país.

Tendo em vista essa situação, que se revela como um novo fenômeno jurídico buscar-se-á neste trabalho, analisar a decisão proferida pelo Tribunal Constitucional dominicano identificando suas contradições e violações aos direitos humanos. Dar-se-á especial destaca à ofensa ao direito à nacionalidade, como parte intrínseca do direito da personalidade, e que por sua vez, geram no caso específico, condições de apatridia. Ademais, far-se-á uma análise da atuação da Comissão e da Corte Interamericana de Direitos Humanos no caso, reforçando o dever dos Estados em cumprir o disposto em tratados internacionais aos quais se compromete. Para refletir sobre esses problemas, será utilizado o método de abordagem dedutivo e a pesquisa bibliográfica e documental como método de procedimento.

2. Considerações acerca da decisão de desnacionalização de estrangeiros proferida pelo Tribunal Constitucional Dominicano

Ao longo das últimas décadas as autoridades da República Dominicana adotaram medidas administrativas, normas e decisões judiciais direcionadas à “desnacionalização” dos descendentes de imigrantes haitianos nascidos na República Dominicana.

As ações iniciaram-se com a conduta dos funcionários de registro civil que se recusaram a registrar os nascimentos, na República Dominicana, dos filhos de imigrantes haitianos. Essa prática expandiu-se gradualmente[2] projetando-se em uma decisão do Tribunal Constitucional Dominicano, que se manifestou através da sentença 168/13, adotada em 23 de setembro de 2013 sobre o recurso de revisão constitucional proposta por Juliana Dequis Pierre, que havia recorrido ao judiciário depois que sua certidão de nascimento original foi retida no Centro de Identidade de Yamasá.

A sentença 168/13, adotada pelo Tribunal Constitucional da República Dominicana determina que os filhos de estrangeiros sem residência legal permanente nascido em território dominicano, não que tenha a nacionalidade deste país, despojando a nacionalidade de dominicanos de origem haitiana, sob o pretexto de que seus ascendentes haitianos são migrantes irregulares

1 No sistema de medição do Índice de Desenvolvimento Humano (IDH), enquanto a República Dominicana ocupa a 101ª posição no ranking mundial seu vizinho Haiti ocupa a 163ª posição. *In*: PNUD. *Relatório do Desenvolvimento Humano 2015*. Disponível em: <http://hdr.undp.org/sites/default/files/hdr15_overview_pt.pdf>. Acesso em: 05.out.2016.

2 CIDH. *Desnacionalización y apatridia en Republica Dominicana*. Disponível em: <http://www.oas.org/es/cidh/multimedia/2016/RepublicaDominicana/republica-dominicana.html>. Acesso em: 01.out.2016.

que estão em trânsito no país.[3]

Com eficácia retroativa a 1929 – em razão do texto constitucional que incluiu os critérios para a concessão da nacionalidade pelo *ius solis*[4] – a decisão priva do direito de nacionalidade dezenas de milhares de pessoas que já haviam sido consideradas dominicanas, reconhecidas e registradas pelas autoridades dominicanas competentes através de documentos oficiais, que passaram a não ter mais validade.

Segundo o argumento do Tribunal Constitucional,

> [...] a alteração mais significativa para o sistema de aquisição de nacionalidade dominicana pelo *ius soli* foi introduzido na Constituição de vinte de junho de mil novecentos e vinte e nove (1929), o que é particularmente importante no caso, uma vez que foi a primeira que subtraiu das crianças nascidas no país de pais estrangeiros em trânsito para o princípio geral de aquisição da nacionalidade por nascimento. De fato, o artigo 8.2 da Constituição dispõe o seguinte: São dominicanos: [...] 2 ° Todas as pessoas nascidas no território da República, com exceção dos filhos legítimos de estrangeiros residentes na República em representação diplomática ou em trânsito por ela. (tradução livre)[5]

A decisão definiu como nacionais apenas os nascidos na República Dominicana filhos de pais dominicanos ou de outras nacionalidades que ali residam legalmente, de forma que, doutro lado, aos filhos de pais haitianos em situação de imigração irregular não se reconhece a nacionalidade dominicana, mesmo que lá nascidos.[6]

Neste sentido, o Tribunal Constitucional decidiu que Juliana Dequis Pierre, por ter nascido em território nacional, filha de cidadão estrangeiro em trânsito, estava privada do direitos à nacionalidade dominicana, de acordo com a norma prescrita pelo art. 11.1 da Constituição de 1966[7], data de seu nascimento.[8]

Ao mesmo tempo, estabeleceu um procedimento para a "regularização" dos registros de atos de estado civil de 1929 até 2007[9], ordenando a criação de livros-registro especial de nascimentos de estrangeiros, a criação de uma lista de estrangeiros que se encontram irregularmente inscritos por carecer de condições requeridas pela Constituição da República para a atribuição da nacionalidade dominicana por *ius soli* e determinou a elaboração de um Plano nacional de regularização de estrangeiros ilegais radicados no país, pelo Conselho Nacional de Migração.[10]

Embora o Tribunal Constitucional tenha discutido pela primeira vez sobre a nacionalidade dos filhos de

3 ACNUR. *Tribunal Constitucional, República Dominicana, Sentencia TC/0168/13*. Disponível em: <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2013/9392.pdf?view=1>. Acesso em: 07.out.2016.

4 "São dominicanos: Todas as pessoas nascidas no território da República, com exceção dos filhos legítimos dos estrangeiros residentes no país como representantes diplomáticos ou que estão em trânsito." (tradução livre) "*Articulo 11.1 - Son dominicanos: Todas las personas que nacieren en el territorio de la República, con excepción de los hijos legítimos de los extranjeros residentes en el país en representación diplomática o los que estén de tránsito en él.*" *In*: EUROSUR. *Constituição da Republica Dominicana de 1929*. Disponível em: <http://www.eurosur.org/constituciones/co16-2.htm>. Acesso em: 14.out.2016.

5 "*[...] la más relevante modificación al régimen de adquisición de la nacionalidad dominicana por ius soli fue introducida en la Constitución del veinte de junio de mil novecientos veintinueve (1929), la cual reviste una particular importancia para el caso de la especie, en vista de que fue la primera que sustrajo los hijos nacidos en el país de padres extranjeros en tránsito al principio general de adquisición de la nacionalidad por nacimiento. En efecto, el artículo 8.2 del indicado texto constitucional dispone lo siguiente: Son dominicanos: […] 2° Todas las personas que nacieren en el territorio de la República, con excepción de los hijos legítimos de los extranjeros residentes en la República en representación diplomática o que estén de tránsito en ella.*" *In*: ACNUR. *Tribunal Constitucional, República Dominicana, Sentencia TC/0168/13*. Disponível em: <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2013/9392.pdf?view=1>. Acesso em: 07.out.2016, p. 51, § 2.1.6.

6 "*El numeral 3, del referido artículo 18 de la Constitución expresa, que son dominicanos y dominicanas: Las personas nacidas en território nacional, con excepción de los hijos e hijas de extranjeros miembros de legaciones diplomáticas y consulares, de extranjeros que se hallen en tránsito o residan ilegalmente en territorio dominicano. Se considera persona en tránsito a toda extranjera o extranjero definido como tal en las leyes dominicanas.*" *In*: ACNUR. *Tribunal Constitucional, República Dominicana, Sentencia TC/0168/13*. Disponível em: <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2013/9392.pdf?view=1>. Acesso em: 07.out.2016, p. 114, § 3.8.

7 De igual teor à norma Constitucional de 1929, o artigo dispõe que: "São dominicanos: Todas as pessoas nascidas no território da República, com exceção dos filhos legítimos dos estrangeiros residentes no país como representantes diplomáticos ou que estão em trânsito." (tradução livre) "*Articulo 11.1 - Son dominicanos: Todas las personas que nacieren en el territorio de la República, con excepción de los hijos legítimos de los extranjeros residentes en el país en representación diplomática o los que estén de tránsito en él.*" *In*: ACNUR. *Constituição da Republica Dominicana de 1966*. Disponível em: <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2012/8872.pdf?view=1>. Acesso em: 14.out.2016.

8 ACNUR. *Tribunal Constitucional, República Dominicana, Sentencia TC/0168/13*. Disponível em: <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2013/9392.pdf?view=1>. Acesso em: 07.out.2016, p.98.

9 Data em que a Junta Central Eleitoral da República Dominicana colocou em vigência, mediante a Resolução 02 de 2007, o "*Libro Registro del Nacimiento de Niño(a) de Madre Extranjera no Residente en la República Dominicana*".

10 ACNUR. *Tribunal Constitucional, República Dominicana, Sentencia TC/0168/13*. Disponível em: <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2013/9392.pdf?view=1>. Acesso em: 07.out.2016, pp. 99-100.

imigrantes ilegais, a questão já havia percorrido outros órgãos jurisdicionais em outras ocasiões. Em 2005, o Supremo Tribunal, por ocasião de outra disputa semelhante a atual, estabeleceu um critério que assemelhou a condição de imigrante ilegal com a de "imigrante em trânsito" estabelecida na Constituição Dominicana como uma exceção ao *jus soli*. [11]

Ademais, no Caso de las niñas Yean y Bosico vs. República Dominicana, a Corte Interamericana de Direitos Humanos se manifestou em sentido contrário a este critério de:

> a) O status de imigratório de uma pessoa não pode ser uma condição para a concessão da nacionalidade por parte do Estado, porque o *status* migratório não pode constituir de forma alguma uma justificativa para privá-lo do direito à nacionalidade ou o gozo e exercício de sua direitos; b) o status de imigratório de uma pessoa não se transmite a seus filhos, e c) a condição de nascimento no território do Estado é o único a ser demonstrado para a aquisição da nacionalidade no que diz respeito a pessoas que não se beneficiam de outra nacionalidade.[12]

Frente a esta decisão da Corte Interamericana, o Tribunal Constitucional sustenta que é impossível estabelecer a existência de um direito a partir de uma situação ilícita de fato.

> [...] os estrangeiros que se encontram no país sem autorização de residência legal ou que tenham entrado ilegalmente no mesmo, estão em situação irregular e, portanto, violam as leis nacionais e tratadas internacionais desta matéria assinados pelo Estado dominicano e ratificados pelo Congresso Nacional. Nesse sentido, essas pessoas não invocar que seus filhos nascidos no país tenham direito a obter a nacionalidade dominicana, sob o amparo do mencionado artigo 11.1 da Constituição de 1966, tendo em vista que resulta juridicamente inadmissível fundar a existência de um direito a partir de uma situação ilícito.[13] (tradução livre)

No entanto, caberia ao Estado dominicano que assim alega, provar que houve intenção fraudulenta por parte dos pais no momento da inscrição no Registro Civil. Ademais, o próprio Tribunal Constitucional reconheceu a falha das instituições e dos serviços burocráticos de Registro Civil do país, por terem expedido documentações que fizeram presumir que tais pessoas eram nacionais dominicanos, e desenvolvendo, em razão desta condição, suas vidas com certezas e expectativas concretas.[14]

Na sentença 168/13, o Tribunal Constitucional defende que tanto o direito dominicano quanto o internacional reservam ao Estado a competência para a concessão da nacionalidade. Para tanto, citou jurisprudências de Cortes internacionais resgatando o reconhecido caso Nottebohm, julgado pela Corte Internacional de Justiça, defendendo, assim que a determinação da concessão da nacionalidade é uma questão relativa ao Estado.

> De acordo com a prática dos Estados, as decisões arbitrais e judiciais, e a doutrina, a nacionalidade é um vínculo jurídico que tem sua base em um fato social de conexão, uma solidariedade efetiva de existência, de interesses e sentimentos, juntamente a uma reciprocidade de direitos e deveres.[15]

A decisão, entretanto, destaca que "de maneira geral, a nacionalidade se considera como um laço jurídico e político que une uma pessoa ao Estado, porém,

11 GUERRA, Virginia Wall. El Tribunal Constitucional y la controversial sentencia sobre la nacionalidade. *Observatorio Judicial Dominicano*. Disponível em: <http://ojd.org.do/index.php/civil-y-comercial/91-resenas-bibliograficas/temas-de-coyuntura/332-el-tribunal-constitucional-y-la-controversial-sentencia-sobre-la-nacionalidad#_ftnref2>. Publicado em: 04.set.2013. Acesso: 14.out.2016.

12 "*a) El status migratorio de una persona no puede ser condición para el otorgamiento de la nacionalidad por el Estado, ya que su calidad migratoria no puede constituir de ninguna forma, una justificación para privarla del derecho a la nacionalidad ni del goce y ejercicio de sus derechos; b) el status migratorio de una persona no se transmite a sus hijos, y c) la condición de nacimiento en el territorio del Estado es la única a ser demostrada para la adquisición de la nacionalidad en lo que se refiere a personas que no tendrían derecho a otra nacionalidad.*" *In*: Corte IDH. *Caso de las niñas Yean y Bosico vs. República Dominicana. Sentencia de 8 de septiembre de 2005*. Serie C No. 130. Disponível em: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_esp.pdf>. Acesso em: 14.out.2016, p. 64, § 156.

13 "*En otros supuestos distintos a los anteriores, los extranjeros que permanecen en el país careciendo de permiso de residencia legal o que hayan penetrado ilegalmente en el mismo, se encuentran en situación migratória irregular y, por tanto, violan las leyes nacionales y los tratados internacionales suscritos por el Estado dominicano y ratificados por el Congreso Nacional en esa materia. En ese sentido, estas personas no podrían invocar que sus hijos nacidos en el país tienen derecho a obtener la nacionalidad dominicana al amparo del precitado artículo 11.1 de la Constitución de 1966, en vista de que resulta jurídicamente inadmisible fundar el nacimiento de un derecho a partir de una situación ilícita de hecho.*" *In*: ACNUR. *Tribunal Constitucional, República Dominicana, Sentencia TC/0168/13*. Disponível em: <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2013/9392.pdf?view=1>. Acesso em: 07.out.2016, p. 66, § 1.1.14.3.

14 ACNUR. *Tribunal Constitucional, República Dominicana, Sentencia TC/0168/13*. Disponível em: <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2013/9392.pdf?view=1>. Acesso em: 07.out.2016, p. 88 e seg.

15 "*Selon la pratique des Etats, les décisions arbitrales et judiciaires les opinions doctrinales, la nationalité est un lien juridique ayant à sa base un fait social de rattachement, une solidarité effective d'existence, d'intérêts, de sentiments jointe à une réciprocité de droits et de devoirs.*" *In*: COUR INTERNATIONALE DE JUSTICE. *Affaire Nottebohm (Liechtenstein C. Guatemala). Arrêt du 6 avril 1955*. Disponível em: <http://www.icj-cij.org/docket/files/18/2674.pdf>. Acesso em: 14 de out.2016, p. 23.

de maneira mais técnica e precisa, não é somente um vínculo jurídico, mas também sociológico e político"[16]. Tais condições de vínculo sociológico e político são identificados na relação entre os desnacionalizados e a República Dominicana, uma vez que muitos não possui mais nenhum vínculo com o pais de seus ascendentes, considerando-se para todos os efeitos, dominicanos.

Sobre este aspecto também é importante registrar que a faculdade dos Estados em determinar seus nacionais está limitada pelo seu dever de prevenir, evitar e reduzir a apatridia[17].

Outro ponto questionado da sentença do Tribunal Constitucional da República Dominicana é a violação ao princípio da irretroatividade da lei[18], uma vez que houve determinação para a aplicação da decisão em registros realizados desde 1939.

Registra-se que o Tribunal Constitucional optou por uma interpretação desfavorável às pessoas, contrariando o princípio do favorecimento estabelecido pelo artigo 74.4[19], estendendo os efeitos *erga omnes* da sentença, e acarretando a privação arbitrária, da nacionalidade de pessoas inocentes.

Deve-se, igualmente considerar para o caso, o princípio da pessoalidade, de que os fatos puníveis são pessoais e não transferíveis, ou ainda, de que ninguém pode ser punido por fato alheio. Neste sentido, a possível apatridia de pessoas que se veem envolvidas no processo, ensejaria uma ofensa (ainda que temporária) à nacionalidade como parte intrínseca do direito da personalidade.

Ademais, emerge-se uma perplexidade ainda maior quando observado que a referida decisão foi adotada pelo Tribunal Constitucional Dominicano, o órgão que deveria defender os princípios fundantes, não só daquele Estado e sua ordem constitucional, mas de todo o ordenamento internacional, abrangendo-se os pactos e tratados ratificados.

Inequívoco que, a Constituição de um país, na finalidade ínsita à sua própria origem, em sua condição de supremacia e essencialidade, é a lei fundamental que vincula e escolta todas as ações do Estado, através de normas basilares que ditam a ordem jurídica fundamental e a vertente orgânica de determinada sociedade em certo contexto. Posição que impõe a análise do impacto de suas forças, ao fim da racionalização de todas as decisões e interpretações de seu texto, para que, social e politicamente, sejam tutelados os direitos fundamentais e mantida a ordem da vida social em comum.

Especificamente a este, nota-se prevalecer na República Dominicana como primordial requisito à aquisição da nacionalidade o advento do nascimento em seu território, ou seja, é adotado o critério do *ius soli*. Mas, entretanto, o que se verifica no presente caso, em afronta ao ordenamento jurídico fundamental, é uma negativa geral de concessão da nacionalidade a indivíduos natos, notadamente quando filhos de haitianos.

Outrossim, deve-se observar que tais pessoas que agora não possuem mais a nacionalidade dominicana também não conseguem se resguardar na nacionalidade haitiana, visto não serem descendentes diretas dos cidadãos de tal país, que adota o critério do *jus sanguinis*[20].

Somada tal circunstancia ao fato de que, em razão

16 "*De manera general, la nacionalidad se considera como un lazo jurídico y político que une a una persona a un Estado; pero, de manera más técnica y precisa, no es solo un vínculo jurídico, sino también sociológico y político* [...]" (tradução livre) *In*: ACNUR. *Tribunal Constitucional, República Dominicana, Sentencia TC/0168/13*. Disponível em: <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2013/9392.pdf?view=1>. Acesso em: 07.out.2016, §1.1.4. p. 24.

17 Corte IDH. *Caso de las niñas Yean y Bosico vs. República Dominicana. Sentencia de 8 de septiembre de 2005*. Serie C No. 130. Disponível em: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_esp.pdf>. Acesso em: 14.out.2016, p. 61, § 140.

18 "*Articulo 110.- Irretroactividitd de la ley. La ley solo dispone y se aplica para lo porvenir. No tiene efecto retroactivo sino cuando sea favorable al que esté subjúdice o cumpliendo condena. En ningún caso los poderes públicos o la ley podrán afectar o alterar la seguridad juridica derivada de situaciones establecidas conforme a una legislación anterior.*" *In*: SENADO DE LA REPÚBLICA DOMINICANA. *Constitución de la República Dominicana, 2010*. Disponível em: <http://www.senado.gob.do/senado/Portals/0/Documentos/constituciones/const-2010.pdf>. Acesso em: 14.ago.2017.

19 "*Los poderes públicos interpretan y aplican las normas relativas a los derechos fundamentales y sus garantias, en el sentido mas favorable a la persona titular de los mismos y, en caso de conflicto entre derechos fundamentales, procurarán armonizar los bienes e intereses protegidos por esta Constitución.*" *In*: SENADO DE LA REPÚBLICA DOMINICANA. *Constitución de la República Dominicana, 2010*. Disponível em: <http://www.senado.gob.do/senado/Portals/0/Documentos/constituciones/const-2010.pdf>. Acesso em: 14. ago.2017.

20 "Artigo 11. Possuem a nacionalidade haitiana originária, todo indivíduo filho de um pai haitiano ou uma mãe haitiana, que nasceram haitianos, e que não tenham renunciado à nacionalidade no nascimento." (tradução livre) "*Article 11. Possède la Nationalité Haïtienne d'origine, tout individu né d'un père haïtien ou d'une mère haïtienne qui eux-mêmes sont nés Haïtiens et n'avaient jamais renoncé à leur nationalité au moment de la naissance.*" *In*: ORGANIZATION OF AMERICAN STATES. *La Constitution de la République d'Haïti*. Disponível em: <http://www.ifrc.org/docs/IDRL/Haiti/Constitution%201987.pdf>. Acesso em: 14.out.2016.

da crise de relacionamento e da falta de cooperação, que culminam na discriminação dos descendentes haitianos, muitos deles, provindos na própria República Dominicana, não nasceram em hospitais ou estabelecimentos de assistência, e, portanto, não possuem documentos básicos, notadamente os que comprovam a legalidade de suas situações.

2.1. Conjuntura jurídica atual dos desnacionalizados

Em um possível direcionamento para um novo contexto, a República Dominicana, plausivelmente, tem sido solidária, em algumas situações, com a infortuna situação do Haiti. De toda forma, como marco de um potencial contexto mais humanitário, tem-se destacado a atuação de Danilo Medina Sánchez[21], que busca a regularização dos imigrantes residentes na Republica Dominicana, que se dá através do denominado "Plano de Reorganização Nacional para Estrangeiros" embasado na Lei 169/2014, pelo qual pretende–se, cumpridos certos requisitos, reconhecer a nacionalidade dominicana àqueles que foram privados da mesma.

A Lei 169/2014 estabelece um regime especial para as pessoas nascidas em território dominicano inscritas irregularmente no Registro Civil, bem como dispõe sobre a nacionalização. A lei tem como objetivo exclusivo estabelecer:

> [...] a) um regime especial em benefício de filhos de padres e mães estrangeiros não residentes nascidos em território nacional durante o período compreendido entre 16 de junho de 1929 a 18 de abril de 2007 inscritos nos livros de Registro Civil dominicano com base em documentos não reconhecidos pelas normas vigentes para este fim no momento da inscrição; e b) o registro de filhos de pais estrangeiros em situação irregular nascidos na República Dominicana e que não figuram inscritos no Registro Civil.[22]

Para todos os efeitos, o Governo dominicano reconheceu com eficácia retroativa à data do nascimento, os atos da vida civil de seu titular. Também reconheceu e dispôs que sejam oponíveis a terceiros os atos praticados pelos beneficiários da lei com documentos utilizados sob presunção de legalidade.[23]

A Lei 169/2014 dispõe sobre a possibilidade de nacionalização dos "desnacionalizados", em até dois após sua regularização como migrante regular:

> Os filhos de estrangeiros nascidos na República Dominicana, regularizados de conformidade ao que dispõe o Plano Nacional de Regularização de Estrangeiros em situação migratória irregular, poderão optar pela nacionalização ordinária estabelecida em lei que rege a matéria, depois de transcorrido dois anos da obtenção de uma das categorias migratórias estabelecidas na Lei Geral de Migração nº 285-04, mediante certificação de inexistência de antecedentes penais.[24]

Tais medidas legislativas tiveram impactos positivo. Neste sentido, a própria Comissão Interamericana de Direitos Humanos tem reconhecido os esforços do Estado para contornar os efeitos da Sentença proferida pelo Tribunal Constitucional:

> As medidas legislativas e administrativas tomadas pelo Estado dominicano para prevenir e eliminar todas as formas de discriminação racial são valorizadas. Da mesma forma que medidas para garantir os direitos das crianças e os direitos das pessoas com deficiência foram aprovadas. Também se reconhece que as medidas políticas e legislativas, administrativas e orçamentais, que têm sido adotadas pelo Estado dominicano também beneficiem dominicanos de ascendência haitiana. (tradução livre)[25]

21 Político e economista dominicano, eleito presidente em 20 de maio de 2012, com 51% dos votos, para o período 2012-2016. É membro do Comité Central do Partido da Libertação Dominicana.

22 *"[...] a) un régimen especial en beneficio de hijos de padres y madres extranjeros no residentes nacidos en el territorio nacional durante el periodo comprendido entre el 16 de junio de 1929 al 18 de abril de 2007 inscritos en los libros del Registro Civil dominicano en base a documentos no reconocidos por las normas vigentes para esos fines al momento de la inscripción; y b) el registro de hijos de padres extranjeros en situación irregular nacidos en la República Dominicana y que no figuran inscritos en el Registro Civil."* *In*: PRESIDÊNCIA DE LA REPÚBLICA DOMINICANA. *Ley nº 169-14*. Disponível em: <https://presidencia.gob.do/haitianossinpapeles/docs/Ley-No-169-14.pdf>. Acesso em: 15.out.2016, p. 5.

23 PRESIDÊNCIA DE LA REPÚBLICA DOMINICANA. *Ley nº 169-14*. Disponível em: <https://presidencia.gob.do/haitianossinpapeles/docs/Ley-No-169-14.pdf>. Acesso em: 15.out.2016, p. 6.

24 "*Los hijos de extranjeros nacidos en la República Dominicana, regularizados de conformidad a lo dispuesto en el Plan Nacional de Regularización de Extranjeros en situación migratória irregular, podrán optar por la naturalización ordinaria establecida en la ley que rige la materia una vez hayan transcurrido dos (2) años de la obtención de una de las categorías migratorias establecidas en la Ley General de Migración No . 285-04, siempre que acredite mediante certificación la inexistencia de antecedentes penales.*" *In*: PRESIDÊNCIA DE LA REPÚBLICA DOMINICANA. *Ley nº 169-14*. Disponível em: <https://presidencia.gob.do/haitianossinpapeles/docs/Ley-No-169-14.pdf>. Acesso em: 15.out.2016, pp. 7-8.

25 "*Se valoran las medidas legislativas y administrativas que han sido adoptadas por el Estado dominicano para prevenir y eliminar todas las formas de discriminación racial. De igual manera se adoptaron medidas para garantizar los derechos de la niñez y los derechos de las personas con discapacidad. Se reconoce que las políticas y medidas legislativas, administrativas y presupuestarias que han sido adoptadas por el Estado dominicano en las áreas mencionadas, benefician igualmente a la población dominicana de ascendencia haitiana. Sin embargo, es preocupante la situación de las personas privadas*

No entanto, a situação decorrente à apatridia gerada pela referida decisão do Tribunal Constitucional Dominicano está longe de ser totalmente reparada, ainda que se sigam à risca todas as novas medidas apaziguadoras.

3. Ofensa ao direito de nacionalidade: propagação da apatridia

Primeiramente, numa questão conceitual, observa-se que os variados designativos semelhantes à concepção dos apátridas, como por exemplo os conceitos de Heimatlos ou Apólides. Pode-se dizer que o primeiro é utilizado mais usualmente com relação aos indivíduos, em geral, que não tem domicílio, enquanto o segundo é um vocábulo de origem grega, cuja acepção é dada por sua formação através do prefixo de privação "a" e de "polis" (cidade), visto que na Grécia antiga se estabelecia confusão entre a cidade e o Estado ou Pátria, assim referindo-se àqueles que não tinham cidadania. [26]

Em que pese possíveis particularizações, tais palavras são utilizadas, comumente, no mesmo sentido, qual seja para designar os indivíduos sem nacionalidade, mesmo que estes tenham domicílio, ou seja, um adjetivo dado ao indivíduo sem nacionalidade, sem pátria, sem leis próprias que se lhe apliquem.

Nacionalidade é expressão que se liga mais intimamente ao conceito sociológico de *nação*. O termo *nação* adquiriu prestígio durante a Revolução Francesa, constantemente utilizado para expressar tudo que fizesse referência ao povo como unidade homogênea. Embora não tenha acepção unívoca, a *nação* pode definir um conjunto de pessoas ligadas por laços comuns – os quais podem ser a pertinência étnica, linguística, tradicional ou histórica -, consciente de sua identidade e com aspirações comuns.[27]

Segundo Pasquale Stanislao Mancini, a região, a raça, a língua, os costumes, a história, as leis, as religiões são os elementos determinantes da nacionalidade:

> O conjunto desses elementos compõe, para dizer a verdade, a própria natureza de cada povo distinto e introduz nos membros do consórcio tal intimidade peculiar de relação materiais e morais que, como legítimo efeito, decorre ainda entre eles uma comunhão de direito criada de modo mais íntimo, impossível de existir entre indivíduos de nações diferentes.[28]

Assim, a nacionalidade pode ser definida como o vínculo jurídico-político que liga o indivíduo ao Estado, ou, em outras palavras, o elo entre pessoa física e um determinado Estado. Em outras palavras, um estado de dependência em que se encontram os indivíduos perante o Estado a que pertencem, recaindo sobre esses nacionais a norma constitucional, em virtude do nascimento ou por fato a ele posterior.

Ainda com os dizeres de José Farani Mansur Guerios, compila-se que, a expressão nacionalidade origina-se do termo nação, cuja etimologia nos indica a origem de nascimento, sendo utilizada no idioma castelhano, de modo semelhante ao latim, para determinar a origem, desde o nascimento. O mesmo sucedendo com a expressão pátria, que indica a terra do nascimento, conceito etimologicamente oriundo dos termos "*pater*" e "*terra patrum*"[29], na forma como exclamavam os antigos no sentido de ser o local onde estão os manes da família.

Claro está, pois, que nenhum indivíduo pode deixar de ter uma nacionalidade, uma pátria, pois a nacionalidade não é só uma simples relação do indivíduo com o lugar do nascimento, e sim, precipuamente, uma relação entre o indivíduo e o Estado, a qual produz direitos e deveres para um e outro.

E, citando o jurista francês Charles André Weiss[30], Guerios afirma ser a nacionalidade um contrato sinalagmático entre o Estado e cada um dos indivíduos que

de su nacionalidad ya que tampoco pueden acceder en igualdad de condiciones a los programas y políticas públicas puestas en marcha por el gobierno en las áreas indicadas." *In*: CIDH. *Desnacionalización y apatridia en Republica Dominicana*. Disponível em: <http://www.oas.org/es/cidh/multimedia/2016/RepublicaDominicana/republica-dominicana.html>. Acesso em: 01.out.2016.

26 GUERIOS, José Farani Mansur. *Condição jurídica do apátrida*. Tese de concurso à cadeira de direito internacional privado da Faculdade de Direito do Paraná. Curitiba, 1936, pp. 9 a 12.

27 O Brasil adota a expressão nacionalidade para definir este vínculo, assim como outros países, a exemplo da Espanha (*nacionalidad*) e França (*nationalité*). Porém, na Itália, a expressão adotada tanto no âmbito jurídico quanto doutrinal é cidadania (*cittadinanza*).

28 MANCINI, Pasquale Stanislao. *Direito Internacional*. Tradução de Ciro Mioranza. Ijuí: Unijuí, 2003, p. 54.

29 Que podem ser lidos como "família patriarcal" e "terra de meus pais", respectivamente. *In*: GUERIOS, José Farani Mansur. *Condição jurídica do apátrida*. Tese de concurso à cadeira de direito internacional privado da Faculdade de Direito do Paraná. Curitiba, 1936, p. 25.

30 Charles André Weiss foi um jurista francês, professor universitário, autor de varias obras, principalmente no ambito do direito internacional, e membro de tribunais e orgaos internacionais, como o Tribunal Internacional de Justiça.

o formam, engendrando deveres e direitos recíprocos.[31] Complementando, ainda, que, considerada a nacionalidade, ou como contrato sinalagmático na expressão de Weiss, ou como um vínculo jurídico de natureza especial, como defende o jurista cubano Antonio Sanchez de Bustamante y Sirven[32], é manifesto que a criação desse laço está mais vinculada a vontade do indivíduo, do que na do Estado.[33]

De acordo com o *princípio da competência exclusiva*, somente o Estado tem competência para atribuir uma nacionalidade. Este princípio está firmemente ancorado na prática internacional, tanto jurisdicional como convencional. A suspensão e a "perda" da nacionalidade, é igualmente uma competência discricionária dos Estados.

A Convenção da Haia sobre a Nacionalidade de 1930, realizada sob os auspícios da Assembleia da Liga das Nações, foi a primeira tentativa internacional para garantir que todas as pessoas tenham uma nacionalidade; O artigo 1º determina que: "Cabe a cada Estado determinar através de sua legislação quais são seus nacionais."[34]

Desta forma, tem-se que a nacionalidade é uma questão jurídico-política de direito público interno, que leva em conta os interesses legítimos do Estado e de seus indivíduos, de acordo com os limites traçados pelo direito internacional que regulamenta a questão de forma complementar apenas para evitar situações incertas de apatrídia, binacionalidade ou polinacionalidade.

Nas palavras de Alain Pellet e Patrick Daillier, o problema da nacionalidade das pessoas ilustra bem a ambiguidade da sua situação jurídica em direito internacional. E, as soluções que lhe são consagradas traduzem uma dupla preocupação:

> O primeiro objetivo é um dos fundamentos políticos clássicos do princípio da auto-determinação: o princípio das nacionalidades autoriza um grupo de homens a fazer a escolha inicial no quadro de um Estado nascente. [...] O segundo objetivo sustenta os esforços com vista ao reconhecimento do direito à nacionalidade como um dos direitos fundamentais do homem.[35]

Considerando os aspectos levantados por Alain Pellet e Patrick Daillier, tem-se que, a criação do Estado justifica o papel essencial dos poderes públicos na definição dos critérios da nacionalidade, quer se trata de nacionalidade "originária"[36], isto é, aquela que decorre de um ato involuntário que é o nascimento e que se impõe a cada cidadão sem que lhe seja necessário tomar uma iniciativa, quer se trate da nacionalidade "adquirida"[37], no seguimento de uma opção explícita do indivíduo dento do quadro oferecido pelo legislador nacional através de critérios de naturalização.[38]

Em que pese caber a cada Estado definir, por sua legislação, a quem é atribuído seu vinculo de nacionalidade, instituindo critérios para aquisição e exercício desta, tal regramento apenas pode ser aceito, num âmbito globalizado, desde que esteja em acordo com os preceitos internacionais em sentido amplo, abrangidos os costumes e os princípios internacionalmente reconhecidos, em matéria de nacionalidade e cidadania.

Se aceita a soberania estatal como absoluta, torna-se impossível a resolução da questão referente à condição jurídica do apátrida, de forma que, assim, tal soberania deve ser relativizada, notadamente para ceder ante os

31 WEISS *apud* GUERIOS, José Farani Mansur. *Condição jurídica do apátrida*. Tese de concurso à cadeira de direito internacional privado da Faculdade de Direito do Paraná. Curitiba, 1936, pp. 9 a 12

32 "*Lo que hasta ahora no se ha discorrido con aceptación general es la manera de que cese fácilmente esa condición y de que puedan tomar nacionalidad conocida y determinada los que por una causa u otra, más o me os legítima, careceu transitoriamente de ella*" *In*: BUSTAMANTE Y SIRVEN *apud* GUERIOS, José Farani Mansur. *Condição jurídica do apátrida*. Tese de concurso à cadeira de direito internacional privado da Faculdade de Direito do Paraná. Curitiba, 1936, p. 29

33 GUERIOS, José Farani Mansur. *Condição jurídica do apátrida*. Tese de concurso à cadeira de direito internacional privado da Faculdade de Direito do Paraná. Curitiba, 1936, pp. 25-26.

34 "*Il appartient à chaque État de déterminer par sa législation quels sont ses nationaux*." (Tradução livre) *In*: SENADO FEDERAL. *Convenção e três protocolos sobre nacionalidade, firmados na Haya, a 12 de abril de 1930. Decreto n. 21.798 de 6 de setembro de 1932*. Disponível em: <http://legis.senado.gov.br/legislacao/ListaTextoIntegral.action?id=34326>. Acesso em: 27.out.2016.

35 PELLET, Allan et al. ***Direito Internacional Público***. Tradução de Vítor Marques Coelho. 2. ed. Lisboa: Fundação Calouste Gulberkian, 2003, p. 505.

36 Para a aquisição de nacionalidade originária, verificam-se três sistemas que podem ser adotados pela legislação interna dos países: o *ius sanguinis*, literalmente traduzido como "direito de sangue", através do qual o descendente adquire a nacionalidade do seu ascendente; o *ius soli*, conhecido como "direito de solo", através do qual o indivíduo adquire a nacionalidade do Estado em cujo território ele nasceu; e o sistema misto, que admite as duas formas anteriores.

37 A nacionalidade derivada ou secundária é adquirida mediante naturalização, definida como o ato pelo qual alguém adquire a nacionalidade de outro país. Resulta, na grande maioria das vezes, do casamento do indivíduo com um nacional ou da sua residência prolongada no território de um Estado diferente do Estado de origem.

38 PELLET, Allan et al. *Direito Internacional Público*. Tradução de Vítor Marques Coelho. 2. ed. Lisboa: Fundação Calouste Gulberkian, 2003, p. 505.

RIBEIRO, Daniela Menengoti Gonçalves; SILVA, Rodrigo Ichikawa Claro. A desnacionalização e as violações de direitos humanos na República Dominicana. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 330-347

direitos humanos fundamentais. Além de que, tal atribuição estatal deve, ainda, ser limitada pelo dever geral de se prevenir, evitar e reduzir a apatridia. Ou seja, deve este figurar numa cooperação, de viés tanto nacional quanto internacional, direcionada à erradicação desta desumana condição.

Atualmente, são considerados como principais elementos do direito positivo reguladores da nacionalidade são constituídos, além de algumas convenções bilaterais, a Convenção de Nova Iorque de 1961[39] e a Declaração Universal de 1948.

Assim, possuir uma nacionalidade, é direito do indivíduo, proclamado pelo artigo 15, 1 e 2 da Declaração Universal dos Direitos do Homem, nos seguintes termos, respectivamente: "[t]oda pessoa tem direito a uma nacionalidade" e "[n]inguém será arbitrariamente privado de sua nacionalidade, nem do direito de mudar de nacionalidade"[40].

Outros instrumentos jurídicos internacionais como o Pacto de 1966 relativo aos direitos civis e político, reconhece tais direitos às crianças (artigo 24°, §3), bem como a Convenção do Conselho da Europa de 1997 (artigo 4º) e o projeto de artigos adaptado em primeira leitura pela Comissão de Direito Internacional em 1997 sobre a nacionalidade das pessoas físicas em relação com a sucessão de Estados assentam no princípio do direito a uma nacionalidade (artigo 1°).

No âmbito da Organização dos Estados Americanos (OEA), a Convenção Americana de Direitos Humanos (Pacto de San Jose da Costa Rica) determina em seu art. 20 que:

> 1. Toda pessoa tem direito a uma nacionalidade.
>
> 2. Toda pessoa tem direito à nacionalidade do Estado em cujo território houver nascido, se não tiver direito a outra.
>
> 3. A ninguém se deve privar arbitrariamente de sua nacionalidade, nem do direito de muda-la.[41]

Segundo entendimento da Corte Interamericana de Direitos Humanos busca-se dotar o indivíduo de um mínimo de amparo jurídico nas relações internacionais ao estabelecer um vínculo com um Estado determinado, e significa protege-lo contra a privação de sua nacionalidade de forma arbitrária, porque desse modo o estaria privado da totalidade de seus direitos políticos e daqueles direitos civis que se sustentam na própria nacionalidade.[42]

3.1 Da desnacionalização à condição de apátridas

Destarte, analisando-se o quadro de apatridia, constata-se que é considerado apátrida o indivíduo que não possui nacionalidade ou cidadania, ou seja, aquele que não detém relação jurídico-política-social com um Estado ou sociedade. E que, por conta desta situação, além de enfrentar vastas complicações cotidianas, figura em situação de extrema vulnerabilidade a tratamentos arbitrários e degradantes ou, até mesmo, condutas criminosas, a exemplo do tráfico de pessoas e da escravização.

A Convenção das Nações Unidas sobre o Estatuto dos Apátridas de 1954 é o principal instrumento internacional estabelecendo padrões mínimos para lidar com a questão, visa regulamentar e melhorar a condição das pessoas apátridas e garantir que gozem dos seus direitos e liberdades fundamentais, sem discriminação.[43] Já a Convenção para a Redução dos Casos de Apatridia de 1961[44], estabelece

39 PLANALTO. *Convenção para a Redução dos Casos de Apatridia, firmada em Nova Iorque, em 30 de agosto de 1961. Decreto nº 8.501, de 18 de agosto de 2015*. Disponível em: <http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Decreto/D8501.htm>. Acesso em: 7.out.2016.

40 ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Declaração Universal dos Direitos Humanos, 1948*. Disponível em: <http://www.onu.org.br/img/2014/09/DUDH.pdf>. Acesso em: 7.out.2016

41 PLANALTO. *Convenção Americana sobre Direitos Humanos (Pacto de São José da Costa Rica), de 22 de novembro de 1969*. Decreto nº 678, de 6 de novembro de 1992. Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/D0678.htm>. Acesso em: 7.out.2016

42 *"[e]l derecho a tener una nacionalidad significa dotar al individuo de un mínimo de amparo jurídico en las relaciones internacionales, al establecer a través de su nacionalidad su vinculación con un Estado determinado; y el de protegerlo contra la privación de su nacionalidad en forma arbitraria, porque de esse modo se le estaría privando de la totalidad de sus derechos políticos y de aquellos derechos civiles que se sustentan en la nacionalidad del individuo."* *In*: Corte IDH. *Caso Ivcher Bronstein Vs. Perú.* Fondo, Reparaciones y Costas. Sentencia de 6 de febrero de 2001. Serie C No. 74. Disponível em: <http://www.corteidh.or.cr/docs/casos/articulos/Seriec_74_esp.pdf>. Acesso em: 7.out.2016, p. 45, § 87.

43 A Convenção garantiu-lhes a liberdade de religião (art. 4°), o direito de acesso aos tribunais (art. 16), educação pública (art. 22), tratamento igual aos estrangeiros em geral em outras matérias como propriedade mobiliaria e imobiliária (art. 13), profissões assalariadas (art. 17), profissões liberais (art. 19), alojamento (art. 21) liberdade de circulação (art. 26). O documento ainda limita o arbítrio do Estado, no que tange a expulsão (art. 31) e estimula a assimilação e naturalização dos apátridas (art. 32). *In*: PLANALTO. *Convenção sobre o Estatuto dos Apátridas. Decreto nº 4.246, de 22 de maio de 2002*. Disponível em: <https://www.planalto.gov.br/ccivil_03/decreto/2002/D4246.htm>. Acesso em: 27.out.2016.

44 República Dominicana não é parte nas Convenções. Já o Brasil ratificou tanto a Convenção das Nações Unidas sobre o Estatuto dos Apátridas de 1954 quanto a Convenção para a Redução dos Casos de Apatridia de 1961.

princípios e marcos legais para prevenir a apatridia.

Para os efeitos da Convenção de 1954, o termo "apátrida" designa toda pessoa que não seja considerada nacional por nenhum Estado. Em complemento, observa-se, com os ensinamentos de José Farani Mansur Guerios, duas categorias de apatridia: "1ª apatridia propriamente dita, quando positivado está o fato da perda da nacionalidade pelo indivíduo. 2ª apatridia impropriamente dita, quando apenas é desconhecida a nacionalidade do indivíduo."[45]

Ainda, nos dizeres do mesmo autor, anota-se que "[a] expatriação dum membro de certo agrupamento humano, significando a interdição do culto, do direito, a privação do lar, da residência, sempre foram consideradas penas capitais tão tremendas quanto a morte".[46]

Pode-se evidenciar haver nesta posição uma verdadeira taxação do individuo, que lhe enuncia, de certa forma, como indigno de ser reconhecidamente um membro de determinada sociedade, o que impede sua livre interação com os demais componentes da mesma. No entanto, configurados os apátridas, deve-se buscar situá-los numa posição jurídica com o Estado, indagando-se qual é a legislação aplicável a estes, pois alguma norma deve lhes ser invocada.

O processo de internacionalização dos direitos humanos promoveu uma onda de proteção dos indivíduos também no que tange à sua nacionalidade. Atualmente a grande maioria dos países do mundo está engajada[47], juntamente com organismos internacionais – a exemplo da Organização das Nações Unidas (ONU) através da ACNUR – a minimizar os casos de apatridia, sejam em decorrência da secessão de países, redesenho de fronteiras ou discriminação étnica.

E, em que pese ainda haja registros de total cerceamento de direitos ao apátrida, o entendimento mais universalizado é o de tratá-los como estrangeiros, para que possam gozar e exercer todos os direitos não exclusivamente reservados aos nacionais. Depreende-se que, mesmo estes não tendo a nacionalidade reconhecida, nem cidadania, diversas faculdades lhe devem ser reconhecidas e possibilitadas, com base, principalmente, na equidade natural, que, se faz indispensável à própria existência humana.

Deve-se atentar, portanto, que o individuo é um ser humano onde quer que esteja, e assim lhe são indispensáveis certas faculdades, devendo ser legitimado na vida jurídica, cuja justeza consiste na atribuição dos devidos direitos, sejam os já adquiridos ou os futuros, que devem, em toda a parte, ser reconhecidos e tutelados, por sua própria essência de prerrogativas inerentes a todo ser humano. No entanto, a adequada proteção, principalmente quando emanada do Estado, aperfeiçoa-se com a devida forma legal, embasada na atribuição implícita do elo fundado pelo reconhecimento da nacionalidade. Isto, pois, os direitos humanos e fundamentais são mais eficazmente reconhecidos quando revestidos pelas normas positivas consolidadas pelos Estados, que segmentam os indivíduos.

Neste sentido, José Farani Mansur Guerios, aduz que.

> A aplicação do direito e a proteção internacional do indivíduo requerem, dada a existência de diferentes Estados, que se distingam os homens uns dos outros, em razão de sua nacionalidade, que é assim o traço distintivo do indivíduo no agrupamento social, como o Estado o é no conjunto internacional. Os direitos e obrigações recíprocos do Estado e indivíduo, fundam-se pois, sempre, no laço de nacionalidade. [48]

Aqui mais especificamente, focalizando-se na situação dos desnacionalizados e apátridas da República Dominicana, assenta-se primeiramente que, o registro de nascimento, num aspecto global, constitui oficialmente a existência jurídica dos sujeitos, além de identifica-los, individualiza-los e determinar a sua relação com certo Estado, ou sociedade. Perfazendo, nesta esteira, condição primordial ao ser humano, que assim será reconhecido como um verdadeiro cidadão, o qual, efetivamente, poderá exercer direitos.

45 GUERIOS, José Farani Mansur. *Condição jurídica do apátrida.* Tese de concurso à cadeira de direito internacional privado da Faculdade de Direito do Paraná. Curitiba, 1936, p. 38.

46 GUERIOS, José Farani Mansur. *Condição jurídica do apátrida.* Tese de concurso à cadeira de direito internacional privado da Faculdade de Direito do Paraná. Curitiba, 1936, p. 16.

47 No Brasil, a Emenda Constitucional 54/2007 eliminou de vez a possibilidade de apatridia entre filhos de brasileiros nascidos no exterior. A EC possibilita serem reconhecidos como natos os nascidos no estrangeiro, de pai brasileiro ou de mãe brasileira, desde que sejam registrados em repartição brasileira competente, ou venham a residir na República Federativa do Brasil e optem, em qualquer tempo, depois de atingida a maioridade, pela nacionalidade brasileira. (art. 12, I, alínea "c", CF). Este foi um bom exemplo de aplicação da Convenção de 1961.

48 GUERIOS, José Farani Mansur. *Condição jurídica do apátrida.* Tese de concurso à cadeira de direito internacional privado da Faculdade de Direito do Paraná. Curitiba, 1936, p. 28.

É clarividente que a certidão de nascimento não constitui a definição da pessoa humana como tal, pois esta é titular de direitos e deveres por sua própria essência. Ora, por obvio, pratica-se um tratamento indigno ao considerar o ser humano como uma coisa ou objeto, tanto quanto é irracional tratar uma coisa ou objeto como pessoa. Todavia, é sabido que a efetividade da grande maioria dos direitos depende de documentos básicos, dos quais a certidão de nascimento é a base fundamental.

Tais documentos são essenciais ao exercício da cidadania, bem como da grande maioria de outros direitos, como os civis, políticos, econômicos, sociais etc. É a expressão da dignidade social destas pessoas, fornecendo-lhes um conjunto de experiências e atividades fundamentais, permitindo, em grande forma, a superação da situação de exclusão.

Pelos apontamentos de Mario de Carvalho Camargo Neto e Marcelo Salaroli de Oliveira anota-se que: "[p]or detrás, como pré-requisito para esse conjunto de documentos, como a "mãe de todos" está o registro e a certidão de nascimento, sem o qual não se obtém os demais."[49]

Estabelecido o estado da pessoa como elemento definidor de seu estatuto normativo, é constante a necessidade de que esta demonstre as circunstancias e elementos que provam a sua posição jurídico-social, notadamente no que tange ao exercício de direitos. Porquanto infere-se que o exercício de tais direitos não é possível na situação de exclusão ou, até mesmo, de "inexistência" da pessoa, que é causada pela falta de documentação e de registro.

Ora, o registro de nascimento é o instrumento originário da pessoa natural na ordem jurídico-social, pois contém os elementos inerentes ao estado dela, servindo, como base para emissão de documentos fulcrais. Outrossim, tido o estado civil da pessoa natural como sua qualificação jurídica, projetante das suas qualidades e das diversas posições que ocupa num Estado ou sociedade, em contextos como o político, familiar e individual, pode-se inferir que, através do reconhecimento destes alcança-se a finalidade dos sistemas estatais, qual seja a busca pela coexistência pacífica das pessoas em sociedade, baseada no devido reconhecimento de todos como seres humanos.

Transparente e perspicaz os dizeres dos referidos autores, no seguinte:

> Nada é mais assustador para um jurista do que uma pessoa sem registro. É um fantasma pairando no mundo natural com o qual não se sabe como lidar. O único e imediato conselho é providenciar o seu devido e necessário registro de nascimento, que é seu documento mais elementar e essencial, sem o qual a pessoa não é um individuo. Sem individualidade, dilui-se na mais primitiva e bruta humanidade, deixando de ser pessoa, ao menos para o mundo dos direitos.[50]

Ademais, para atender suas finalidades, com segurança e autenticidade, o registro de nascimento, e seus efeitos, devem ser tidos como vitalícios. Ou seja, até mesmo aos registros do século passado deve ser possibilitado o acesso, para que produza sua eficácia, pois, seu cancelamento apenas pode ser permitido em casos excepcionalíssimo, a exemplo da duplicidade de registos, sob pena de manifesta violação a institutos como o direito adquirido, a segurança jurídica, entre outros que confluem diretamente à própria existência, e dignidade, da pessoa.

A preocupação apresentada reflete-se, inclusive, no âmbito internacional. Exemplificativamente, observa-se que, tanto o Pacto Internacional dos Direitos Civis e Políticos quanto a Convenção sobre os Direitos das Crianças, trazem o mando de, que imediatamente após o nascimento, deve ser realizado o registro de todo ser humano. Sendo cediço que, com a ausência do registro civil já se tem a sonegação do primeiro direito da cidadania, o que repercute até mesmo em necessidades básicas.[51]

Segundo o disposto na Convenção sobre os Direitos das Crianças

> Artigo 7 1. A criança será registrada imediatamente após seu nascimento e terá direito, desde o momento em que nasce, a um nome, a uma nacionalidade e, na medida do possível, a conhecer seus pais e a ser cuidada por eles. 2. Os Estados Partes zelarão pela aplicação desses direitos de acordo com sua legislação nacional e com as obrigações que tenham assumido em virtude dos instrumentos internacionais pertinentes, sobretudo se, de outro modo, a criança se tornaria apátrida. [52]

49 JOBIN, Nelson *apud* NETO, Mario de Carvalho Camargo Neto; OLIVEIRA, Marcelo Salaroli. *Registro Civil das Pessoas Naturais:* parte geral e registro de nascimento. 1 Ed. Volume I. São Paulo: Saraiva, 2014, p. 20.

50 NETO, Mario de Carvalho Camargo Neto; OLIVEIRA, Marcelo Salaroli. *Registro Civil das Pessoas Naturais:* parte geral e registro de nascimento. 1 Ed. Volume I. São Paulo: Saraiva, 2014, p. 19.

51 NETO, Mario de Carvalho Camargo Neto; OLIVEIRA, Marcelo Salaroli. *Registro Civil das Pessoas Naturais:* parte geral e registro de nascimento. 1 Ed. Volume I. São Paulo: Saraiva, 2014, p. 22

52 PLANALTO. *Convenção sobre os Direitos da Criança. Decreto no 99.710, de 21 de novembro de 1990*. Disponível em: <http://www.pla-

RIBEIRO, Daniela Menengoti Gonçalves; SILVA, Rodrigo Ichikawa Claro. A desnacionalização e as violações de direitos humanos na República Dominicana. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 330-347

No mesmo sentido tem-se a garantia no Pacto Internacional dos Direitos Civis e Políticos: "[a]rtigo 24 [...] 2. Toda criança deverá ser registrada imediatamente após seu nascimento e deverá receber um nome. 3. Toda criança terá o direito de adquirir uma nacionalidade."[53]

É, desta forma, dever do Estado, principalmente por meio do direito, garantir a identidade, estado, e dignidade dos indivíduos, protegendo-os como pessoa humana, com a devida tutela das suas pretensões legítimas. Neste sentido, Luiz Guilherme Loureiro explica que "[m]ais do que uma entidade biológica, a pessoa é uma entidade ética, com seus sonhos, desejos e projetos a realizar."[54] Observando-se que certas qualidades são permanentes e não devem sofrer modificações em razão do lugar ou contexto em que a pessoa se situa.

E, mesmo que seja necessário analisar-se cada direito fundamental de acordo com suas próprias especificidades, bem como com as possibilidades do Estado, a fim de sua adaptação estrutural à promoção de tais direitos, o controle sobre certas discricionariedades deve ser o mais rígido e intenso possível quando a prestação sacrificada pelo contingenciamento estiver ligada ao mínimo existencial.

Ou seja, a negativa de reconhecimento legal de tais pessoas, além de obstar o gozo de certos direitos humanos, coloca-os em uma situação de extrema vulnerabilidade, que facilita sua sujeição a múltiplas ações ofensivas e desumanas. Além de que, a desnacionalização retroativa, gerada pela referida decisão, retira os direitos de seus já legítimos possuidores.

4. Dos direitos humanos violados com a desnacionalização frente ao sistema interamericana

A República Dominicana assinou a Convenção Americana sobre Direitos Humanos (Pacto de San Jose da Costa Rica) em julho de 1977, que foi posteriormente ratificado pela República Dominicana mediante a Resolução nº 739 de dezembro de 1977 do Congresso Nacional[55]. O país também reconhecido a competência contenciosa da Corte Interamericana em março de 1999, reconhecendo sua competência como obrigatória, de pleno direito e por tempo indeterminado, em todos os casos que possuam relação com a interpretação ou aplicação da Convenção Americana.

A Convenção Americana dispõe que "toda pessoa tem o direito ao reconhecimento de sua personalidade jurídica, estendendo essa interpretação ás crianças"[56]. Segundo Luiz Flávio Gomes e Valério de Oliveira Mazzuoli:

> [...] o intuito do art. 3º em comento foi o de abolir, no Continente Americano, a "personalidade jurídica *sub conditione*" (ou "personalidade jurídica condicionada"), segundo a qual se reconhece tal *personalidade* às pessoas (e sua consequente capacidade para vindicar direitos), mas desde que satisfeitas determinadas condições impostas pelo Estado. São dramáticos os exemplos de reconhecimento da personalidade jurídica *sub conditione*, sendo o mais bestial deles o que ocorreu no período do Holocausto, em que o governo de Hitler condicionava a titularidade de direitos a pertencer o individuo à "raça pura ariana", excluindo por assassinato todos os demais que nesta categoria não enquadravam.[57]

Segundo enunciado pela Comissão Interamericana de Direitos Humanos, todas as pessoas dominicanas de ascendência haitiana ou aquelas percebidas como tais sofrem discriminação que as priva do gozo e exercício de direitos humanos. Além da violação ao direito à nacionalidade, sua privação tem refletido nas violações de direitos civis, políticos, sociais e econômicos. Como exemplos dos óbices causados, tem-se:

nalto.gov.br/ccivil_03/decreto/1990-1994/D99710.htm>. Acesso em: 27.out.2016.

53 PLANALTO. *Pacto Internacional sobre Direitos Civis e Políticos. Decreto no 592, de 6 de julho de 1992*. Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0592.htm>. Acesso em: 27.out.2016.

54 LOUREIRO, Luiz Guilherme. *Registros públicos*: teoria e prática. Ed. 7. Salvador: JusPodvim, 2016. p. 130.

55 Com a reforma da Constituição em 2010, a República Dominicana passou a admitir a incorporação direita no direito interno, com força de norma constitucional, dos compromissos internacionais adotados pelo Estado em matéria de direitos humanos. "*Artículo 74. 3) Los tratados, pactos y convenciones relativos a derechos humanos, suscritos y ratificados por el Estado dominicano, tienen jerarquía constitucional y son de aplicación directa e inmediata por los tribunales y demás órganos del Estado*;" *In*: SENADO DE LA REPÚBLICA DOMINICANA. *Constitución de la República Dominicana, 2010*. Disponível em: <http://www.senado.gob.do/senado/Portals/0/Documentos/constituciones/const-2010.pdf>. Acesso em: 14. out. 2016.

56 PLANALTO. *Convenção Americana sobre Direitos Humanos (Pacto de São José da Costa Rica), de 22 de novembro de 1969*. Decreto nº 678, de 6 de novembro de 1992. Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/D0678.htm>. Acesso em: 15.set.2016.

57 GOMES, Luiz Flávio; MAZZUOLI, Valério de Oliveira. *Comentários à Convenção Americana sobre Direitos Humanos, Pacto de San Jose da Costa Rica*. São Paulo: Revista dos Tribunais, 2013, p. 38.

> 1 - As crianças não podem continuar a sua educação básica; 2- Não podem se inscrever no ensino superior; 3 - São incapazes de pagar as contribuições para a Segurança Social; 4 - Não podem aderir a determinados serviços de saúde; 5 - Não têm acesso a um trabalho digno; 6 - Não podem se casar ou divorciar: 7 - Não podem registrar o nascimento de uma criança; 8 - Não podem abrir uma conta bancária; 9 - São incapacitados de obter documentos de viagem, tais como passaportes e, portanto, não são capazes de viajar legalmente para o estrangeiro; 10 - Não podem executar contratos; 11- Não são capazes de comprar ou transferir a propriedade; 12- Não podem executar uma declaração; 13- Não votam nem concorrem a cargos públicos.[58] (tradução livre)

Acresce-se a esta lista a inquietação quanto aos políticos que tenham eventualmente sido eleitos pelos agora desconsiderados dominicanos. Diante desta situação pergunta-se: é possível afirmar que houver reais condições de elegibilidade uma vez que os eleitores não eram dominicanos? Poder-se-ia falar em nulidade de eleições?

De fato, essa situação de privação arbitrária da nacionalidade dominicana e da personalidade jurídica tem provocado incertezas e gerado um impacto na integridade física e psicológica das pessoas afetadas somando-se ainda o fato de serem detidas ou expulsas de seu país por não obterem documento de identidade. O direito à integridade pessoal (física, psíquica e moral) garantido no art. 5º da Convenção Americana sobre Direitos Humanos nada mais significa que expressão da dignidade humana.

O "controle de identidade" que ampara as saídas compulsórias (deportações e expulsões) de estrangeiros da República Dominicana não é baseado em documentos e critérios objetivos, mas numa discriminação racial por aparência. Os agentes dominicanos, muitas vezes, acabam identificando os residentes irregulares com base na origem nacional ou *status* de imigração dos pais, cor da pele, linguagem, sobrenomes etc.

A retirada de imigrantes, sem o direito de defesa, viola, igualmente, o direito ao acesso à justiça e as garantias ao devido processo legal.

Calcula-se que mais de 20.000 indivíduos foram expulsos ou deportados somente em novembro de 1999. As autoridades dominicanas impõem força excessiva para assegurar que suas ordens sejam obedecidas, incluindo abuso sexual de mulheres. As crianças sofrem danos psicológicos, o temor os impede de sair de casa. Os que são deportados tem que sobreviver sem nada. A prática da deportação e expulsão afeta os trabalhadores haitianos documentados e indocumentados, e os dominicanos de origem haitiana que residem em território dominicano, sejam eles documentados ou não.[59]

Nos termos do artigo 8 da Convenção Americana sobre Direitos Humanos todos têm o direito a um julgamento justo, considerando-se "[p]ara os efeitos desta Convenção, [que] pessoa é todo ser humano":

> Artigo 8. Garantias judiciais:
>
> 1. Toda pessoa tem direito a ser ouvida, com as devidas garantias e dentro de um prazo razoável, por um juiz ou tribunal competente, independente e imparcial, estabelecido anteriormente por lei, na apuração de qualquer acusação penal formulada contra ela, ou para que se determinem seus direitos ou obrigações de natureza civil, trabalhista, fiscal ou de qualquer outra natureza.[60]

O entendimento da Corte quanto ao direito de ser ouvido, protegido no artigo 8.1 da Convenção, compreende o direito de todos a ter acesso ao tribunal ou órgão estadual competente para determinar seus direitos e obrigações. [61]

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58 "*1- Que los niños no puedan continuar con su educación básica; 2- No puedan inscribirse en la educación universitaria; 3- No poder pagar contribuciones al Sistema de Seguridad Social; 4- No poder acceder a ciertos servicios de salud; 5- No poder acceder a un trabajo digno; 6- No poder casarse o divorciarse; 7- No poder registrar el nacimiento de un hijo; 8- No poder abrir una cuenta bancaria; 9- No poder obtener documentos de viaje como el pasaporte y por consiguiente no poder viajar internacionalmente; 10- No poder realizar contratos; 11- No poder comprar o transferir una propiedad; 12- No poder realizar una declaración jurada; 13- No poder votar y postularse para un cargo público.*" *In*: CIDH. *Desnacionalización y apatridia en Republica Dominicana*. Disponível em: <http://www.oas.org/es/cidh/multimedia/2016/RepublicaDominicana/republica-dominicana.html>. Acesso em: 01.out.2016.

59 "[...] *calculan que más de 20.000 individuos fueron "expulsados o deportados" durante noviembre de 1999. Las autoridades dominicanas emplean fuerza excesiva para asegurar que las presuntas víctimas obedezcan sus órdenes, incluyendo abuso sexual de mujeres; los niños sufren daño psicológico, el temor los impide salir de sus casas; las mujeres de los que son "deportados" tienen que sobrevivir sin nada; [...] la práctica de "deportaciones" y "expulsiones" afecta a dos grupos: trabajadores haitianos documentados e indocumentados y dominicanos de origen haitiano que residen en territorio dominicano documentados e indocumentados.*" (tradução livre) *In*: Corte IDH. *Asunto Haitianos y Dominicanos de origen haitiano en la República Dominicana respecto República Dominicana*. Medidas Provisionales. Resolución de la Corte Interamericana de Derechos Humanos de 18 de agosto de 2000. Disponível em: <http://www.corteidh.or.cr/docs/medidas/haitianos_se_02.pdf>. Acesso em: 29.out.2016.

60 PLANALTO. *Convenção Americana sobre Direitos Humanos (Pacto de São José da Costa Rica), de 22 de novembro de 1969*. Decreto nº 678, de 6 de novembro de 1992. Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/D0678.htm>. Acesso em: 15.set.2016.

61 Ver a respeito: Corte IDH. *Caso del Tribunal Constitucional (Camba Campos y otros) vs. Ecuador*. Excepciones Preliminares, Fondo, Repara-

A situação se potencializa quando se leva em conta que a maioria os haitianos que vivem na República Dominicana não tem documentos e muitos se aglomeram em zonas da periferia. São também comuns as existências dos denominados "*bateyes*" que são assentamentos, geralmente ao redor dos campos de plantação de cana e usinas de açúcar, em locais de aglomeração nos quais os trabalhadores vivem proximamente do local de trabalho.

A falta dos documentos necessários ao exercício da cidadania tem gerando a impossibilidade de acesso a benefícios sociais, como escolas, estabelecimentos de assistência e serviços públicos em geral. Ou seja, aqueles haitianos que ainda não foram retirados compulsoriamente da República Dominicana, vivem em sua grande maioria, em situação degradante de pobreza e sem os documentos que comprovem sua própria existência.

A proteção à honra[62] e à dignidade também é garantida na Convenção Americana sobre Direitos Humanos:

> Artigo 11. Proteção da honra e da dignidade
>
> 1. Toda pessoa tem direito ao respeito de sua honra e ao reconhecimento de sua dignidade.
>
> 2. Ninguém pode ser objeto de ingerências arbitrárias ou abusivas em sua vida privada, na de sua família, em seu domicílio ou em sua correspondência, nem de ofensas ilegais à sua honra ou reputação.
>
> 3. Toda pessoa tem direito à proteção da lei contra tais ingerências ou tais ofensas.[63]

Neste sentido, os Estados-parte na Convenção, e mais especificamente no caso a República Dominicana, também devem garantir a todas as pessoas os meios legais contra as ingerências ou ofensas arbitrárias ou indevidas à sua honra ou dignidade.

Tal situação vem sendo acompanhada pelos órgãos do Sistema Interamericanos de Direitos Humanos. Neste sentido, a própria Comissão Interamericana de Direitos Humanos, analisando o caso, fez recomendações de que o Estado dominicano tome as medidas necessárias para restaurar e tutelar integralmente o direito à nacionalidade de todas as pessoas afetadas, tanto pela decisão do Tribunal Constitucional Dominicano quanto pelas variadas medidas históricas que ocasionaram tal situação catastrófica. Incluídas recomendações para uma efetiva cooperação das autoridades na adoção de políticas, leis e práticas públicas que realmente demonstrem engajamento com os deveres internacionais relativos aos direitos humanos.

Em maio de 2000, a Corte Interamericana de Direitos Humanos[64], em atenção ao pedido feito pela Comissão Interamericana de Direitos Humanos, concedeu uma medida provisória em favor de haitianos e dominicanos de origem haitianas que se encontram sujeitas a jurisdição da República Dominicana e que corriam risco de serem expulsas ou deportadas.

A medida ressaltou a necessidade do país em garantir a proteção de todas aquelas pessoas – tanto as que haviam peticionado junto à Comissão, quanto as demais que se encontravam na mesma situação. Porém, apesar das reiteradas intervenções por parte da Corte, as expulsões massivas continuaram ocorrendo, e, em 2013, culminou com a fatídica decisão do Tribunal Constitucional dominicano.

Em 2014, a Corte Interamericana de Direitos Humanos[65] declarou que a República Dominicana é internacionalmente responsável pela violação dos direitos estabelecidos na Convenção Americana sobre Direitos Humanos, a saber: reconhecimento da personalidade jurídica (art. 3), nacionalidade (art. 20), nome (art. 18), identidade e liberdade pessoal (art. 7), livre circulação e residência (art. 22.1, 22.5 e 22.9), garantias judiciais (art. 8.1), proteção judicial (art. 25.1), proteção da família (art. 17.1), proteção à honra e a dignidade (art. 11) e direitos das crianças (art. 19) em prejuízo das vítimas que

ciones y Costas. Sentencia de 28 de agosto de 2013. Disponível em: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_268_esp.pdf>. Acesso em: 06.set.2017, p. 54, § 181.

62 "Por honra se entende o conjunto de atributos morais e a reputação que tem determinada pessoa nas suas relações com os demais membros da sociedade. Daí ser ela também chamada de direito à integridade moral, consistente no respeito, na boa-fama, no bom-nome e no carisma que a pessoa goza nas suas relações com os demais." *In*: GOMES, Luiz Flávio; MAZZUOLI, Valério de Oliveira. *Comentários à Convenção Americana sobre Direitos Humanos, Pacto de San Jose da Costa Rica*. São Paulo: Revista dos Tribunais, 2013, p. 170.

63 PLANALTO. *Convenção Americana sobre Direitos Humanos (Pacto de São José da Costa Rica), de 22 de novembro de 1969*. Decreto nº 678, de 6 de novembro de 1992. Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/D0678.htm>. Acesso em: 15.set.2016.

64 Corte IDH. *Asunto Haitianos y Dominicanos de origen haitiano en la República Dominicana respecto República Dominicana*. Medidas Provisionales. Resolución de la Corte Interamericana de Derechos Humanos de 7 de agosto de 2000. Disponível em: <http://www.corteidh.or.cr/docs/medidas/haitianos_se_01.pdf>. Acesso em: 29.out.2016.

65 Corte IDH. *Caso de personas dominicanas y haitianas expulsadas Vs. República Dominicana*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de agosto de 2014. Serie C No. 282. Disponível em: <http://corteidh.or.cr/docs/casos/articulos/seriec_282_esp.pdf>. Acesso em: 29.out.2016.

RIBEIRO, Daniela Menengoti Gonçalves; SILVA, Rodrigo Ichikawa Claro. A desnacionalização e as violações de direitos humanos na República Dominicana. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 330-347

no momento em que ocorreram os fatos, eram crianças.

A sentença da Corte determinou a reparação material e imaterial das vítimas, ordenando que as mesmas sejam devidamente registradas e passem a ter a documentação necessária para acreditar sua identidade e nacionalidade dominicana. Ademais, determinou que fossem adotadas medidas de direito interno para evitar que a sentença 168/13 emitida pelo Tribunal Constitucional continuasse produzindo efeitos jurídicos.

Por fim, cabe esclarecer que compete ao órgão judiciário do Estado que faz parte de um tratado internacional, observar, através da análise do controle de convencionalidade entre a norma interna e a internacional, os direitos e liberdades garantidos, bem como determinar a adoção de medidas judiciais ou administrativas que sejam necessárias para sua efetivação. Neste sentido é flagrante a inobservância pelo Tribunal Constitucional dominicano, dos preceitos da Convenção Americana sobre Direitos Humanos.

Como resultado deste processo, a justiça da República Dominicana expressou que não irá cumprir as sentenças da Corte Interamericana de Direitos Humanas, alegando, inclusive, que a associação do país à Corte Interamericana, firmada pelo então presidente Leonel Fernández, em fevereiro de 1999, foi inconstitucional, pois não foi ratificada pelo Congresso Nacional.

5. Considerações finais

A decisão do Tribunal Constitucional privou, retroativamente, do direito à nacionalidade, milhares de pessoas que durante toda a vida haviam sido consideradas dominicanas, muitas das quais foram registradas pelas autoridades competentes como nacionais ao nascer e, ao longo da vida, lhes foram outorgados outros documentos de identidade tais como títulos de eleitores, cédulas de identidade e passaportes.

Além da violação ao direito à nacionalidade, a decisão do Tribunal Constitucional vai na contramão das intenções globais de garantia dos direitos humanos e contra a discriminação. A "limpeza étnica" na República Dominicana seguiu-se à total revelia dos apelos da comunidade internacional, em total contraponto à imperiosa tendência de reduzir a incidência de casos de apatridia.

O direito tem um papel fundamental que é o de atender as novas necessidades de proteção do ser humano. Mas é inquietante que em pleno século XXI, em um mundo globalizado como o que se vive, ainda existam situações que retratem pensamentos e comportamentos retrógados e discriminatórios.

Outrossim, é consolidado nos mais diversos ordenamentos internos, e no âmbito internacional, a vedação ao denominado efeito "*cliquet*", ou retrocesso, no que tange à proteção dos direitos humanos. E, nesta forma, configuram-se inaceitáveis medidas, normativas ou não, tendentes a suprimir ou enfraquecer direitos humanos e fundamentais reconhecidos, salvo se presentes meios alternativos capazes de compensar tais atos.

Importante frisar que as autoridades judiciárias internas estão sujeitas ao império da lei e são obrigadas a aplicar as disposições vigentes no ordenamento jurídico, porém, quando um Estado é parte em um tratado internacional – como é o caso da República Dominicana em relação a Convenção Americana sobre Direitos Humanos – todos os seus órgãos, inclusive juízes, também estão sujeitos a zelar por sua aplicação, devendo exercer, *ex officio*, o "controle de convencionalidade" entre a norma interna e a internacional.

Tratando-se, portanto, de compromissos e determinações de âmbito internacional, cabendo ao Estado promover as condições necessárias para que os direitos se tornem efetivos e possam ser usufruídos por seus titulares.

O que se espera, em verdade, são políticas públicas e atuações, que visem a efetiva concretização dos direitos reconhecidos, seja no âmbito nacional ou internacional, com a principal função de promover o interesse social, principalmente na direção de diminuir as desigualdades sociais e equilibrar a situação de cidadãos que não tiveram o mesmo acesso a semelhantes direitos fundamentais, até porque, cabe primordialmente ao Estado promover a inclusão social destes indivíduos. Legítimo e virtuoso seria, portanto, um empenho geral direcionado a equilibrar as relações sociais, para fornecer a todos um modo de vida digno, com a devida concretização dos direitos inerentes ao ser humano.

É preciso que se busque uma solução ao problema que tais pessoas enfrentam, pois, ainda que irregularmente inscritas no Registro Civil pelo próprio Estado, conduziram suas vidas sob a premissa de gozarem da nacionalidade dominicana e em razão disso possuem

um grande apego com aquela sociedade.

Independente de a República Dominicana ser ou não parte na Convenção das Nações Unidas sobre o Estatuto dos Apátridas de 1954 e na Convenção para a Redução dos Casos de Apatridia de 1961, seu compromisso no âmbito interamericano, através da Convenção Americana sobre Direitos Humanos (Pacto de San Jose da Costa Rica), por si só, já caracteriza a violação de direitos humanos.

É preciso que a condição de nacional dominicano dessas pessoas seja definitivamente reestabelecida. Os documentos e o reconhecimento da nacionalidade são essenciais ao exercício da cidadania. É a superação da situação de exclusão e da restituição da dignidade social, para que possam novamente desfrutar do direito a ter direitos. E, a supervisionar da condição destes cidadãos é um dever de toda a comunidade interamericana.

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Competência do TPI no caso do ataque ao hospital de Kunduz: uma análise envolvendo a jurisdição do TPI em relação a nacionais de Estados não-Parte do Estatuto de Roma

ICC´s competence in the case of the attack of the Kunduz Hospital: an analysis involving the ICC´s jurisdiction regarding the nationals of non-Party States of the Rome Statute

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Resumo

Pretende-se no presente artigo discorrer sobre a competência *ratione materiae*, *ratione loci*, *ratione personae* e *ratione temporis* estabelecidas no Estatuto de Roma. Após, analisar-se-á o ataque ao Centro de Trauma de Kunduz, localizado no Afeganistão, por militares Americanos, dentro do contexto de um conflito armado. Subsequentemente, proceder-se-á ao exame da investigação realizada pelos Estados Unidos sobre o incidente. Por fim, verificar-se-á a possibilidade do exercício da jurisdição do TPI sobre o caso. A vertente metodológica adotada: jurídico-teórica; tipo de raciocínio: dedutivo; tipos metodológicos da pesquisa: histórico-jurídico, jurídico-comparativo e jurídico-interpretativo.

Palavras chave: Estatuto de Roma; Tribunal Penal Internacional; Centro de Trauma de Kunduz; Conflito Armado; Crime de Guerra.

Abstract

It is intended in this paper to broach about the *ratione materiae*, *ratione loci*, *ratione personae* and *ratione temporis* competence, established in the Rome Statute. After, the attack of the Kunduz Trauma Centre, located in Afghanistan, by American military, within the context of an armed conflict, will be analyzed. Subsequently, an exam of the United States investigation about the incident will be performed. Lastly, the possibility of the exercise of ICC´s jurisdiction on the case will be verified. The methodological aspects adopted: juridical-theoretic; reasoning type: deductive; Research methodological types: historical-juristic; juridical-comparative, juridical-interpretative.

Keywords: Rome Statute; International Criminal Court; Kunduz Trauma Centre; Armed Conflict; War Crime.

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1. Introdução

No dia 03/10/2015, o Centro de Trauma operado pela Organização Internacional dos Médicos Sem Fronteiras, localizado na cidade de Kunduz, no Afeganistão, foi bombardeado por cerca de uma hora por um avião pertencente aos Estados Unidos. Referido hospital foi completamente destruído e várias pessoas foram mortas ou ficaram feridas como resultado deste ataque. Uma vez que a conduta dos militares Americanos encontra-se tipificada como crime de guerra no Estatuto de Roma, além de ter sido praticada no âmbito de um conflito armado, acredita-se que o Tribunal Penal Internacional (TPI), possua a prerrogativa de exercer sua jurisdição em relação a referidos indivíduos, mesmo que eles não sejam nacionais de um Estado-Parte de seu Estatuto.

O TPI, criado pelo Estatuto de Roma com o intuito de combater a impunidade dos indivíduos perpetradores dos crimes de maior gravidade, que afetam a comunidade internacional como um todo, conta com um importante mecanismo jurisdicional para cumprir com eficiência este objetivo. Referido mecanismo, disposto no artigo 12, 2, "a" de dito Estatuto (ONU, 1998), permite que o Tribunal exerça sua jurisdição em relação a nacionais de Estados não-Parte do Estatuto de Roma, na hipótese do crime ser cometido no território de um Estado-Parte.

Neste sentido, Markus Wagner discorre sobre referida competência em razão do lugar ou do território (*ratione loci ou ratione tertiis*), estabelecida pelo Estatuto de Roma, sendo que sua explanação servirá como marco teórico para o presente artigo. *In verbis*:

> Uma leitura literal da norma revela que o TPI possui jurisdição sobre aqueles crimes contidos no artigo 5 (1) do Estatuto do TPI, *i.e.* genocídio, crimes contra a humanidade e crimes de guerra, caso a conduta em questão seja cometida no território de um Estado parte, ou a bordo de uma embarcação ou aeronave, se estas ostentarem a bandeira de ou estiverem registradas em um Estado parte.
>
> Assim sendo, o alcance geográfico do Estatuto do TPI é consideravelmente maior do que qualquer um de seus predecessores, provavelmente melhor simbolizado pelo muito limitado foco geográfico do TPII [Tribunal Penal Internacional para a ex-Iugoslávia] e TPIR [Tribunal Penal Internacional para Ruanda], ambos os quais estavam confinados aos eventos ocorridos na ex-Iugoslávia, no caso do TPII, e em Ruanda e seus países vizinhos, no caso do TPIR. O fundamento para o alcance quase global do TPI já vem estabelecido no Preâmbulo, o qual afirma que "os crimes de maior gravidade, que afetam a comunidade internacional no seu conjunto, não devem ficar impunes". Entretanto, este potencial alcance verdadeiramente global está limitado pela aplicação territorial do Estatuto do TPI àqueles estados que são Estados-parte, um resultado que claramente constitui uma expressão do princípio da soberania estatal.[1] (WAGNER, 2003, p.483/484).

Tendo em vista que o Afeganistão constitui-se num Estado-parte do Estatuto de Roma desde 2003, surgiu, diante de referido incidente, a possibilidade do TPI exercer sua jurisdição no tocante à nacionais de um país não-Parte do Estatuto de Roma, possibilidade esta que, como se pretende demonstrar ao longo do presente trabalho, deve ser exercida pelo Tribunal em nome do seu objetivo preambular de erradicação da impunidade.

Portanto, o objetivo do presente artigo é examinar as competências *ratione materiae*, *ratione loci*, *ratione personae* e *ratione temporis* do TPI, construindo uma estrutura doutrinária e jurisprudencial para, logo após, analisar-se o ataque ao Hospital de Kunduz por militares Americanos, determinando-se a viabilidade de exercício da jurisdição do TPI em relação a este incidente.

Neste trabalho, adotar-se-á a vertente metodológica jurídico-teórica, uma vez que se destacará aspectos doutrinários e jurisprudenciais do TPI. O tipo de raciocínio utilizado será o dedutivo, pois partir-se-á do estudo das normas em abstrato do Estatuto de Roma para, após, examinar a sua aplicação ao caso concreto do incidente em Kunduz. Por fim, em relação aos tipos metodológicos da pesquisa, serão empregados o histórico-jurídico, jurídico-comparativo e jurídico-interpretativo (DIAS; GUSTIN, 2013, p.22-29).

2. Competência do Tribunal Penal Internacional

A competência do TPI define os limites dentro dos quais referido tribunal irá exercer seu poder jurisdicional. A mesma pode ser fixada através da análise de quatro critérios: material (*ratione materiae*), territorial (*ratione loci*), pessoal (*ratione personae*) e temporal (*ratione temporis*).

1 Tradução nossa.

2.1. Competência em razão da matéria (*ratione materiae*)

A competência em razão da matéria diz respeito aos crimes passíveis de serem julgados pelo TPI. Estão elencados no artigo 5º do Estatuto de Roma (ONU, 1998), a saber, o crime de genocídio, os crimes contra a humanidade, os crimes de guerra e o crime de agressão. Esclarecem Brina e Lima (2006, p.106) que "Esses delitos, classificados como *core crimes* e igualmente denominados como coletivos ou em massa, afetam a toda humanidade, sendo irrelevante o apontamento do direito individual violado".

No que tange aos crimes contra a humanidade, uma questão importante surgiu durante as negociações do Estatuto de Roma: se era necessária a existência de nexo causal com algum conflito armado para que ocorresse a sua caracterização, ou se seriam também passíveis de punição na ausência de tais conflitos. As nações favoráveis ao nexo com conflitos armados apresentaram como argumentos os precedentes do Estatuto de Nuremberg e da ex-Iugoslávia. Ocorre que, caso fosse necessária esta vinculação com conflitos armados para que os crimes contra a humanidade fossem punidos pelo Estatuto de Roma, criar-se-ia uma relação de duplicidade com a figura dos crimes de guerra (WAGNER, 2003, p.434). Nesse sentido:

> Uma minoria de delegações participantes da Conferência de Roma acreditavam fortemente que os crimes contra a humanidade poderiam ser cometidos somente no contexto de um conflito armado. Entretanto, a maioria das delegações acreditavam que tal limitação teria tornado os crimes contra a humanidade largamente redundante, uma vez que iriam subsumir-se, na maioria dos casos, à definição de "crimes de guerra". Na visão da maioria, referida restrição teria sido inconsistente com os progressos pós-Nuremberg, conforme observado em declarações da Comissão de Direito Internacional (CDI), do TPII e de outros comentadores, e refletidos em instrumentos dirigidos a crimes específicos contra a humanidade, como a Convenção sobre o Genocídio e a Convenção sobre o Apartheid.
>
> Uma das características mais importantes da definição no estatuto do TPI é que a mesma não faz nenhuma referência a um nexo com conflitos armados, afirmando que os crimes contra a humanidade podem ocorrer não apenas durante um conflito armado, mas também durante tempos de paz ou de conflitos civis. Esse resultado foi essencial para a efetividade prática do TPI em responder a atrocidades de larga-escala cometidas por governos contra sua própria população.[2] (ROBINSON, 1999, p.45/46).

Já em relação aos argumentos sobre os precedentes contidos no Estatuto do Tribunal Penal Internacional de Nuremberg e no Estatuto do Tribunal Penal Internacional da ex-Iugoslávia, exigindo a vinculação dos crimes contra a humanidade a conflitos armados, existe uma explicação para que referida regra não se aplique ao Estatuto de Roma.

Pois bem, em 1945, os atos criminosos perpetrados pelos nazistas contra civis em territórios fora da Alemanha apresentaram menos dificuldade legal em relação ao seu processo de julgamento, uma vez que o direito internacional já proibia a perseguição de civis dentro de territórios ocupados. Ocorre que, muitos dos advogados Aliados, durante a preparação para o processo do pós-guerra, não acharam legalmente razoável processar os nazistas por crimes cometidos contra alemães dentro da Alemanha, o que foi prontamente criticado pela população, principalmente por organizações não-governamentais judias, fazendo com que houvesse uma mudança neste entendimento e, consequentemente, ficou acordado que tais crimes iriam ser julgados sob a rubrica de "crimes contra a humanidade" (SCHABAS, 2004, p.42).

Entretanto, os Aliados, preocupados com o modo que este entendimento poderia repercutir em relação ao tratamento que dispensavam às minorias dentro de seus territórios e colônias, decidiram por insistir que os crimes contra a humanidade só poderiam ser cometidos se estivessem associados aos outros crimes passíveis de persecução legal dentro da esfera jurisdicional do Tribunal de Nuremberg, a saber, os crimes de guerra e os crimes contra a paz. Desta forma, criou-se um requisito vinculativo entre os crimes contra a humanidade e conflitos armados (SCHABAS, 2004, p.42). Porém:

> Insatisfação com tal limitação surgiu dentro de semanas do julgamento de Nuremberg. A Assembleia Geral das Nações Unidas decidiu definir a forma mais flagrante de crime contra a humanidade, qual seja, o genocídio, como uma ofensa distinta que poderia ser cometida em tempo de paz, bem como em tempo de guerra. Ao longo dos anos, desde 1945, houveram várias variantes na definição de crimes contra a humanidade, alguma delas eliminando o *nexo* com conflito armado. Isso instigou muitos a sugerir que, do ponto de vista do direito consuetudinário, a definição tinha evoluído

2 Tradução nossa.

para cobrir atrocidades cometidas em tempo de paz. Mas o próprio Conselho de Segurança turvou as águas em 1993, quando estabeleceu o Tribunal Penal Internacional para a ex-Iugoslávia. O artigo 5 do Estatuto deste tribunal estabelece que os crimes contra a humanidade devem ser cometidos "em conflitos armados, sejam eles de carácter internacional ou interno". Um ano mais tarde, entretanto, o Conselho de Segurança não insistiu no *nexo* quando estabeleceu o Tribunal Penal Internacional para Ruanda. Em 1995, em sua célebre decisão jurisdicional do caso *Tadic*, a Câmara de Apelações do Tribunal Penal Internacional para a ex-Iugoslávia descreveu o *nexo* como "obsolescente", e disse que "não há base lógica ou legal para este requisito, sendo abandonado na prática Estatal subsequente em relação a crimes contra a humanidade. Desde então, a Câmara de Apelações têm descrito o *nexo* com conflito armado, estabelecido no Artigo 5 do Estatuto do Tribunal Iugoslavo como sendo "puramente jurisdicional".[3] (SCHABAS, 2004, p.42).

Este entendimento foi reafirmado no caso *Dragan Nikolic* (Caso nº IT-94-2), no qual a Câmara de Julgamento do Tribunal Penal Internacional para a ex-Iugoslávia (TPII) decidiu que, apesar do artigo 5 do Estatuto do TPII exigir um nexo com conflitos armados, tal requisito seria desnecessário no âmbito do direito internacional para a configuração de crime contra a humanidade (HWANG, 1998, p.480).

Avançando, no que diz respeito ao crime de guerra, o artigo 8º do Estatuto de Roma (ONU, 1998) define, de forma pormenorizada, as condutas que o caracterizam. Estes ilícitos criminais pressupõe a existência de um conflito armado associados às condutas praticadas, o que pode ser apreendido pela simples leitura de referido artigo, que vincula expressamente os atos descritos em seu texto à conflitos armados.

Além disso, o documento intitulado "Elementos dos Crimes" (TPI, 2011) – adotado pela Assembleia dos Estados Partes do Estatuto de Roma, e que, conforme preconiza o artigo 9º deste mesmo Estatuto (ONU, 1998), tem como escopo auxiliar o Tribunal a interpretar e aplicar seus artigos 6º, 7º e 8º – também ressalta que todas as condutas descritas no artigo 8º devem ocorrer dentro do contexto ou estar associadas a um conflito armado, seja ele de caráter internacional ou não.

Neste contexto sobre o vínculo com conflitos armados cabem duas observações: primeiramente, alguns crimes de guerra, particularmente aqueles relativos à repatriação de prisioneiros de guerra, podem ser cometidos após a conclusão das hostilidades, quando não há mais conflito armado. A segunda observação refere-se ao fato de que para uma conduta descrita no artigo 8º do Estatuto de Roma ser punível perante o TPI, é necessário que, além de ser cometida dentro de um contexto de guerra estabelecida, exista um nexo entre o ato perpetrado e o conflito armado. Este último requisito foi desenvolvido pela jurisprudência dos tribunais *ad hoc*[4](SCHABAS, 2004, p.56/57).

Em relação aos incisos que constituem o artigo 8º, o seu inciso 1 (ONU, 1998) estabelece uma "cláusula limitadora" da jurisdição do TPI. Referida cláusula foi proposta pelos Estados Unidos em 1997 (ONU, 1997), na ocasião da 54ª e 55ª reuniões do Comitê Preparatório sobre a criação de um Tribunal Penal Internacional, sendo que:

> Durante as negociações, a necessidade de uma cláusula limitadora foi uma questão muito controversa. Em apoio à limitação, argumentou-se que apenas ocorrências sistemáticas ou em larga-escala de crimes de guerra seriam motivo de preocupação para a comunidade internacional e, portanto, justificar a análise pelo Tribunal. Também se argumentou que uma cláusula limitadora ajudaria o Tribunal a evitar ficar sobrecarregado por casos pequenos ou isolados. De uma importância adicional, particularmente para os Estados Unidos, proporcionaria uma salvaguarda contra o exercício de jurisdição sobre casos isolados de crimes de guerra, que poderia, por exemplo, ser cometido por um soldado Americano servindo no exterior, por exemplo, numa operação ordenada pelas Nações Unidas.
>
> Aqueles contrários a uma cláusula limitadora sustentaram que isto introduziria uma falsa distinção entre diferentes categorias de crimes de guerra. Argumentou-se que uma salvaguarda contra o exercício de jurisdição sobre casos isolados já constava no Estatuto através do princípio da complementaridade: se incidentes isolados de crimes de guerra fossem devidamente processados por um tribunal nacional, o Tribunal não lidaria com tais crimes. Uma limitação poderia, portanto, na prática, ter o efeito de desencorajar os tribunais nacionais a processar referidos casos incidentais.[5] (HEBEL; ROBINSON, 1999, p.107/108).

No final, a redação do inciso em comento acabou por contemplar uma "limitação sem limites" (HEBEL; ROBINSON, 1999, p.124), uma vez que, apesar de res-

3 Tradução nossa.

4 Ver caso "Procurador v. Kunarac et al. (IT-96-23 & 23/1)": Julgamento datado de 22/02/2001, parágrafo 568.

5 Tradução nossa.

tringir a competência do Tribunal a crimes de guerra "cometidos como parte integrante de um plano ou de uma política ou como parte de uma prática em larga escala desse tipo de crimes", tal restrição veio precedida pela expressão "em particular", o que garante ao Tribunal a prerrogativa de analisar cada caso concreto e exercer sua jurisdição quando entender necessário.

O inciso 2 do artigo 8º (ONU, 1998) define quatro categorias de crimes de guerra: dois pertinentes à conflitos armados internacionais (alíneas "a" e "b") e dois relativos à conflitos armados não internacionais (alíneas "c" e "e"). Esta separação entre conflitos armados de caráter internacional e não-internacional surgiu no âmbito da regulação histórica de guerras e conflitos pelo direito internacional, sendo que, da Paz de Vestefália até a Segunda Guerra Mundial, as leis internacionais de guerra aplicavam-se apenas à conflitos entre Estados. Existia a possibilidade de que as leis de guerra se aplicassem a guerras civis, mas somente nos casos em que o Estado envolvido, ou um terceiro Estado, reconhecesse a "beligerância"[6] da parte insurgente (AKANDE, 2012, p.1/2).

No entanto, o reconhecimento de "beligerância" não era um critério que fornecia uma base certa e concreta em relação ao momento e a quais conflitos o Direito Internacional Humanitário se aplicaria. Com isso em mente, o Comitê Internacional da Cruz Vermelha (CICV) começou a desempenhar seu papel no âmbito de conflitos internos, tanto que, na Guerra Civil Espanhola (1936 a 1939), obteve o acordo de ambas as partes no conflito em respeitar as Convenções de Genebra de 1864 e 1906. Após a Segunda Guerra Mundial, o CICV sustentou que as Convenções de Genebra de 1949 deveriam aplicar-se tanto a conflitos armados internacionais como não-internacionais, proposta esta que sofreu grande oposição de países que temiam uma redução em sua soberania no que tange a sua capacidade de contenção de revoltas dentro de suas fronteiras (WILLMOTT, 2004, p.5). Assim, referida proposta:

> [...] foi rejeitada, porém, em favor do artigo 3º Comum às Convenções de Genebra, o qual claramente estabelece que a aplicação das regras do direito humanitário dependerá da natureza do conflito. O artigo 3º Comum foi primariamente desenvolvido com o objetivo de regular conflitos não-internacionais. Comparado com o resto das Convenções de Genebra, as quais contém um alto grau de regulamentação de conflito armado, o artigo 3º Comum é relativamente modesto neste aspecto. Ele contém somente o que parecem ser os elementos "centrais" das Convenções de Genebra, como o tratamento humano daqueles que não estejam participando do combate e a obrigação das partes de cuidarem dos doentes e feridos. É agora incontestável que estas regras contidas no artigo 3º Comum representam o direito internacional consuetudinário.[7] (ODERMATT, 2013, p.20).

O principal fator que diferencia um conflito armado internacional de um não-internacional diz respeito às partes envolvidas nas hostilidades. Conflitos armados internacionais, em regra, são travados entre Estados, sendo que, na teoria, também podem ocorrer entre um Estado e um movimento nacional libertário. Porém, é muito difícil que um Estado admita, na prática, que esteja envolvido em uma guerra de libertação nacional, uma vez que isso implicaria na aceitação de que o mesmo é um regime racista, um ocupante estrangeiro ou um dominador colonial (SIVAKUMARAN, 2011, p.237).

Em contrapartida, os conflitos armados internos são travados entre forças armadas governamentais e grupos armados não-estatais (facções rebeldes), ou entre grupos armados inimigos dentro de um Estado, sem que haja qualquer intervenção nas hostilidades por parte de algum Estado estrangeiro ou da ONU (VERHOEVEN, 2007, p.7).

Neste ponto, poder-se-ia questionar qual a importância prática desta distinção entre conflitos armados internacionais e não-internacionais para o Direito Humanitário. Atualmente, apesar de existir uma tendência crescente pela diminuição da importância desta distinção, ela ainda é relevante (BARTELS, 2009, p.40/41). Nesse sentido:

> O direito internacional humanitário tenta aliviar o sofrimento causado pela guerra e tenta proteger os fracos durante conflitos. Por isso, as quatro Convenções de Genebra de 1949 e seus dois protocolos adicionais de 1977 estabelecem regras com o escopo de salvaguardar os feridos, doentes, náufragos, prisioneiros de guerra e civis o tanto quanto possível dos flagelos da guerra. Consequentemente, num primeiro momento, não parece ser relevante se o conflito é travado por vários Estados ou entre vários grupos armados dentro de um Estado. Entretanto, e infelizmente, isto é relevante. A proteção oferecida pelo direito internacional humanitário em relação a um conflito

6 Para uma análise mais aprofundada do tema ver: BARTELS, Rogier. **Timelines, borderlines and conflicts. The historical evolution of the legal divide between international and non-international armed conflicts**.

7 Tradução nossa.

> armado internacional ou Interestatal é muito mais ampla do que aquela oferecida a um conflito armado não-internacional ou um conflito armado dentro de um Estado, apesar do sofrimento ser o mesmo ou até mesmo mais severo num conflito armado interno. Como resultado, a natureza do conflito realmente faz diferença, e uma delimitação correta pode ser de vital importância para a proteção das pessoas contra a barbárie, que ainda se encontra frequentemente presente em conflitos armados.[8] (VERHOEVEN, 2007, p.3).

Atualmente, existem conflitos armados que não se encaixam nas definições clássicas de conflitos armados internacionais e não-internacionais. São os chamados "conflitos armados internacionalizados", que apresentam características tanto de um quanto de outro, formando uma espécie de conflito híbrido ou misto (CRAWFORD, 2008, p.20). Dentre várias situações hipotéticas que se encaixam em referido conceito, pode-se citar como exemplo a guerra travada entre forças governamentais de um determinado Estado e facções rebeldes ou grupos armados, com a intervenção[9] de um ou mais Estados estrangeiros apoiando o governo, as facções rebeldes ou os grupos armados (VERHOEVEN, 2007, p.15). Sobre o tema, a Câmara de Apelações do Tribunal Penal Internacional para a ex-Iugoslávia, em sua decisão datada de 15/07/1999 no caso *Dusko Tadic* (Caso nº IT-94-1), afirmou que:

> É indiscutível que um conflito armado é internacional se o mesmo ocorre entre dois ou mais Estados. Ademais, no caso de um conflito armado interno se desencadear no território de um Estado, ele pode tornar-se internacional (ou, dependendo das circunstâncias, possuir caráter internacional ao lado de um conflito armado interno) se (i) outro Estado intervir naquele conflito através de suas tropas, ou alternativamente se (ii) alguns dos participantes no conflito armado interno agir em nome daquele outro Estado.[10] (TPII, 1999, p.34, parágrafo 84).

No âmbito do Estatuto de Roma, há condutas consideradas como crimes de guerra tanto no caso de conflitos armados internacionais como no caso de conflitos armados internos, sendo que a proteção dada pelo Estatuto é mais ampla nos conflitos de índole internacional. Por exemplo, o ataque intencional a hospitais é considerado como crime de guerra em ambas as espécies de conflito armado (artigo 8º, 2, "b", ix e artigo 8º, 2, "e", iv). Já a proibição em se utilizar armas ou métodos que causem ferimentos supérfluos ou sofrimento desnecessário (artigo 8º, 2, "b", xx) só está presente no contexto de conflitos armados internacionais.

No entanto, é importante notar que, após a entrada em vigor de uma emenda ao artigo 8º do Estatuto de Roma, em 26/09/2012, acrescentando condutas aos conflitos de índole não-internacional que antes eram exclusivas dos conflitos internacionais, referida diferença de proteção legislativa entre ambos tipos de conflito foi reduzida consideravelmente. Cumpre ressaltar, porém, que esta emenda é válida somente para os países que ratificaram tal emenda ao artigo 8º, estando este número atualmente em 34 (trinta e quatro) países ratificantes[11].

Esclarecido este ponto, o artigo 8º, 2, "a" do Estatuto de Roma (ONU, 1998) define como crimes de guerra a prática de condutas que se traduzem em graves violações às Convenções de Genebra como, por exemplo, o homicídio doloso (i) e a tomada de reféns (viii). No tocante à alínea "b", são descritas condutas que derivam de várias fontes legais e consuetudinárias aplicáveis à conflitos armados internacionais como: a Convenção de Haia de 1907 (Leis e Costumes de Guerra em terra); o Protocolo I Adicional às Convenções de Genebra (Proteção das Vítimas de Conflitos Armados Internacionais); a Declaração de Haia de 1899 que trata sobre Projéteis Expansivos; o Protocolo de Genebra de 1925 sobre a proibição do uso de Gases Venenosos (DÖRMANN, 2003, p.343/344).

O artigo 8º, 2, "c" (ONU, 1998) trata sobre condutas que constituem graves violações ao artigo 3º comum às Convenções de Genebra como, por exemplo, os atos de violência contra a vida e a pessoa, em particular, o homicídio, a mutilação, o tratamento cruel e a tortura. Por fim, a alínea "e" cobre outras graves violações de leis e costumes aplicáveis à conflitos armados não-internacionais derivadas, por exemplo, da Convenção de Haia de 1907 e do Protocolo II Adicional às Convenções de Genebra que versa sobre a Proteção das Vítimas de Conflitos Armados sem Caráter Internacional (DÖRMANN, 2003, p.344/345).

8 Tradução nossa.

9 Sobre as formas de intervenção de Estados estrangeiros em conflitos armados não-internacionais ver: SCHINDLER, Dietrich. **International humanitarian law and internationalized internal armed conflicts**; VITÉ, Sylvain. **Typology of armed conflicts in international humanitarian law: legal concepts and actual situations**.

10 Tradução nossa.

11 Informação disponível no site: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-a&chapter=18&clang=_en.

Para que o indivíduo se enquadre em qualquer uma das condutas descritas no artigo 8º, não é exigível, de acordo com o documento "Elementos dos Crimes" (TPI, 2011), que o agente proceda a uma avaliação legal sobre a existência ou não de um conflito armado ou sobre sua natureza internacional ou interna. Assim, também não é necessário que o agente esteja ciente dos fatos que determinaram o caráter internacional ou interno do conflito. O único requisito geral, dentro deste contexto, que necessita estar presente, é a ciência por parte do agente das circunstâncias fáticas que estabeleceram a existência do conflito armado.

2.2. Competência em razão do lugar (*ratione loci*)

A competência territorial, em sua acepção clássica, é estabelecida em razão de um determinado espaço geográfico onde ocorrem os fatos que poderão ser conhecidos, processados e julgados pela autoridade estatal (BRINA; LIMA, 2006, p.141). No que tange ao TPI, o artigo 12, 2, "a", do Estatuto de Roma (ONU, 1998) estabelece o seu poder jurisdicional de conhecer, processar e julgar crimes de acordo com o local onde foram cometidos. Preliminarmente, é importante esclarecer-se sobre este ponto que:

> De acordo com o Direito Internacional, os crimes de genocídio, guerra e os crimes contra a humanidade possuem jurisdição universal. Isso implica atribuir o direito ou mesmo a obrigação a qualquer Estado do globo para julgar crimes dessa natureza, mesmo na ausência de nexo quanto à nacionalidade do perpetrador, da vítima ou do lugar em que o delito fora cometido. Por essa razão, algumas delegações pugnaram pela transposição desse sistema também para o âmbito do Tribunal. Contudo, mais uma vez, considerações políticas, devido às repercussões nas relações diplomáticas, impediram uma maior autonomia jurisdicional do Tribunal, restringindo, consequentemente, sua esfera de aplicação territorial. Desse modo, o campo de incidência territorial, no caso específico do TPI, ficou restrito aos Estados signatários do Tratado de Roma nos quais tenham sido cometidos atos delituosos; ou, se a bordo de um navio ou aeronave, o Estado de sua respectiva matrícula. (BRINA; LIMA, 2006, p.141-143).

Apesar de não possuir jurisdição universal, o artigo 12 do Estatuto de Roma (ONU, 1998), conforme visto, prevê a possibilidade de que nacionais de países não-Parte do Estatuto sejam julgados pelo TPI, desde que o crime tenha sido cometido no território de um Estado-parte. Esta norma legal sofreu forte oposição de alguns países, principalmente dos Estados Unidos, chegando os mesmos a questionarem a própria legalidade do TPI, uma vez que referida norma supostamente feriria a regra *pacta tertiis nec nocent nec prosunt*, consagrada no artigo 34 da Convenção de Viena sobre o Direito dos Tratados, que prega que um tratado não cria obrigações nem direitos para um terceiro Estado sem que haja o seu consentimento (WAGNER, 2003, p.487).

No entanto, este argumento é falho por embasar-se numa confusão entre as noções de obrigação e interesse. O Estatuto de Roma não cria nenhuma obrigação aos Estados não-parte do mesmo, uma vez que seu artigo 17 consagra o princípio da Complementaridade, ou seja, o TPI somente exercerá sua jurisdição caso o Estado competente para processar o crime não queira ou não possua condições de fazê-lo. Isso se revela como uma questão envolvendo mero interesse dos Estados não-parte, e não como uma obrigação criada sem o seu consentimento, o que demonstra que o Estatuto de Roma claramente não viola as regras do Direito Internacional (MÉGRET, 2001, p.249). Também nesse sentido:

> [...] a alegação que lá [no Estatuto de Roma] existe uma obrigação para Estados não-partes carece de uma fundamentação clara. O Estatuto do TPI não impõe uma obrigação a um Estado não-parte em cooperar com o Tribunal, de acordo com seus artigos 86 et seq. Essa não-obrigação refere-se a qualquer tipo de assistência concebível, e.g. a entrega de supostos perpetradores ou evidência. Parece que dois conceitos distintos estão entrelaçados nesta linha de argumento. Isto diz respeito à imposição de obrigações por tratados a Estados não-partes, por um lado, e o exercício de jurisdição sobre nacionais de tais estados. Ademais, tanto a nacionalidade (ativa) quanto a territorialidade são princípios bem reconhecidos como bases para a jurisdição. Neste sentido, o regime jurisdicional do TPI não é extraordinário. É, além do mais, reconhecido que o estado cujo o território a conduta criminal ocorreu, possui jurisdição concorrente com o estado de nacionalidade. Caso se aceite esta proposição – e a maioria dos países com um sistema legal Anglo-Americano concordam plenamente com a territorialidade como a principal base para o exercício da jurisdição – é direito territorial do estado em processar a pessoa dentro de seu próprio sistema legal, extraditar aquela pessoa para outro país com um título jurisdicional, ou entregá-la a outro foro, que poderia ser o TPI. Referida base jurisdicional está incorporada na maioria das convenções de direito criminal internacional, nas quais tal distinção entre nacionais e não-nacionais não existe. Assim, não se pode alegar que o Estatuto do TPI cria qualquer obrigação para um Estado não-parte. Pelo contrário, o regime jurisdicional do TPI segue de perto o de muitos sistemas legais

domésticos.[12] (WAGNER, 2003, p.487-489).

A regra da territorialidade estabelecida pelo artigo 12 do Estatuto de Roma (ONU, 1998) pode gerar dúvidas em relação à sua aplicação em certos casos que envolvam o território de Estados-parte e não-parte como, por exemplo, quando uma conduta criminosa é perpetrada no território de vários países ou quando um crime é praticado em um Estado, mas produza seu resultado no território de outro. Atualmente, é possível afirmar que, nestes casos, todos os Estados que possuírem uma conexão com a conduta poderão exercer plenamente sua jurisdição e, por conseguinte, também o TPI, respeitado o princípio da Complementaridade (WAGNER, 2003, p.484/485).

Quando o artigo 12 afirma que o TPI será competente nos casos onde a conduta tenha ocorrido dentro dos limites territoriais de um Estado-parte, sendo silente quanto ao resultado que a mesma possa ocasionar, não é prudente que tal regra seja interpretada de forma literal, sob pena de gerar situações absurdas. Por exemplo, caso um ataque perpetuado por um agente localizado no território de um Estado não-parte venha a atingir o espaço geográfico de um Estado-parte, obviamente que este último, em cujo território ocorreu o resultado, será competente para processar o crime, assim como o TPI. Pensar o contrário resultaria na legitimação de situações incoerentes com o escopo do Estatuto de Roma, bem como do próprio Direito Internacional, nas quais criminosos se furtariam à jurisdição do Tribunal.

2.3. Competência em razão da pessoa (*ratione personae*)

A competência em razão da pessoa, sob o Estatuto de Roma, é definida levando-se em conta certos atributos ostentados pelo agente que cometeu o crime. Em seu artigo 12, 2, "b", o Estatuto (ONU, 1998) preconiza que o TPI poderá exercer sua jurisdição caso o perpetrador da conduta criminosa possua a nacionalidade de um Estado-parte do Estatuto, adotando-se, desta forma, o Princípio da Nacionalidade ou Personalidade Ativa. Portanto, a nacionalidade da vítima não influi para estabelecer a competência *ratione personae* do Tribunal. Porém, é importante destacar que:

> Uma exceção a esta estreita autorização existe, entretanto. O TPI possui, virtualmente, – ao menos numa base legal e deixando considerações políticas de lado – jurisdição pessoal ilimitada para aquelas situações que lhe são indicadas pelo Conselho de Segurança, sob o artigo 13 (b) de seu Estatuto. Apenas através de tal indicação o requisito da nacionalidade não existe. O mesmo também é verdade para o requisito de que a suposta conduta deva ter sido realizada no território de um Estado parte.[13] (WAGNER, 2003, p.483).

Ainda sobre a competência *ratione personae*, "[...] a regra é que o Tribunal só exerce sua jurisdição para pessoas físicas maiores de 18 anos. Portanto, excluem-se da competência do TPI, v.g., os Estados, as organizações internacionais e as pessoas jurídicas de direito privado" (MAZZUOLI, 2015, p.1051). Esta regra encontra-se consagrada nos artigos 25 e 26 do Estatuto de Roma (ONU, 1998).

Por fim, o artigo 27 do Estatuto de Roma (ONU, 1998) afirma que nenhuma qualidade oficial do indivíduo o eximirá de sua responsabilidade criminal perante o TPI, nem constituirá motivo, por si só, para a redução de sua pena em caso de condenação. Além disso, referido artigo esclarece que "As imunidades ou normas de procedimento especiais decorrentes da qualidade oficial de uma pessoa, nos termos do direito interno ou do direito internacional, não deverão obstar a que o Tribunal exerça a sua jurisdição sobre essa pessoa".

Entretanto, existe uma exceção específica a esta regra, envolvendo à cooperação dos Estados-parte na entrega de indivíduos ao TPI. O artigo 98, 1, do Estatuto de Roma (ONU, 1998) prega que o Tribunal não poderá dar andamento a um pedido de entrega ou de auxílio, caso isto leve o Estado-parte requerido a agir de forma incompatível com as obrigações por ele assumidas perante o Direito Internacional, em matéria relacionada às imunidades de um terceiro Estado, a menos que este último concorde com o levantamento de tais imunidades. Isto não significa que o Estado-parte esteja proibido de efetuar a entrega voluntariamente, sendo que, caso esta seja realizada, o agente entregue sob a jurisdição do TPI não terá qualquer espécie de tratamento especial em relação a outros réus (SCHABAS, 2004, p.81). De forma semelhante:

> [...] o Tribunal também está proibido de realizar um pedido de entrega que exigisse de um Estado parte a agir inconsistentemente com certos acordos internacionais concluídos com um terceiro Estado. A disposição – Artigo 98 (2) – foi feita com o

12 Tradução nossa.

13 Tradução nossa.

objetivo de assegurar que uma classe bastante comum de tratados conhecidos como "acordos de status de força" (ou SOFAs) [em inglês: *status of forces agreements*] não fossem enfraquecidos ou neutralizados pelo Estatuto. Os SOFAs são utilizados para garantir que as forças de manutenção da paz ou tropas localizadas num país estrangeiro não estejam sujeitas à jurisdição dos tribunais deste país. Alguns advogados engenhosos do Departamento de Estado dos Estados Unidos tentaram perverter o Artigo 98 (2), redigindo tratados que escudassem todos os nacionais Americanos do Tribunal. Vários Estados parte sucumbiram à pressão de Washington e concordaram com tais acordos.[14] (SCHABAS, 2004, p.81).

Desta forma, logo após a entrada em vigor do Estatuto de Roma, os Estados Unidos partiram numa empreitada internacional para convencer os demais Estados a assinarem referidos acordos bilaterais de não-entrega de seus nacionais, tanto que, em 2011, noventa e cinco acordos desta natureza se encontravam vigentes[15], muitos deles envolvendo países parte do Estatuto. O tamanho e a força de tal empreitada foram tão intensos que acabaram se tornando um dos itens na pauta de discussão da 2450ª Sessão do Conselho Europeu (CE, 2002), datada de 30/08/2002, na qual foram estabelecidos Princípios Guias com o escopo de preservar a integridade do Estatuto de Roma no tocante às obrigações de cooperação assumidas perante o TPI. Ademais, uma opinião conjunta (CRAWFORD; SANDS; WILDE, 2003) sobre o tema também foi requerida pelos advogados do Comitê de Direitos Humanos e Fundação Médica para as vítimas de Tortura, com o objetivo de esclarecer a compatibilidade do artigo 98, 2, do Estatuto de Roma com referidos acordos bilaterais dos Estados Unidos.

O intento dos Estados Unidos em proteger seus nacionais da jurisdição do TPI com a negociação de referidos acordos é evidente. No entanto, indaga-se se tal conduta de aceitação destes acordos por Estados-parte do Estatuto de Roma feriria as regras impostas pelo Direito Internacional, mais especificamente aquelas estabelecidas pela Convenção de Viena sobre os Direitos dos Tratados (CVDT). Nesse sentido, o artigo 18 de dita Convenção (ONU, 1969) determina que os Estados não podem frustrar o objeto e a finalidade de um tratado ao qual tiverem assinado ou trocado instrumentos constitutivos, bem como que tiverem expressado seu consentimento em obrigar-se no período que preceda a sua entrada em vigor.

Ora, é amplamente aceito que a finalidade do Estatuto de Roma é erradicar a impunidade que protege aqueles que cometem os crimes de maior gravidade, os quais afetam a comunidade internacional como um todo. Esta conclusão pode ser embasada na redação dos parágrafos quinto e sexto do próprio preâmbulo do Estatuto. Assim, caso se submetam a esses acordos bilaterais de não-entrega de indivíduos, os Estados-parte do Estatuto de Roma estarão em manifesta violação de suas obrigações perante o Direito Internacional, uma vez que referidos acordos têm como escopo impedir a entrega ou a transferência de pessoas à jurisdição do TPI, criando uma espécie de imunidade exclusiva a estes indivíduos, o que tem o condão de fomentar a impunidade (TAN JUNIOR, 2003, p.1130/1131).

Nesse contexto, também é importante notar que referidos acordos bilaterais não possuem qualquer mecanismo que garanta que as pessoas proibidas de serem entregues ou transferidas ao TPI, sejam sujeitas a investigação por uma outra autoridade competente pelos crimes cometidos. Percebe-se, portanto, que o único objetivo desses acordos é privar o TPI de exercer sua jurisdição sob certas pessoas. No máximo, tais acordos constam em sua redação[16] que os países contratantes expressam suas intenções de, quando adequado, investigar e processar os crimes sob a jurisdição do TPI, o que, nem remotamente, é suficiente para afastar a potencial impunidade dos indivíduos que os acordos bilaterais de não-entrega visam proteger (TAN JUNIOR, 2003, p.1131/1132).

Ademais, um acordo que proíba um Estado-parte de entregar um suspeito ao TPI, infringe o dever geral de cooperação plena consagrado no artigo 86 do Estatuto de Roma (ONU, 1998), o que, por sua vez, também viola o artigo 26 da CVDT (ONU, 1969), que prega que todo tratado em vigor obriga as partes e deve ser cumprido por elas de boa-fé (BENZING, 2004, p.218).

Outra questão pertinente à validade dos acordos bilaterais de não-entrega perante o artigo 98, 2, do Estatuto de Roma (ONU, 1998) diz respeito ao momento

14 Tradução nossa.

15 Informação disponível em http://www.amicc.org/usicc/bialist.

16 Um modelo padrão dos Acordos Bilaterais de Não-Entrega pode ser encontrado em: BENZING, Markus. **U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties**, p.191/192.

da conclusão dos mesmos, ou seja, se são anteriores ou posteriores à entrada em vigor, ou até mesmo à assinatura, de referido Estatuto. O artigo 31 da CVDT (ONU, 1969) preconiza que os tratados devem ser interpretados de boa-fé, de acordo com o sentido comum atribuível contextualmente aos seus termos e à luz de seu objetivo e finalidade. Pois bem, o propósito do artigo 98, 2, do Estatuto de Roma é proteger o Estado-parte de uma situação que envolva obrigações internacionais conflitantes, ou seja, prevenir que o mesmo, uma vez que já possuísse previamente um acordo de não-entrega firmado com um Estado não-parte, tivesse de escolher entre o envio ou não de um indivíduo ao TPI, violando, desta forma, sua obrigação com uma das partes interessadas. Tendo em vista este contexto, um Estado-parte não pode se aproveitar, de boa-fé, da proteção proporcionada pelo artigo 98, 2, caso tenha se colocado, voluntariamente, numa situação de conflito obrigacional, após tornar-se parte do Estatuto de Roma (BENZING, 2004, p.216-218). Por fim:

> [...] a história da negociação confirma as conclusões encontradas. Na Conferência de Roma, os negociadores estavam preocupados com o fato de que os estados talvez estariam relutantes em ratificar o Estatuto, devido a preocupações em se violar acordos concluídos *previamente*, em particular os SOFAs e tratados bilaterais de extradição. O artigo 98 (2) foi especificamente introduzido para lidar com essa preocupação.[17] (BENZING, 2004, p.219).

2.4. Competência em razão do tempo (*ratione temporis*)

O artigo 11 do Estatuto de Roma (ONU, 1998) afirma que o TPI somente terá competência em relação aos crimes cometidos após a sua entrada em vigor (01/07/2002), sendo que, caso algum país venha a se tornar parte depois desta data, o Tribunal só será competente para processar os atos criminosos praticados posteriormente à vigência do Estatuto para referido país. No entanto, o Estado poderá fazer uma declaração, nos termos do artigo 12, 3, do Estatuto de Roma, para aceitar a jurisdição do TPI em relação a crimes cometidos no lapso temporal que compreende a entrada em vigor internacional do Estatuto, e a entrada em vigor do Estatuto para tal Estado.

Logo, nenhum crime cometido antes da entrada em vigor internacional do Estatuto de Roma, na data de 01/07/2002, poderá ser julgado pelo TPI, ainda que se trate da situação excepcional, autorizada pelo artigo 13, "b", do Estatuto, que permite ao Conselho de Segurança da ONU, agindo nos termos do Capítulo VII da Carta das Nações Unidas, o encaminhamento ao Tribunal de casos que envolvam a prática de crimes sob a jurisdição deste último. Mesmo nesta situação excepcional, não basta que os crimes denunciados pelo Conselho sejam da competência do TPI, os mesmos também não poderão ter sido cometidos antes de 01/07/2002, pois o Tribunal "[...] é uma criatura do Estatuto, e não do Conselho de Segurança e, embora as resoluções do Conselho possam prevalecer sobre as obrigações dos Estados em matéria de tratados (Art. 103 da Carta), não podem alterar os poderes de uma organização independente."[18] (CRYER; FRIMAN; ROBINSON; WILMSHURST, 2007, p.138, nota de rodapé 98).

3. Análise da Competência do TPI no caso do ataque ao Hospital de Kunduz por Forças Americanas

O Centro de Trauma localizado na cidade de Kunduz, no Afeganistão foi aberto em 2011 pela Organização Internacional Não-governamental dos Médicos Sem Fronteiras (MSF). Referido hospital oferecia tratamento gratuito e de alta qualidade a seus pacientes, vítimas de traumas em geral. Esta era a única instalação na região nordeste do Afeganistão que oferecia este tipo de tratamento, sendo que, desde sua inauguração, mais de quinze mil cirurgias foram realizadas e mais de sessenta e oito mil pacientes em estado de emergência foram tratados (MSF, 2015).

No dia 28/09/2015, forças do Talibã invadiram a cidade de Kunduz, dando início a um combate armado com as forças do governo Afegão. Tendo em vista o aumento da intensidade do conflito instaurado, os MSF, no dia 29/09/2015, confirmaram com as respectivas partes envolvidas nas hostilidades – incluindo o Departamento de Defesa dos Estados Unidos e o exército Americano em Cabul, uma vez que este país prestava auxílio às forças governamentais Afegãs – a já muito bem conhecida localização do hospital, através do envio

17 Tradução nossa.

18 Tradução nossa.

das coordenadas de GPS exatas da mesma. O Departamento de Defesa e exército Americanos, bem como o Ministro do Interior e Defesa do Afeganistão, acusaram o recebimento da localização de referido Centro de Trauma (MSF, 2015).

Mesmo assim, na madrugada do dia 03/10/2015, foi autorizado pelos Estados Unidos um ataque na localidade exata onde se encontrava o Hospital de Kunduz. Por mais de uma hora, durante a qual os MSF emitiram vários avisos que o local estava sob ataque, o hospital foi bombardeado pelo avião americano AC-130U, deixando quarenta e dois mortos e trinta e sete feridos[19]. No momento do ataque, cento e cinco pacientes se encontravam no hospital, e duas, das três salas de operação, estavam sendo utilizadas. Sobreviventes relatam que pacientes queimaram em suas camas e integrantes da equipe médica tiveram seus membros amputados durante o bombardeio (MSF, 2015).

Nos primeiros relatórios após o incidente, foi indicado que o ataque aéreo havia sido requisitado por forças Americanas que estavam sendo ameaçadas por combatentes do Talibã em solo. No entanto, em entrevista concedida à imprensa no dia 05/10/2015, o então Comandante da Missão de Apoio Resoluto e das Forças dos Estados Unidos no Afeganistão, General John Francis Campbell, afirmou que, diferentemente dos relatórios iniciais, foram forças Afegãs que haviam solicitado apoio aéreo Americano, o que resultou na destruição do hospital (EUA, 2015).

No dia 06/10/2015, o General Campbell prestou novos esclarecimentos, afirmando que a decisão em fornecer apoio aéreo havia sido uma decisão dos Estados Unidos, realizada dentro de sua cadeia de comando, sendo que o hospital tinha sido atingido por acidente em decorrência de referido apoio[20]. Uma investigação, conduzida por militares Americanos, foi aprovada em 21/11/2015 pelo General Campbell para apurar o incidente (EUA, 2016), porém, uma investigação independente foi demanda pelos MSF à Comissão Humanitária Internacional para a Apuração de Fatos[21], uma vez que acreditavam que o ocorrido tratava-se de um crime de guerra (MSF, 2016).

Em abril de 2016, o Departamento de Defesa dos Estados Unidos liberou o sumário referente às conclusões das investigações sobre o incidente do Hospital de Kunduz. No documento, afirma-se que a tribulação do avião AC-130U, em apoio a forças Americanas e Afegãs em solo, cometeu um erro de identificação e acabou atingindo o hospital, sendo que, nem a tripulação, nem as forças em solo, estavam cientes de que a aeronave atirava numa instalação médica. Concluiu-se, assim, que o incidente foi causado por uma combinação de erros humanos, agravados por falhas no processo e equipamento. Ademais, concluiu-se que o pessoal envolvido falhou em cumprir com as regras de engajamento e com a lei de conflitos armados, mas que, tais falhas, não constituíam um crime de guerra, uma vez que as condutas não tinham sido intencionais (EUA, 2016).

Por fim, a investigação identificou dezesseis membros do serviço Americano, cujas condutas ensejaram a tomada de ações disciplinares ou administrativas. Destes, doze foram punidos através das seguintes ações: suspensão e remoção da posição de comando, cartas de reprimenda, aconselhamento formal e, novo treinamento extensivo. Segundo o documento, medidas também foram tomadas para melhorar as operações militares no Afeganistão como, por exemplo, a realização de treinamento suplementar para as tropas e a revisão dos equipamentos utilizados nas operações. Ademais, foram aprovados pelo Departamento de Defesa a quantia de cinco milhões e setecentos mil dólares para a reconstrução do hospital, além do pagamento de indenizações a mais de cento e setenta indivíduos e suas famílias afetados pelo incidente (EUA, 2016).

Parte-se, neste momento, para a análise da competência do TPI para conhecer, processar e julgar o presente caso. Referida análise será conduzida com base nas informações já apresentadas anteriormente neste estudo.

4.1. Competências *ratione personae, ratione temporis* e *ratione loci*

Conforme visto, nenhuma qualidade pessoal influi na competência do TPI para julgar indivíduos maiores de idade, que venham a praticar alguma das condutas elencadas no artigo 5º do Estatuto de Roma (ONU, 1998). Assim, a competência *ratione personae* não desper-

19 Dados obtidos no site http://kunduz.msf.org/.

20 Vídeo do esclarecimento prestado pelo General John Francis Campbell disponível em https://www.nytimes.com/2015/10/06/world/asia/afghanistan-kunduz-doctors-without-borders-hospital.html.

21 Em inglês: "International Humanitarian Fact-Finding Commission".

ta maiores controvérsias, podendo os perpetradores do ataque ao Hospital de Kunduz serem processados pelo Tribunal.

A conduta em análise ocorreu em 03/10/2015, na cidade de Kunduz, localizada no Afeganistão, que ratificou o Estatuto de Roma na data de 10/02/2003[22]. Portanto, a ação que causou o incidente foi posterior à entrada em vigor do Estatuto para o Afeganistão, possuindo o TPI competência *ratione temporis* em relação ao caso. Já a competência em razão do lugar, naquilo que preconiza o artigo 12, 2, "a" do Estatuto (ONU, 1998), encontra-se também satisfeita para que o Tribunal possa exercer sua jurisdição, uma vez que a conduta foi perpetrada no território de um Estado-parte.

Porém, no que tange a esta última competência, existe dois pontos que merecem uma análise mais aprofundada: aquele que diz respeito ao Princípio da Complementaridade, presente no artigo 17 do Estatuto de Roma (ONU 1998), e ao *ne bis in idem* (dupla punição), preconizado no artigo 20 de dito Estatuto. Neste sentido:

> Sob a rubrica de "admissibilidade", no Artigo 17, o Estatuto endereça a complexa relação entre os sistemas legais nacionais e o Tribunal Penal Internacional. O Tribunal é obrigado a considerar um caso inadmissível, quando este está sendo lidado apropriadamente por um sistema nacional de justiça. [...]
>
> O Artigo 17 (1) declara que um caso é inadmissível quando está sendo investigado ou processado por um Estado que possui jurisdição sobre o mesmo, ou quando o caso já tenha sido investigado e o Estado decidiu por não processá-lo. Nestas circunstancias, o Tribunal somente poderá proceder quando o Estado "não tiver vontade ou ter incapacidade real" de investigar ou processar o caso. [...]
>
> A questão da falta de vontade surgirá quando um sistema nacional de justiça está "realizando os procedimentos" para fazer parecer que a investigação e o processo estão em andamento, apesar de faltar a vontade de fazê-lo, ou até mesmo permitir um falso julgamento, para que em qualquer procedimento subsequente o acusado possa alegar que já foi julgado e condenado, e que qualquer novo julgamento está impedido pela aplicação da regra contra a dupla punição. O Estatuto requer que o Tribunal avalie essas questões "levando em consideração os princípios do devido processo reconhecido pelo direito internacional", sugerindo uma avaliação da qualidade da justiça do ponto de vista da equidade processual, talvez até mesmo substantiva. [...]
>
> Quando um caso já foi julgado por um sistema de justiça doméstico, o artigo da complementaridade no Estatuto aponta para outra disposição, a proibição da dupla punição ou *ne bis in idem*, estabelecida no Artigo 20 e codificada em importantes tratados de direitos humanos como o Pacto Internacional sobre os Direitos Civis e Políticos. O teste para avaliar se os procedimentos do julgamento nacional foram legítimos difere um pouco do padrão "incapaz ou sem vontade real" presente no Artigo 17, que se aplica às investigações pendentes ou concluídas e aos processos pendentes. Se um julgamento interno já foi concluído, o mesmo é um impedimento ao processamento pelo Tribunal, exceto no caso de procedimentos fraudulentos. Estes são definidos como julgamentos realizados para proteger um ofensor da responsabilidade criminal, ou que, de outro modo, não foram conduzidos com independência ou imparcialidade, sendo realizados de uma maneira que "dada as circunstâncias, seja incompatível com a intenção de levar a pessoa em causa perante a justiça".[23] (SCHABAS, 2004, p.85-88).

Pois bem, diante do Princípio da Complementaridade, tanto o Afeganistão, local onde ocorreu a conduta, como os Estados Unidos, cujos nacionais perpetraram a conduta, possuem jurisdição primária, estando o exercício da competência do TPI, num primeiro momento, reservada à ocorrência das circunstâncias excepcionais descritas pelo artigo 17 do Estatuto de Roma (ONU, 1998). No tocante ao Afeganistão, o presidente Ashraf Ghani Ahmadzai estabeleceu uma comissão composta por cinco investigadores para apurar as circunstâncias que levaram à captura da cidade de Kunduz pelo Talibã, bem como para analisar o ataque Americano ao Hospital de Kunduz. Referida comissão apuradora, liderada pelo ex-chefe da agência de inteligência nacional Afegã, Amrullah Saleh, tinha a missão de entregar um relatório ao presidente esclarecendo o que ocorrera em Kunduz, as reformas que deveriam ser feitas, bem como as lições aprendidas para o futuro[24]. No entanto, a comissão acabou excluindo o ataque ao Hospital de Kunduz de suas investigações (JEONG, 2016). Assim, percebe-se a falta de vontade de tal país em investigar, processar e julgar o caso.

Em relação aos Estados Unidos conforme visto, o caso foi conduzido por militares Americanos, sendo que dezesseis pessoas, cujas identidades sequer foram

22 Informações obtidas no site: https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/afghanistan.aspx.

23 Tradução nossa.

24 Informações disponíveis no site: http://www.usnews.com/news/world/articles/2015/10/10/afghan-president-appoints-investigators-for-kunduz-airstrike.

divulgadas, foram investigadas e, destas, doze foram "punidas" administrativamente, uma vez que se alegou a ausência de intenção na conduta. Pode-se afirmar, sem nenhuma dúvida, que esta situação encaixa-se com perfeição nas hipóteses excepcionais descritas no artigo 17, 2, "a" e "c" do Estatuto de Roma (ONU, 1998), pelos seguintes fatos: 1) o incidente foi investigado, processado e julgado por uma comissão liderada por militares Americanos, o que levanta suspeitas sobre a independência e imparcialidade da investigação; 2) apesar da a gravidade do incidente, bem como o fato de existirem vários indícios apontando para um crime, foi concluído na investigação dos Estados Unidos que o ocorrido não se tratava de crime de guerra por não ter havido intenção na conduta dos agentes, sendo estes punidos administrativamente. Não se questiona, sobre este ponto, a falta de um processo criminal em si, pois uma decisão administrativa, dependendo das circunstâncias, pode ser plenamente válida para afastar a competência do TPI, o que, evidentemente, não é o caso do ataque ao Hospital de Kunduz. A grave negligência, como se verá mais à frente no presente estudo, também é punível, não precisando existir, necessariamente, a intenção, o que por si só já demandaria uma investigação judicial, devido à complexidade das circunstâncias presentes; 3) várias circunstâncias e informações-chave envolvendo o ataque ao Hospital de Kunduz, não foram devidamente esclarecidas ou divulgadas, o que levanta suspeitas sobre a decisão administrativa ter sido proferida para proteger os perpetradores de sua responsabilidade criminal. Por exemplo: o fato de que, durante todo o ataque, os MSF alertaram as partes que estavam sendo atingidos e, mesmo assim, o bombardeio continuou a ocorrer por cerca de uma hora; o sigilo das gravações contendo a conversa entre a tripulação do avião AC-130U e as tropas Americanas em solo, nas quais há indícios do questionamento da legalidade da ordem de ataque pela tripulação[25]; o sigilo sobre a identidade dos militares punidos, o que impossibilita averiguar se referidas punições verdadeiramente existiram e, em caso positivo, se estão sendo cumpridas.

Assim, perante o exposto, a investigação promovida pelos Estados Unidos no caso do ataque ao Hospital de Kunduz, falha em cumprir com os requisitos da independência e da imparcialidade, tendo sido o processo administrativo conduzido de uma maneira que, dada as circunstâncias, foi inteiramente incompatível com a intenção de levar os perpetradores perante a justiça. Somado a isto, a extrema brandura da punição, frente à imensa gravidade do caso, aponta, inevitavelmente, para a intenção em se subtrair os agentes de suas devidas responsabilidades criminais frente ao TPI. Portanto, duas exceções do artigo 17 do Estatuto de Roma (ONU, 1998) encontram-se presentes, justificando a jurisdição do Tribunal para conhecer, processar e julgar o presente caso.

4.2. Competência *ratione materiae*

Para se definir a competência *ratione materiae* em relação à conduta praticada pelos militares Americanos, primeiramente é necessário que se determine qual a natureza do conflito armado, dentro do qual a mesma ocorreu. A guerra internacional travada no Afeganistão pelos Estados Unidos foi formalmente encerrada em 28/12/2014. Porém, forças militares Americanas permaneceram no país em apoio ao governo Afegão, para auxiliá-lo em sua luta contra o Talibã. Esta é uma situação que não se encaixa nos conceitos clássicos de conflito armado internacional e interno. Ou seja, trata-se de um cenário que se encaixa na noção moderna de conflitos armados híbridos ou mistos. Porém, com base na jurisprudência do caso *Dusko Tadic* (Caso nº IT-94-1), já citada anteriormente neste estudo, um conflito interno tornar-se-á internacional, caso outro Estado intervenha no mesmo através de suas tropas (TPII, 1999, p.34, parágrafo 84).

Desta forma, pode-se afirmar que o ataque ao Hospital de Kunduz ocorreu no contexto de um conflito armado internacional. Analisando-se o artigo 8º do Estatuto de Roma (ONU, 1998), é possível encontrar dois crimes de guerra internacional que se encaixam na conduta perpetrada pelos soldados Americanos: a do artigo 8º, 2, "b", iv e ix.

O primeiro crime, descrito no item iv, diz respeito à conduta de lançar intencionalmente um ataque, sabendo que o mesmo causará perdas acidentais de vidas humanas ou ferimentos na população civil, bem como danos em bens de caráter civil, que se revelem claramente excessivos em relação à vantagem militar global concreta e direta que se previa. Neste caso, a previsão legal tem como objetivo proteger a vida, integridade fí-

25 Informações disponíveis no site: http://www.slate.com/blogs/the_slatest/2015/10/16/kunduz_hospital_bombing_the_u_s_airstrike_is_looking_more_and_more_like.html.

sica e os bens da população civil.

O segundo crime, descrito no item ix, trata sobre o direcionamento intencional de ataque a edifícios consagrados ao culto religioso, à educação, às artes, às ciências ou à beneficência, monumentos históricos, hospitais e lugares onde se agrupem doentes e feridos, sempre que não se trate de objetivos militares. Aqui, o objetivo da norma é proteger locais específicos considerados importantes.

A conduta dos militares Americanos, além de ter sido direcionada a um local protegido pelo Direito Humanitário, qual seja, um hospital (item ix), também matou quarenta e duas pessoas e deixou trinta e sete feridas (item iv). Ou seja, apesar da conduta ter sido única, houveram dois resultados materiais, descritos em normas distintas sob o Estatuto de Roma. Cabe aqui, porém, um importante esclarecimento sobre os elementos dos crimes de guerra, mais especificamente no que diz respeito ao elemento mental da ação criminosa ou *mens rea*.

Ambas os crimes descritos exigem que haja a intenção do agente em praticar as condutas que os definem. Este, aliás, foi o principal argumento presente na investigação dos Estados Unidos para afastar a responsabilidade criminal de seus nacionais, qual seja, que o ataque não foi intencional. No entanto, esta alegação não é suficiente para eximir os agentes de sua responsabilidade no caso em análise, uma vez que houve, no mínimo, dolo direto de segundo grau na conduta dos mesmos.

O artigo 30 do Estatuto de Roma prega que, salvo disposição em contrário, "[...] nenhuma pessoa poderá ser criminalmente responsável e punida por um crime da competência do Tribunal, a menos que atue com vontade de o cometer e conhecimento dos seus elementos materiais" (ONU, 1998). Assim, como regra geral, um crime sob o Estatuto deve ser cometido tanto com intenção, como com conhecimento do indivíduo. A Câmara de Pré-Julgamento II do TPI já se pronunciou sobre este tema no caso *Jean-Pierre Bemba Gombo* (Caso nº: ICC-01/05-01/08), em decisão datada de 15/06/2009, na qual afirmou que:

> [...] os termos "intento" e "conhecimento", conforme mencionado no artigo 30(2) e (3) do Estatuto, reflete o conceito de *dolus*, o qual requer a existência tanto de um elemento volitivo, como um cognitivo. Geralmente, o *dolus* pode tomar uma de três formas, dependendo da força do elemento volitivo *vis-à-vis* ao elemento cognitivo – a saber, (1) *dolus directus de primeiro grau* ou intento direto, (2) *dolus directus de segundo grau* – também conhecido como intenção oblíqua, e (3) *dolus eventualis* – comumente referido como imprudência subjetiva ou advertida.
>
> Na visão da Câmara, o artigo 30(2) e (3) do Estatuto abarca dois graus de *dolus*. O d*olus directus de primeiro grau* (intento direto) requer que o suspeito saiba que suas ações ou omissões produzirão os elementos materiais do crime, e que as execute com a vontade proposital (intento) ou desejo de produzir referidos elementos materiais do crime. De acordo com o *dolus directus de primeiro grau*, o elemento volitivo é prevalente, uma vez que o suspeito, propositalmente, tem vontade ou deseja obter o resultado proibido.
>
> O *dolus directus de segundo grau* não requer que o suspeito tenha o real intento ou vontade de concretizar os elementos materiais do crime, e sim que o mesmo esteja ciente que tais elementos serão o resultado quase que inevitável de suas ações ou omissões [...]. Neste contexto, o elemento volitivo diminui substancialmente, sendo sobrepujado pelo elemento cognitivo, *i.e.* a consciência de que suas ações irão causar a consequência proibida *indesejada*.[26] (TPI, 2009, p.120/121, parágrafos 357-359).

Através da análise dos fatos que envolveram o ataque ao Hospital de Kunduz, pode-se afirmar que, se realmente não houve dolo direito de primeiro grau (intenção direta) na conduta, conforme supostamente alegado na investigação dos Estados Unidos, pelo menos o dolo direto de segundo grau esteve presente. Conforme visto, nesta espécie de dolo direto (intenção oblíqua), não há a necessidade que exista uma intenção real ou vontade do agente em concretizar o resultado material do crime, basta a ciência de que sua ação causará, quase que inevitavelmente, tal resultado. Ou seja, há uma diminuição considerável do elemento volitivo, dando espaço ao elemento cognitivo.

É inegável que, no mínimo, houve intenção oblíqua dos agentes, pelos seguintes fatos: 1) os militares sabiam a exata localização, através de coordenadas de GPS, do hospital, que fora fornecida dias antes do ataque; 2) como medida de precaução, duas bandeiras dos MSF foram colocadas no teto do hospital, além daquela já presente em sua entrada (MSF, 2015), aumentando-se as formas de identificação de referida instalação médica; 3) os avisos emitidos pelos MSF durante o ataque para alertar que o hospital estava sendo atingido.

Seja qual for a verdadeira intenção por trás da conduta dos agentes, somente pelas circunstâncias aqui enumeradas, já é possível afirmar o conhecimento de que as ações perpetradas concretizariam os resultados

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matérias de ambos os crimes de guerra aqui aduzidos. Esclarecido este importante ponto, volta-se à análise dos crimes de guerra cometidos pelos militares Americanos.

O fato que deu origem ao ataque no Hospital de Kunduz foi a requisição de apoio por tropas Afegãs em solo contra forças do Talibã. Não é nenhum segredo que vários combatentes Talibãs estavam sendo tratados em referido hospital. No entanto, é fato que os mesmos não estavam se utilizando de dita instalação médica como base ou local de resistência armada, conforme foi alegado por autoridades do Afeganistão, logo após o incidente, como forma de justificar o ataque (JEONG, 2016). Eles lá estavam pois foram feridos em combate e precisavam de atendimento médico urgente.

Além disso, no dia 01/10/2015, os MSF foram questionados por um oficial Americano localizado em Washington, se o hospital contava com um grande número de Talibãs escondidos em seu interior. Referida Organização Internacional respondeu que, dentre os pacientes que se encontravam sob seus cuidados médicos, haviam sim combatentes ligados ao Talibã (MSF, 2015), fato este que, por si só, não transforma automaticamente o hospital – um local internacionalmente protegido por lei – num alvo militar válido.

Por se tratar de uma organização neutra, os MSF não questionam a qual parte das hostilidades seus pacientes pertencem, uma vez que isto não é uma informação relevante do ponto de vista médico (MSF, 2015). Ou seja, eles se encontravam ali para prestar seus serviços para qualquer indivíduo que deles necessitassem, fossem eles combatentes Afegãos, Americanos ou ligados ao Talibã.

Portanto, pelo conjunto de informações que envolvem o incidente, conclui-se que tropas Afegãs solicitaram apoio militar Americano, para atacar um local, no caso o hospital, que alegavam estar sob controle do Talibã, servindo como base e refúgio para seus combatentes. Com isto em mente, é possível analisar mais a fundo os crimes de guerra perpetrados.

4.2.1. Artigo 8º, 2, "b", iv do Estatuto de Roma

A vantagem ou objetivo militar buscado no ataque ao Hospital de Kunduz era a destruição de um local que, supostamente, abrigava combatentes Talibãs, servindo de base para os mesmos. Na busca deste objetivo, várias vidas foram perdidas, civis foram feridos, e uma instalação médica de importância ímpar na região foi completamente destruída. O que irá dizer se este resultado constituiu-se em algo flagrantemente excessivo ao objetivo militar almejado, será o Princípio da Proporcionalidade, de observância obrigatória em qualquer conflito armado. Assim, antes de se executar qualquer investida, as partes de um conflito armado devem ponderar se os meios utilizados, bem como se os objetivos a serem alcançados, são proporcionais e justificáveis em relação ao dano colateral que seu ataque causará. Neste sentido, Francisco de Vitoria afirma que:

> [...] devemos nos lembrar [...] que todos os cuidados devem ser tomados para garantir que os efeitos maléficos da guerra não superem os possíveis benefícios almejados que a justificaram. Se o ataque a uma fortaleza ou cidade guarnecida pelo inimigo, porém cheia de habitantes inocentes, não seja de grande importância para uma eventual vitória na guerra, não parece permissível matar-se um grande número de pessoas inocentes, através do bombardeamento indiscriminado, a fim de se derrotar um pequeno número de combatentes inimigos. Finalmente, nunca é lícito matar pessoas inocentes, mesmo que acidentalmente ou involuntariamente, exceto quando se trate de uma guerra justa que não possa ser vencida de qualquer outra forma.[27] (VITORIA, 1991, p.315, 316).

Não se irá discutir aqui a proporcionalidade em relação ao *jus ad bellum*, ou seja, se a guerra dentro da qual o incidente de Kunduz ocorreu é considerada justa ou injusta, uma vez que este não é o foco do presente trabalho. O que importa do texto supracitado é a ideia de proporcionalidade no travamento da guerra (*jus in bello*). Vê-se que, para Francisco de Vitoria, a morte acidental de inocentes somente é aceitável, quando a vantagem militar for decisiva para uma vitória na guerra e não exista qualquer outra forma de se vencê-la. Ou seja, são dois requisitos que devem ser observados pelas partes nas hostilidades.

Indaga-se, portanto, se bombardear um hospital ativo era realmente a única estratégia existente no presente caso. O apoio deveria ter sido realizado por tropas em solo para, primeiramente, confirmar se realmente haviam forças Talibãs, armadas e prontas para o combate, dentro das instalações médicas. Como já salientado, os poucos combatentes Talibãs que se encontravam no local estavam destituídos de armas, e até mesmo de vestes ou adornos que os identificassem como tais, justamente para que se evitasse qualquer tipo de tensão dentro do

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hospital. Justamente por estarem recebendo tratamento médico, se encontravam, ainda que temporariamente, fora de combate, não representando qualquer ameaça imediata às partes contrárias no conflito.

Assim, no presente caso, não se consegue visualizar sequer a existência de um objetivo militar propriamente dito, quanto mais uma vantagem militar que justificasse a prática de um ato tão hediondo. Por todo exposto, conclui-se que os perpetradores do ataque ao Hospital de Kunduz praticaram o crime de guerra descrito no artigo 8º, 2, "b", iv do Estatuto de Roma (ONU, 1998).

4.2.2. Artigo 8º, 2, "b", ix do Estatuto de Roma

Através de uma interpretação a *contrario sensu* do crime de guerra descrito no artigo 8º, 2, "b", ix do Estatuto de Roma (ONU, 1998), somente seria lícito atacar os lugares protegidos por referida norma, caso se constituíssem em objetivos militares. Ocorre que, mesmo que algo seja considerado por uma parte como um objetivo militar, ainda assim é necessário que se pondere se as vantagens a serem alcançadas justificam os danos que também irão resultar da conduta.

Portanto, não é qualquer objetivo militar que será capaz de justificar um ataque a um hospital ou escola, eximindo os indivíduos que o perpetraram de sua responsabilidade criminal. Conforme visto no tópico anterior, a vantagem a se conquistar deve ser tamanha a ponto de contribuir de forma decisiva para uma eventual vitória da guerra. Obviamente que, dependendo da situação, isto não se traduz numa tarefa fácil, mas, no caso concreto em análise, o curso de ação a se tomar era óbvio: não atacar, de forma indiscriminada, um hospital em atividade.

Não se consegue imaginar de que forma o bombardeio ao Hospital de Kunduz poderia proporcionar uma vantagem militar considerável ou ter contribuído de forma decisiva com a vitória sobre o Talibã. Assim, não resta outra conclusão a não ser considerar que referido hospital não se tratava de um objetivo militar válido, não estando os perpetradores do ataque livres de sua responsabilidade criminal.

5. Considerações finais

O TPI foi criado com o objetivo de acabar com a impunidade dos indivíduos que cometem os crimes mais graves que afetam a comunidade internacional como um todo. Sendo assim, quando crimes de guerra, como o ataque ao hospital de Kunduz, são cometidos, toda a humanidade é afetada, exigindo uma resposta adequada em relação aos perpetradores da conduta proibida. Porém, em respeito à complementaridade, aos Estados que possuam jurisdição sobre o caso, é dada a primazia de lidar com o mesmo antes que o TPI possa exercer sua jurisdição, desde que os procedimentos sejam conduzidos de forma séria e justa, para se evitar que os criminosos sejam isentos, injustificadamente, de sua responsabilidade criminal.

Assim, o mínimo que se poderia esperar da investigação promovida pelos Estados Unidos, era que a mesma se pautasse na transparência e na imparcialidade, uma vez que, o crime perpetrado pelos nacionais daquele país, não concernem somente a eles ou ao Estado onde a conduta foi praticada, e sim a comunidade internacional como um todo.

Infelizmente, não foi com base na transparência e na imparcialidade que tal investigação foi conduzida. A mesma se mostra muito genérica e carece de provas que corroborem todo o alegado em favor da isenção da responsabilidade criminal dos militares envolvidos no incidente. Por exemplo, a conversa gravada entre a tripulação do avião AC-130U e as tropas em solo, que poderia provar cabalmente a inocência ou a culpa dos militares Americanos, não foi divulgada. E neste caso, acredita-se que o sigilo não se justifica, primeiramente porque, como já dito, o crime cometido concerne a toda comunidade internacional, que merece uma resposta adequada ao crime perpetrado e, em segundo lugar, duvida-se que um diálogo de poucas horas, gravado nestas circunstâncias, possa comprometer algum segredo de Estado que justifique o sigilo. Portanto, esta atitude evidencia a falta de seriedade através da qual foi realizada dita investigação, o que levanta suspeitas mais do que suficientes para a abertura de uma investigação independente e imparcial pelo TPI.

Por todas as informações e evidências aqui trazidas, pela gravidade do caso em questão, bem como pelos fundamentos apresentados em relação ao cometimento, pelos militares Americanos, dos crimes estabelecidos no

artigo 8º, 2, "b", iv e ix do Estatuto de Roma (ONU, 1998), acredita-se, fortemente, que o Procurador do TPI possua fundamentos suficientes para apresentar um pedido de autorização, perante o Juízo de Instrução, para a abertura de um inquérito sobre o incidente ocorrido Kunduz.

O ataque ao Hospital de Kunduz não se resume às vítimas imediatas, mortas e feridas durante o ataque, mas engloba milhares de outros indivíduos que têm deixado de receber atendimento médico gratuito e especializado, desde a destruição de referida instalação médica. Desta forma, considera-se que a instauração de um inquérito pelo TPI é uma medida essencial a ser tomada, para que este crime de guerra, de consequências nefastas, não fique impune. Ademais, referida medida reafirmaria a força, seriedade, imparcialidade e comprometimento do TPI, consolidando, ainda mais, a sua presença e excepcional importância perante a comunidade internacional.

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A criminalização dos imigrantes em situação irregular na itália: biopolítica e direito penal do autor

The criminalization of immigrants in irregular situation in italy: biopolytics and criminal law of the author

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A criminalização dos imigrantes em situação irregular na itália: biopolítica e direito penal do autor*

The criminalization of immigrants in irregular situation in italy: biopolytics and criminal law of the author

Maiquel Angelo Dezordi Wermuth**

Jeannine Tonetto de Aguiar***

Resumo

A percepção dos processos migratórios como problema de segurança nacional, principalmente a imigração irregular, levou à adoção pelos Estados de regulamentações jurídicas a partir das quais se assiste ao triunfo de políticas e práticas em total desrespeito aos direitos e garantias fundamentais humanos. Identificados e classificados como "sujeitos de risco", isto é, "inimigos" que ameaçam a ordem social, os imigrantes em condição de irregularidade migratória são transformados em objetos de um discurso criminalizador não apenas nos debates públicos e políticos, mas também na legislação, como é o caso da criminalização do imigrante irregular na legislação italiana analisado na presente pesquisa ¾ que evidencia um movimento de retrocesso do Direito Penal ao institucionalizar um modelo de Direito Penal de autor fundamentado em medidas de dominação e opressão que preconizam tão somente a exclusão desses sujeitos.

Palavras-chave: Direitos Humanos. Imigração irregular. Direito Penal. Biopolítica.

Abstract

The perception of migratory processes as a problem of national security, especially irregular immigration, led to the adoption by the States of legal regulations from which they can witness the triumph of policies and practices in total disregard for rights and guarantees human fundamental. Identified and classified as "subjects of risk", that is, "enemies" that threaten the social order, immigrants in the condition of migratory irregularity are transformed into objects of a criminalizing discourse not only in public and political debates, but also in legislation, such as the criminalization of the irregular immigrant in Italian – legislation analyzed in the present investigation – that shows a movement of retrogression of Penal Law when institutionalizing a model of Penal Law of author based on measures of domination and oppression that only recommend the exclusion of these subjects.

Keywords: Human Rights. Irregular immigration. Penal Law. Biopolitics.

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1. Introdução

Caso 1: em 23 de fevereiro de 2012, a Corte Europeia de Direitos Humanos julgou o caso "Hirsi Jamaa e outros v. Itália", levado àquela Corte por um grupo de vinte e quatro cidadãos somalis e eritreus, que alegaram imediata expulsão coletiva sem análise devida dos casos, expondo-os a inúmeros riscos e maus tratos. De acordo com os fatos do caso, os imigrantes eram parte de um grupo de cerca de duzentas pessoas que deixaram a Líbia a bordo de três navios, com o objetivo de alcançar a costa italiana. Em 6 de maio de 2009, eles foram interceptados por três navios da guarda costeira e da Polícia da Receita italiana (*Guardia di Finanza*), sendo, posteriormente, transferidos para navios militares que os encaminharam para Trípoli, na Líbia.

Os recorrentes afirmaram que, durante essa viagem, não tiveram informações sobre seu destino pelas autoridades italianas, que, também, não tomaram qualquer medida para identificá-los, tendo sido, apenas, entregues às autoridades líbias quando da chegada ao porto de Trípoli, com base no acordo bilateral entre os Estados, assinado em 29 de dezembro de 2007. Dois cidadãos morreram em circunstâncias desconhecidas durante esses eventos[1].

Caso 2: o caso *Left-To-Die Boat*, assim denominado por Charles Heller e Lorenzo Pezzani[2] em relatório no âmbito do projeto *Forensic Oceanography,* evidencia, além do descaso nas interceptações e nas repatriações imediatas, outras situações de extrema violência nas ações e nos regimes de controle das fronteiras. Segundo o relato, em 27 de março de 2011, setenta e dois migrantes fugiam de Trípoli em um barco quando, no início da manhã, ficaram sem combustível e permaneceram à deriva por quatorze dias até retornarem novamente ao litoral da Líbia. Sem água e comida no barco, apenas nove desses migrantes sobreviveram. Em várias entrevistas, os sobreviventes relataram os contatos que tiveram com o mundo externo durante o período no mar, contatos que incluem um avião que sobrevoou sobre eles, o pedido de socorro enviado mediante telefones via satélite, um helicóptero militar que lançou alguns pacotes de biscoitos e algumas garrafas de água e um navio militar que não lhes ofereceu nenhuma assistência.

Ou seja, apesar dos pedidos de ajuda enviados ao órgão de resgate marítimo italiano e também da presença aérea e naval na área, em razão da intervenção militar na Líbia, nenhuma assistência foi prestada para evitar a morte de dezenas de migrantes em perigo no mar, em total violação aos Tratados e Convenções Internacionais de Direitos Humanos.

Esses dois casos, selecionados dentre tantos outros congêneres, revelam a dramaticidade que envolve a questão da imigração irregular na Europa e, particularmente, na Itália. O tema da acentuação contemporânea dos fluxos de mobilidade humana, impulsionada pela globalização e pelo avanço tecnológico requer reflexão. Nesse cenário, no qual a intensificação dos fluxos migratórios atingiu um ponto no qual a regulamentação jurídica pelos Estados, apresenta sintomas de falência, é preciso pensar, sobretudo, sobre a perspectiva da proteção do imigrante e da garantia de seus direitos.

Com efeito, o que se tem assistido no campo das discussões acerca das migrações internacionais contemporâneas é uma vinculação do assunto ao das soberanias estatais. Nesse rumo, migrar significa transpor essas fronteiras políticas, de modo que, ao fazê-lo, o imigrante se coloca sob a jurisdição do outro Estado que, baseado na sua soberania, define critérios de inclusão e exclusão. Apesar do fortalecimento, na virada do século XX, de vertentes no âmbito do Direito Internacional voltadas à proteção da pessoa que, com base nos Direitos Humanos, buscam fomentar a limitação do poder soberano atribuído aos Estados. A partir da Primeira Guerra Mundial, essa balança começou a pender, mais fortemente, para a soberania nacional, como se tem evidenciado na Europa, onde os países têm regulamentado a movimentação humana, apenas, sob a perspectiva de critérios de admissibilidade e de expulsão que variam, consideravelmente, a depender da conjuntura econômica e política de cada país.

Atualmente, os Estados detêm competência para regulamentar o acesso ao seu território, conforme seus próprios critérios e conveniências, e, assim, recusar a entrada e a permanência de imigrantes, desde que em observância às regras de Direito Internacional. Em outras palavras, ainda que assegurada a soberania aos Estados quando da adoção de normas sobre a admissão e expulsão de estrangeiros em seu território, esse controle

1 EUROPEAN COURT OF HUMAN RIGHT. *Case of Hirsi Jamaa and others v. Italy*. 2012. Disponível em: <http://hudoc.echr.coe.int/>. Acesso em: 23 jan. 2016.

2 HELLER, Charles; PEZZANI, Lorenzo. *Situ Studio*: *report on the "Left-To-Die Boat"*. 2012. Disponível em: <https://www.fidh.org/IMG/pdf/fo-report.pdf>. Acesso em: 28 jan. 2017.

WERMUTH, Maiquel Angelo Dezordi; AGUIAR, Jeannine Tonetto de. A criminalização dos imigrantes em situação irregular na itália: biopolítica e direito penal do autor. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 368-387

soberano de suas fronteiras não é absoluto. Com isso, devem os Estados observar suas obrigações jurídicas internacionais, inclusive as que impõem a flexibilização de sua soberania quando o caso exigir amparo ao imigrante.

Essa limitação estatal no estabelecimento das políticas migratórias ganhou destaque, em setembro de 1994, na Conferência Internacional sobre população e desenvolvimento (Conferência de Cairo), quando se preconizou a importância de evitar ações arbitrárias de Estados receptores (políticas racistas e xenofóbicas, ou ainda, de políticas que permitam outras formas de castigo aos imigrantes que excedam a deportação). Por outro lado, no mesmo sentido de documentos anteriores, afirmou-se a necessidade de prevenção de condutas de exploração de imigrantes irregulares.

De modo geral, os instrumentos internacionais seguem disposições bastante próximas que, da mesma forma que visam à proteção dos imigrantes e à aplicação dos Direitos Humanos às demandas vinculadas à mobilidade humana, condenam as condutas de facilitação e promoção da imigração irregular. Inclusive, conforme se destaca na Declaração sobre os Direitos Humanos dos indivíduos que não são nacionais do país em que vivem, aprovada em dezembro de 1985 pela Assembleia Geral da Organização das Nações Unidas, pugna-se que as imigrações irregulares não devam ser regulamentadas, conforme o disposto no artigo 2º[3] do referido documento.

De igual modo, a Convenção Internacional sobre a proteção dos direitos de todos os trabalhadores migrantes e dos membros das suas famílias, adotada em dezembro de 1990 (em vigor apenas desde julho de 2003) não reconhece a regulamentação do imigrante em situação irregular. Por outro lado, ela também promove o "combate" a esse tipo de imigração indesejada pela União Europeia, sem deixar de exigir dos Estados-membros a obrigação de proteger os imigrantes, inclusive os irregulares. Nota-se, com isso, que, apesar desses documentos internacionais insistirem no "combate" à imigração irregular, não é permitido qualquer tratamento desumano ao imigrante nessa condição, bem como qualquer conduta de exploração desses indivíduos em decorrência de atividades criminosas (tráfico de pessoas, escravidão etc.).

Observa-se, assim, na perspectiva internacional, alguns esforços no sentido de proteção ao imigrante sem constituí-lo em sujeito de risco, passível de criminalização. A problemática que orienta o presente artigo, nesse sentido, reside no fato de que, muito embora essas organizações internacionais sejam, atualmente, como os Estados, titulares de personalidade jurídica (e essa condição, em tese, se impor a toda comunidade internacional independentemente da ratificação do tratado constitutivo pelo Estado perante o qual se busca o reconhecimento), o que ocorre na prática é uma personalidade jurídica limitada, que, no campo da imigração, não obstante o fim declarado desses instrumentos, faz com que a proteção dos direitos fundamentais dos imigrantes não seja amplamente aceita pelos Estados. E mais, ao fomentar o controle dos fluxos migratórios e o "combate" à imigração irregular, esses instrumentos internacionais acabam servindo como "meio" (pelos Estados) para a utilização de mecanismos de controle social arbitrários, cujo exemplo maior é a criminalização do imigrante que, no presente estudo, será analisada a partir da realidade italiana.

Como hipótese básica, parte-se da ideia de que, paralelamente ao incremento do discurso da proteção internacional da pessoa a partir de instrumentos multilaterais com base nos Direitos Humanos, o que se verifica, não obstante o fim declarado desses instrumentos — qual seja, a proteção da pessoa, sobretudo do imigrante — é que eles acarretam mecanismos de segregação e criminalização do imigrante ou da imigração, consolidando — particularmente no caso italiano — um modelo de Direito Penal de autor.

Com efeito, os discursos políticos e midiáticos somados às práticas atuais de legislação e policialização

3 Artigo 2. 1. Nada na presente Declaração será interpretado de forma a legitimar a entrada e a presença ilegais de um estrangeiro em qualquer Estado, e nenhuma disposição será interpretada de forma a restringir o direito de qualquer Estado a promulgar leis e regulamentos relativos à entrada de estrangeiros e aos termos e condições da sua estadia ou a estabelecer diferenças entre nacionais e estrangeiros. Porém, tais leis e regulamentos não deverão ser incompatíveis com as obrigações jurídicas internacionais do Estado, incluindo as suas obrigações em matéria de direitos humanos (Tradução nossa). Texto original: "Article 2. 1. Nothing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights." UNITED NATIONS. *General Assembly*: declaration on the human rights of individuals who are not nationals of the country in which they live. 1985. Disponível em: <http://www.un.org/documents/ga/res/40/a40r144.htm>. Acesso em: 29 nov. 2016.

passam a atuar como uma verdadeira indústria do medo, induzindo a pensar que imigrar é crime. Isso se deve, em grande parte, ao fato de que a imigração é controlada pela polícia e, assim, os imigrantes estão sujeitos a serem presos, ou deportados para seus países de origem, ou confinados em centros de detenção (que são até piores que a prisão). Assim, construídas socialmente de modo negativo, altamente xenofóbico e racista, as respostas institucionais aos processos migratórios não poderiam ser diferentes senão a implementação de medidas que objetivam a criminalização e consequente expulsão dos imigrantes em situação irregular, como se procurará demonstrar ao longo deste artigo.

2. As políticas migratórias europeias e seus três objetivos

O tratamento legal da questão da imigração irregular pelos países europeus é analisado por Margarita Martínez Escamilla[4], ao sintetizar a "luta" contemporânea contra a imigração irregular na União Europeia em três principais objetivos, quais sejam: 1) impedir que os imigrantes saiam de seus países de origem; 2) impedir que os imigrantes que tenham saído de seus países de origem transpassem as fronteiras europeias; 3) forçar os imigrantes que entram no território europeu a deixá-lo.

2.1. Objetivo 1: impedir que os imigrantes saiam de seus países de origem

No que se refere ao primeiro objetivo do controle dos fluxos migratórios pela Europa, qual seja, de evitar a saída dos imigrantes de seus países de origem, evidencia-se a tarefa dos países de trânsito e de origem migratório com destino à Europa em conter a imigração, como uma função de guardas das fronteiras. A partir de tal objetivo, observa-se que o controle das fronteiras tem início muito antes do acesso aos países de destino, conforme menciona Ana María López Sala[5]:

> en los últimos años ha sido habitual la firma de acuerdos bilaterales y multilaterales de cooperación en el control y la lucha contra la inmigración irregular. Puede afirmarse que hemos asistido a una creciente transnacionalización de esta política y al incremento de su peso en la agenda internacional. Estas iniciativas han tenido un doble alcance, incluyendo tanto acuerdos con otros Estados receptores como con países de tránsito y de origen. La cooperación han sido especialmente intensa en Europa. En contra de la «renacionalización» de las políticas, los acuerdos de Schengen y, posteriormente, de Ámsterdan y Tampere han alentado la colaboración interestatal em materia de justicia, seguridad y fronteras, de lo que da muestra la reciente creación de la Agencia europea de control de las Fronteras Exteriores, Frontex[6]. Estos objetivos se han concretado no sólo em modificaciones normativas, sino en la vigilancia y la financiación conjunta y la colaboración policial.

Os acordos bilaterais firmados pelos Estados-membros com países terceiros possuem papel fundamental na política de controle migratório. Por meio desses acordos de cooperação, os países europeus conseguem impedir a chegada e ter facilitada a expulsão de imigrantes irregulares. Assim, aquele imigrante que consegue transpor fronteira é forçado, por meio de inúmeras medidas, a retornar ao seu país de origem, muitas vezes, inclusive, em condições perigosas e insalubres, como bem refere López Sala[7]: "la práctica de disuasión más extrema ha sido la interceptación de embarcaciones en aguas internacionales, medidas que han producido un gran rechazo entre las organizaciones civiles y de derecho humanos".

Esses acordos bilaterais têm se transformado em mecanismos de controle para além das próprias fronteiras em que atores não estatais, também, têm se incorporado ao controle das fronteiras, como é o caso das companhias de transporte de passageiros. Segundo López Sala[8], "las legislaciones de Europa y Norteamérica han tipificado la responsabilidad de la devolución a las compañías aéreas en caso de transportar personas sin la documentación necesaria para entrar en los paí-

4 MARTÍNEZ ESCAMILLA, Margarita. Inmigración, derechos humanos y política criminal: ¿Hasta donde estamos dispuestos a llegar? *Revista para el análisis del Derecho*, n. 3, 2009. Disponível em: <http://www.raco.cat/index.php/InDret/article/viewFile/138050/188695>. Acesso em: 09 jan. 2016.

5 LÓPEZ SALA, Ana María. La ley de la frontera: migraciones internacionales y control de flujos. *Revista de Occidente,* Madrid, n. 316, p. 102-103, Sep. 2007.

6 A Agência Europeia de Gestão da Cooperação Operacional nas Fronteiras Externas dos Estados-Membros da União Europeia (*Frontex*), é encarregada da cooperação operacional entre os Estados-membros da União Europeia e os países associados de Schengen no controle das fronteiras externas.

7 LÓPEZ SALA, Ana María. La ley de la frontera: migraciones internacionales y control de flujos. *Revista de Occidente,* Madrid, n. 316, p. 105, Sep. 2007.

8 LÓPEZ SALA, Ana María. La ley de la frontera: migraciones internacionales y control de flujos. *Revista de Occidente,* Madrid, n. 316, p. 104, Sep. 2007.

ses de destino, transformando de forma indirecta a sus empleados en funcionarios de frontera". A estratégia de limitar o acesso pode ocorrer de diversas formas, inclusive por meio de medidas que dificultem a entrada de solicitantes de asilo, de campanhas informativas com o objetivo de dissuadir a saída dos imigrantes, de políticas de restrições de concessão de vistos, de refúgio e de agrupamento familiar, entre outros.

A impossibilidade de sair de seu país de origem por vias formais pode acarretar consequências terríveis ao indivíduo que tenta transpor fronteiras, como a sua detenção e também o aumento do tráfico de pessoas. Ainda, como se tem registrado nos últimos anos, tal medida de externalização do controle de fronteiras acaba por resultar em milhares de mortes de imigrantes em acidentes marítimos ou terrestres.

O relatório "Viagens Letais", elaborado pela Organização Internacional para as Migrações (OIM), publicado em 14 de junho de 2016, revela que, desde 1996, na tentativa de chegar a um país mais desenvolvido, mais de 60 (sessenta) mil imigrantes morreram ou desapareceram em rotas marítimas e terrestres em todo o mundo. Calcula-se que 5.400 (cinco mil e quatrocentos) imigrantes morreram ou desapareceram em 2015. Até junho de 2016, mais de 3.400 (três mil e quatrocentos) imigrantes perderam a vida em todo mundo e mais de 80% deles no intento de chegar à Europa pelo mar[9].

A ineficácia de tal método de controle resta comprovada diante do significativo aumento do número de mortes de pessoas frente a, cada vez maior, dificuldade encontrada ao se tentar sair de seu país de origem, aumentando os riscos assumidos pelos imigrantes, levando, segundo Martínez Escamilla[10], a "una relación directa entre incremento de las dificultades y número de muertes en el intento".

A União Europeia, por meio desses acordos de readmissão e cooperação, recorre aos Estados que não podem ou que não respeitam os direitos humanos dos refugiados e dos migrantes, para fazer o "trabalho sujo" de interceptação e repatriamento forçado desses sujeitos, em clara violação do Direito Internacional[11].

Nesse sentido, o Relator Especial da Organização das Nações Unidas (ONU) sobre os Direitos Humanos dos migrantes, François Crépeau, expressou preocupação com os acordos de cooperação bilaterais negociados entre a Itália e seus vizinhos, especialmente a cooperação com a Líbia, devido à falta de padrões mínimos de Direitos Humanos e os inúmeros e frequentes relatos de abusos e violações aos imigrantes. Segundo o Relator, apesar de atualmente suspenso o acordo de 2007 em repercussão ao caso *Hirsi Jamaa* (caso 1, das considerações iniciais), a cooperação entre os dois Estados foi recentemente reforçada por meio de um processo verbal, preocupando a perpetuação e a possibilidade de novas práticas que violem os Direitos Humanos[12].

Percebe-se um avanço radical desse processo de externalização das fronteiras, a partir do qual esses acordos de readmissão, que permitem a intercepção de embarcações e consequentes retornos desburocratizados e imediatos de imigrantes que estão na Itália de forma irregular, ocorram sem que haja uma análise prévia da situação de cada indivíduo, evidenciando o total descaso por parte do Estado italiano que se isenta das responsabilidades e parece ignorar as consequências desastrosas de tais ações — muito bem descritas no Caso 1 —, mesmo conhecendo a condenação/reprovação de tais violações pelos instrumentos internacionais.

Por meio dessas políticas, o imigrante fica à mercê do Estado e de suas medidas extraordinárias que não têm o Direito Internacional como fundamento e que visam atender tão somente aos interesses nacionais. Não há nenhuma preocupação com os Direitos Humanos nessas políticas que impedem a chegada, que criminalizam e que expulsam imigrantes irregulares. Essas ações, no entanto, violam princípios e garantias fundamentais humanos e acarretam consequências desastrosas de extremos abusos, violações, discriminações e mortes.

Diante disso, em setembro de 2016, o Parlamento Eu-

9 INTERNATIONAL ORGANIZATION FOR MIGRATION. *Fatal Journeys*: Identification and tracing of dead and missing migrants. v. 2, 2016. Disponível em: <https://publications.iom.int/books/fatal-journeys-volume-2-identification-and-tracing-dead-and-missing-migrants>. Acesso em: 16 jul. 2016.

10 MARTÍNEZ ESCAMILLA, Margarita. Inmigración, derechos humanos y política criminal: ¿Hasta donde estamos dispuestos a llegar? *Revista para el análisis del Derecho*, n. 3, 2009. Disponível em: <http://www.raco.cat/index.php/InDret/article/viewFile/138050/188695>. Acesso em: 09 jan. 2016.

11 AMNESTY INTERNATIONAL. *Hotspot Italy*: how EU's flagship approach leads to violations of refugee and migrant rights. 2016. Disponível em: <https://www.amnesty.org/en/documents/eur30/5004/2016/en/>. Acesso em: 29 nov. 2016.

12 FRENZEN, Niels. *Un special rapporteur on HR of migrants expresses concern over Italy-Libya cooperation on migration*. 2012. Migrants at sea. Disponível em: <https://migrantsatsea.org/tag/bilateral-immigration-agreements/>. Acesso em: 24 mar. 2016.

ropeu e do Conselho adotou ato legislativo, qual seja, o Regulamento 2016/1624, que altera e revoga documentos anteriores no sentido de implementar uma gestão europeia integrada das fronteiras em nível nacional e da União que possua maior eficiência na gestão, vigilância e controle dos fluxos migratórios e das potenciais ameaças nas fronteiras, contribuindo para combater a criminalidade e para garantir um elevado nível de segurança interna na União, reforçando medidas com países terceiros, nomeadamente no âmbito da política comum dos vistos, medidas com países terceiros vizinhos, medidas de controles externos, análises de risco (dados estatísticos) e medidas no âmbito do espaço Schengen e em matéria de regresso.

O respectivo regulamento reconhece e reforça a Agência Europeia de Gestão da Cooperação Operacional nas Fronteiras Externas dos Estados-membros da União Europeia, designada como *Frontex*, como um dos principais programas na execução da gestão das fronteiras europeias externas. Sua atuação se dá por meio de operações conjuntas e de intervenções rápidas nas fronteiras, bem como da análise de risco, do intercâmbio de informações, das relações com países terceiros e no regresso de retornados, transformando-a em uma agência com responsabilidade partilhada em matéria de gestão das fronteiras externas, alargando, assim, suas atribuições anteriores.

Essas práticas de fomento de identificação e classificação de "perfis de risco", com base em dados estatísticos coletados de forma integrada na União Europeia, bem como a antecipação e a prevenção de supostas ameaças oriundas desses perfis, que criam estereótipos de "inimigos" perigosos e indesejáveis, pautam toda a atuação da Agência *Frontex*, que define quem são os alvos desse controle, como também quais serão os mecanismos de controle migratório utilizados contra esses sujeitos. Evidencia-se, com isso, uma estrutura de controle para além do "combate" à imigração irregular, que busca, também, a fundamentação da criminalização da imigração e do imigrante. Alimenta-se, assim, a continuidade e reforça-se a lógica do risco atrelada ao imigrante.

2.2. Objetivo 2: impedir que os imigrantes que tenham saído de seus países de origem transpassem as fronteiras europeias

O segundo objetivo das políticas migratórias europeias, analisado por Martínez Escamilla[13], objetiva impermeabilizar as fronteiras de forma a impedir o ingresso dos imigrantes, principalmente daqueles que possam tentar entrar de maneira irregular.

Percebe-se que, atualmente, os controles migratórios de saída em países de origem e trânsito, somados às restrições de entrada na Europa, praticamente impedem, de qualquer maneira, a livre circulação. Por meio dessa política, portanto, a Europa fecha suas fronteiras, selecionando quem entra em seu território.

Nesse contexto, no que tange à seleção dos imigrantes, atenta-se a um outro aspecto na gestão da imigração, qual seja, o desenvolvimento de uma política inspirada fundamentalmente nos interesses econômicos, como bem refere Martínez Escamilla[14]: "se admite a quien consideramos que puede ser útil para nuestra economía, una economía que há pasado de prospera a maltrecha". Ou seja, o processo de regulação da imigração na União Europeia ganha uma dimensão laboral de especial relevância, segundo a qual o imigrante se converte em mão de obra barata e flexível, importante para o crescimento econômico.

Esse aspecto do imigrante como força de trabalho informal ganha força quando, na prática, políticas de controle e regulação da imigração irregular passam a ter prioridade em detrimento de políticas de integração e cooperação, resultando em um processo de retirada dos direitos desses sujeitos, como é o caso do processo de despolitização do imigrante, que é fundamental para a sua constituição como um mero instrumento de trabalho que não indica pertencimento, que não indica permanência eterna no país receptor, que caracteriza o imigrante um instrumento de mão de obra que é descartável quando não mais necessário. Nesse rumo, o imigrante, enquanto for útil, é, provisoriamente, aceito. Com isso, quando sua função na sociedade de imigração se esgotar, ele deve retornar ao seu país de origem[15]. Dito de outra forma, como o imigrante deve continuar sendo sempre um imigrante, visto sua natureza total-

13 MARTÍNEZ ESCAMILLA, Margarita. Inmigración, derechos humanos y política criminal: ¿Hasta donde estamos dispuestos a llegar? *Revista para el análisis del Derecho*, n. 3, 2009. Disponível em: <http://www.raco.cat/index.php/InDret/article/viewFile/138050/188695>. Acesso em: 09 jan. 2016.

14 MARTÍNEZ ESCAMILLA, Margarita. Inmigración, derechos humanos y política criminal: ¿Hasta donde estamos dispuestos a llegar? *Revista para el análisis del Derecho*, n. 3, 2009. Disponível em: <http://www.raco.cat/index.php/InDret/article/viewFile/138050/188695>. Acesso em: 09 jan. 2016.

15 SAYAD, Abdelmalek. *A imigração ou os paradoxos da alteridade*. Tradução: Cristina Murachco. São Paulo: EDUSP, 1998.

mente provisória e utilitária, ele é passível de expulsão a qualquer momento.

Nesse sentido, cientes de que, dificilmente, seriam denunciados, muitos empregadores e empresários inescrupulosos se aproveitam da situação de vulnerabilidade do imigrante, especialmente o imigrante em condição de irregularidade. Este, por viver durante a maior parte do tempo se escondendo, necessita encontrar trabalho, mesmo que em condições nas quais os cidadãos nacionais não aceitariam, como salários extremamente baixos, carga de trabalho bastante superior, enfim, condições que remetem a uma situação de escravidão, e, consequentemente, violam os Direitos Humanos fundamentais desses sujeitos. Além do empregador, outros setores, também, se beneficiam com essas medidas restritivas, como é o caso dos chamados "coiotes", que são aquelas pessoas que auxiliam, mediante pagamento, na travessia de fronteiras pelos imigrantes, seja fornecendo transporte, burlando os controles de fronteiras, entre outros, que acabam aumento seus lucros em razão de políticas mais severas para a entrada de imigrantes.

Na Itália, a adoção da lei conhecida como Turco-Napolitano, em 1998, prevê a permissão de ingresso e residência de estrangeiros por motivo laboral, concedida pelo prazo que durar o contrato de trabalho e condicionada à estadia no país de acordo com o interesse dos empregadores, de modo que, ao final do contrato, o trabalhador estrangeiro deve retornar ao seu país de origem. Observa-se, com isso, que esses indivíduos são concebidos como força de trabalho e não como indivíduos titulares de direitos humanos, reforçando preconceitos culturais e institucionais, reproduzindo um mecanismo de discriminação e violência[16]. Esse tipo de ação, ainda, em tempos de crises políticas, serve como válvula de escape para atitudes xenófobas e racistas, pois os imigrantes são vistos como competidores ilegítimos, verdadeiros parasitas[17].

Em resumo, o que se evidencia é um verdadeiro paradoxo entre as políticas adotadas, que, na prática, são de controle e regulação, e a insatisfação generalizada com o aumento dos fluxos migratórios, que crescem conforme aumentam os controles fronteiriços. Ao mesmo tempo em que a Europa busca impulsionar a economia, ela impede a chegada de imigrantes, ainda que pesquisas indiquem que a imigração pode proporcionar crescimento econômico e contribuir para melhorar as estatísticas de consumo e arrecadação. Apesar de toda influência do cenário econômico e das necessidades do mercado de trabalho, responsáveis pela construção utilitarista do imigrante, percebe-se, sobretudo, uma supremacia da vontade política no que diz respeito à implementação dessas medidas, a qual mantém um discurso securitário que caracteriza os imigrantes como uma ameaça ao Estado e que, ao que parece, por vezes, é sobreposta aos interesses econômicos.

Assim, o que não precisaria ser problemático, conforme aduz Lopes[18], acaba tomando esse caminho pois, em vez de tomar medidas para ordenar a imigração, "os países potencialmente receptores de mão de obra estão aumentando a altura dos muros de contenção de imigrantes, investindo em policiamento, tecnologia, controle dos mais generalizados e, ainda, pactuando com os países pobres (dos quais pessoas emigram) para que estes países colaborem na repressão da imigração". O mais grave dessa "psicose migratória" é que, as pessoas, ainda que no seu íntimo saibam a verdade, qual seja, de que "boa parte da humanidade está privada dos bens necessários para satisfazer as necessidades básicas de sobrevivência e bem-estar", preferem, "para não ter que atuar para modificar uma realidade de que são beneficiárias", acreditar nessa ideia de "virtual ameaça". E é por isso que, atualmente, já não se trata de apenas defender o mercado de trabalho ou uma certa homogeneidade nacional, mas sim de defender o país de uma nova espécie de ameaça à própria integridade física de seus cidadãos.

A perspectiva de seletividade migratória a partir da qual o imigrante serve como mão de obra para a resolução de problemas pontuais do mercado de trabalho europeu é combinada com a abrangência do ideal securitário em que se busca afastar as ameaças, ou seja, aqueles imigrantes indesejáveis. Com isso, crescem as violações de Direitos Humanos, evidenciadas no aumento dos números de mortes de imigrantes em resultado de violências preconceituosas, também no aumento das

16 GARCIA, Fernanda di Flora. A exceção é a regra: os centros de detenção para imigrantes na Itália. *Revista Interdisciplinar da Mobilidade Humana,* Brasília, n. 43, p. 235-250, 2014.

17 SPIRE, Alexis. Xenofobia em nome do Estado de bem-estar social. *Le Monde Diplomatique Brasil.* 2013. Disponível em: <http://www.diplomatique.org.br/artigo.php?id=1550>. Acesso em: 13 out. 2016.

18 LOPES, Cristiane Maria Sbalqueiro. *Direito de imigração*: o estatuto do estrangeiro em uma perspectiva de direitos humanos. Porto Alegre: Nuria fabris, 2009. p. 49.

explorações e na degradação dos centros de detenção.

2.3. Objetivo 3: forçar os imigrantes que entram no território europeu a deixá-lo

No que tange ao terceiro e último objetivo das políticas de controle de fluxos migratórios definido por Martínez Escamilla[19], é cada vez mais evidente a criação de mecanismos para fazer com que aquele imigrante que conseguiu transpor a fronteira europeia seja forçado a retornar ao seu país de origem, muitas vezes, inclusive, em condições perigosas e insalubres. Para López Sala[20],

> la práctica de disuasión más extrema ha sido la interceptación de embarcaciones en aguas internacionales, medidas que han producido un gran rechazo entre las organizaciones civiles y de derechos humanos. [...] En el caso europeo la interceptación en alta mar se está convertiendo, paulatinamente, en una prolongación de la vigilancia marítima de la frontera sur y de la ejecución de los acuerdos de devolución.

A partir de tais objetivos, notadamente, a Europa passa a reconhecer a imigração como um problema, atuando na forma de controle e expulsão desses fluxos migratórios, convidando os Estados-membros a conduzir, pela potencial ameaça que representam, a criminalização dos imigrantes indesejados.

Nesse sentido, em maio de 2001, o Conselho da União Europeia adotou um ato legislativo que demonstra o início de uma sequência de documentos que chegaram à utilização de medidas punitivas no tratamento e controle da imigração irregular. A Diretiva 2001/40/CE buscava legitimidade e maior eficácia de decisões de afastamento de nacionais de países terceiros (imigrantes extracomunitários), bem como o estabelecimento de uma política comum de gestão migratória que conduzisse a um tratamento uniforme nesse sentido de afastamento de extracomunitários.

O objetivo dessa política comum migratória de gerenciamento dos fluxos migratórios era de, por meio de mecanismos de controle atuarial, gerir os riscos decorrentes da associação da imigração irregular com a criminalidade e demais mal-estares sociais, que, ao final, tornassem eficaz o "combate" à imigração irregular, conforme se observa da análise do artigo 3º da respectiva diretiva[21].

Nota-se que, em relação a essa ideal de gestão dos riscos decorrentes dos fluxos migratórios, determinadas condições identificadas como perigosas — imigrantes infratores ou em situação de irregularidade — passaram a fundamentar a necessidade de afastamento desses sujeitos dos demais na comunidade europeia.

Esse movimento de identificação da imigração extracomunitária, essencialmente a irregular, com questões relacionadas à insegurança e à criminalidade a fim de justificar a expulsão desses indivíduos, é evidenciado em documentos como a Diretiva 2002/90/CE, adotada em novembro de 2002, que insiste nessas associações negativas à imigração para reforçar a necessidade de "combate". Além disso, seguindo outros documentos, o respectivo dispositivo determina aos seus Estados-membros a incumbência de criminalizar as condutas de auxílio e facilitação da imigração irregular, conforme o disposto no artigo 1º[22].

19 MARTÍNEZ ESCAMILLA, Margarita. Inmigración, derechos humanos y política criminal: ¿Hasta donde estamos dispuestos a llegar? *Revista para el análisis del Derecho*, n. 3, 2009. Disponível em: <http://www.raco.cat/index.php/InDret/article/viewFile/138050/188695>. Acesso em: 09 jan. 2016.

20 LÓPEZ SALA, Ana María. La ley de la frontera: migraciones internacionales y control de flujos. *Revista de Occidente,* Madrid, n. 316, p. 105, Sep. 2007.

21 Art. 3. 1. O afastamento referido no artigo 1 abrange os casos seguintes: a) Quando um nacional de um país terceiro for objeto de uma decisão de afastamento baseada em uma ameaça grave e atual para a ordem pública ou para a segurança nacional tomada em caso de: - condenação do nacional do país terceiro pelo Estado-membro autor por uma infração passível de pena de prisão não inferior a um ano; - existência de razões sérias para crer que um nacional de um país terceiro cometeu atos puníveis graves ou de existência de indícios reais de que tenciona cometer atos dessa natureza no território de um Estado-membro. [...] b) Quando o nacional de um país terceiro seja objeto de uma medida de afastamento baseada no descumprimento da regulamentação nacional relativa à entrada ou à permanência de estrangeiros (Tradução nossa). Texto original: "Article 3. 1. The expulsion referred to in Article 1 shall apply to the following cases: (a) a third country national is the subject of an expulsion decision based on a serious and present threat to public order or to national security and safety, taken in the following cases: - conviction of a third country national by the issuing Member State for an offence punishable by a penalty involving deprivation of liberty of at least one year; - the existence of serious grounds for believing that a third country national has committed serious criminal offences or the existence of solid evidence of his intention to commit such offences within the territory of a Member State. […] (b) a third country national is the subject of an expulsion decision based on failure to comply with national rules on the entry or residence of aliens". EUROPEAN UNION. *Council Directive 2001/40/CE*. 28 may 2001. Disponível em: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:149:0034:0036:PT:PDF>. Acesso em: 29 nov. 2016.

22 Artigo 1º. Infração geral. 1. Os Estados-Membros devem adotar sanções adequadas: a) Contra quem auxilie intencionalmente

O processo de criminalização da imigração irregular é impulsionado, então, com a adoção da denominada "Diretiva de Regresso" (2008/115/CE), aprovada pelo Parlamento Europeu e o Conselho em dezembro de 2008, propondo, para um maior controle dos fluxos migratórios, normas e procedimentos comuns utilizados para o regresso de imigrantes em situação irregular. O objetivo do referido documento é conceder autonomia procedimental e poder discricionário aos Estados-membros para o regresso, voluntário ou involuntário, de imigrantes irregulares que estejam no território da União Europeia.

O artigo 15 da respectiva Diretiva confere autorização aos Estados-membros para, fundamentado pela lógica do risco, realizar a detenção preventiva dos imigrantes durante o procedimento de expulsão por um período de até 6 (seis) meses, podendo, ainda, tal privação de liberdade ser prolongada pelos Estados-membros por até 12 (doze) meses a mais[23].

Ao autorizar a detenção preventiva do imigrante irregular, o texto do referido documento é um verdadeiro convite ao retrocesso. A severidade da medida administrativa de expulsão resta demonstrada a partir de seus potenciais efeitos negativos, quais sejam, de extremo perigo à integridade física e à vida desses sujeitos expostos a tal ato de deportação que poderá, conforme dispõe o artigo 3º, número 3, da referida Diretiva, ocorrer ao país de origem, ou a um país de trânsito (ao abrigo de acordos de readmissão comunitários ou bilaterais ou de outras convenções), como também a outro país terceiro, para o qual a pessoa em causa decida regressar, voluntariamente, e no qual seja aceita.

Essas medidas de detenção e expulsão administrativas ainda, de acordo com Brandariz García[24], se constituem em uma "fraude de etiquetas", ou seja, em razão de seu conteúdo, sentido e notável severidade, essas medidas configuram sanções penais materiais e não administrativas, como são formalmente consideradas. Essa fraude permite que a aplicação, a execução e o controle dessas medidas não estejam "sometidos a las garantías que corresponderían a su gravedad, entre ellas el postulado de proporcionalidad, que debería conducir a una neta distinción de gravedad entre las sanciones aplicables a las infracciones administrativas y las derivadas de la responsabilidad criminal".

uma pessoa que não seja nacional de um Estado-Membro a entrar ou a transitar através do território de um Estado-Membro, em infração da legislação aplicável nesse Estado em matéria de entrada ou trânsito de estrangeiros; b) Contra quem, com fins lucrativos, auxilie intencionalmente uma pessoa que não seja nacional de um Estado-Membro a permanecer no território de um Estado-Membro, em infração da legislação aplicável nesse Estado em matéria de residência de estrangeiros (Tradução nossa). Texto original: "Article 1. General infringement. 1. Each Member State shall adopt appropriate sanctions on: (a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens; (b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens." EUROPEAN UNION. *Council Directive 2002/90/EC*. 28 nov. 2002. Disponível em: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:328:0017:0018:EN:PDF>. Acesso em: 29 nov. 2016.

23 Artigo 15. Detenção 1. A menos que no caso concreto possam ser aplicadas com eficácia outras medidas suficientes, mas menos coercivas, os Estados-membros só podem manter detidos nacionais de países terceiros objeto de procedimento de regresso, a fim de preparar o regresso e/ou efetuar o processo de afastamento, nomeadamente quando: a) Houver risco de fuga; ou b) O nacional de país terceiro em causa evitar ou entravar a preparação do regresso ou o procedimento de afastamento. [...] 5. A detenção mantém-se enquanto se verificarem as condições enunciadas no número 1 e na medida do necessário para garantir a execução da operação de afastamento. Cada Estado-membro fixa um prazo limitado de detenção, que não pode exceder os seis meses. 6. Os Estados-membros não podem prorrogar o prazo a que se refere o número 5, exceto por um prazo limitado que não exceda os doze meses seguintes, de acordo com a lei nacional, nos casos em que, independentemente de todos os esforços razoáveis que tenham envidado, se preveja que a operação de afastamento dure mais tempo, por força de: a) Falta de cooperação do nacional de país terceiro em causa; ou b) Atrasos na obtenção da documentação necessária junto de países terceiros (Tradução nossa). Texto original: "Article 15. Detention. 1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when: (a) there is a risk of absconding or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process. [...] 5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months. 6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to: (a) a lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries." EUROPEAN PARLIAMENT AND OF THE COUNCIL. *Directive 2008/115/EC*. 16 December 2008. Disponível em: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:en:PDF>. Acesso em: 29 nov. 2016.

24 BRANDARIZ GARCÍA, José Ángel. *Sistema penal y control de los migrantes*: gramática del migrante como infractor penal. Granada: Comares, 2011. p. 74.

A detenção administrativa de imigrantes em situação irregular constitui uma privação de liberdade que é materialmente equiparável a uma prisão preventiva, com a particularidade de que possui um prazo máximo de duração estabelecido em lei. Essa afirmação, na ótica de Brandariz García[25], é comprovada pela frequência com que a medida de detenção tem sido utilizada como função sancionadora, a partir de uma lógica preventiva (geral e especial) que objetiva intimidar o imigrante para que regresse ao seu país de origem ou dissuadir outros migrantes com intento de destino à Europa. Além disso, a aproximação entre o contexto carcerário e os centros de detenção para imigrantes é especialmente evidente em diversos países europeus, nos quais a privação de liberdade dos migrantes irregulares ocorre em celas policiais ou centros penitenciários, com aplicação da legislação carcerária.

3. Biopolítica e controle penal de fluxos migratórios na Itália: a consolidação de um modelo de direito penal de autor

No que tange à política migratória nacional, a Itália é um dos países da União Europeia no qual o processo de controle da imigração irregular se faz de forma mais intensa, muito em razão da sua posição geográfica, que constitui uma extensa fronteira externa que contribui para a entrada irregular de imigrantes. Segundo dados divulgados pela Organização Internacional para as Migrações (OIM), em dezembro de 2016, mais de 352 (trezentos e cinquenta e dois) mil imigrantes e refugiados já haviam ingressado na Europa por via marítima, especialmente pela Itália e Grécia. Em relação a esse total, mais de 176 (cento e setenta e seis) mil chegaram à Itália, e foram registradas 4.244 (quatro mil duzentos e quarenta e quatro) mortes durante a tentativa de travessia pela rota do mar Mediterrâneo central (Itália)[26].

Até o início dos anos 1980, visando ao fomento do turismo, o governo italiano assumia uma postura institucional com relação aos estrangeiros de abertura de suas fronteiras, de modo que não existia uma legislação específica de regulamentação da imigração, e o país apenas observava os tratados internacionais dos quais era signatário que visavam à proteção de seus emigrantes. Essa relação de indiferença e sem muitas restrições no que tange ao ingresso e à permanência de imigrantes em seu território começaram a assumir outra conotação após a queda do Muro de Berlim e a desagregação do bloco soviético. A queda do governo comunista da Albânia acarretou um intenso movimento migratório em direção à península itálica, que fora inicialmente apoiado pelas autoridades italianas e pela opinião pública local. Entretanto, com a intensificação desse fluxo e a entrada massiva de albaneses, o discurso político sobre a imigração, de modo geral, mudou de sentido, passando, em um primeiro momento, a identificar os albaneses como responsáveis pelo aumento da criminalidade no país e, posteriormente, ampliando essa concepção a todos os demais estrangeiros. Em um intervalo de tempo de poucos meses, "não se falava mais em refugiados, mas sim em imigrantes 'ilegais' ou 'clandestinos' para definir e caracterizar os indivíduos que entraram recentemente no país, em especial os albaneses, cujas demandas por refúgio e asilo passaram a ser arbitrariamente consideradas ilegítimas"[27].

Nesse sentido, pode-se afirmar que a Itália, desde a década de 1990, vive mudanças em suas políticas migratórias que transformaram o tratamento e a percepção dos processos migratórios, especialmente no que diz respeito à política de repressão e criminalização dos imigrantes ainda em curso. Desde esse período, conforme menciona Dal Lago[28], os imigrantes em situação irregular passaram a encontrar no cárcere o destino inevitável de seu percurso migratório, independentemente do fato de haverem cometido crimes ou de sua efetiva periculosidade social.

Desde então, o panorama atual do governo italiano é marcado: a) por medidas excepcionais que se tornam a regra; b) pela constante declaração de estados de emergência; c) pela proliferação de centros de detenção para estrangeiros altamente arbitrários; d) pela criação de leis que determinam uma espécie de direito especial para

25 BRANDARIZ GARCÍA, José Ángel. *Sistema penal y control de los migrantes*: gramática del migrante como infractor penal. Granada: Comares, 2011

26 INTERNATIONAL ORGANIZATION FOR MIGRATION. *Fatal Journeys*: Identification and tracing of dead and missing migrants. v. 2, 2016. Disponível em: <https://publications.iom.int/books/fatal-journeys-volume-2-identification-and-tracing-dead-and-missing-migrants>. Acesso em: 16 jul. 2016.

27 GARCIA, Fernanda di Flora. A exceção é a regra: os centros de detenção para imigrantes na Itália. *Revista Interdisciplinar da Mobilidade Humana,* Brasília, n. 43, p. 238, 2014.

28 DAL LAGO, Alessandro. *Non-persone*: l'esclusione dei migranti in una società global. Milano: Feltrinelli, 2004. p. 32.

os imigrantes; e) por racismo popular e institucional; f) pela confusão de questões *a priori* de refúgio e asilo com imigração; e g) pela assustadora violação e consequente derrocada dos Direitos Humanos em relação ao assunto[29].

Em âmbito legislativo, a adoção da lei conhecida como Turco-Napolitana, em março de 1998, configura a primeira principal alteração na política migratória desse período e que fundamentou as alterações subsequentes, passando a "combater" a imigração irregular através de medidas mais rígidas no controle dos fluxos migratórios. Com base nesta legislação, condutas de facilitação e auxílio à imigração irregular passaram a ser punidas como crime com pena de prisão de até 3 (três) anos e multa.

Além disso, uma das características mais notáveis dessa lei, segundo Garcia[30], é a adoção da lógica securitária no interior da política migratória. Todas as medidas elencadas na lei "reforçam a visão da migração como gestão dos riscos potenciais, independente da sua natureza objetiva ou da relevância concreta das supostas ameaças". Fortemente baseada pela discriminação, a legislação em tela adota uma severa vigilância e monitoramento com relação aos estrangeiros ao transformar em regra geral a detenção forçada para fins de expulsão. Assim, não sendo possível o imediato processo de expulsão, deve o imigrante ser detido em um dos centros de detenção temporária até que os procedimentos para a expulsão sejam definidos. Nesse rumo, atenta-se para o fato de esses centros de detenção administrativa para imigrantes não funcionarem como espaços de acolhimento temporário, mas sim como verdadeiras prisões, nas quais os imigrantes são mantidos em confinamento até que seja realizada a sua expulsão ou deportação.

Durante anos esses centros de detenção, hoje denominados, sem nenhum eufemismo, de "Centros de Identificação e Expulsão (CIEs)" — alteração que aproximou os termos daquilo que de fato tais espaços são —, vêm sendo denunciados por organização internacionais e nacionais, por inúmeras violações aos Direitos Humanos, pelo aumento do uso da detenção arbitrária de imigrantes e, ainda, por ataques violentos de moradores e militantes da extrema direita que são resistentes aos processos migratórios, como vem ocorrendo dos centros de detenção na Itália[31].

Segundo o relatório anual do *Human Rights Watch*[32], a Itália, no ano de 2015, esperava criar seis locais conhecidos como *hotspots*, que são espécies de centros de recepção e processamento de pedidos de asilo, que trabalham sob coordenação da *Frontex* e do Gabinete Europeu de Apoio ao Asilo, selecionando e registrando quem são as pessoas que pretendem pedir proteção internacional e quem são os imigrantes irregulares sujeitos à expulsão, sendo estes entregues às autoridades nacionais para o devido repatriamento, de modo a dar um melhor andamento na gestão dos fluxos migratórios. No entanto, no ano de 2016, a própria *Human Rights Watch*[33], entre outras organizações, como a *Amnesty International*[34] e *European Council for Refugees and Exiles*[35], criticaram as condições e tratamentos dispensados aos migrantes nos centros de processamento italianos, que estão cada vez mais, na tentativa de deslocamento forçado, cometendo abusos aos Direitos Humanos dos imigrantes, que incluem o uso excessivo da força pela polícia, a detenção arbitrária, expulsões coletivas, tortura, maus-tratos, etc.

É justamente nesses espaços de confinamento ilegais (centros de detenção) que são aplicados procedimentos específicos, como uma espécie de "direito especial", de maneira que delitos da mesma espécie possuem penas distintas de acordo com "quem" os comete. Nesses locais os imigrantes são excluídos da cidadania, não possuem garantias jurídicas por meio das quais possam recorrer da decisão que estabelece sua detenção ou para

29 GARCIA, Fernanda di Flora. A exceção é a regra: os centros de detenção para imigrantes na Itália. *Revista Interdisciplinar da Mobilidade Humana,* Brasília, n. 43, p. 235-250, 2014.

30 GARCIA, Fernanda di Flora. A exceção é a regra: os centros de detenção para imigrantes na Itália. *Revista Interdisciplinar da Mobilidade Humana,* Brasília, n. 43, p. 240, 2014.

31 AMNESTY INTERNATIONAL. *Hotspot Italy*: how EU's flagship approach leads to violations of refugee and migrant rights. 2016. Disponível em: <https://www.amnesty.org/en/documents/eur30/5004/2016/en/>. Acesso em: 29 nov. 2016.

32 HUMAN RIGHTS WATCH. *Europe's Refugee Crisis*: report November 16, 2015. An Agenda for Action. Disponível em: <https://www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action>. Acesso em: 29 nov. 2016.

33 HUMAN RIGHTS WATCH. *Restore Rights Values to Migration Policy*. 2016. Disponível em: <https://www.hrw.org/news/2016/12/13/eu-restore-rights-values-migration-policy>. Acesso em 29 nov. 2016.

34 AMNESTY INTERNATIONAL. *Hotspot Italy*: how EU's flagship approach leads to violations of refugee and migrant rights. 2016. Disponível em: <https://www.amnesty.org/en/documents/eur30/5004/2016/en/>. Acesso em: 29 nov. 2016.

35 EUROPEAN COUNCIL FOR REFUGEES AND EXILES. *The implementation of the hotspots in Italy and Greece.* Report 2016. Disponível em: <http://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-12.2016..pdf>. Acesso em: 29 nov. 2016.

questionar o tratamento degradante ao qual são submetidos, não se configuram mais como sujeitos de direitos humanos, afirmando uma mudança da lei que deixa de ser igualitária e universal ao caracterizar um direito especial, exclusivo para determinadas categorias da população. Nesses espaços os indivíduos são mantidos em termos puramente vitais, de mera manutenção da sua existência, sem qualquer possibilidade de manifestar sua subjetividade ou sua identidade[36]. Essa condição de pura vida nua, ou seja, de vida cuja (in)existência é, absolutamente, irrelevante para o sistema, segundo Garcia[37], corresponde a duas estratégias diversas de desumanização: a "primeira é aquela ordinária, normal, legal, do controle social nas instituições totais. A segunda é aquela extrema e destrutiva da guerra total, dos campos de concentração, da tortura em larga escala e do extermínio organizado".

Com efeito, os refugiados, segundo Agamben[38], cujo número nunca parou de crescer ao longo do século XX, representam, no ordenamento do Estado-nação moderno, um elemento inquietante, uma vez que, "rompendo a continuidade entre homem e cidadão, entre *nascimento* e *nacionalidade*, eles põem em crise a ficção originária da soberania moderna. Exibindo à luz o resíduo entre nascimento e nação, o refugiado faz surgir por um átimo na cena política aquela vida nua que constitui seu secreto pressuposto".

Do mesmo modo, a população migrante, transformada em mera vida nua (*homo sacer*), evidencia, claramente, o caráter biopolítico[39] das medidas punitivas contemporâneas voltadas a esses sujeitos, que são capazes de exercer um controle dos fluxos migratórios a tal ponto que anulam esses indivíduos como cidadãos de direitos, transformando-os em súditos à mercê dos desígnios do poder soberano. Objetos de pura dominação, excluídos da lei e do controle do judiciário, portanto.

Nesse panorama, no qual o Estado detém poder de intervenção cada vez mais amplo, o racismo no interior das relações sociais e na esfera institucional e a existência desses espaços de detenção preventivos que privam os imigrantes do estatuto jurídico de cidadão, que aniquilam, que destroem, punindo-os coletivamente, reduzindo-os a pura vida nua, acabam se tornando espaços de exceção nos quais qualquer ato de violência não é considerado um crime ou delito passível de condenação.

Essas medidas excepcionais de internação, confinamento e execução, passam a ser vistas como constitutivas do ordenamento jurídico-político: são confundidas com a própria normalidade, implicando a normalização da exceção e da desumanização, pela via da produção de campos (instituições totais), constituindo uma linguagem contemporânea dos efeitos do capitalismo tardio, "que gera o *risco*, a *insegurança*, o *medo*, a *incerteza*, a *debilidade*, a *crise do Welfare State*, que efetua o *controle difuso*, a *vigilância constante*, entre outros"[40].

Com efeito, apesar de o ordenamento jurídico italiano regulamentar o estado de exceção apenas em casos de guerra, segundo Garcia[41], a política italiana, a partir da Lei nº 225 de 1992, pode delegar poderes emergenciais a órgãos especiais com o objetivo de superar determinadas situações de crise. Com base nesse dispositivo, a prática da legislação governamental por meio de decretos-lei transformou-se em regra na Itália, tornando rotineiro o uso de medidas excepcionais, a tal ponto que, ao constituírem a forma normal de legislação, acabam culminando alterações jurídicas, políticas e sociais.

Nesse sentido, ainda que não tenha havido de fato a suspensão do ordenamento jurídico, o Estado italiano, assim como outras democracias modernas, estabelece poderes extraordinários por meio de leis ordinárias, mesmo sem o recurso formal da declaração do estado de exceção. Com isso, o regime da emergência, por meio do qual os processos migratórios são compreendidos por meio da ótica securitária, passa a impor alterações permanentes na estrutura jurídica.

Nesse rumo, a partir do ano de 2002, com o advento da Lei 189, conhecida como "Lei Bossi-Fini", o governo italiano passou a potencializar o "combate" à

36 GARCIA, Fernanda di Flora. A exceção é a regra: os centros de detenção para imigrantes na Itália. *Revista Interdisciplinar da Mobilidade Humana,* Brasília, n. 43, p. 235-250, 2014.

37 GARCIA, Fernanda di Flora. A exceção é a regra: os centros de detenção para imigrantes na Itália. *Revista Interdisciplinar da Mobilidade Humana,* Brasília, n. 43, p. 244, 2014.

38 AGAMBEN, Giorgio. *Homo sacer*: o poder soberano e a vida nua I. Tradução: Henrique Burigo. Belo Horizonte: UFMG, 2010.

39 FOUCAULT, Michel. *Em defesa da sociedade*: curso no Collège de France (1975-1976). Tradução: Maria Ermantina Galvão. 2. ed. São Paulo: WMF M. Fontes, 2010.

40 GARCIA, Fernanda di Flora. A exceção é a regra: os centros de detenção para imigrantes na Itália. *Revista Interdisciplinar da Mobilidade Humana,* Brasília, n. 43, p. 248, 2014.

41 GARCIA, Fernanda di Flora. A exceção é a regra: os centros de detenção para imigrantes na Itália. *Revista Interdisciplinar da Mobilidade Humana,* Brasília, n. 43, p. 246, 2014.

imigração irregular, por meio do endurecimento da lei migratória, dificultando a entrada e reduzindo os direitos dos imigrantes[42].

No ano de 2008, o governo de Silvio Berlusconi, então primeiro-ministro da Itália, propôs o chamado *Pacchetto sicurezza*, que promoveu novas políticas migratórias relacionadas às políticas de segurança pública, dispondo de um conjunto de medidas voltadas ao controle dos fluxos migratórios, de criminalização e repressão do imigrante que se encontrasse no país em situação irregular, decretando pena de multa, privação de liberdade e consequente expulsão desses sujeitos[43].

A partir de então, a Itália criminaliza, com pena de multa ou de prisão em certas condições de gravidade, o ato de atravessar, irregularmente, suas fronteiras, conforme prevê a Lei 125, promulgada em julho de 2008, que introduziu um novo parágrafo (11-*bis*) no artigo 61 do Código Penal, estabelecendo uma circunstância de agravamento de pena para o delito praticado por um imigrante em situação irregular[44].

No ano de 2009, destaca-se a promulgação da Lei 94, relativa à entrada e permanência irregular de estrangeiro no território italiano, que alterou o Decreto Legislativo 286, de 25 de julho de 1998 (*Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*) e que está diretamente ligada à questão da segurança nacional. A referida lei inseriu o artigo 10-*bis*, que institui crime punível com pena de multa que pode ser transformada em prisão e consequente expulsão do país, ao prever:

> Art. 10-bis. *(Ingresso e soggiorno illegale nel territorio dello Stato).*
>
> *1.* Salvo che il fatto costituisca più grave reato, lo straniero che fa ingresso ovvero si trattiene nel territorio dello Stato, in violazione delle disposizioni del presente testo unico nonché di quelle di cui all'articolo 1 della legge 28 maggio 2007, n. 68, è punito con l'ammenda da 5.000 a 10.000 euro. Al reato di cui al presente comma non si applica l'articolo 162 del codice penale[45].

Para Cecilia Valbonesi[46], a pena de multa prevista no artigo 10-*bis* constitui uma punição mais simbólica do que dissuasiva, uma vez que é direcionada a uma população, em sua maior parte, insolvente, o que resultaria na ineficácia da medida. Por essa razão, o dispositivo legal, que busca "parecer" não tão severo, uma vez que a pena se daria em caráter pecuniário e não privativo de liberdade, sugere a única intenção do legislador, qual seja, de expulsar o imigrante do território italiano.

Expulsar e neutralizar os estrangeiros são, claramente, os objetivos buscados pelo legislador. Nesse sentido, a Lei 94/2009, também, modificou o parágrafo 5-*ter* do artigo 14 do Texto Único sobre a Imigração, para criminalizar a violação de uma ordem de expulsão, permanecendo, ilegalmente, o estrangeiro em território italiano:

> Art. 14.
>
> [...]
>
> *m)* all'articolo 14, i commi 5-*bis*, 5-*ter*, 5-*quater* e 5-*quinquies* sono sostituiti dai seguenti:
>
> *5-bis.* Quando non sia stato possibile trattenere lo straniero presso un centro di identificazione ed espulsione, ovvero la permanenza in tale struttura non abbia consentito l'esecuzione con l'accompagnamento alla frontiera dell'espulsione o del respingimento, il questore ordina allo straniero di lasciare il territorio dello Stato entro il termine di cinque giorni. L'ordine è dato con provvedimento scritto, recante l'indicazione delle conseguenze sanzionatorie della permanenza illegale, anche reiterata, nel territorio dello Stato. L'ordine del questore può essere accompagnato dalla consegna all'interessato della documentazione necessaria per raggiungere gli uffici della rappresentanza diplomatica del suo Paese in Italia, anche se onoraria,

42 DI MARTINO, Alberto et al. *The criminalization of irregular immigration*: law and practice in Italy, 2013. Disponível em: <http://www.wiss-lab.dirpolis.sssup.it/files/2013/05/Libro-dirpolis-1.pdf>. Acesso em: 12 jan. 2016.

43 DI MARTINO, Alberto et al. *The criminalization of irregular immigration*: law and practice in Italy, 2013. Disponível em: <http://www.wiss-lab.dirpolis.sssup.it/files/2013/05/Libro-dirpolis-1.pdf>. Acesso em: 12 jan. 2016.

44 Art. 1. Modifiche al codice penale. 1. Al codice penal sono apportate le seguenti modificazioni: [...] f) all'articolo 61, primo comma, dopo il numero 11 e' aggiunto il seguinte: 11-bis. l'avere il colpevolfe commesso il fato mentre si trova ilegalmente sul território nazionale. PARALAMENTO ITALIANO, Legge n. 125, 2008.

45 Art. 10-*bis*. (Entrada e permanência ilegal no Estado). 1. Salvo se o fato constituir infração penal mais grave, o estrangeiro que ingressa ou permanece no território do Estado, em violação das disposições do presente texto único, além das previstas no art. 1º da Lei nº 68 de 28 de maio de 2007, é punido com multa de 5.000 a 10.000 euros. Ao presente parágrafo não se aplica o art. 162 do Código Penal (tradução nossa). PARLAMENTO ITALIANO. PARLAMENTO ITALIANO. *Decreto Legislativo 25 luglio 1998, n. 286*. Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero. Disponível em: <http://www.camera.it/parlam/leggi/deleghe/98286dl.htm>. Acesso em: 09 jan. 2016.

46 VALBONESI, Cecilia. Il reato di immigrazione clandestina nell'ordinamento italiano fra "diritto penale del nemico" e "multiculturalismo". *Revista de Estudios Jurídicos*, n. 12, 2012. Disponível em: <http://revistaselectronicas.ujaen.es/index.php/rej/article/view/831>. Acesso em: 28 jan. 2017.

nonchè per rientrare nello Stato di appartenenza ovvero, qndo ciò non sia possibile, nello Stato di provenienza.

5-*ter*. Lo straniero che senza giustificato motivo permane illegalmente nel territorio dello Stato, in violazione dell'ordine impartito dal questore ai sensi del comma 5- bis, è punito con la reclusione da uno a quattro anni se l'espulsione o il respingimento sono stati disposti per ingresso illegale nel territorio nazionale ai sensi dell'articolo 13, comma 2, lettere a) e c), ovvero per non aver richiesto il permesso di soggiorno o non aver dichiarato la propria presenza nel territorio dello Stato nel termine prescritto in assenza di cause di forza maggiore, ovvero per essere stato il permesso revocato o annullato. Si applica la **pena della reclusione da sei mesi ad un anno** se l'espulsione è stata disposta perchè il permesso di soggiorno è scaduto da più di sessanta giorni e non ne è stato richiesto il rinnovo, ovvero se la richiesta del titolo di soggiorno è stata rifiutata, ovvero se lo straniero si è trattenuto nel territorio dello Stato in violazione dell'articolo 1, comma 3, della legge 28 maggio 2007, n. 68. In ogni caso, salvo che lo straniero si trovi in stato di detenzione in carcere, si procede all'adozione di un nuovo provvedimento di espulsione con accompagnamento alla frontiera a mezzo della forza pubblica per violazione all'ordine di allontanamento adottato dal questore ai sensi del comma 5-*bis*. Qualora non sia possibile procedere all'accompagnamento alla frontiera, si applicano le disposizioni di cui ai commi 1 e 5-*bis* del presente articolo nonchè, ricorrendone i presupposti, quelle di cui all'articolo 13, comma 3.

5-quater. Lo straniero destinatario del provvedimento di espulsione di cui al comma 5-*ter* e di un nuovo ordine di allontanamento di cui al comma 5-*bis,* che continua a permanere illegalmente nel territorio dello Stato, è punito con la reclusione da uno a cinque anni. Si applicano, in ogni caso, le disposizioni di cui al comma 5-*ter,* terzo e ultimo periodo.

5-*quinquies*. Per i reati previsti ai commi 5-*ter*, primo periodo, e 5-*quater* **si procede con rito direttissimo ed è obbligatorio l'arresto dell'autore del fato**[47].

Além da desproporcionalidade na punição ao estrangeiro em razão da mera incapacidade de cumprir a ordem de expulsão, o artigo 14 demonstra a instrumentalização do Direito Penal para a gestão dos fluxos migratórios. Como refere Valbonesi[48], o legislador, no seu intento de criminalizar a condição pessoal do autor, ou seja, daquele que, no momento da infração, está presente no território italiano em situação de irregularidade, pune um "modo de ser" que não é sintomático de uma efetiva periculosidade social.

Em 2010, a Corte Constitucional italiana, por meio do acórdão nº 249, declarou inconstitucional a circunstância agravante da presença irregular do imigrante introduzida pelo pacote de segurança, em 2008, e mantida nas alterações legislativas de 2009, pelo governo italiano. Na ocasião, a medida foi compreendida, sobretudo, como responsável pelo abarrotamento do judiciário e ineficaz no controle e gestão dos fluxos migratórios irregulares.

Apesar de ser alvo de inúmeras críticas e de ser bastante rejeitada pelos partidos mais conservadores e

47 *Art. 14. [...]* m) no artigo 14, os parágrafos 5-*bis*, 5-*ter*, 5-*quater* e 5-*quinquies* são substituídos pelo seguinte: 5-*bis*. Se não for possível a detenção do estrangeiro em um centro de identificação e expulsão, ou se ainda não houver condições deste ser escoltado até a fronteira para fins de expulsão ou repulsão, o Comissário notificará o estrangeiro a deixar o território do Estado no prazo de cinco dias. A ordem é dada por escrito, mencionando expressamente as consequências sancionatórias de sua permanência ilegal, inclusive a sua reincidência, no território do Estado. A notificação do Comissário pode ser acompanhada da entrega da documentação necessária para envio à sede da missão diplomática de seu país na Itália, além dos honorários devidos, bem como para se obter os seus dados de qualificação, quando isto não for possível a partir do seu Estado de origem. ***5-ter***. O estrangeiro que sem justificação permanecer ilegalmente no território italiano, em descumprimento à ordem dada pelo Comissário, nos termos do parágrafo 5-*bis,* ***será punido com pena de prisão de um a quatro anos****, se a expulsão ou repulsão* tiver sido efetivada após a entrada ilegal no país*, com fundamento no art. 13, parágrafo 2º, alíneas "a" e "c",* ou por não ter solicitado autorização de permanência ou não ter declarado a sua presença no Estado, no prazo fixado, não havendo motivo de força maior, ou se a permissão foi revogada ou cancelada. Aplica-se a **pena de prisão de seis meses a um ano** se a expulsão foi ordenada porque a autorização de residência expirou há mais de sessenta dias e não houve solicitação de sua renovação, ou se o pedido de autorização de residência foi negado, ou se o estrangeiro está detido no Estado em violação ao art. 1º, parágrafo 3º, da Lei nº 68 de 28 de maio de 2007. Em qualquer caso, a não ser que o estrangeiro esteja detido na prisão, haverá uma nova ordem de expulsão, com acompanhamento policial até a fronteira, em razão de violação à ordem de expulsão emitida pelo Comissário referida no parágrafo 5-*bis*. Se não for possível o acompanhamento policial até a fronteira, aplicar-se-á o disposto nos parágrafos 1 e 5-*bis* do presente artigo, bem como, caso as condições sejam satisfeitas, aplicar-se-á o disposto no art. 13, parágrafo 3º. *5-quater*. O estrangeiro destinatário da ordem de expulsão prevista no parágrafo 5-*ter* e de uma nova ordem de remoção estatuída conforme o parágrafo 5-*bis*, que continue a permanecer ilegalmente no Estado, será punido com **pena de prisão de um a cinco anos**. Aplica-se, em qualquer caso, o disposto no parágrafo 5-*ter*, terceiro e último período. 5-*quinquies*. Para os delitos previstos nos parágrafos 5-*ter*, primeiro período, e 5-*quater*, serão processados e julgados em rito de urgência, **sendo obrigatória a detenção do autor do fato** (grifo e tradução nossa). PARLAMENTO ITALIANO. *Legge 15 luglio 2009, n. 94*. Disposizioni in materia di sicurezza pubblica. Disponível em: <http://www.parlamento.it/parlam/leggi/09094l.htm>. Acesso em: 09 jan. 2016.

48 VALBONESI, Cecilia. Il reato di immigrazione clandestina nell'ordinamento italiano fra "diritto penale del nemico" e "multiculturalismo". *Revista de Estudios Jurídicos*, n. 12, 2012. Disponível em: <http://revistaselectronicas.ujaen.es/index.php/rej/article/view/831>. Acesso em: 28 jan. 2017.

xenofóbicos, em abril de 2014, o Parlamento Italiano aprovou a Lei 67, delegando ao Poder Executivo a emanação de um Decreto, em um período de até dezoito meses a partir de maio de 2014 (data de entrada em vigor da lei), para a descriminalização e revogação de uma série de infrações penais, entre elas a de imigração irregular, que é transformada em infração administrativa conforme dispõe o artigo 2º, número 3, alínea b:

> Art. 2.
>
> Delega al Governo per la reforma dela disciplina sanzionatoria.
>
> [...]
>
> b) abrogare, trasformandolo in illecito amministrativo, il reato previsto dall'articolo 10-bis del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, di cui al decreto legislativo 25 luglio 1998, n. 286, conservando rilievo penale alle condotte di violazione dei provvedimenti amministrativi adottati in materia[49].

Em novembro de 2015, o governo italiano aprovou o projeto de execução do Decreto Legislativo que revoga o uso indiscriminado do Direito Penal no controle dos fluxos migratórios, conforme dispõe o referido relatório:

> Il provvedimento, in sintesi, mira a depenalizzare, ossia a trasformare taluni reati in illeciti amministrativi rispondendo ad una scelta di politica criminale, da tempo sollecitata, anche in relazione alle sottese esigenze economiche e sociali, di deflazionare il sistema penale, sostanziale e processuale, in ossequio ai principi di frammentarietà, offensività e sussidiarietà della sanzione penale.

Ocorre que, até o momento, apesar da promulgação pelo governo italiano dos correspondentes Decretos Legislativos (n. 7 e n. 8) em janeiro de 2016, que descriminalizam o ingresso e a permanência irregular no território italiano, e já decorrido o prazo para a entrada em vigor da lei, qual seja, em fevereiro de 2016, a descriminalização ainda não é aplicada. Isso decorre do fato de que o tema da descriminalização da imigração irregular configura matéria sensível para os interesses envolvidos, os quais parecem entender que o processo criminal é indispensável para uma melhor regulação dos processos migratórios, para que os cidadãos não pensem que se está descuidando da segurança[50].

O fato é que o imigrante irregular, por natureza excluído em razão da sua condição, também se vê encurralado pelo Direito Penal que, de acordo com Martínez Escamilla[51], é chamado para a proteção da população europeia em "defesa" dos imigrantes irregulares e não na defesa dos direitos humanos, revelando, com isso, uma nova razão do tipo penal, qual seja, de "combate" à imigração irregular. Definitivamente, o Direito Penal se converte em um instrumento de política migratória.

Com isso, o imigrante irregular, subalterno e vulnerável, é selecionado. negativamente, em todos os planos da vida social, inclusive por meio da atuação do sistema punitivo[52], que age buscando reprimi-lo, impedi-lo e exclui-lo. Nesse contexto, o imigrante irregular acaba por ser inserido — pelos fatores já expostos acima — na categoria de indivíduos perigosos, de inimigos, e que por serem assim "identificados", não precisam praticar nenhum ato perigoso para estabelecer a "verdade" sobre a sua condição de população perigosa. Logo, o Estado priva-lhes, unilateralmente, da proteção legal que corresponde a qualquer pessoa sujeita às leis nacionais e internacionais, pois se tratam de não cidadãos, ou seja, "de personas no consideradas como sujetos, de seres humanos no conceptualizados dentro del marco de una cultura política en la que la vida humana goza de derechos legales y está asegurada por leyes — seres humanos que por lo tanto no son humanos"[53].

Nota-se que, nesse estado de coisas, o Direito Penal

49 Art. 2. Delega ao Governo a reforma das regras relativas às sanções: [...] b) Revogar, convertendo em infração administrativa, o delito previsto no artigo 10-*bis* do Texto único das disposições que regulamentam a imigração e as normas sobre a condição do estrangeiro, nos termos do Decreto Legislativo de 25 de julho de 1998, n. 286, mantendo como crime a conduta de violação das medidas administrativas adotadas nesta matéria (tradução nossa). PARLAMENTO ITALIANO. *Legge 28 aprile 2014, n. 67*. Deleghe al Governo in materia di pene detentive non carcerarie e di reforma del sistema sanzionatorio. Disposizioni in materia di sospensione del procedimento con messa ala prova e nei confronti degli irreperibili. Disponível em: <http://www.avvocatomassimoscrascia.it/wordpress/wp-content/uploads/2014/06/LEGGE-67-2014.htm>. Acesso em: 29 nov. 2016.

50 FRIGENI, Luisa. La depenalizzazione si arresta di fronte al reato di immigrazione clandestina. Federalismi.it. *Rivista di diritto pubblico italiano*, comparato, europeo, n. 15, 2016.

51 MARTÍNEZ ESCAMILLA, Margarita. Inmigración, derechos humanos y política criminal: ¿Hasta donde estamos dispuestos a llegar? *Revista para el análisis del Derecho*, n. 3, 2009. Disponível em: <http://www.raco.cat/index.php/InDret/article/viewFile/138050/188695>. Acesso em: 09 jan. 2016.

52 BRANDARIZ GARCÍA, José Ángel. *Sistema penal y control de los migrantes*: gramática del migrante como infractor penal. Granada: Comares, 2011.

53 BUTLER, Judith. *Vida pracaria*: el poder del duelo y la violência. Buenos Aires: Paidós, 2006. p. 108.

é utilizado como instrumento de massa de manobra, que há muito perdeu sua legitimidade e compatibilidade com o próprio Estado de Direito. É nesse sentido que ocorre a expansão do Direito Punitivo em relação à imigração irregular. No intento de dar respostas eficientistas aos medos e inseguranças da população, e com o objetivo de evitar que os riscos se convertam em situações concretas de perigo, o Direito Penal passa a ser utilizado como instrumento preventivo, levando ao reconhecimento, segundo Massimo Donini[54], da "transición de un Estado de derecho a un Estado de prevención", ou seja, "un Estado que por raziones de seguridad pide a los ciudadanos la renuncia a los derechos que tienen frente al Estado mismo, anticipando la intervención invasiva de los poderes públicos a todo nivel, y no sólo en vista de particulares, circunscritas emergencias".

Desse modo, o tratamento penal direcionado à imigração irregular, segundo Donini[55], apresenta uma política de exclusão penalmente armada, na qual se evidencia a adoção de um modelo de Direito Penal voltado para a exclusão dos imigrantes. Trata-se de um modelo de Direito Penal autoritário, orientado pela lógica do "inimigo" e, portanto, incompatível com o Estado de Direito. Isso porque esse modelo propõe um estado policialesco, com a retirada de garantias e direitos que, além de não resolver os problemas relacionados à criminalidade, objetiva tão somente a exclusão do sujeito não desejado. Em suma, trata-se de um modelo que "convierte a los adversarios en "no personas" destinadas a ser neutralizadas o excluidas sin culpabilidad, o en todo caso *sin una 'culpa' correspondiente a la sanción que es aplicada*, transformando la respuesta penal en la más típica de un derecho penal de autor"[56].

Esse modelo de Direito Penal, voltado ao inimigo, conforme menciona Ferrajoli[57], inverte a lógica segundo a qual o Direito Penal pune determinados "tipos de ação" e não determinados "tipos de pessoas", ou seja, segundo a qual os indivíduos são punidos pelo que "fazem ou deixam de fazer" e não por aquilo que "são". Nesse modelo, a predeterminação legal e a averiguação judicial do fato punível cedem posto à identificação do inimigo, que, inevitavelmente, ao não estar mediada pela prova de atos específicos de inimizade, se resolve na identificação, na captura e na condenação dos suspeitos. Com efeito, "el enemigo debe ser castigado por lo que es y no por lo que hace". Logo, "el presupuesto de la pena no es la realización de un delito, sino una cualidad personal determinada en cada ocasión con criterios puramente potestativos como los de 'sospechoso' o 'peligroso'. Ni sirven pruebas sino diagnosis y prognosis políticas".

De acordo com Donini[58], o Direito Penal do autor consiste em um Direito Penal em que "la razón de ser de la punición (o de una respuesta sancionatoria agravada) no consiste en el hecho cometido, sino en el tipo de autor", ou porque, "falta el hecho que es sustituido por un sujeto 'antijurídico', o porque el 'hecho' existe pero es sintoma de un juicio sobre el autor: es verdad que no se quiere la comisión del 'hecho', pero porque en realidad es su autor quien resulta indeseable".

Essa identificação de determinados grupos de pessoas como inimigos e/ou fontes de perigo, que criminaliza determinada forma de "ser" do autor (no caso em comento a condição de ser imigrante irregular) e não um fato delituoso cometido, configura um modelo de Direito Penal de autor mascarado dentro dos regulamentos do Direito Penal do fato. Isso representa um retrocesso inadmissível, uma vez que tal modelo de Direito Penal não respeita a dignidade da pessoa humana, bem como não reconhece direitos humanos fundamentais.

O ressurgimento desse modelo de Direito Penal, de controle preventivo e excludente, é nitidamente evidenciado na perspectiva contemporânea de controle dos fluxos migratórios, que consiste na securitização da imigração, ou seja, na tentativa de gestão dos riscos mediante a regulação, a seleção, a manipulação e a eliminação da população migratória, o que denota a institucionalização do controle biopolítico[59] sobre o imigrante,

54 DONINI, Massimo. El ciudadano extracomunitario: de "objeto material" a "tipo de autor" en el control penal de la inmigración. *Revista Nuevo Foro Penal*, v. 5, n. 72, p. 205-206, 2009.

55 DONINI, Massimo. El ciudadano extracomunitario: de "objeto material" a "tipo de autor" en el control penal de la inmigración. *Revista Nuevo Foro Penal*, v. 5, n. 72, p. 170-210, 2009.

56 DONINI, Massimo. El ciudadano extracomunitario: de "objeto material" a "tipo de autor" en el control penal de la inmigración. *Revista Nuevo Foro Penal*, v. 5, n. 72, p. 170-210, 2009.

57 FERRAJOLI, Luigi. El derecho penal del enemigo y la disolución del derecho penal. *Revista del Instituto de Ciencias Jurídicas de Puebla A. C.*, n. 19, p. 5-22, 2007. Disponível em: <http://www.icipuebla.com/revista/IUS19/IUS%2019IND.pdf>. Acesso em: 12 jan. 2016.

58 DONINI, Massimo. El ciudadano extracomunitario: de "objeto material" a "tipo de autor" en el control penal de la inmigración. *Revista Nuevo Foro Penal*, v. 5, n. 72, p. 192, 2009.

59 FOUCAULT, Michel. *Em defesa da sociedade*: curso no Collège de France (1975-1976). Tradução: Maria Ermantina Galvão. 2. ed. São Paulo: WMF M. Fontes, 2010.

que o torna passível dessas políticas antes mesmo de cometer qualquer crime.

As medidas de detenção administrativa, criminalização e expulsão de imigrantes irregulares caracterizam o objetivo de normalização desse conjunto de sujeitos, que, ao final, viabilizam um controle absoluto dos corpos, um controle biopolítico "donde el poder soberano disciplina el estatus de quien no tiene derechos de ciudadanía y se manifiesta al Estado por ser simplemente un «cuerpo», con su identidad física, sexual, étnica, geográfica, etc., sobre el cual el poder dicta las leyes, comenzando así a asignar o negar derechos *en razón de las «corpóreas» o, en el tipo penal, de proveniencia geográfica*"[60].

Os imigrantes irregulares sujeitos a esse controle biopolítico restam, extremamente, vulnerabilizados, privados de todos os direitos relacionados à existência humana, sem qualquer proteção ou garantia jurídico-política, passíveis de toda e qualquer forma de violência. São "vidas nuas", ou seja, não cidadãos (inimigos) que devem ser excluídos. São, nessa lógica, objetos de pura dominação.

4. Considerações Finais

O medo e a insegurança, transformados na base da agenda política internacional contemporânea, tem permitido a consolidação de políticas marcadas pela violência. Estas políticas — bastante evidentes no que se refere ao campo do controle de fluxos migratórios pelos países centrais europeus — afrontam, diretamente, os direitos e garantias fundamentais de determinados grupos de pessoas, e são contrárias, inclusive, aos valores sobre os quais as democracias europeias encontram-se assentados. Nesse cenário de paranoia securitária, as políticas de controle, pautadas pela lógica da guerra, evidenciam a produção de "inimigos" que são necessários para a legitimação da violência dispensada pelos Estados.

Em um contexto tal, os imigrantes, especialmente os irregulares, são percebidos como fontes inesgotáveis de riscos, transformando-se, com isso, em objetos de políticas nebulosas de marginalização e repressão, como é o caso da política de criminalização da imigração irregular adotada pela legislação italiana, analisada ao longo do texto. Como se procurou demonstrar — confirmando-se a hipótese inicial esboçada nas considerações introdutórias —, a instalação frequente do estado de exceção nos Estados Democráticos de Direito torna-se a principal responsável por esse nexo entre sistemas incompatíveis entre si, como são as democracias parlamentares e os regimes totalitários, o que permite que a exceção atue como o dispositivo por meio do qual o soberano poderá capturar a vida através de uma exclusão inclusiva a partir da qual o imigrante irregular se converte em mera "vida nua", exposto a toda forma de violência. Revela-se, nesse contexto, além do abandono da vida humana pelo direito, a existência de uma vontade soberana com capacidade de suspensão da ordem democrática e do direito.

O controle e a vigilância, que produzem binarismos como imigrante/nacional, ganham proporções desastrosas em consequência das novas formas de racismo, o que os leva a atuar incansavelmente na tentativa de eliminar as alteridades consideradas ameaçadoras e rebeldes, as quais, na sua tentativa de fuga, ativam seu potencial subversivo, tornando-se, reflexamente, objetos perigosos aos dispositivos de controle e vigilância.

Do exposto, é possível afirmar que as políticas migratórias europeias contemporâneas, principalmente as políticas migratórias italianas, exercem um papel que produz efeitos claramente negativos, como a ausência da inclusão desses grupos de indivíduos, a promoção indireta de agressões xenofóbicas e racistas, e perigos para os fundamentos jurídicos e institucionais da própria sociedade. Os riscos resultantes desse processo, portanto, acabam se tornando maiores do que a ameaça atribuída aos imigrantes.

Em definitivo, alguns Estados-membros da União Europeia — particularmente a Itália, analisada na presente pesquisa —, têm edificado, a partir da cultura do medo que altera a realidade e a percepção social sobre a insegurança, novas estratégias voltadas à segurança nacional que avançam sobre liberdades individuais, bem como a adoção de uma nova política criminal no tratamento à imigração irregular de ampliação da intervenção penal, consolidando um modelo de direito penal de autor.

60 DONINI, Massimo. El ciudadano extracomunitario: de "objeto material" a "tipo de autor" en el control penal de la inmigración. *Revista Nuevo Foro Penal*, v. 5, n. 72, p. 170-210, 2009.

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The New Rules On Trade And Environment Linkage In Preferential Trade Agreements

As Novas Regras sobre a Relação entre Comércio e Meio Ambiente em Acordos Preferenciais de Comércio

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The New Rules On Trade And Environment Linkage In Preferential Trade Agreements*

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Alberto do Amaral Júnior**

Alebe Linhares Mesquita***

Abstract

The present paper aims to analyze the advancement of environmental provisions in Preferential Trade Agreements (PTAs), more specifically, in the Trans-Pacific Partnership (TPP). Even though the TPP might never enter into force due to political changes in the United States' government, the rules established under it represent the new benchmark on trade and environment linkage. The language adopted in the Agreement is already guiding negotiations in the multilateral, plurilateral and bilateral level. This study is divided into three main sections. In the first section, the interplay between international trade and protection of the environment will be depicted. In the second section, the phenomenon of the advancement of environmental provisions in PTAs will be analyzed. In the third section, the environmental provisions consolidated in the TPP will be considered. The methodology adopted in the development of this research is bibliography, descriptive and exploratory. In conclusion, it can be asserted that incorporation of environmental provisions in PTAs has assumed an increasing importance in the efforts to render international trade and environmental protection mutually supportive and to achieve sustainable development goals. Among PTAs, the TPP stands out as the most modern advanced in terms of environmental provisions. However, the TPP's analysis demonstrated that environmental consequences of the implementation of preferential trade agreements should be further assessed. This would allow the elaboration of preventive measures to overcome possible side effects, such as the increase of trade in fossil fuels or the reallocation of pollution intensive industries, due to the other trade liberalization provisions.

Keywords: Environment. Preferential Trade Agreements. TPP.

Resumo

O presente artigo pretende analisar a expansão de dispositivos ambientais em Acordos Preferenciais de Comércio (APCs), mais especificamente, no Acordo Transpacífico (TPP). Mesmo que o TPP nunca chegue a entrar em vigor devida a mudanças políticas no governo dos Estados Unidos, a regras nele estabelecidas representam a nova referência sobre a relação en-

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tre comércio e meio ambiente. A linguagem adotada no Acordo já orienta as negociações em níveis multilateral, plurilateral e bilateral. Este estudo é dividido em três seções principais. Na primeira, a interação entre comércio internacional e meio ambiente será demonstrada. Na segunda, o fenômeno da expansão dos dispositivos ambientais nos APCs será analisado. Na terceira, os dispositivos ambientais consolidados no TPP e a as suas implicações serão considerados. A metodologia adotada no desenvolvimento desta pesquisa é bibliográfica, descritiva e exploratória. Em conclusão, pode-se afirmar que a incorporação de normas ambientais em APCs vem assumindo uma importância crescente nos esforços para tornar o comércio internacional e a proteção ambiental mutualmente favoráveis e para se alcançar as metas do desenvolvimento sustentável. Dentre os APCs, o TPP se destaca como o mais moderno e avançado em termos de dispositivos ambientais. No entanto, a análise do TPP demonstrou que as consequências ambientais da implementação de acordos preferenciais de comércio devem ser avaliadas mais profundamente. Isso permitira a elaboração de medidas preventivas para superar possíveis efeitos colaterais, como o aumento do comércio de combustíveis fósseis ou a realocação de indústrias de poluição intensiva, decorrentes de outros dispositivos de liberação comercial.

Palavras-Chave: Meio Ambiente. Acordos Preferenciais de Comércio. TPP.

1. Introduction

It is no longer reasonable to envisage a sustainable economic order disconnected from an international trading system that promotes environmental protection. Since the end of the twentieth century, environmental protection has acquired an unprecedented importance thanks to huge risks coming from the stunning degradation of nature. As an outcome, the relationship between international trade and the environment sets the center stage so as to alleviate awful menaces that hover on the entire Humanity.

At the multilateral level, the World Trade Organization (WTO) progress on this matter has been modest. The exception clause of the General Agreement on Tariffs and Trade (GATT) lists situations and requirements that allow countries to disregard the liberalization duties accorded. Article XX *b* and *g* determines, respectively, that nothing in the Agreement shall be construed to prevent the adoption or enforcement by any contracting Party of measures necessary to protect human, animal or plant life or health; and relating to the conservation of exhaustible natural resources.[1] This article inspired similar provisions included in other WTO Agreements.

The Agreements on Technical Barriers to Trade (TBT Agreement) and on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) are particularly important because they authorize trade restrictions so that legitimate environmental objectives can be achieved. Under the TBT Agreement, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate goal, such as the protection of human health or safety or plant life or health, or the environment (Article 2.2). Under the SPS Agreement, sanitary and phytosanitary measures shall be applied based on scientific principles and only to the extent to protect human, animal or plant life or health (Article 2.2). The SPS Agreement also covers ecological and environmental criteria within its conditions for risk assessment (Article 5.2) and demands governments to take into consideration ecosystems as one aspect in determining disease or pest free areas (Article 6.2).

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) also alludes to the environmental protection by establishing an exception with respect to patents. Members may exclude an invention from patentability when necessary to protect human, animal or plant life or health or to avoid serious prejudice to the environment (Article 27.2).

1 It is also worth mentioning that in the EC – Seals Products Case (DS401) the exception of the article XX (a) was recognized as potentially usable for assuring animal-welfare. The Appellate Body upheld the Panel's decision that the EU Seal Regime is 'necessary to protect public morals' within the meaning of Article XX (a) of the GATT 1994 (Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS401/AB/R (22 May 2014)). In the India – Solar Cells Case (DS456), India has also try to justify its domestic content requirements in the initial phase of the national solar mission under the exceptions of Article XX (d) and (j). However, India's attempt was unsuccessful and the Panel found that it failed to demonstrate application of such exceptions. On April 2016, India notified the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretation in the panel report (Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc WT/DS456/R (24 February 2016)).

The Doha Round impasse precluded the advancement of important trade related environmental rules. Presently, there is no specific WTO Agreement that deals directly with the promotion of sustainable development through trade liberalization. This subject is approached separately in different provisions of the WTO multilateral agreements.

The most significant initiative on the environmental mandate brought by the Doha Development Agenda is found in the negotiation of the Environmental Goods Agreement (EGA).[2] So far, the goods object of negotiation cover a broad range of environmental categories, like air pollution control, renewable energy, waste management and wastewater treatment. Even so, EGA's talks are far from being concluded.

Preferential trade agreements (PTAs) have disseminated too fast since the end of the Uruguay Round. A vast amount of PTAs either increases the scope of the WTO rules or regulate subject matters that do not belong to the multilateral trading system. Their negotiations have yielded effects not yet fully assessed.

Translating pressures from civil societies, preferential trade agreements came to contain environmental clauses or even entire chapters on that matter. Rules vary in accordance with the specificity, legal depth and bindingness of the commitments. They do not only reaffirm what has been adopted under the WTO Agreements, but also advance on topics not yet regulated by the Organization, exemplified by fisheries subsidies, illegal logging and wildlife trafficking.

Among the new generation of PTAs, special attention should be drawn to negotiation of the Mega Regional Trade Agreements (Mega-RTAs), a label coined to mean agreements bringing together the most powerful world economies. Due to their geographic extension and economic relevance, the topics that are being currently negotiated or have already been adopted will certainly be multilateralized in the future.

The Trans-Pacific Partnership (TPP) connects eleven economies of Asia and the Pacific Ocean to the US economy. Originally a Free Trade Agreement between Brunei, Chile, New Zealand and Singapore (Pacific-4), the TPP comprises more eight countries: United States, Australia, Canada, Japan, Malaysia, Mexico, Peru and Vietnam. It amounts to 36.3% of the world GDP and 25.5% of the world trade. After five years of negotiations, the countries achieved a final version of the Agreement in October 2015 in Atlanta (United States). The TPP has been the deepest plurilateral trade agreement signed since the end of the Uruguay Round in 1994. To enter into force, it is necessary the approval by the legislative powers of all signatory countries within a period of two years since the Agreement's signature or – after the expiry of this period – by at least 6 countries, which together account for at least 85% of the combined GDP of the original signatories.[3]

Given the political changes in the United States' government due to the election of Donald Trump for president, it is unlikely that the agreement might one day produce its legal effects. In his first week as president of the United States, Donald Trump withdrew the U.S from the TPP, keeping with one of its campaign promises. During Barack Obama's administration, the TPP was never presented to the U.S Congress given the lack of necessary parliamentary support to adopt the agreement. Even though the TPP might never enter into force, the rules established under it represent the new benchmark for trade and environment linkage and are already guiding negotiations on this matter in the multilateral, plurilateral and bilateral level. Its importance resides in the language consensus achieved by 12 developed and developing on a controversial topic. The TPP text will shed light in the future international negotiations and norm-setting. Therefore, it is so relevant to assess its provisions and implications for the governance of international trade and environment.

From this perspective, this article intends to analyze

2 The 17 participants in the negotiation of the Environmental Goods Agreement are: Australia, China, Costa Rica, the European Union (representing 28 members); Hong Kong, China; Iceland; Israel; Japan; Korea; New Zealand; Norway; Singapore; Switzerland; Separate Customs Territory of Taiwan; Penghu; Kinmen and Matsu; Turkey; and the United States (WTO SECRETARIAT. *Trade and Enviroment:* DG Azevedo welcomes progress in Environmental Goods Agreement. Available at: <https://www.wto.org/english/news_e/news15_e/envir_14dec15_e.htm>. Accessed on: 16 Dec. 2016).

3 THORSTENSEN, Vera; NOGUEIRA, Thiago; ARIMA JÚNIOR, Mauro. Introdução. In: THORSTENSEN, Vera; NOGUEIRA (Coord.). *O Tratado da Parceria Transpacífica (TPP)*: Impactos do Novo Marco Regulatório para o Brasil. São Paulo: VT, 2017. p. 47. In this regard, Thorstensen et al. highlight that the 85%'s figure was not a random choice. The TPP could not enter into force if it were not ratified jointly by the two largest economies of the trading bloc: United States and Japan. These countries, respectively, amount for 63% and 17% of the combined GDP of the original signatories. Hence, the United States and Japan, even separately, could prevent the entry into force of the TPP.

the evolution of the relationship between trade and environment beyond the WTO, in PTAs, paying particular attention to the TPP. We are specifically concerned with a particular question of whether a balanced relationship was achieved between trade and the environment. This paper is divided into three main sections.

In the first section, the interplay between international trade and the environmental protection will be depicted. The aim is to demonstrate the environmental effects for international trade, especially how and to what extent the liberalization and the expansion of international trade can harm or help the protection of the environment.

In the second section, the inclusion of environmental provisions in Preferential Trade Agreements will be considered. Our purpose is to investigate the types of environmental provisions adopted, the ways in which they have been incorporated and the main incentives for embracing those clauses.

At last, the provisions adopted under the Environment Chapter (Chapter 20) of the Trans-Pacific Partnership will be assessed. The TPP represents the most advanced regulatory framework in terms of trade and environment linkage.

The importance of this research resides in identifying the main trends and patterns concerning the adoption of environmental provisions in the TPP. This is crucial to understand the relationship between regionalism and multilateralism and to foresee its consequences for the international trade regulation.

2. International Trade And The Protection Of The Environment

The first major initiative to incorporate environmental provision into the world trading system dates back to Uruguay Round (1986-1994), curiously the same period that the Rio Summit on the Environment and Development took place. Naturally, some conclusions of that summit reverberated in the Uruguay Round. More broadly, international environmental law started actually to be consolidated in 1960s.

Nevertheless, drawing on the observation by Dupuy and Viñuales, the failed Havana Charter[4] and even its predecessor, 'the 1927 Convention for the Abolition of Import and Export Prohibitions and Restrictions,[5] both contained explicit exceptions to accommodate what today would be called environmental measures.'[6] The 1947 GATT only incidentally alluded to protection of natural resources.[7]

Throughout time, international trade and the environmental protection have followed different paths, rarely crossing their sphere. Both fields had different logics and principles to address particular problems. However, due to the swift depletion of natural resources deriving from the industrialization process, the environmental protection became a political sensitive issue mobilizing both societies and governments to enhance the interaction between trade and the environment.[8]

The grass roots social movements played a decisive role in the formulation of claims for environmental regulation. NGOs acted in several fronts, such as information collection and dissemination, policy development consultation, policy implementation, assessment and monitoring and advocacy for environmental justice.[9] Its political activism grew continuously and its influences could be noticed in the outcomes of 1972 and 1992 United Nations Conferences.[10]

As new ecologically responsible standards were being internationally agreed, domestic environmental regulations have started to collide with trade obligations, reaching the GATT/WTO dispute settlement system. The multilateral trading dispute settlement system has already appreciated a number of trade disputes

4 Article 45 (1) (a) (x) of the Havana Charter for an International Trade Organization, 24 March 1948.

5 Article 4 of the Convention for the Abolition of Import and Export Prohibitions and Restrictions, 8 November 1927.

6 DUPUY, Pierre-Marie; VIÑUALES, Jorge. *International Environmental Law*. Cambridge: Cambridge University Press, 2015. p. 391.

7 LOWENFELD, Andreas. *International Economic Law*. 2. ed. Oxford: Oxford University Press, 2011. p. 372.

8 AMARAL JÚNIOR, Alberto. *Comércio Internacional e Proteção do Meio Ambiente*. São Paulo: Atlas, 2011. p. 139.

9 GEMMILL, Barbara; BAMIDELE-IZU, Abimbola. The role of NGOs and Civil Society in Global Environmental Governance. In: ESTY, Daniel C; IVANNOVA, Maria H. (Ed.). *Global environmental governance*: Options and opportunities. New Haven: Yale School of Forestry & Environmental Studies, 2002. p. 77-78.

10 Article 12 of the 1992 Rio Declaration affirms that: 'trade policy measures for environmental purposes should not constitute a means for arbitrary or unjustifiable discrimination or disguised restriction on international trade.'

involving environmental aspects,[11] such as the notorious cases: US – Shrimp-Turtle; US – Tuna-Dolphin I and II; and Brazil – Retreated Tires. In order to illustrate this collision, it is worth highlighting briefly the most important aspects of these cases.

In the US – Shrimp-Turtle, India, Malaysia, Pakistan and Thailand claimed that the US regulation[12] 'requiring that all shrimpers, foreign and domestic, exporting shrimp to the USA use a 'turtle excluder device' (TED) according to the US agency standards'[13] violated GATT's Articles XI (prohibition on quantitative restrictions). The United States alleged that this measure fell under the GATT Article XX (general exceptions) *b* (animal life) and *g* (exhaustible natural resources). The US supported that this measure was necessary to avoid the accidental catch of sea turtles and other endangered species both under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the 1973 US Endangered Species Act.[14]

The United States appealed the panel's ruling, which found the US measure to be in violation of Article XI and not justifiable under Article XX.[15] The Appellate Body recognized that 'under WTO rules, countries have the right to take trade action to protect the environment (in particular, animal or plant life and health) and endangered species and exhaustible resources).'[16] However, the Appellate Body kept the panel's ruling on Article XX, because the US measure discriminated unjustifiably between WTO Members. It provided other countries – mainly in the Caribbean – more favorable conditions regarding the use of TEDs than the four Asian countries (India, Malaysia, Pakistan and Thailand) that failed the complaint.[17]

In the United States – Tuna-Dolphin I, Mexico complaint that the "US moratorium on imports of Mexican yellowfin tuna through the implementation of US Marina Mammal Protection Act [MMPA]"[18] violated GATT's Articles III (national treatment), XI (prohibition on quantitative restrictions) and XIII (non-discriminatory administration of quantitative restrictions). The USA refuted the applicability of the mentioned GATT provisions and argued that its measure was allowed under GATT XX *b* and *g*. The MMPA aimed to promote the preservation of dolphins found in the tropical east of the Pacific Ocean through reducing their death caused by tuna fishing with the use of purse seine nets.[19]

The panel conclusions can be summed up in two main rulings. First, 'the US could not embargo imports of tuna products from Mexico simply because Mexican regulations on the way tuna was produced did not satisfy US regulations' ('product' versus 'process').[20] Considering that the measure "related to the process of capturing tuna and not the final product itself, […] GATT Article III was not applicable.'[21] Second, the 'GATT rules did not allow one country to take trade action for the purpose of attempting to enforce its own domestic laws in another country'[22] (extraterritoriality).[23] The panel found that 'the US moratorium was beyond the reach of US jurisdiction and, therefore, did not qualify

11 Examples of trade-related environmental disputes include: United States – Taxes on Automobiles; United States – Standards for Reformulated and Conventions Gasoline; European Communities – Trade Description of Sardines; and European Communities – Measures Affecting the Approval and Marketing of Biotech Products.

12 Section 609 of the Public Law 101-162.

13 TRUJILLO, Elizabeth. A Dialogical Approach to Trade and Environment. *Journal of International Economic Law*, Oxford, v. 16, n. 3, p. 548, Mar. 2013.

14 TRUJILLO, Elizabeth. A Dialogical Approach to Trade and Environment. *Journal of International Economic Law*, Oxford, v. 16, n. 3, p. 548, Mar. 2013.

15 For a deeper analysis of the case see: HOWSE, Robert. The Appellate Body Ruling in the Shrimp/Turtle Case: A New Legal Base Line for the Trade and Environment Debate. *Columbia Journal of International Law*, v. 27, n. 2, p. 491-521, 2002.

16 WORLD TRADE ORGANIZATION. *India etc versus US*: Shrimp-Turtle. Available at: <https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm>. Accessed on: 18 Jul. 2017.

17 WORLD TRADE ORGANIZATION. *India etc versus US*: Shrimp-Turtle. Available at: <https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm>. Accessed on: 18 Jul. 2017.

18 TRUJILLO, Elizabeth. A Dialogical Approach to Trade and Environment. *Journal of International Economic Law*, Oxford, v. 16, n. 3, p. 535-585, mar. 2013, p. 545.

19 AMARAL JÚNIOR, Alberto. *Comércio Internacional e Proteção do Meio Ambiente*. São Paulo: Atlas, 2011. p. 220.

20 WORLD TRADE ORGANIZATION. *Mexico etc versus US*: Tuna-Dolphin. Available at: <https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm>. Accessed on: 19 Jul. 2017.

21 TRUJILLO, Elizabeth. A Dialogical Approach to Trade and Environment. *Journal of International Economic Law*, Oxford, v. 16, n. 3, p. 535-585, mar. 2013, p. 546.

22 WORLD TRADE ORGANIZATION. *Mexico etc versus US*: Tuna-Dolphin. Available at: <https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm>. Accessed on: 19 Jul. 2017.

23 It is worth noting that the panel's report was never adopted. Mexico decided to pursue bilateral consultations with the USA in order to achieve an agreement outside GATT (WORLD TRADE ORGANIZATION. *Mexico etc versus US*: Tuna-Dolphin. Available at: <https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm>. Accessed on: 19 Jul. 2017).

for any of the GATT Article XX exceptions.'[24]

In the US – Tuna-Dolphin II, the European Community and the Netherlands brought a similar complaint questioning the US Marina Mammal Protection Act. The panel resumed the previously defended theses in US – Tuna-Dolphin I.[25] This ruling differs from the previous by finding that 'regulatory measures for the protection of human, animal, or plant life could be valid under Article XX (b) even if these measures were not confined to the jurisdictional boundaries of the state implementing the regulation.'[26] The panel, however, did not give further guidance as to under what circumstances.[27]

In the Brazil – Retreaded Tires, the EU claimed that the Brazilian ban and penalties on retreated tires imports from non-MERCOSUR countries[28] consisted a violation of GATT Articles I (most-favored-nation treatment), III (national treatment), XI (prohibition on quantitative restrictions) and XIII (non-discriminatory administration of quantitative restrictions).[29] This Brazilian ban was in accordance with the MERCOSUR's Arbitral Award No. 01/2006, exempting MERCOSUR countries from this measure. Brazil argued that its measures intended to reduce the harms produced by retreaded tires in the country, because their undue disposal and toxic composition could pose risks to human, animal and plant life and health. Besides, abandoned retreated tires still a serious public health problem in the country, since they are the birthplace of the *aedes aegypti* mosquito, the vector of several infectious diseases such as dengue.[30] Brazil alleged that its measures were justified under GATT Article XX *b*.

The EU appealed the panel's ruling to the Appellate Body, which, in general terms: (i) maintained the panel's finding that the import ban can be considered 'necessary' within the meaning of Article XX *b*;[31] but (ii) it decided that the measure was not the least restrictive means of pursuing the environmental objective, being applied in a arbitrary manner, leading to unjustifiable discrimination in regard to non-MERCOSUR.[32]

The above-mentioned cases are just a few examples of intricate interface between trade and environment protection. Today we are confronted with a huge environmental crisis that prevents the nature from recovering. Further, this rationale interferers with the fragile environmental balance of the planet. The unbridled international trade tends to boost an ever-greater degradation of natural resources, pushing the planet to its limits.

Trade issues are linked to central environmental challenges, such as: climate change; unsustainable use of natural resources; biodiversity losses; the air, land and ocean pollution; and desertification. They put not only the environment at risk, but also human health and livelihoods around the globe.[33] By accelerating the level of economic activity, they provoke the exaggerated use of the earth's resources, far beyond the natural replacement rate, and the use of non-renewable resources in an incompatible manner with the basic principles of sustainability. International trade has the potential to become a powerful source of environmental degradation if environmental values are not taken into consideration.[34]

It is worth noting that regulatory requirements for the sustainable management of natural resources, environmental impact assessment studies, treatment of

24 TRUJILLO, Elizabeth. A Dialogical Approach to Trade and Environment. *Journal of International Economic Law*, Oxford, v. 16, n. 3, p. 546, Mar. 2013.

25 AMARAL JÚNIOR, Alberto. *Comércio Internacional e Proteção do Meio Ambiente*. São Paulo: Atlas, 2011. p. 221.

26 TRUJILLO, Elizabeth. A Dialogical Approach to Trade and Environment. *Journal of International Economic Law*, Oxford, v. 16, n. 3, p. 547, Mar. 2013.

27 TRUJILLO, Elizabeth. A Dialogical Approach to Trade and Environment. *Journal of International Economic Law*, Oxford, v. 16, n. 3, p. 547, Mar. 2013.

28 Brazilian National Environment Council (CONAMA)'s Resolution No. 258/99.

29 TRUJILLO, Elizabeth. A Dialogical Approach to Trade and Environment. *Journal of International Economic Law*, Oxford, v. 16, n. 3, p. 571, Mar. 2013.

30 MATIAS, João Luis Nogueira; ZANOCCHI, José Maria McCall. A Compatibilização entre o Comércio Internacional e a Proteção do Meio Ambiente no Âmbito da OMC: Análise do Caso das Restrições à Importação de Pneus Recauchutados pelo Brasil. *Anais do XX Encontro Nacional do CONPEDI*, Florianópolis: Fundação Boiteux, p. 4994-5016, 2011.

31 WORLD TRADE ORGANIZATION. *Brazil:* Measures Affecting Imports of Retreaded Tyres. Available at: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm>. Accessed on: 19 Jul. 2017.

32 TRUJILLO, Elizabeth. A Dialogical Approach to Trade and Environment. *Journal of International Economic Law*, Oxford, v. 16, n. 3, p. 572, Mar. 2013.

33 BIRKBECK, Carolyn Deere; BOTWRIGHT, Kimberley. *The Future of the Global Trade and Investment Architecture*: Pursuing Sustainable Development in the Global Economy – Overview of Issues, Challenges and Debates. Geneva: International Centre for Trade and Sustainable Development and World Economic Forum, 2015. p. 33.

34 AMARAL JÚNIOR, Alberto. *Comércio Internacional e Proteção do Meio Ambiente*. São Paulo: Atlas, 2011. p. 143-144.

industrial waste as well as the reparation and compensation in case of environmental damage are not yet a consensus at international level. As a result, a country that has stricter environmental rules is in a less favorable position in commercial terms than the one that has more flexible rules. This stems from the fact that the value of the goods produced in its territory does not reflect the costs related to the compliance with minimum standards of environmental protection, rendering them more competitive in the global market.

This situation demonstrates a negative effect of trade liberalization. Highly polluting and/or extensive natural resource-based enterprises are encouraged to move to countries whose legislation and environmental requirements are softer. Enterprises mostly located in the European Union and in the United States try to move to pollution havens, in order to escape from its stringent national environmental law and, consequently, higher production costs.

In this respect, Frankel asserts that: 'openness to trade might encourage some countries to specialize in dirtier activities, and export their products to others with higher environmental standards.'[35] On this view, international trade liberalization has its primary effect on the distribution of pollution across countries, rather than on the overall average.[36]

In addition, countries with low environmental protection rules are not motivated to adopt more severe environmental rules and those that already have stricter rules find themselves tempted to lower their level of environmental protection to attract new foreign investments.[37] This represents the well-known race-to-the bottom hypothesis. Open countries in general adopt less stringent environmental regulations than less open countries out of fear of adverse effects on their international competitiveness.[38] Countries are led to maintain the lowest level of environmental protection as much as possible to keep their competitiveness in the global market. However, the race-to-the-bottom argument is questioned by empirical accuracy, as countries might have other genuinely environmental concerns that point in the opposite direction. China, for example, wants to reduce air pollution at all costs.

Moreover, arguments advocating potential benefits between the two fields must be remarked. The expansion of international trade, some authors opine, could favor technical innovation and, consequently, the dissemination of less polluting forms of production. Open markets are used to stimulate the empowerment of consumers who could spur the adoption of sustainable corporate codes of conduct. Besides, the so-called Environmental Kuznets Curve[39] shows that even tough at early stages of economic development growth may bring a deterioration in the environment, after a particular critical level is reached, the further growth brings an improvement.[40] Hence, the trade effects on the environment would be beneficial in the long run.

As it stands, the impact of trade liberalization on environmental protection is ambiguous. As noted by Professors Dupuy and Viñuales, this interaction may place constraints on legitimate environmental restrictions or contribute to the wider circulation of polluting substances, but it may also lead to a more efficient use of natural resources, as a result of global competition among producers, or to a wider circulation of environment-friendly goods and technologies.[41]

As can be observed, no matter the assumption about the relation between the two fields, one thing is sure: there is an inseparable link between international trade and environmental protection in the pursuit of sustainable development. According to studies developed by the Organization for Economic Cooperation and Development (OECD), environmental problems are not caused by trade itself, but by market and intervention failures that occur, respectively, when markets do not reflect the environmental values and public policies create, aggravate or do not correct those failures.[42]

35 FRANKEL, Jeffrey. *Environmental Effects of International Trade*. Västerås: Sweden's Globalisation Council, 2009. p. 7.

36 FRANKEL, Jeffrey. *Environmental Effects of International Trade*. Västerås: Sweden's Globalisation Council, 2009. p. 9.

37 QUEIROZ, Fábio Albergaria. Meio ambiente e comércio internacional: relação sustentável ou opostos inconciliáveis? Argumentos ambientalistas e pró-comércio do debate. *Contexto Internacional*, Rio de Janeiro, v. 31, n. 2, p. 258-259, maio/ago. 2009.

38 FRANKEL, Jeffrey. *Environmental Effects of International Trade*. Västerås: Sweden's Globalisation Council, 2009. p. 7.

39 The environmental Kuznets Curve is a loose U-shaped relationship between income and environmental quality (FRANKEL, Jeffrey. *Environmental Effects of International Trade*. Västerås: Sweden's Globalisation Council, 2009. p. 6).

40 FRANKEL, Jeffrey. *Environmental Effects of International Trade*. Västerås: Sweden's Globalisation Council, 2009. p. 6.

41 DUPUY, Pierre-Marie; VIÑUALES, Jorge. *International Environmental Law*. Cambridge: Cambridge University Press, 2015. p. 391.

42 ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT. *The Environmental Effects of Trade*. Paris: OECD Publications, 1994. p. 8.

JÚNIOR, Alberto do Amaral; MESQUITA, Alebe Linhares. The New Rules On Trade And Environment Linkage In Preferential Trade Agreements. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 388-411

Among market failures, special attention should be given to externalities. They occur when the actions of one person affect others who do not receive any compensation by the damage caused or by the benefits created.[43] Negative externalities happen when the action of one party imposes costs on others, for example, the emission of polluting gases. Positive externalities take place when the action of one party is beneficial to others, such as the conservation of tropical forests.[44] As externalities are not turned out in the price, they end up becoming a cause of economic inefficiency. Its incorporation into the market is extremely important to adjust economic rules to environmental protection.

In this sense, the costs of negative externalities lie in the option of getting rid of the waste of a particular production process without treatment, leaving this burden to the nature. Instead of being embedded in the final price, the cost of pollution is transferred to the environment, inhabitants, fauna and flora. Economic agents wish to privatize profits and socialize losses and production costs.[45]

Therefore, the current dynamic of international trade should be modified to internalize damages to the environment. The contemporary challenges require joint initiatives to incorporate environmental provisions into the international trading system structure, so that minimum environmental standards form part of its normative framework. Environment and trade policies ought to be mutually supportive.

Trade should not be understood as an end in itself, but as a tool to achieve the noblest human purposes, which were to Montesquieu and Kant peace and harmony among men.[46] Countries must reassess ways in which international trade can be successfully used to foster the protection of the environment as opposed to its degradation.[47]

A major step in this direction has come about under preferential trade agreements. Their regulatory expansion is building new pathways between trade and the environment. There are not only clauses on environmental protection but also entire chapters on the subject. Hence, it is valuable to analyze in what direction the international environmental trade rules are heading by investigating this new dynamic of trade negotiations.

3. The Expansion Of Environmental Provisions In Preferential Trade Agreements

In the last decades, the world witnessed the increasing proliferation of Preferential Trade Agreements (PTAs)[48] concluded in parallel to the WTO system. According to the 2013 World Trade Report, the number of agreements more than tripled between 1990 and 2010, from around 70 at the beginning of the period to nearly 300 at the end.[49] As of 1st July 2016, 635 of them have already been reported to the WTO, of which 423 are now in force.[50] These numbers represents a shift in how trade is being regulated and negotiated internationally.

In accordance with Baccini and Dür, this phenomenon could be explained as a result of 'the stagnation of the process of multilateral trade liberalization, the search for economies of scale, the desire to signal commitment to specific trade and economic policies and the protection of foreign direct investments.'[51] In a similar vein, Baldwin understands this new wave of agreements as a response to the demands of the 21st century regionalism that has as its core the trade-investment-service

43 AMARAL JÚNIOR, Alberto. *Comércio Internacional e Proteção do Meio Ambiente*. São Paulo: Atlas, 2011. p. 42.

44 PINDYCK, Robert; RUBINFELD, Daniel. *Microeconomia*. São Paulo: Makron Books, 1994.

45 CAUBET, Christian Guy. A Irresistível Ascensão do Comércio Internacional: o meio ambiente fora da lei? *Revista de direito Ambiental*, São Paulo, v.6, p. 92, abr./jun. 2001.

46 AMARAL JÚNIOR, Alberto. *Comércio Internacional e Proteção do Meio Ambiente*. São Paulo: Atlas, 2011. p. 127.

47 FRANKEL, Jeffrey. *Environmental Effects of International Trade*. Västerås: Sweden's Globalisation Council, 2009. p. 6.

48 Usually, researchers and policy-makers have adopted the terms Preferential Trade Agreements (PTAs) and Regional Trade Agreements (RTAs) more or less interchangeably due to the fact that PTAs traditionally have a strong regional orientation (WTO SECRETARIAT. *2013 World Trade Report*. p. 75. Available at: <https://www.wto.org/english/res_e/booksp_e/world_trade_report13_e.pdf>. Accessed on: 30 Nov. 2016). For now on, the present paper adopts the term PTA to describe this type of agreement.

49 WTO SECRETARIAT. *2013 World Trade Report*. Available at: <https://www.wto.org/english/res_e/booksp_e/world_trade_report13_e.pdf>. Accessed on: 30 Nov. 2016.

50 WTO SECRETARIAT. *Regional Trade Agreements*. Available at: <https://www.wto.org/english/tratop_e/region_e/region_e.htm>. Accessed on: 15 Nov. 2016.

51 BACCINI, Leonardo; DÜR, Andreas. The New Regionalism and Policy Interdependence. *British Journal of Political Science*, Cambridge, v. 42, n. 1, p. 57, jun. 2011.

nexus.[52]

Although apparently incompatible with the central idea of the multilateral trading system, the Preferential Trade Agreements are not prohibited under the WTO Law. On the contrary, GATT's article XXIV allows its formation, as long as three conditions are met: (i) the customs duties and other regulations of commerce shall not be higher or more restrictive than before in the constituent territories; (ii) or in respect to third countries; and (iii) their reduction shall be scheduled within a reasonable period of time.[53]

Nevertheless, it is important to stress that this provision is a clear exception of the Most-Favored-Nation clause established under GATT's Article I.[54] This waiver was allowed to enable countries to negotiate and reduce tariffs in smaller groups, making global trade liberalization easier.

However, increasingly PTAs go beyond the simple dismantling of border barriers to trade in goods.[55] Those agreements now regulate services and other elements of integration, such as, regulatory liberalization, competition policy, investment and intellectual property protection. Moreover, traditionally PTAs were only restricted to tariff reduction, encompassing solely the already accepted WTO rules (WTO-in).[56] PTAs have incorporated rules deepening the already existing regulation (WTO-plus) as well as rules about themes that don't pertain to the multilateral trading system (WTO--extra).

In general terms, there is a trend of legal strengthening in all regulated areas. As observed by Badin and Tasquetto, this encompasses 'the evolution of provisions restricted to the cooperation between the parties and their national authorities towards more comprehensive arrangements, with clear and detailed obligations and even specific institutional mechanisms.'[57]

Among the new subjects that the WTO agreements have not fully regulated, special attention needs to be drawn to the notable expansion of environmental provisions in Preferential Trade Agreements. This is a recent phenomenon in the history of PTAs' development. The creation of the North American Free Trade Agreement (NAFTA) stands out as one the first benchmarks in this direction.[58]

The NAFTA was one of the first PTAs to explicitly incorporate environmental concerns into a trade agreement.[59] There is an attempt to balance the need of states to protect the environment and to expand free trade in the Chapter on Standard Related Measures and Agriculture and Phytosanitary Measures; by recognizing that the investment chapter should not be construed as preventing Parties from adopting and enforcing domestic environmental measures; and by incorporating certain MEAs[60] into its provisions.[61]

Moreover, NAFTA was only adopted after the ac-

52 BALDWIN, Richard. *21st Century Regionalism*: filling the gap between 21st century trade and 20th century trade rules. WTO Staff Working Paper ERSD-2011-08. Available at: <https://www.wto.org/english/res_e/reser_e/ersd201108_e.pdf>. Accessed on: 16 Nov. 2016.

53 As stated under paragraph 5, (a) (b) (c), of 1994 GATT Article XXIV.

54 GATT's article I defines the Most-Favored-Nation Treatment as 'any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.'

55 ROLLO, Jim. The Challenge of Negotiating RTAs for Developing Countries: what could the WTO do to help? In: BALDWIN, Richard; LOW, Patrick (Ed.). *Multilateralizing Regionalism*: Challenges for the Global Trading System. Cambridge: Cambridge University Press, 2009.

56 THORSTENSEN, Vera; FERRAZ, Lucas. *A multiplicação dos acordos preferenciais de comércio e o isolamento do Brasil*. São Paulo: Instituto de Estudos para o Desenvolvimento Industrial, 2013. Available at: <http://retaguarda.iedi.org.br/midias/artigos/51d18e9168afa9d0.pdf>. Accessed on: 20 Dec. 2016.

57 BADIN, Michelle; TASQUETTO, Lucas. Os Acordos de Comércio para Além das Preferências: uma Análise da Regulamentação sobre os Novos Temas. *Revista de Direito Internacional*, Brasília, v. 10, n. 1, p. 126, 2013.

58 BADIN, Michelle; AZEVEDO; Milena. A regulação de Meio Ambiente e Questões Trabalhistas nos Acordos Preferenciais de Comércio. In: OLIVEIRA, Ivan; BADIN, Michelle (Ed.). *Tendências Regulatórias nos Acordos Preferenciais de Comércio no Século XXI*: os casos de Estados Unidos, União Europeia, China e Índia. Brasília: IPEA, 2013. p. 297-298.

59 It is worth recalling that the European Integration Agreements also incorporated gradually environmental concerns. The 1957 Treaty establishing the European Economic Community – EEC (Treaty of Rome), for example, provided for in its article 36 that the commitments shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit, which are justified on grounds of the preservation of plant life.

60 Article 104 of NAFTA incorporate the following MEAs into its provisions: (i) the Convention on International Trade and Endangered Species of Wild Fauna and Flore (as amended June 22, 1979); the Montreal Protocol on Substances that Deplete the Ozone Layer (as amended June 29, 1990); and (iii) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

61 TRUJILLO, Elizabeth. A Dialogical Approach to Trade and Environment. *Journal of International Economic Law*, Oxford, v. 16, n. 3, p. 562-563, Mar. 2013.

ceptance of the North American Agreement on Environmental Cooperation (NAAEC), a side agreement established to provide environmental cooperation in the NAFTA implementation.[62] Negotiated at the request of the United States, the NAAEC was a political necessity both to allay the fear of delocalization due to lax environmental standards and to ensure Congressional ratification.[63] There was a preoccupation from the US that foreign investments would be displaced to Mexico where environmental standards were lower.

Even though the NAAEC has established a Commission for Environmental Cooperation (CEC) and its dispute settlement body, the Agreement has been more influential in cross-fertilizing environmental issues – for example, renewable electricity markets – at regional level than its adjudicatory function.[64] The NAFTA model influenced significantly the adoption of subsequent PTAs negotiated by the United States. All recent North American PTAs devote entire chapters to environmental issues, including law enforcement and dispute settlement mechanisms.[65]

Usually, developed countries have been the primary drivers in including environmental provisions into PTAs. United States, Canada, New Zealand, and the European Union 'have been among the strongest proponents, both at the multilateral level and in PTAs.'[66] Developing countries, on the contrary, have been skeptical about including environmental provisions into trade agreements. Their preoccupation is that the trade-environment linkage might turn into an excuse to impose disguised protectionist measures. Even though the scope and depth of such provisions are not as elaborate as those proposed by developed countries, 'countries such as Chile, China, and Mexico have been incorporating environmental provisions into their PTAs.'[67]

From that angle, PTAs with environmental provisions are classified on the basis of three degrees of legal depth.[68] Agreements in the first category introduce general provisions on cooperation in the realms of trade and the environment. Commitments are commonly found in a side agreement or in a Memorandum of Understanding. Similar type of PTA is usually adopted by China. The second category involves agreements that align provisions of cooperation with the establishment of minimum level of environmental protection and channels for public participation. The European Union PTAs signed until the beginning of the 2000s fall into this category. At last, the third category covers PTAs that go further on the provisions of cooperation by deepening their regulation through more substantive, detailed and binding commitments. Those features can be found in the US agreements and in the EU agreements signed after 2000.[69]

The Organization for Economic Co-operation and Development (OECD) has so far conducted one of the most comprehensive studies on the expansion of the environmental provision in Preferential Trade Agreements. The first OECDS's survey on this matter occurred in 2007 and aimed to analyze the types of environmental provisions, the ways they have been incorporated and the main incentives for adopting these provisions.

The 2007 Report recognized four main reasons (or policy drivers) for States to negotiate environmental issue in PTAs, that are: '(i) to contribute to the overarching goal of sustainable development; (ii) to ensure a level of playing field among Parties to the agreement; (iii) to enhance co-operation in environmental matters

62 KONG, Hoi; WROTH, L. Introduction: NAFTA and Sustainable Development. In: KONG, Hoi; WROTH, L. (Ed.). *NAFTA and Sustainable Development*: History, Experience and Prospects for Reform. Cambridge: Cambridge University Press, 2015. p. 1.

63 GAGNÉ, Gilbert; MORIN, Jean-Frédéric. The Evolving Policy on Investment protection: evidence from recent FTAs and the 2004 Model BIT. *Journal of International Economic Law*, Oxford, v. 9, n. 2, p. 379, May 2006.

64 TRUJILLO, Elizabeth. A Dialogical Approach to Trade and Environment. *Journal of International Economic Law*, Oxford, v. 16, n. 3, p. 565, Mar. 2013.

65 2012 U.S – Korea Free Trade Agreement (Article 20); 2012 U.S – Panama Free Trade Agreement (Article 17); 2009 U.S – Oman Free Trade Agreement (Article 17); 2009 U.S – Peru Free Trade Agreement (Article 17); 2006 U.S – Marocco Free Trade Agreement (Article 17).

66 ANURADHA, R. V. Environment. In: CHAUFFOUR, Jean-Pierre; MAUR, Jean-Christopher (Ed.). *Preferential Trade Agreement*: policies for development. Washington: World Bank, 2011. p. 408.

67 ANURADHA, R. V. Environment. In: CHAUFFOUR, Jean-Pierre; MAUR, Jean-Christopher (Ed.). *Preferential Trade Agreement*: policies for development. Washington: World Bank, 2011.

68 BADIN, Michelle; AZEVEDO; Milena. A regulação de Meio Ambiente e Questões Trabalhistas nos Acordos Preferenciais de Comércio. In: OLIVEIRA, Ivan; BADIN, Michelle (Ed.). *Tendências Regulatórias nos Acordos Preferenciais de Comércio no Século XXI*: os casos de Estados Unidos, União Europeia, China e Índia. Brasília: IPEA, 2013. p. 299-300.

69 The 2011 European Union – South Korea Free Trade Agreement and the 2002 European Union – Chile Free Trade Agreement are examples of EU PTAs that falls into this third category due to their deeper commitments on trade-related environmental regulation.

of shared interest; (iv) pursuing an international environmental agenda.'[70]

Since then, this OECD study has been updated annually. Its last review disclosed on 25 July, 2014 evidences some interesting developments on the increase in environmental provisions in Preferential Trade Agreements. In accordance with the survey, the types of environmental provisions detected in PTAs are those related to: (i) a reference in the preamble; (ii) general and specific exceptions founded on GATT Article XX or GATS Article XIV for protection of human, animal and plant life; (iii) a commitment to upholding environmental law, and not weaken it to attract trade or investment; (iv) more environmental provisions, such as: environmental cooperation, public participation, dispute settlement, coverage of specific environmental issues, specific provisions on Multilateral Environmental Agreements (MEAs), and implementation mechanisms.[71]

Those provisions are incorporated either into the main text of the PTA or placed in separate side agreements.[72] They may appear in specific chapters or under the cooperation chapter. Of note environmental and labor issues are often approached under the same chapter or even in the same clause. In some PTAs, the chapters are entitled social and sustainable development with a view to covering both issues.[73] These commitments may appear as a blend of legally binding and nonbinding provisions.[74]

In regard to emerging trends in terms of approach and wording adopted in PTAs' environmental provisions, there has been stressed (i) the expansion on the general exceptions; (ii) the inclusion of conflict clauses that ensure that obligations in other agreements take priority over the trade agreement; and (iii) the establishment of positive social obligations.[75]

Pursuant to 2014 OECD Survey, from 2007 to 2012, the total number of Preferential Trade Agreements containing environmental provisions that were in force amounted to 77.[76] The most common type of environmental provision in this sample of Agreements has been the exceptions based on GATT Article XX or GATS Article XIV for protection of human, animal and plant life. These provisions are an integral part of 60 of all Preferential Trade Agreements reviewed, 78% of them. The second most common type of environmental provision has been the reference to the environment or sustainable development in the Preamble, appearing in 52% of the PTAs reviewed. The third most common type of environment provision has been the mention of environmental cooperation, accounting for 49% of all PTAs.[77]

Of great significance the 2014 OECD research indicated an increase in the adoption of more substantive environmental provisions. In consonance with the report, these kinds of provisions remained constant up to 2010 at around 30% of PTAs entering into force. They then rose to over 50% in 2011 and near to 70% in 2012. Among them, the environmental cooperation clause has been the most common type, rising from 20% at the beginning of the study to almost 70% in 2012.[78]

Thus, we can assert that recent international free tra-

70 GEORGE, Clive. Environment and Regional Trade Agreements: Emerging Trends and Policy Drivers. *OECD Trade and Environment Working Papers,* n. 2, 2014. Available at: <http://www.oecd-ilibrary.org/trade/environment-and-regional-trade-agreements_5jz0v4q45g6h-en>. Accessed on: 10 Nov. 2016.

71 GEORGE, Clive. Environment and Regional Trade Agreements: Emerging Trends and Policy Drivers. *OECD Trade and Environment Working Papers,* n. 2, p. 7, 2014. Available at: <http://www.oecd-ilibrary.org/trade/environment-and-regional-trade-agreements_5jz0v4q45g6h-en>. Accessed on: 10 Nov. 2016.

72 ANURADHA, R. V. Environment. In: CHAUFFOUR, Jean-Pierre; MAUR, Jean-Christopher (Ed.). *Preferential Trade Agreement*: policies for development. Washington: World Bank, 2011. p. 409.

73 BADIN, Michelle; AZEVEDO; Milena. A regulação de Meio Ambiente e Questões Trabalhistas nos Acordos Preferenciais de Comércio. In: OLIVEIRA, Ivan; BADIN, Michelle (Ed.). *Tendências Regulatórias nos Acordos Preferenciais de Comércio no Século XXI*: os casos de Estados Unidos, União Europeia, China e Índia. Brasília: IPEA, 2013. p. 297.

74 ANURADHA, R. V. Environment. In: CHAUFFOUR, Jean-Pierre; MAUR, Jean-Christopher (Ed.). *Preferential Trade Agreement*: policies for development. Washington: World Bank, 2011. p. 409.

75 BARTELS, Lorand. Social issues, environment and human rights. In: LESTER, Simon; MERCURIO, Bryan (Ed.). *Bilateral and Regional Trade Agreements*: commentary and analysis. New York: Cambridge University Press, 2009. p. 366.

76 GEORGE, Clive. Environment and Regional Trade Agreements: Emerging Trends and Policy Drivers. *OECD Trade and Environment Working Papers,* n. 2, p. 8, 2014. Available at: <http://www.oecd-ilibrary.org/trade/environment-and-regional-trade-agreements_5jz0v4q45g6h-en>. Accessed on: 10 Nov. 2016.

77 GEORGE, Clive. Environment and Regional Trade Agreements: Emerging Trends and Policy Drivers. *OECD Trade and Environment Working Papers,* n. 2, 2014. Available at: <http://www.oecd-ilibrary.org/trade/environment-and-regional-trade-agreements_5jz0v4q45g6h-en>. Accessed on: 10 Nov. 2016.

78 GEORGE, Clive. Environment and Regional Trade Agreements: Emerging Trends and Policy Drivers. *OECD Trade and Environment Working Papers,* n. 2, p. 9, 2014. Available at: <http://www.oecd-ilibrary.org/trade/environment-and-regional-trade-agreements_5jz0v4q45g6h-en>. Accessed on: 10 Nov. 2016.

de agreements have tended to enhance environmental cooperation among participating countries. Three factors particularly matter for developing regional environmental cooperative mechanisms, which are: (i) networks of intergovernmental organizations; (ii) the strong willingness of political leaders often embodied in national strategies for regionalism and (iii) the establishment and the institutionalized linkage – especially through FTAs – between trade and the environment.[79]

Although PTAs raise the possibility of addressing environmental issues beyond provisions of cooperation, 'trade and investment instruments promoting sustainable development goals can be adopted under PTA chapters on trade in goods, services, technical barriers to trade, sanitary and phytosanitary measures, government procurement, investment and technology transfer.'[80]

Besides, another main innovation brought by the latest PTAs' generation lies in enforcing environmental obligations on the same basis as commercial provisions of the agreement – the identical remedies, procedures and sanctions. PTAs 'enforcement provisions make a meaningful addition to environmental obligations, above whatever exists in Multilateral Environmental Agreements and national laws.'[81]

As observed, there has been a dizzying dissemination of environmental provisions in Preferential Trade Agreements in the last decade. In this context, special attention should be drawn to the negotiations of the so-called Mega Regional Trade Agreements. Due to their regulatory coverage and their geographical extension, these agreements may foreground a new paradigm for the protection of the environment through trade regulation.

4. Trans-Pacific Partnership: A New Paradigm For Trade And Environment Linkage

The negotiation of Mega Regional Trade Agreements (Mega-RTAs) is gradually rearranging the world trading system into large regional trading blocs gathering the world's main developed and developing countries.[82] These agreements are 'deep integration partnerships between countries or regions with a major share of world trade and foreign direct investment (FDI), and in which two or more of the parties are a paramount driver position, or serve as hubs, in global values chains.'[83] In line with Draper, Lacey and Ramkolowan, those agreements can be defined as involving three features: (i) are negotiated by three or more countries or regional groupings; (ii) whose members collectively account for 25% or more of world trade; and (iii) the substance of which goes further the current WTO disciplines.[84]

While the majority of the Free Trade Agreements focus on creating preferential tariff regimes between countries over and above the WTO's multilateral tariff levels, Palit reminds that Mega Regional Trade Agreements are aimed at deepening market-access gains beyond tariffs by harmonizing policies and regulations so as to influence cross-border movement of services, capital, people, technology, knowledge and ideas.[85]

A new way of governing world trade appears to be emerging. Even though the creation of the WTO in 1994 signaled a process of centralization of the world trading system that started with the adoption of GATT in 1947, the expansion of preferential trade agreements and the Mega Regional Trade Agreements over the last twenty years have reconfigured the governance in world trade.[86]

79 YOO, Tae; KIM, Inkyoung. Free Trade Agreements for the Environment? Regional economic integration and environmental cooperation in East Asia. *International Environmental Agreements*: Politics, Law and Economics, v. 15, n. 5, p. 721-738, Oct. 2015.

80 COTTIER, Thomas; HOLZER, Kateryna. Addresssing Climate Change under Preferential Trade Agreements: towards alignment of carbon standards under the Transatlantic Trade and Investment Partnership. *Global Environmental Change*, v. 35, p. 516, Jul. 2015.

81 HUFBAUER, Gary; CIMINO-ISAACS, Catheleen. How will TPP and TTIP Change the WTO System? *Journal of International Economic Law*, Oxford, v. 18, p. 684, Aug. 2015.

82 PALIT, Amitendu. *Mega-RTAS and LDCs*: Trade is not for the poor. Geoforum, Singapore, v. 58, p. 23, Jan. 2015.

83 MÉLENDEZ-ORTIZ, Ricardo. Mega-regionals: what is going on? In: WORLD ECONOMIC FORUM. *Mega-Regional Trade Agreements*: game-changers or costly distractions for the World Trading System? Geneva: World Economic Forum, 2014. p. 6.

84 DRAPER, Peter; LACEY, Simon; RAMKOLOWAN, Yash. Mega-Regional Trade Agreements: implications for the African, Caribbean and the Pacific Countries. *ECIPE Occasional Paper,* n. 2, p. 8, 2014. Available at: <http://www.ecipe.org/app/uploads/2014/12/OCC22014_.pdf>. Accessed on: 20 Nov. 2016.

85 PALIT, Amitendu. *Mega-RTAS and LDCs*: Trade is not for the poor. Geoforum, Singapore, v. 58, p. 24, Jan. 2015.

86 AMARAL JÚNIOR, Alberto. Is Trade Governance Changing? *Revista Brasileira de Direito Internacional*, Brasília, v. 12, n. 2, p.

If successfully adopted, Mega Regionals will have an extraordinary impact on how the international trade regime is governed. Or even if no mega-regional agreement succeeded, their negotiating objectives and ultimate stumbling blocks will shape the future of the WTO.[87] Therefore, in view of understanding the trajectory of the environmental regulation under trade agreements, it is necessary to examine the Trans-Pacific Partnership (TPP). The first Mega-RTA to have its negotiations concluded.

Its Environment Chapter is the most far-reaching ever achieved in a trade agreement. It contains provisions on topics such as wildlife trade; marine fisheries; environmental goods and services; implementation of multilateral environmental agreements; access to remedies for environmental harm; transparency; cooperation; biodiversity; transition to a low-emission economy; corporate social responsibility and public-private partnerships.[88]

The TPP introduces new features that are: (i) transparency requirements for fisheries subsidies programs and prohibition on some of the most harmful fisheries subsidies; (ii) broad commitments to promote sustainable fisheries management; and (iii) broad commitments to combat wildlife trafficking beyond the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[89]

The Chapter's main purposes are to 'promote mutually supportive trade and environmental policies; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues.'[90] Environmental law shall not be used as disguised restriction to trade and investment, as well as the Parties shall not waive or derogate from its environmental law to encourage trade or investment.[91]

Even though the TPP might never enter into force due to the decision of the U.S president Donald Trump to withdraw the country from the Agreement, the language consensus on trade and environment protection achieved constitutes a new paradigm for the interplay between those two fields. The TPP's text is already being use to guide the discussions in this issue in all levels of negotiation. That is why its analysis still relevant.

4.1. Implementation of Multilateral Environmental Agreements

Regarding Multilateral Environmental Agreements (MEAs), the TPP countries affirmed their commitment to implement them to which they are already parties as well as to enhance the mutual supportiveness between trade and environmental law and policy. This should be undertaken especially through dialogue between relevant multilateral environmental agreements and trade agreements.[92]

The Environment Chapter expressly reinforces the commitments foreseen in three MEAs[93]: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); the Montreal Protocol on Ozone Depleting Substances[94]; and the International Convention for the Prevention of Pollution from Ships (MARPOL).[95] Even though the TPP provisions were based on those three MEAs, the CITES is the only expressly mentioned in the text of the Agreement. The Montreal Protocol and the MARPOL Convention are only referred in the footnotes. Not surprisingly, these three agreements are the only MEAs already commonly ratified by all the 12 Parties.

379, 2015.

87 HUFBAUER, Gary; CIMINO-ISAACS, Catheleen. How will TPP and TTIP Change the WTO System? *Journal of International Economic Law*, Oxford, v. 18, p. 679, Aug. 2015.

88 UNITED STATES TRADE REPRESENTATIVE – USTR. *Trans-Pacific Partnership*: leveling the playing field for American workers & American Businesses. Chapter 20 – Environment (TPP). Available at : <https://medium.com/the-trans-pacific-partnership/environment-a7f25cd180cb#.8mi33h9nz>. Accessed on: 16 Dec. 2016.

89 UNITED STATES TRADE REPRESENTATIVE – USTR. *Trans-Pacific Partnership*: leveling the playing field for American workers & American Businesses. Chapter 20 – Environment (TPP). Available at : <https://medium.com/the-trans-pacific-partnership/environment-a7f25cd180cb#.8mi33h9nz>. Accessed on: 16 Dec. 2016.

90 TPP Art. 20.2 (1).

91 TPP Art 20.2(3) and 20.3(7).

92 TPP Art. 20.4.

93 Such commitment is quite similar to the one adopted under NAFTA (Article 104), except that in the latter, instead of MARPOL you find the 1989 Basel Convention on Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

94 The Montreal Protocol was agreed on 16 September 1987 and entered into force on 1 January 1989. The treaty is designated to protect the ozone layer by phasing out the production of substances that are harmful to the ozone layer, causing its depletion.

95 The MARPOL Convention was adopted on 2 November 1973 and entered into force on 2 October 1983. The treaty covers the prevention of pollution of the marine environment by ships from operational or accidental causes.

JÚNIOR, Alberto do Amaral; MESQUITA, Alebe Linhares. The New Rules On Trade And Environment Linkage In Preferential Trade Agreements. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 388-411

The CITES seeks to ensure that international trade in specimens of wild animals and plants does not threaten their survival, particularly by protecting endangered species (mostly located in developing countries) through the control of demand (from developed countries).[96] The Convention was opened for signature in 1973 and entered into force on 1 July 1975. Approximately 5.600 species of animals and 30.000 species of plants are protected by CITES against over-exploitation through international trade. At the time of writing, 181 States are parties to the Convention.[97]

In order to achieve its goal, the CITES adopts mainly two approaches. The first one constitutes strictly regulating species that are threatened with extinction and which are or may be affected by trade.[98] The second approach comprises ensuring that 'species that are not currently threatened with extinction do not become so as a result of un-controlled trade.'[99] Hence, 'CITES allows trade, but regulates it, in order to prevent extinction of animal and plant species.'[100]

The TPP asserts that each Party shall adopt, maintain and implement laws, regulations and any other measures to fulfill its obligations under the CITES.[101] The Parties further commit to: (a) take appropriate measures to protect and conserve wild fauna and flora that it has identified to be at risk within its territory; (b) maintain or strengthen government capacity and institutional frameworks to protect sustainable forest management and wild fauna and flora conservation; and (c) endeavor to develop and strengthen cooperation and consultation with interested non-governmental entities.[102] The creation and participation in law enforcement networks are also encouraged.[103]

Hence, the TPP includes provisions to combat trade in wildlife, plants and fish – whether or not protected under CITES – if they have been taken illegally and if they have come from the TPP region. The scope of protection of endangered species of wild fauna and flora's protection is, therefore, extended beyond the established under the CITES.

Conservation of especially protected areas, such as wetlands and glaciers are also regulated under the TPP.[104] A panel established under its Dispute Settlement Mechanism may also seek advice or assistance from an entity authorized in conformity with CITES to address a particular matter.[105] The help of such entities could improve the balance of trade and environmental interests in commercial disputes.

The TPP strategy is direct: environmental abuses could be reduced if illegal trade in wild fauna and flora could be restricted more efficiently. These TPP provisions will directly bind the Parties to improve their sustainable management of biodiversity. However, it is worth noting that the sole reinforcement of CITES is not the ultimate solution for stopping trafficking of plants and animals. More comprehensive outcomes might be achieved if greater efforts to reduce the demand for these products in developed countries were carried out.[106] It is worth noting that other key international treaties on biodiversity that cover issues addressed by the TPP were not reinforced by it, such as the 1949 Inter-American Tropical Tuna Convention, the 1946 International Convention for the Regulations of Whaling and the 1992 Convention on Biological Diversity (CBD)[107].[108]

96 DUPUY, Pierre-Marie; VIÑUALES, Jorge. *International Environmental Law*. Cambridge: Cambridge University Press, 2015. p. 398.

97 CITES Secretariat. *Convention web-page*. Available at: <https://www.cites.org/eng>. Accessed on: 10 Dec. 2016.

98 TORPY, Renee. If Criminal Offenses Were Added to CITES, Would Nations be Better Able to Restrict International Trade in Endangered Species and Protect Biodiversity? *Revista Brasileira de Direito Internacional*, Brasília, v. 9, n. 3, p. 60, Dec. 2012.

99 TORPY, Renee. If Criminal Offenses Were Added to CITES, Would Nations be Better Able to Restrict International Trade in Endangered Species and Protect Biodiversity? *Revista Brasileira de Direito Internacional*, Brasília, v. 9, n. 3, p. 60, Dec. 2012.

100 TORPY, Renee. If Criminal Offenses Were Added to CITES, Would Nations be Better Able to Restrict International Trade in Endangered Species and Protect Biodiversity? *Revista Brasileira de Direito Internacional*, Brasília, v. 9, n. 3, p. 60, Dec. 2012.

101 TPP Art. 20.17 (2).

102 TPP Art. 20.17 (4).

103 TPP Art. 20.17 (7).

104 UNITED STATES TRADE REPRESENTATIVE – USTR. *Transatlantic Trade and Investment Partnership:* TTIP Issue-by-Issue – Environment. Available at: <https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip-9>. Accessed on: 16 Dec. 2016.

105 TPP Art. 20.23 (2).

106 SCHOTT, Jeffrey. TPP and the Environment. In: SCHOTT, Jeffrey; CIMINO-ISAACS, Cathleen (Ed.). *Assessing the Trans-Pacific Partnership*: innovations in trading rules. Washington: Peterson Institute for International Economics, 2016. p. 38.

107 Even though the United States signed the CBD in 1993, it never ratified it.

108 PEREIRA, Mariana Barreto. O Trans-Pacific Partnership Agreement e seus potenciais impactos para a regulação da biodiversidade no âmbito transnacional. *Revista de Direito Internacional*, Brasília, v. 13, n. 2, p. 377–391, 2016.

As regards to the Montreal Protocol, TPP Environment Chapter determines that its Parties 'shall take measures to control the production and consumption of and trade in, [substances that deplete the ozone layer].'[109] The Agreement's Annex 20-A keeps a record of the measures currently applied by the Parties that are deemed to comply with this obligation. Furthermore, the TPP recommends[110] its Partners to cooperate on matters such as environmentally friendly alternatives to ozone-depleting substances and the combating of illegal trade in those products.[111] The content behind these rules will have a direct effect in the industry of the TPP Parties, which will have to adapt and improve its market approaches to substitute substances that deplete the ozone layer in a wide range of industrial and consumer applications.

With respect to protection of the marine environment, the TPP establishes provisions on the prevention of pollution from ships, including cooperation in enforcement measures by the flag State or, as appropriate, by the port State.[112] The strengthening of these provisions grounded in the MARPOL Convention will have a direct impact in the regional shipping industry. The Parties' flag State vessels will probably face new obligations regarding accidental or deliberate pollution; and increased protection in special geographic areas.

4.2. Fisheries Subsidies

Total fisheries subsidies are estimated to amount to approximately 'US$ 35 billion, which constitutes 30-40% of the landed values generated by wild fisheries worldwide.'[113] The highest share of them (about US$ 20 billion) is constituted by capacity-enhancing subsidies. Destructive fishing practices and fleet overcapacity are enabled by those government subsidies.[114]

The TPP seeks to control, reduce and eventually eliminate all subsidies that contribute to overfishing and overcapacity. Therefore, no Party shall grant or maintain any: (a) subsidies for fishing that negatively affect fish stocks that are in an overfished condition; and (b) subsidies provided to any fishing vessel while listed by the flag State or Regional Fisheries Management Organization or Arrangement for illegal, unreported and unregulated (IUU) fishing.[115] Subsidy programs that were created before the TPP's conclusion shall be brought into conformity as soon as possible and no later than three years after the date of entry into force of the Agreement.[116] Each Party shall also report regularly to the other TPP Parties the details of its fisheries subsidies programs.[117]

Fisheries subsidies regulation is a major TPP achievement, considering that its Parties rank among the world's largest fish exporters and the subsidies provided by some of them contribute substantially to overfishing.[118] Nevertheless, the TPP provisions are only a similar version of the main Treaty on the matter, the 2009 Food and Agriculture Organization (FAO) Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal Unreported and Unregulated Fishing. The TPP is less comprehensive and binding than 2009 Agreement and it does not require its Parties to adopt and implement it. The Port State Measures[119] has not yet entered into force because it is pending ratification by a minimum number of signatories.[120]

109 TPP Art. 20.5 (1).

110 TPP Art. 20.5 (3).

111 SCHOTT, Jeffrey. TPP and the Environment. In: SCHOTT, Jeffrey; CIMINO-ISAACS, Cathleen (Ed.). *Assessing the Trans-Pacific Partnership*: innovations in trading rules. Washington: Peterson Institute for International Economics, 2016. p. 36.

112 TPP Art. 20.6.

113 SUMAILA, Rashid. Trade Policy Options for Sustainable Oceans and Fisheries. *E15 Expert Group on Oceans*, Fisheries and Trade System – Policy Options Paper, REF 181215. p. 6. Available at: <http://www3.weforum.org/docs/E15/WEF_Fisheries_report_2015_1401.pdf>. Accessed on: 16 Dec. 2016.

114 SUMAILA, Rashid. Trade Policy Options for Sustainable Oceans and Fisheries. *E15 Expert Group on Oceans*, Fisheries and Trade System – Policy Options Paper, REF 181215. Available at: <http://www3.weforum.org/docs/E15/WEF_Fisheries_report_2015_1401.pdf>. Accessed on: 16 Dec. 2016.

115 TPP Art. 20.16 (5).

116 TPP Art. 20.16 (6).

117 These notifications shall contain information such as: program name; legal authority for the program; catch data by species in the fishery for which the subsidy is provided; status of the fish stocks in the fishery for which the subsidy is provided, fleet capacity in the fishery for which the subsidy is provided; conservation and management measures in place for the relevant fish stock; and total imports and exports per species (TPP art 20.16 (10)).

118 SCHOTT, Jeffrey. TPP and the Environment. In: SCHOTT, Jeffrey; CIMINO-ISAACS, Cathleen (Ed.). *Assessing the Trans-Pacific Partnership*: innovations in trading rules. Washington: Peterson Institute for International Economics, 2016. p. 34.

119 The United States ratified the 2009 FAO Agreement on Port State Measures to Prevent, Deter, and Eliminate IUU Fishing in February 2016.

120 SCHOTT, Jeffrey. TPP and the Environment. In: SCHOTT, Jeffrey; CIMINO-ISAACS, Cathleen (Ed.). *Assessing the Trans-Pacific Partnership*: innovations in trading rules. Washington: Peterson Institute for International Economics, 2016. p. 35.

In the multilateral realm, the Doha Declaration assigned the issue of fishing subsidies to the 'Rules' Negotiating Group, which is entitled to negotiate amendments to the WTO Agreement on Subsidies and Countervailing Measures (SCM). However, over a decade later, the group of Member Countries led by the United States (known as Friends of Fish) did not achieve any substantive outcome on the matter,[121] especially, because of 'fundamental disagreements over the respective level of commitments expected from emerging countries and more advanced economies.'[122]

In 2006, the U.S Congress allowed the shift of its fish protection efforts to regional and bilateral forums through the amendment of its primary law governing marine fisheries, the Magnuson-Stevens Fishery Conversation and Management Act. The regulation of this subject under the TPP is a direct result of this policy.[123] The language adopted in the Agreement will probably light the way for a WTO multilateral agreement on fisheries subsidies. Its provisions on the subject are likely to be used as a model for the negotiations in the next Ministerial Conference in Argentina in 2017.

The TPP also foresees other broader commitments on marine fisheries protection. The Parties shall seek to operate a fisheries management system that is designed to: (a) prevent overfishing and overcapacity; (b) reduce by-catch of non-target species and juveniles, and (c) promote the recovery of overfished stocks for all marine fisheries in which that Party's persons conduct fishing activities.[124] More precisely, the Environment Chapter sets forth that each Party shall promote the long-term conservation of sharks, marine turtles and marine mammals.[125] These obligations were particularly sensitive for many Asian negotiating countries that have the custom of eating these animals as national delicacy.

4.3 Public-Private Partnership

With regard to voluntary mechanisms to enhance environmental performance and public-private partnerships (PPPs), the TPP Parties recognized the importance of those mechanisms to achieve and maintain high levels of environmental protection and complement domestic regulatory measures. They should be designed in a manner that avoids the institution of unnecessary barriers to trade and boost environmental benefits.[126]

Through the mobilization and sharing of knowledge, expertise, technology and financial resources, PPPs can be an important tool to achieve sustainable. They can be designed to provide incentive to the private sector to adopt sustainable criteria in the conduction of its business. Without the responsible, participative and active involvement of the private sector, the current environmental challenges cannot be overcome.[127] In this sense, the TPP encourages to the formation of new partnerships between the public and the private sector.

4.4. Committee on Environment

The Transpacific Partnership created a Committee composed of senior government representatives responsible for the implementation of the Environment Chapter.[128] The Committee is competent to: (i) provide a forum to discuss and review the implementation of the Chapter; (ii) provide periodic reports to the TPP Commission; (iii) and provide a forum to discuss and review activities.[129] All decisions and reports of the Committee shall be made by consensus and be made available to the public, unless agreed otherwise.[130]

On the matter of trade in environmental goods and services, the senior-level Environment Committee shall consider issues identified as potential non-tariff barriers to trade.[131] The Parties may also engage in bilateral and plurilateral cooperative projects on environmental goo-

121 GLASS-O'SHEA, Brooke. Watery Grave: Why International and Domestic Lawmakers need to do More to Protect Oceanic Species From Extinction. *West Northtwest*, San Francisco, v. 17, n. 2, p. 116, 2011.

122 SUMAILA, Rashid. Trade Policy Options for Sustainable Oceans and Fisheries. *E15 Expert Group on Oceans*, Fisheries and Trade System – Policy Options Paper, REF 181215. p. 14. Available at: <http://www3.weforum.org/docs/E15/WEF_Fisheries_report_2015_1401.pdf>. Accessed on: 16 Dec. 2016.

123 UNITED STATES NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION. *Implementation of Title IV of the Management Reauthorization Act of 2006*. Available at: <http://www.nmfs.noaa.gov/ia/iuu/msra_page/2009_report.pdf>. Accessed on: 5 Dec. 2016.

124 TPP Art. 20.16 (3).

125 TPP Art. 20.16 (4).

126 TPP Art. 20.11 (1).

127 UNITED NATIONS INSTITUTE FOR TRAINING AND RESEARCH. *Annemasse Declaration*. Available at: <http://www.unppp.org/annemasse-declaration>. Accessed on: 5 Nov. 2016.

128 TPP Art. 20.19 (2).

129 TPP Art. 20.19 (3).

130 TPP Art. 20.19 (5) and (6).

131 TPP Art. 20.18 (3).

ds and services.[132] Even though such initiatives are key to unlock renewable energy production among Parties and facilitate action on climate change, no specific commitment on trade in environmental goods and services was achieved. The issue was delegated to the Committee to conduct further consultations.

In addition, the Environment Committee makes possible that TPP Members name and shame countries that do not implement or enforce policies that are not legally binding in the Agreement.[133] For example, even though the TPP does not expressly prohibits shark finning because its Article 20.16 states that countries 'should' ban these practices, the TPP Environment Committee could use peer pressure to change such a policy. The successful implementation of the TPP environmental provisions will much depend upon the Parties' voluntary efforts to make the most of them.[134]

The TPP's Committee on Environment is a good example of institutional design that could enhance the compliance with the trade-related environmental rules. Even though the TPP might never come into force, this institutional model could be replicated in other PTAs. Such a forum is of key importance in the constant monitoring, reviewing and improvement of environmental obligations agreed under a PTA's framework.

4.5. Dispute Settlement

Obligations on the TPP's Environment Chapter will be enforced through the same dispute settlement procedures and mechanisms accessible for other disputes arisen under other TPP Chapters. Thus, the Parties may apply trade sanctions when environmental obligations have been breached.[135] In this aspect, the TPP is more comprehensive than the dispute settlement systems of the WTO and the NAFTA. Neither of them allow for the resolution of issues regarding environment provisions in such an objective and direct manner.[136] The TPP might then build its own jurisprudence on this new regulated subject.

However, before taking a controversy to the TPP's dispute settlement system, the Parties agreed to conduct three levels of consultations.[137] Only if the (i) parties consultation, (ii) the senior representative consultations and the (iii) ministerial consultations have failed to solve the problem, the requesting Party may require the establishment of a panel under the TPP dispute settlement system.[138]

TPP's Dispute Settlement Chapter also innovates insofar as the panels shall be composed not only of international trade experts, but also of experts on the matter of the dispute.[139] In this connection, environmental experts may compose a panel that appreciates trade disputes involving environmental issues. This opens the possibility of a more balanced decision without a purely commercial bias. It is argued that the lack of environmental experts in trade disputes involving environmental issues overshadows the preservation of natural resources in detriment of the trade agreement's economic scope.[140]

It is worth noting that, the commitments made by the Parties under the Multilateral Environmental Agreements to which they have joined are also subjected to

132 TPP Art. 20.18 (4).

133 SCHOTT, Jeffrey. TPP and the Environment. In: SCHOTT, Jeffrey; CIMINO-ISAACS, Cathleen (Ed.). *Assessing the Trans-Pacific Partnership*: innovations in trading rules. Washington: Peterson Institute for International Economics, 2016. p. 35.

134 RIMMER, Matthew. Greenwashing the Trans-Pacific Partnership: Fossil Fuels, the Environment and Climate Change. *Santa Clara Journal of International Law*, Santa Clara, v. 14, n. 2, p. 502, May 2016.

135 UNITED STATES TRADE REPRESENTATIVE – USTR. *Trans-Pacific Partnership*: leveling the playing field for American workers & American Businesses. Chapter 20 – Environment (TPP). Available at : <https://medium.com/the-trans-pacific-partnership/environment-a7f25cd180cb#.8mi33h9nz>. Accessed on: 16 Dec. 2016.

136 HILLMAN, Jennifer. Dispute Settlement Mechanism. In: SCHOTT, Jeffrey; CIMINO-ISAACS; Cathleen (Ed.). *Assessing the Trans-Pacific Partnership*: innovations in trading rules. Washington: Peterson Institute for International Economics, 2016. p. 102.

137 A Party may request consultations with any other Party regarding any matter arising under the Environmental Chapter by delivering a written request to the responding Party's contact point. This consultation request shall circulate to the other Parties that may participate in the consultations if they consider that they have substantial interest in the matter discussed (TPP Article 20.20). If the involved Parties have failed to resolve the matter, a committee of senior representatives shall be called to address the issue. They may gather relevant scientific and technical information from governmental e non-governmental experts (TPP Article 20.21). If the senior representative consultations have failed, the Parties shall refer the matter to their respective Ministers (TPP Article 20.22). Failing all three levels of consultation, the Party may request the establishment of a panel.

138 TPP Art. 20.23.

139 TPP Art. 28.10.

140 PEREIRA, Mariana Barreto. O Trans-Pacific Partnership Agreement e seus potenciais impactos para a regulação da biodiversidade no âmbito transnacional. *Revista de Direito Internacional*, Brasília, v. 13, n. 2, p. 385-386, 2016.

the same dispute settlement procedure as commercial obligations under the TPP. This will 'helps to ensure that countries do not waive or weaken their obligations under MEAs in order to attract trade or investment and that a country faces consequences if it does weaken its safeguards.'[141] Besides, this legal scheme grants teeth to MEAS that lacks biding enforcement regimes.

It should be noted that TPP's developing countries were very skeptical about the adoption of binding dispute settlement procedures for environmental obligations. Nonetheless, United States accomplish to overcome such reluctance by softening other clauses (i.e, 'should' instead of 'shall') in exchange of this possibility.[142] If the TPP one day comes into force, it remains to be seen if countries will really bring trade dispute against a Party, which fails to live up to its environmental obligations in a trade deal. The United States, for example, did not take action under the US – Peru Trade Promotion Agreement to combat illegal logging, even when there was documented evidence of non-compliance with environmental obligations.[143]

The use of trade sanctions in response to environmental provisions' violations has been historically criticized by developing countries. They have argued that, due to the current significant discrepancy between the levels of environmental protection between developing and developed countries, only the latters would able to make full use of this mechanism in practice. On this view, developed countries would be virtually immune to this kind of trade sanctions, since they already have a sound established environmental protection system with well functioning institutions and effective rules. The implementation of environmental obligations is costly and demands high expenditures on infrastructure and human capacity building. Developing countries argue that commercially sanctioning countries that have not achieved to comply with these rules is not the best approach to incentivize national sustainable policies. They defend that greater emphasis should be put on cooperation, technology transfer and technical assistance initiatives.

4.6. Other Environment-Related Provisions

It is also important to stress that environmental provisions are not restricted to the TPP's Environment Chapter. Its Investment and Intellectual Property Chapters also set forth substantial clauses on the issue. For instance, nothing in the TPP Investment Chapter shall be construed to prevent a country from adopting, maintaining or enforcing any measure that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental objectives.[144]

Moreover, the Investment Chapter determines that 'non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as […] the environment do not constitute indirect expropriations except in rare circumstances.'[145] Accordingly, to prove that an environmental measure constitutes an indirect expropriation, the Party should carry out a case-by-case inquiry that considers: (i) the economic impact of the government action; (ii) the extent to which the government action interferes with reasonable investment-backed expectations; (iii) and the character of the government action.[146] In addition, it makes up of an indispensable attitude to prove that an environmental measure was not applied in a discriminatory manner.

This commitment intends to avoid that corporations use the Investor-State Dispute Settlement (ISDS) carved out under Transpacific Partnership to challenge environmental policies and other regulatory initiatives protecting the environment. This reflects an old claim raised by environmental groups fearful that ISDS litigation might outweigh the environmental gains of the TPP.[147]

Furthermore, the Intellectual Property Chapter determines that a Party may exclude an invention from

141 RIMMER, Matthew. Greenwashing the Trans-Pacific Partnership: Fossil Fuels, the Environment and Climate Change. *Santa Clara Journal of International Law*, Santa Clara, v. 14, n. 2, p. 498, May 2016.

142 SCHOTT, Jeffrey. TPP and the Environment. In: SCHOTT, Jeffrey; CIMINO-ISAACS, Cathleen (Ed.). *Assessing the Trans-Pacific Partnership*: innovations in trading rules. Washington: Peterson Institute for International Economics, 2016. p. 33-34.

143 RIMMER, Matthew. Greenwashing the Trans-Pacific Partnership: Fossil Fuels, the Environment and Climate Change. *Santa Clara Journal of International Law*, Santa Clara, v. 14, n. 2, p. 503, May 2016.

144 TPP Art. 9.15.

145 TPP Annex 9-B, paragraph 3 (b).

146 TPP Annex 9-B, paragraph 3 (a).

147 SCHOTT, Jeffrey. TPP and the Environment. In: SCHOTT, Jeffrey; CIMINO-ISAACS, Cathleen (Ed.). *Assessing the Trans-Pacific Partnership*: innovations in trading rules. Washington: Peterson Institute for International Economics, 2016. p. 34.

patentability when necessary to protect '*ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to nature or the environment.'[148] Therefore, a Party may prevent the commercial exploitation within its territory of a patent that may harm the environment or put the life or health of humans, animals and plants in danger. That provision is also mentioned by the TRIPS Agreement (Article 27.2).

4.7. TPP's Limitations and Achievements

The Transpacific Partnership fails to establish a framework that fosters the transfer of green technology to combat global warming, particularly of renewable energy. The expression 'climate change is not even mentioned in the Agreement, because the US negotiators bowed to demands from skeptical members of Congress who threatened to vote against the entire pact if [those words] appeared in the text.'[149] To replace it, the negotiators entitled the section Transition to a Low Emissions and Resilient Economy that does not dedicate the necessary funding to carry out activities to address the issue, being unlikely to be translated into effective actions.[150]

Actually, there are concerns that the commitments under the TPP might work against the efforts to combat climate change. The reduction and elimination of tariffs and service barriers related to the oil and gas sector could increase trade in fossil fuels and enable the expansion of the American fracking industry throughout the Pacific Rim. The TPP's timid effort to promote clean energy policies will probably be counteracted by more trade in fossil fuels. The TPP's weak language on climate change falls short to address one of the most pressing environmental problems of our time.

However, the TPP remains the most important and extensive preferential trade agreement until the present moment that deals directly with the interplay between trade and environmental protection. Besides, the TPP represents an ambitious leap forward since it is the first time for the majority of the TPP countries that they include an environment chapter and environmental goals in their PTAs.[151] This is particularly relevant for countries that make up of more than one third of global fisheries catch and are the home to roughly one third of the world's threatened species.[152]

5. Final conclusions

The Transpacific Partnership is the most advanced Preferential Trade Agreement in terms of environmental provisions already concluded. There is no trade agreement currently in force that matches its Environment Chapter in terms of breadth and depth of obligations and dispute settlement procedures. Even though the TPP might never enter into force due to Donald Trump's decision to withdraw the United States from the Agreement, its treaty language reflects important consensus between developing and developed countries on rules designed to enhance the mutual supportiveness between trade and environmental protection.

The TPP contains binding provisions and enforcement mechanisms that allow the imposition of trade sanctions in case of an environmental obligation have been breached. This gives greater effectiveness to the commitments agreed upon the Environment Chapter and enhances national standards of environmental protection.

In addition, some Multilateral Environmental Agreements adopted by the TPP Parties also could gain real teeth, since the obligations agreed upon were subjected to the Dispute Settlement System established under the Transpacific Partnership. This could be a relevant boost in the effectiveness of some MEAs that only have weak enforcement mechanisms.

The TPP's Dispute Settlement System also provides for the participation of specialists other than trade ex-

148 TPP Art. 18.37 (3).

149 SCHOTT, Jeffrey. TPP and the Environment. In: SCHOTT, Jeffrey; CIMINO-ISAACS, Cathleen (Ed.). *Assessing the Trans-Pacific Partnership*: innovations in trading rules. Washington: Peterson Institute for International Economics, 2016. p. 39.

150 SCHOTT, Jeffrey. TPP and the Environment. In: SCHOTT, Jeffrey; CIMINO-ISAACS, Cathleen (Ed.). *Assessing the Trans-Pacific Partnership*: innovations in trading rules. Washington: Peterson Institute for International Economics, 2016.

151 LURIÉ, Andrew; KALININA, Maria. Protecting Animals in International Trade: a Study of the Recent Successes at the WTO and in Free Trade Agreements. *The American University Law Review*, Washington, v. 30, n. 3, p. 474, 2015.

152 LURIÉ, Andrew; KALININA, Maria. Protecting Animals in International Trade: a Study of the Recent Successes at the WTO and in Free Trade Agreements. *The American University Law Review*, Washington, v. 30, n. 3, p. 472, 2015.

perts in the panel's composition. As a consequence, trade disputes concerning environmental issues may also count with the presence of environmental experts. This could diminish the trade bias, normally found in the WTO decisions and render them more balanced with environmental precepts.

The TPP goes beyond the CITES by taking enhanced actions to combat wildlife trafficking – regardless of whether the wildlife is protected under CITES. The Partnership requires its Party to implement its CITES obligations and effectively enforce its laws and regulations, including commitments to cooperate by sharing information relevant to inquiry of criminals engaged in wildlife trafficking.

The Partnership addresses the sensitive issue of fish subsidies, providing innovative and concrete alternatives that should diminish the destructive effects of this practice. The TPP Parties agreed to gradually reduce and, eventually, eliminate the most harmful subsidies that are one of the main causes of overfishing and make their fisheries subsidies programs more transparent. Such initiatives could help to build up language that can light the way for WTO negotiations on this matter. The regulation of fishing subsidies under the TPP is a good example of how common environmental problems are more easily addressed in regional efforts than in global forums.

Even though the TPP covers a wide range of environmental issues, it does not address other urgent environmental challenges such as global warming. The 'Transition to a Low Emissions and Resilient Economy' clause is only a euphemism for taking real action in mitigating greenhouse gas emissions. The core subjects, such as environmental technologies, renewable energies and subsidies were not regulated. There is only a possible list of cooperation initiatives. There were, in fact, concerns that the TPP could actually facilitate trade in fossil fuels and the expansion of fracking industry in the Asia-Pacific Region. Preventive measures to counterbalance such side effects should have been put in place within the Agreements' implementation exercise.

The reasons why the TPP chose to protect some environmental aspects and neglected others are based on the Parties' capacity to build consensus in sensitive issues that, after all, still have to be approved by the legislative powers of all signatory countries. Considering that the TPP constitutes an agreement mainly driven by the United States, the advancements in its trade-related environmental clauses display the U.S priorities and beliefs that could not be achieved at the multilateral level.

Taking into account the abovementioned arguments, we can assert that incorporation of environmental provisions in the Transpacific Partnership has assumed growing importance in the efforts to render international trade and environmental protection mutually supportive and to achieve the sustainable development goals. However, the TPP's analysis demonstrated that environmental consequences of the implementation of preferential trade agreements should be further assessed. Complementary studies should be undertaken to analyze the environmental consequences of the implementation of preferential agreements as a whole. This would allow the elaboration of preventive measures to overcome possible side effects, such as the increase of trade in fossil fuels or the reallocation of pollution intensive industries, due to the other trade liberalization provisions.

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Abstract

This article aims at presenting the possibilities of introducing Decolonial approaches in the field of research on Regionalisms. It states that Eurocentrism and lack of epistemic alternatives produced in the South are the main obstacles to undertaking in-depth studies on Mercosur.

The first topic presents the historiography of research conducted on Mercosur and emphasizes the main themes and issues that have been on the agenda for debate. The second topic describes the motivations behind the use of Decolonial approaches in the sphere of regionalisms. The last topic raises some hypotheses about the possibilities of promoting the decolonization of Mercosur's realm of research by applying tools offered by new Latin American critical epistemes.

The use of critical approaches and "border epistemologies" in the field of regionalisms is innovative and useful because they offer the opportunity to redefine the emancipatory assumptions of Modernity - rather than reject them - and to include and appreciate other epistemic places of enunciation by opening spaces for pluriversal, non-hierarchical dialog with "other experiences" and "other knowledges".

Keywords: Decoloniality; Mercosur; critical approaches; fields of research.

Resumo:

O objetivo deste artigo é apresentar a possibilidade de introdução das abordagens Decoloniais no campo de pesquisas sobre os regionalismos. Defende-se que o eurocentrismo e a carência de alternativas epistêmicas produzidas no Sul constituem-se como importantes limitadores para o aprofundamento dos estudos sobre o Mercosul.

O primeiro tópico apresenta a historiografia das pesquisas elaboradas sobre o Mercosul e enfatiza os principais temas e problemas que têm ocupado espaço nas agendas de debates. O segundo tópico expõe as motivações para utilização das abordagens Decoloniais na esfera dos regionalismos. No

último tópico são levantas algumas hipóteses sobre as possibilidades de promover a descolonização dos espaços investigatórios mercosulinos, através da aplicação de ferramentas oferecidas pelas novas epistemias críticas latino-americanas.

A introdução de abordagens críticas e das "epistemologias de fronteira" nos campos dos regionalismos é inovadora e útil porque oferece a oportunidade de redefinir os pressupostos emancipatórios da Modernidade - ao invés de rechaçá-los – e de incluir e valorizar outros lugares de enunciação epistêmica, através da abertura de espaços de diálogo pluriversalizado, não hierarquizado com as experiências-outras e os saberes-outros.

Palavras-chave: Decolonialidade; Mercosul; epistemologias críticas; campos de pesquisas.

1. Introduction

Mercosur has never comfortably fit into the measures established by European standards. Theories of regional integration formulated in the North, although relevant in many aspects, can hardly encompass the whole of the landscape designed from the Global South. Although this diagnosis has already been widely accepted by the European literature, comparative analyses made in the Southern Cone are still strongly induced by Eurocentric parameters, which poses problems for research on regionalism.

Research studies in this field will produce further insights when they start taking into account critical thoughts borne from the Global South and geared towards the diversity of integrationist movements. The fact that theoretical frameworks are still based in the North, while the subjects of study are located in the South, poses risks of image distortion. Breaking such limitations requires, first and foremost, overcoming intellectual dependence and decolonizing the knowledge that naturalizes the hierarchies of rationalities; however, above all, it is crucial to transcend fundamentalisms, "whether hegemonic or marginal"[1].

The objective of this article is to discuss the possibility of introducing Decolonial approaches in the field of research on regionalisms and argue that Eurocentrism and lack of epistemic critical alternatives produced in the Global South are the main barriers to undertaking in-depth studies on Mercosur.

The first topic presents the historiography of research conducted on Mercosur and emphasizes the main themes and issues that have been on the agenda for debate. The second topic describes the motivations behind the use of Decolonial approaches in the sphere of regionalisms. The last topic raises some hypotheses about the possibilities of promoting the decolonization of Mercosur's realm of research by applying tools offered by new Latin American critical epistemes.

This study will highlight the possible contributions that Decolonial perspectives can offer to the field of regional integration (RI) by questioning the reproduction of Eurocentrism and 'coloniality of knowledge' in this context.

The purpose of introducing Latin American critical approaches is to widen the understanding of integration processes in this region rather than discard the existing frameworks. This is not an anti-European manifest, and we acknowledge the relevant contribution of European intellectual movements. However, this study stresses the need to extend the scope of theoretical frameworks by including Latin Americans critical approaches in essays.

It is assumed that one should look into regionalisms as historical processes and, therefore, one has to identify their genealogy in order to understand their potential and their constraints. Much of the uniqueness of the Southern Cone is connected with colonialist legacies; similarly, the nature of the European Union (EU) maintains traces and the legacies of the great world wars. The existing theories are unable to interpret the whole of colonial influence on the core of Mercosur.

For this reason, fields of research should be decolonized in order to expose the omissions and prejudice in mainstream thinking as well as overcome the influence of Eurocentric Modernity, based on plural cartographies that allow reaching the integrality of problems and more adequately disclose the limitations, challenges and perspectives of existing regionalisms outside Europe.

One of the many solutions proposed by Decolonial approaches to promote such decolonization, without

1 GROSFOGUEL, R. Para descolonizar os estudos de economia política e os estudos pós-coloniais: TransModernidade, pensamento de fronteira e colonialidade global. *Revista Crítica de Ciências Sociais*, 80, 2008, p. 115.

resorting to the outdated dilemma "Eurocentric *versus* fundamentalist", is the so-called "border thinking".

Border epistemologies are useful and innovative because they redefine the emancipatory assumptions of Modernity - rather than reject them - based on cosmologies and epistemologies of groups subordinated by colonial difference, with a view to engaging in libertarian decolonial practices capable of transcending the downside of Modernity, that is the suppression of the differences and a justification of European Imperialism.

This proposal, if applied to the field of regional integration, implies recognizing and validating the parameters and categories offered by integrationist theories while resignifying them by appreciating local experiences and by opening spaces for pluriversal, non-hierarchical dialog with different point of views and "other knowledges".

2. Historiography of research on regional integration in Mercosur

Research studies on Mercosur arose concomitantly with the birth of the block, although the studies on regionalism have already emerged as an object of interest (after World War II) of the Economic Commission for Latin America (CEPAL), which stood out for the developmental thought, whose main thinker was Argentinian Raul Prebish. Subsequently, the subject gained some prominence through the Dependency Theories, through its main approaches, internationally known by the works of Fernando Henrique Cardoso, Enzo Faletto, Theothonio dos Santos, Mauro Marini, and others. In 1970 and 1980, Marini revived the Bolivarian dream and argued that the integration was a prerequisite for the Latin American insertion into the global economy.

Despite the differences between Dependency theorists and CEPAL, when they examined the relations between the development of central countries and underdevelopment of peripheral nations, they placed regional integration in a prominent place on the Latin American agenda. Even though none of these paradigms has broken free from the ties of the 'coloniality of power', since they remained stuck to the modern ideals of development and the concept of Eurocentric progress[2], these are powerful theoretical contributions that inspired the progressive forces which influenced Mercosur at the beginning of the 21st century.

Actually, the Treaty founder of Mercosur resulted from the context known as liberal regionalism, present in the 1990s, whose premises advocated open markets, minimization of the State and reduction of the state's intervention in the economy. In this situation, the studies that have spread more vigorously were those that approached the liberal principles of the Washington Consensus. On the other hand, there also emerged critiques against the neoliberal thesis[3] and against the commercial liberalization without being accompanied by a formulation of common politics executed by supranational institutions[4].

Since the beginning, the choices of analytical axes and scopes of research on the Southern Cone have privileged the theoretical trends and themes predominant in European Schools, particularly focusing on the principles of Intergovernmentalism, Functionalism and Federalism.

The degree of interest and sophistication of research on themes about the Southern Cone is concomitant with the phases of delight and disappointment with the vitality of the block.

The first wave of studies was influenced by the enthusiasm arising from the signature of the Treaty of Asunción, which launched Mercosur. The *belle époque* of the 1990s[5] was reflected in the academy and stimulated the development of numerous analyses that were first elaborated in the fields of Economics, Law and Political Science. However, they soon spread to other branches of knowledge such as History, Geography, Education, Literature, etc. The studies that had the most significant repercussions were concentrated in the areas of Law, Political Science and Economy, and addressed themes such as institutional engineering, the Supranationality--Intergovernamentality binomial, globalization, inter-

2 GROSFOGUEL, R. Desenvolvimentismo, Modernidade e Teoria da Dependência na América Latina. *REALIS – Revista de Estudos Antiutilitaristas e Póscoloniais*, 3 (2), 2013, p. 27.

3 MARINI, R. *América Latina*: dependência e integração. São Paulo: Brasil Urgente, 1992.

4 GUIMARÃES, Samuel P. *Quinhentos anos de periferia*. Porto Alegre: Ed. UFRGS, 1999.

5 LINS, Hoyedo. *Vinte anos de MERCOSUL*: as partes e o todo. In: 3º Encontro Nacional da Associação Brasileira de Relações Internacionais - Governança Global e Novos Atores. Anais. São Paulo, 2011.

regional trade, investments, freedoms of the common market, international insertion of the region, the nuances of the Integration Law and, especially, the subjects derived from external policies of the member countries[6].

Nonetheless, in the early 2000s, considered as an *almost requiem* of Mercosur[7], academic enthusiasm diminished and, consequently, there were fewer scopes of debates.

However, the rise of left-wing governments in South America signalled the emergence of an era known as *"neo-developmental regionalism"*, which, in turn, gave power and robustness to integrationist discourses. This moment of regionalism, referred to as post-liberal[8], was responsible for closing a cycle based on the precepts of trade and the inauguration of a social and productive Mercosur, a phase in which the social agenda has taken on the space of economic-commercial regulatory demands. The components of physical and energy integration were also included in the regional platform that, this way, acquired structural connotations. The domestic agenda of progressive governments that favoured affirmative policies and income distribution, mechanisms of social inclusion and expansion of citizenship, crossed borders and reached the sub-regional scope.

One cannot yet claim that social cohesion can be considered as the "coal and steel" of Mercosur, i.e. if it is "the functional task that is manifestly difficult to realize within the confines of a single national state, and capable of generating concrete benefits for all participants within a relatively short period of time" as pointed by Philippe Schmitter in his paper *The experience of European integration and its potential for regional integration*[9]. However, the inclusion of social themes in agenda of the Organization is surely one of the most valuable assets of Mercosur's heritage.

This second developmental stage of the block - which was marked by the fact that the Member States explicitly recognized the existence of structural assymmetries[10] - renewed Mercosur's vivacity by implementing the Mercosur Structural Convergence Fund (FOCEM), the Social Institute, the Strategic Plan for social projects and also by creating the position of High Representative-General. The procedures for the adhesion of Venezuela and Bolivia have reinforced the tone of this recent picture that showed a more progressive facet.

The thematic axes which have had more room in the second phase are the theories about the current state of art, the constraints and advances of the model, in particular as regards the participation of civil society, of subnational actors, democracy and the crisis of representativeness and the implementation of the Mercosur Parliament, as well as the various nuances of "Social Mercosur" and the FOCEM itself. These subjects represent the potentiality of new dimensions of integration and, consequently, of fields of research[11].

There are debates that remain steadfast in academic realm, revealing key issues that have been considered as motivating and relevant, such as the constraints caused by the low level of institutionalization[12] that, as pointed out by Letícia Pinheiro[13], is convenient to Brazil. By impeding a deeper institutional structure, Brazil's federal government manages to keep a high degree of intervention and control over the rules and, consequently,

6 VENTURA, Deisy. (Org.) Direito Comunitário do Mercosul - Série Integração Latino americana. Porto Alegre: Livraria do Advogado, 1997; BAPTISTA, L. *Mercosul*: das Negociações à Implantação. São Paulo: LTr, 1994; VIGEVANI, T. Mercosul e globalização: sindicato e atores sociais. *Caderno CEDEC,* São Paulo, n.63, p. 1-28, 1997; MARINI, R. *América Latina*: dependência e integração. São Paulo: Brasil Urgente, 1992.

7 LINS, Hoyedo. *Vinte anos de MERCOSUL*: as partes e o todo. In: 3º Encontro Nacional da Associação Brasileira de Relações Internacionais - Governança Global e Novos Atores. Anais. São Paulo, 2011.

8 SANAHUJA, J.A. Del 'regionalismo abierto' al 'regionalismo postliberal': Crisis y cambio en la integración regional en América Latina. *Anuario de la Integración Regional de América Latina y el Gran Caribe*, 7, 12-54, 2009.

9 SCHMITTER, P. A experiência da integração europeia e seu potencial para integração regional. *Lua Nova*, 80, 2010. p. 40-43.

10 VIGEVANI, T.; RAMANZINI JÚNIOR, H. Autonomia, Integração Regional e Política Externa Brasileira: Mercosul e Unasul. *DADOS – Revista de Ciências Sociais*, 57 (2), 517-552, 2014.

11 RESENDE, E. S. A.; MALLMANN, M. I. (Orgs.) *Mercosul 21 anos*: maioridade ou imaturidade? Curitiba: Appris, 2013; OLIVEIRA, M. F. *Mercosul*: atores políticos e grupos de interesses brasileiros. São Paulo: Editora UNESP, 2003; MEDEIROS, M. A. Legitimidade, democracia e accountability no Mercosul. *Revista Brasileira de Ciências Sociais*, v. 23, p. 51-69, 2008; MARIANO, Karina Lilia Pasquariello. A eleição parlamentar no Mercosul. *Revista Brasileira de Política Internacional.* v. 54, p. 138-157, 2011; BRICEÑO J.; HOFFMANN A. Ribeiro. 'Post-Hegemonic Regionalism, UNASUR and the Reconfiguration of Cooperation in South America'. *Canadian Journal of Latin American and Caribbean Studies*, 40(1), 48–62, 2015.

12 COSTA, Rogério S.; SILVA, Karine de S. *Organizações Internacionais de Integração Regional*: União Europeia, Mercosul e UNASUL. Florianópolis: EDUFSC, 2013.

13 PINHEIRO, L. Traídos pelo desejo: um ensaio sobre a Teoria e a prática da política externa brasileira contemporânea. *Contexto internacional*, 22, 305- 335, 2000.

does not have to shoulder the costs derived from the supranational format. The literature points out that the gaps in institutional spaces have opened margins for the decisions taken by means of presidential diplomacy[14], headed by the two largest states, and they show, on the one hand, the convergences and divergences between Brazil and Argentina and their influence on the pace and design of Mercosur[15] and, on the other hand, the specificities of the perennial dispute of leadership between the two paymasters.

In this vein, the incursions of Brazilian foreign policy between regionalism and universalism, and the challenge of reconciling the logics of autonomy with regional needs, have raised questions about the regional leadership of the Latin American giant and misgivings about possible intentions of sub-imperialism or regional hegemony.

A topic of relative interest has been the gains of Mercosur in various sectors, a fact that runs counter to the predominant theories of regional integration, as the block does not accumulate some requirements considered to be central, e.g., absence of history of accentuated interdependence (demand factors) and lack of a vigorous institutional basis (supply factor)[16]. In fact, the agreement was signed as an initiative of national governments per se rather than as demands formulated by transnational actors, as it occurred in Europe. In this case, social appeals for adjustment are incorporated in the Southern Cone after the signature of the Treaty of Asunción[17].

In effect, the European epistemologies are incapable of plausibly explaining the trajectory and performance of the non-western regionalisms that responds to impulses and concrete objectives that differ from those theorized by the mainstream[18]. Mercosur does not fit perfectly in the stages of economic integration, and beyond this, the protagonism of the topics related to democracy[19] and human rights[20] in its agenda are unique when compared to other cases of regionalism. The Residence Treaties of Mercosur that include Chile, Bolivia, Peru, Colombia and Ecuador are regulatory benchmarks for migrations that represent a pragmatic turn because they encompass States that are not full members and thereby strengthen the solidary ties of the regional community.

However, it is certain that the weakening of Mercosur caused an impact in the academy, where interest in the area of regionalism has declined in recent years, especially because the objectives contained in the Treaty of 1991 have not been fulfilled. By the end of the second wave, alike to that of the first, a certain academic discouragement has occurred. Clearly, in a context marked by the international crisis and by its implications in domestic environments, the moment calls for introspection. In this sense, most of the literature has been dedicated mainly to evaluating the influence of internal factors in the results and dynamics of integration, in addition to verifying the overlapping regionalism and the compatibility of Mercosur with Unasur or with a possible competition against the Pacific Alliance. A few studies have looked into institutional elasticity, the path for democratic consolidation through citizen participation and the implementation of Parlasur, the potential of integration, the existence of an autonomous Legal Theory of regional integration, migrations, in addition to theorizations on regional public goods[21].

14 MALAMUD, A. Presidential diplomacy and the institutional underpinnings of Mercosur. *Latin American Research Review*, 40 (1), p. 138-164, 2005.

15 SARAIVA, M. Brazilian foreign policy towards South America during the Lula administration: caught between South America and Mercosur. *Revista brasileira de Política Internacional*, 53, 151-168, 2010.

16 MORAVCSIK, A. *The Choice for Europe: Social Purpose and State Power From Messina to Maastricht*. New York: Cornell University Press, 1998; SANDHOLTZ, W.; STONE SWEET, A. *European Integration and Supranational Governance*. Oxford: Oxford University Press, 1998.

17 MALAMUD, A. Mercosur Turns 15: Between Rising Rhetoric and Declining Achievement. *Cambridge Review of International Affairs*, 18 (3), p. 421-433, 2005a.

18 ACHARYA, Amitav. Global International Relations and Regional Worlds: a new agenda for international studies. *International Studies Quarterly*, 58 (4): 1-13, 2014.

19 HOFFMANN, A. Ribeiro. O processo de institucionalizacao dos direitos humanos no Mercosul e as comunidades epistemicas. RESENDE, E. S. A.; MALLMANN, M. I. (Orgs.) *Mercosul 21 anos*: maioridade ou imaturidade? Curitiba: Appris, 2013. p. 135-158.

20 SIKKINK, Kathryn. Latin American Countries as Norm Protagonists of the Idea of International Human Rights. *Global Governance* 20 (3): 389–404, 2014.

21 BERGAMASCHINE, JAMILE; JAEGER JÚNIOR, AUGUSTO. Por uma teoria jurídica da integração regional: a inter-relação direito interno, Direito Internacional Público e Direito da integração. Revista de Direito Internacional, v. 12, p. 139-158, 2016.; MOURA, A. B. A criação de um espaço de livre residência no Mercosul sob a perspectiva teleológica da integração regional: aspectos normativos e sociais dos Acordos de Residência. *Revista de Direito Internacional*, v. 12, p. 630-648, 2015; RESENDE, E. S. A.; MALLMANN, M. I. (Orgs.) *Mercosul 21 anos*: maioridade ou imaturidade? Curitiba: Appris, 2013; HOFFMANN, A. Ribeiro; BIANCULLI, A. C. (Orgs.) Regional Organizations and Social Policy in Europe and Latin America: a Space for Social Citizenship? London: Palgrave Macmillan, 2016; BOTTO, M. I. *La integración regional en América*

Currently, there are too few empirical studies about the implementation of specific themes of the integration agenda, outcomes, regional public goods, challenges posed by asymmetries, deficiencies of transport, energy and communications infrastructure. In the context of predominance of presidential activism, research should also focus on how much the top-down approach meets the demands of societies, and how one can facilitate the opening of more channels of participation for civil society which, for the most part, is completely unaware of the existence of Mercosur. Consequently, another theme that has been hardly explored is the equalization between demands and regional goods that only regional integration can satisfy.

Also dialogs on methodological questions have been neglected in the Southern Cone. Consequently, there is no regular debate on comparative research and little interaction takes place between scholars from other regions of the world, except with European ones. Studies about comparative regionalism have been dominated by the idea whereby the EU is a *sui generis* phenomenon. This vision is an obstacle to further understanding regionalism in South America. The so-called n = 1 problem has produced serious barriers to further research[22]. This way, it is necessary to develop the comparative facet of regionalism without falling into the trap of Eurocentrism or parochialism[23] and recognizing the literary contributions and the experiences about regionalisms that are produced in non-western contexts[24]. Although the theoretical corpus of the Eurocentrism, in the realm of regionalisms, have been amply questioned, it has not been possible to reverse[25].

Undoubtedly, one of the main limitations of commonly formulated diagnostics is the lack of reflection about the influence of the colonial heritage on Mercosur and the lack of introduction of critical perspectives in this context.

Explanations about the non-materialization of the Common Market, the failed attempt of the sub-regional strategy to gain international insertion[26] and the institutional difficulties are both endogenous and exogenous, and they are often related to the historical background of the Member States. The arguments based on the rhetoric of governments, the reluctance to cede sovereignty, the responsibilities of paymasters, the institutional weaknesses and the ambiguous leadership of Brazil are useful to explain the problems of the block, but they cannot reveal the whole panorama.

Evaluations on the influence of the EU on the results and impulses of integration have been neglected; however, they open a new horizon for research.

The fact that the Common Market has not been implemented as envisaged in the Treaty of Asunción has fuelled mercosceptic narratives, especially because of the comparison with the European Union. However, it is clear that Mercosur has gone deeper[27] by including social themes which, in turn, have stimulated the foundation of new decision-making bodies that granted more autonomy to the block and propitiated the expansions and the redefinition of Mercosur's identity. In other words, it cannot be categorically stated that the model is in free fall, or that it is a failure, because one might come down to dangerous reductionism. The institutional redesign by including actors and topics is proof that the agenda has become complex, dynamic and intense.

The current institutional structure, while inadequate to enable the construction of an integrationist sentiment among the Member States, was not able to interrupt a certain development of the block, although it remained in continuous inactivity in some areas and even regressed in others.

As stated previously, the existing theories cannot perfectly portray the reality of Mercosur, nor do they point to appropriate mechanisms to capture the influence exerted by the colonial past on South American

Latina: Quo Vadis? el Mercosur desde una perspectiva sectorial comparada. Buenos Aires: Eudeba, 2015; DRI, C. Latin America and the building of regional public goods. In: XXXIII International Congress of the Latin American Studies Association 2015. Anais. San Juan, 2015.

22 SÖDERBAUM, Fredrik. *Rethinking Regionalism.* London: Palgrave, 2016; SÖDERBAUM, F. & SBRAGIA. A. "EU studies and the New Regionalism: What can be gained from dialogue? *Journal of European Integration*, 32(6), 563–582, 2010.

23 BÖRZEL, T.; RISSE, T. *The Oxford Handbook of Comparative Regionalis*m. Oxford: Oxford, 2016, p. 50.

24 ACHARYA, Amitav. Comparative Regionalism. A field whose time has gone? *The international Spectator: Italian Journal of international Affairs*, 47,(1), 3-15, 2012.

25 ACHARYA, Amitav. Comparative Regionalism. A field whose time has gone? *The international Spectator: Italian Journal of international Affairs*, 47,(1), 3-15, 2012.

26 HURREL, A. Lula's Brazil: a rising power, but going where? *Current History*, 107 (706), 51-57, 2008.

27 CAETANO, G. (Org.). *Mercosur 20 años.* Montevideo: CEFIR, 2011.

regionalisms. There are few attempts to critically think about the integration from the Global South, although both Dependency theorists and developmentalists have warned of the dangers of interpreting Latin American phenomena by unconditionally using theories which correspond to another historical reality[28]. For this reason, the integration has to be thought beyond Eurocentric categories, and Latin American thoughts have to be built on IR.

One problem is that Eurocentric analyses are based on a notion of the progress founded on a concept of linear time and therefore are not able to grasp the idiosyncrasies and the context where the integration in South America is formed. It is in this sense that Decolonial approaches can shed light on the matter and construct alternatives.

3. Bringing together Decolonial approaches and the field of regionalisms

Preliminarily, it is necessary to emphasize the relevance of introducing critical approaches in debates on regionalisms, because they allow the analysis of asymmetries and exclusions that occur in the various bodies of international society and that are permeated by the dynamics of production of inequalities. The use of critical thinking categories is also aimed at encouraging the emancipatory and heterarchical dialog with collectivities historically devoid of voice and agency within international relations. To establish dialogs, it is extremely necessary to include local voices in the discussions.

The Decolonial approach is the result of the "Modernity/Coloniality/Decoloniality" (MCD) project, and it is considered as the most genuine Latin American contribution to the Academy nowadays. This is one of the most important sets of critical thinking, whose interdisciplinary perspective comprises views of several areas of knowledge, such as Sociology, Semiotics, Anthropology, Philosophy, etc. Major theorists include Walter Mignolo, Anibal Quijano, Ramón Grosfoguel, Santiago Castro-Gómez, Enrique Dussel and Catherine Walsh, among others.

The Decolonial thought suggests that colonization was a violent process in physical and symbolic terms, which proposed to homogenize cultural patterns and cosmovisions based on an alleged concept of progress that, inevitably, affected colonial populations[29]. This mentality clearly emerges in dichotomies such as civilization/barbarity, Western/non-Western, developed/underdeveloped, which consider that non-European peoples are inferior.

MDC considers that the end of colonialism was the first stage of the process of decolonization. The second step of decolonization is Decoloniality, which is the struggle to break free from the old features of colonialism. Coloniality arises from colonialism and remains after the end of it by peripherically importing European models and reproducing certain patterns of power. Thus, the second decolonization, referred to by the category *Decoloniality*, will have to be "geared to the heterarchy of multiple racial, ethnic, sexual, epistemic, economic and gender relations that the first decolonization left intact"[30]. As a result, the world at the beginning of the 21st century needs a decoloniality that complements the decolonization that was carried out in the nineteenth and twentieth centuries.

It is assumed that the world is not yet fully post-colonial. The eradication of colonial administrations and the formation of independent states did not mean the opening of a post-colonial era[31]. The "colonial power matrix" is not extinguished with the political-juridical decolonization, since the old hierarchies between Europeans and non-Europeans still remain in power relations. For this reason, the "myth of post-colonial world" needs to be overcome through the decolonization of the structures of international relations, and therefore of the fields of knowledge, or in other words, surpass the coloniality of knowledge[32]. In this way, it is essential

28 PREBISCH, R. *Transformación y desarrollo*: la gran tarea de América Latina. México D.F.: Fondo de Cultura Económica, 1970.

29 LISBOA, A. De América a Abya Yala – Semiótica da descolonização. *Revista de Educação Pública*, 23 (53/2), p. 505-506, 2014.

30 CASTRO-GÓMEZ, S.; GROSFOGUEL, R. Giro decolonial, teoría crítica y pensamiento heterárquico. In: CASTRO-GÓMEZ, Santiago; GROSFOGUEL, Ramon. (Org.) *El giro decolonial. Reflexiones para una diversidad epistémica más allá del capitalismo global*. Bogotá: Siglo del Hombre Editores; Universidad Central, Instituto de Estudios Sociales Contemporáneos y Pontificia Universidad Javeriana, Instituto Pensar, 2007. p. 17.

31 GROSFOGUEL, R. The epistemic Cultural turn. Beyond political-economy paradigms. *Cultural Studies*, 21 (2-3), p. 211-223, 2007.

32 GROSFOGUEL, R. Para descolonizar os estudos de economia política e os estudos pós-coloniais: TransModernidade, pensamento de fronteira e colonialidade global. *Revista Crítica de Ciências*

to give voice, also, to the "other knowledges"[33] and to "other experiences".

Decolonization has uncovered the wounds of colonized societies, which continue reproducing the values of Modernity, such as ethnic-racial hierarchy, maintenance of coloniality of power, knowledge, and being, etc., since these societies have been not completely decolonized. Thus, Decoloniality induces the release from domination, the search for mental emancipators; the fight against "*nordomanía*", a term initially conceived by José Enrique Rodó (1900) and evoked by Santiago Castro-Gómez and Ramón Grosfoguel[34], which represents the efforts of indigenous elites to evoke models of Northern States, reproducing the old forms of colonialism[35]. In this way, Decoloniality is not understood as just a legal-political-economic process, since it holds an epistemic and cultural dimension[36].

The MCD project has shown to be engaged in the search for alternatives to overcome the Eurocentric Modernity without ignoring the most important contributions that it has offered to humanity. For such purpose, the first step in this direction is to transcend the fundamentalist dichotomies. The second step is to enable the opening of spaces for the promotion of dialogs between scholars originating from different regions, in an effort to think also from the Global South, rather than only from the North. Thirdly, it is essential to gain intellectual dependence. This said, it is stated that one of the principal riches offered by the MDC Movement to the area of research on South American regionalisms is the possibility of formulating epistemic perspectives which exceed the so-called third-world and Eurocentric fundamentalisms.

The MCD collective proposes "border thinking" as a critical response to fundamentalism, be they Eurocentric or anti-European, since there is not only a single epistemic tradition that can find truth and universality[37].

Based on "border thinking"[38] one can rethink, reinterpret concepts, categories and forms of relations, without submitting neither to the standards imposed by European Modernity, nor to anti-modern, anti-European fundamentalisms. This is "a decolonial transmodern response of the subaltern to Eurocentric modernity"[39]. This response, applied to the field of regionalisms, means recognizing and validating the parameters and categories offered by European integrationist theories, and enrich them while also resignifying them through the appreciation of local experience and by opening non-hierarchical, pluriversal dialogic environments that also include non-European experiences and knowledge.

Following the reasoning of Grosfoguel, the conditions for decolonization of knowledge are: broadening the matrix of thought, which is still dominated by Western canons; fighting against allegedly universal particularisms, since Decoloniality must be "the result of critical dialogue between diverse critical epistemic/ethical/political projects towards a pluriversal as opposed to a universal world"; including "the epistemic perspective/cosmologies/insights of critical thinkers from the Global South thinking from and with subalternized racial/ethnic/sexual spaces and bodies"[40].

Critical approaches can aid the understanding of issues relative to regional integration based on some categories such as epistemic decolonization, coloniality of power, being and knowledge, Decoloniality, transmo-

Sociais, 80, p. 115-147, 2008; QUIJANO, A. Coloniality of Power, Ethnocentrism, and Latin America. *Nepantla: Views from South,* 1(3), 533-580, 2000.

33 WALSH, C. "Other" Knowledges, "Other" Critiques: Reflections on the Politics and Practices of Philosophy and Decoloniality in the "Other" America. *Transmodernity:* Journal of Peripheral Cultural Production of the Luso-Hispanic World, 1(3), 11-27, 2012.

34 CASTRO-GÓMEZ, Santiago; GROSFOGUEL, Ramon. (Org.) *El giro decolonial. Reflexiones para una diversidad epistémica más allá del capitalismo global.* Bogotá: Siglo del Hombre Editores; Universidad Central, Instituto de Estudios Sociales Contemporáneos y Pontificia Universidad Javeriana, Instituto Pensar, 2007.

35 CASTRO-GÓMEZ, Santiago; GROSFOGUEL, Ramon. (Org.) *El giro decolonial. Reflexiones para una diversidad epistémica más allá del capitalismo global.* Bogotá: Siglo del Hombre Editores; Universidad Central, Instituto de Estudios Sociales Contemporáneos y Pontificia Universidad Javeriana, Instituto Pensar, 2007.

36 QUIJANO, A. Colonialidade, poder, globalização e democracia. *Novos Rumos*, 37 (17), 4-28, 2002.

37 GROSFOGUEL, R. Para descolonizar os estudos de economia política e os estudos pós-coloniais: TransModernidade, pensamento de fronteira e colonialidade global. *Revista Crítica de Ciências Sociais*, 80, p. 115-147, 2008.

38 MIGNOLO, W. *Historias locales/diseños globales*: Colonialidad, conocimientos subalternos y pensamiento fronterizo. Madrid: Ed. Akal, 2003.

39 GROSFOGUEL, R. Para descolonizar os estudos de economia política e os estudos pós-coloniais: TransModernidade, pensamento de fronteira e colonialidade global. *Revista Crítica de Ciências Sociais*, 80, p. 115-147, 2008.

40 GROSFOGUEL, R. Para descolonizar os estudos de economia política e os estudos pós-coloniais: TransModernidade, pensamento de fronteira e colonialidade global. *Revista Crítica de Ciências Sociais*, 80, p. 115-147, 2008.

SILVA, Karine de Souza. Beyond the border between the North and the South: towards a decolonization of epistemologies and fields of research on Mercosur. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 412-428

dernity, border thinking, Global South, emancipation, heterarchy and pluriversality.

In fact, the attempts of mimetization of European regional integration in other corners of the world follows the line of argument of Enrique Dussel, when he deals with the fallacy of developmentalism that has existed since the beginning of Modernity. For Dussel, "developmentism itself is an ontological position by which it is thought that the path of Europe's modern development must be followed unilaterally by every other cultures. Development is taken here as an ontological, and not simply a sociological or economic category, but a fundamental philosophical category. For Hegel, it is the necessary movement of being, its inevitable development. Eurocentrism is trapped by the developmentist fallacy: these are two aspects of itself". In this sense, it is important to clarify that Dussel does not deny the rational core of Modernity but rather "its irrational moment of sacrificial myth, its domineering, victimizing and violent reason"[41].

Under Dussel's influence, it can be seen that the conceptions and idealizations on regionalism are replicated from Europe to the world, from a Eurocentric angle, often without considering cultures and local specificities.

Once again, this proposition doesn't repeat the error of discourses that reject the knowledge and practices originating in central countries, thus running the risk of falling into the same Eurocentric trap. Denying the West means reproducing intolerance and praising a discriminating discourse, incapable of understanding the various forms of alterities and cultural multiplicities. Criticism is directed towards two main issues: (a) the exclusion of alterities in an environment that is meant to be plural; b) the intents to use, without the participation of local subjects, models and categories that are not necessarily suitable for the context of South America. The European example is fully relevant to the debate on the ontology of regionalism, and to the theoretical, historical and comparative dimensions of this field of study. However, while Eurocentrism has to be urgently avoided, the EU cannot be considered to be an "anti-model"[42]. The problem is not to be European, but Eurocentric, which are two different concepts. The European is a geographic concept, while Eurocentrism is a hierarchical cannon.

According to Boaventura de Sousa Santos, one should not demonize the European thought, but "recognize its incompleteness". The same way, one cannot "romanticise the innovations of the South, but approach them through a sociology of absences and emergencies, that is, to recognize invisibilized experiences and knowledges devalued by the colonial thought in order to think the future from a dilated present"[43].

In this vein, the attempt to merely incorporate theories into other contexts is a colonial attitude towards knowledge, a fact that reinforces the hierarchies between the center and periphery that are present in Eurocentrism. What can be seen, in practice, is that no process can develop in the same way and pace as in the EU. Acharya[44] states that non-western regionalisms should not be judged in terms of how they comply with EU goals.

"Euromimetism" in Mercosur follows the logic of Modernity imposed by the French Revolution, which merges a concept of progress conceivable from a "tyranny of linear time, of progress and development"[45], with the universalization of European values. The tendency to conceive history from the European experience is surely detrimental to understanding and making an in-depth analysis of the phenomenon.

Some of the Decolonial categories can be used to respond to important issues that remain under Mercosur's regionalism, such as: the participation of civil society, the role of elites in the reproduction of foreign models; the attempts of institutional isomorfism allied to the old intergovernmentalism vs. supranationality debate; the difficulties in transferring parcels of sovereignty; the influence and the interests of the EU in the modulation of the block; the construction of public goods driven by external demands; the international in-

41 DUSSEL, E. *1492: o encobrimento do outro:* a origem do mito da modernidade. Petrópolis: Vozes, 1992, p. 07.

42 SÖDERBAUM, F. What's Wrong with Regional Integration? The Problem of Eurocentrism. *EUI Working Paper* RSCAS 2013/64, p. 2-3, 2013.

43 SANTOS, Boaventura de Sousa. Para uma nova visão da Europa: aprender com o Sul. Sociologias, Porto Alegre, ano 18, no 43, set/dez 2016, p. 28.

44 ACHARYA, Amitav. Comparative Regionalism. A field whose time has gone? *The international Spectator: Italian Journal of international Affairs*, 47,(1), 3-15, 2012.

45 MIGNOLO, W. *Historias locales/diseños globales*: Colonialidad, conocimientos subalternos y pensamiento fronterizo. Madrid: Ed. Akal, 2003, p. 30.

tegration of the region; and the obstacles to regional interdependence. Some of these themes will be addressed in the next topic.

4. Decoloniality and Mercosur: addressing significant questions

Integration is not an end in itself. It is a means, a form of political-regional interconnection that, in Mercosur, must be intended for the promotion of social cohesion, the fight against poverty, the materialization of regional goods, the defence of national sovereignty, of human rights, of democracy, of development, etc. In other words, each process has a history, a spirit, a reason to exist and its own way to connect other processes. Thus, Mercosur has its own personality - inherited by the Bolivarian aspirations of unity and non-intervention and modelled after its advocacy in the affirmation of democracy, social cohesion and human rights - and it cannot and will never be a copy of the EU and must not be what the Union wants it to be.

The European literature already attested to the problem of Eurocentrism in comparison of experiences of integration that exist outside the EU[46]. Actually, the debate began in the 1960s with Ernest Haas[47] (1961) about the possibility of imitating the European archetype in other regions. This discussion has already been questioned and acquired other connotations after some authors realized the dangers of generalizing a local experience. In this sense, Söderbaum and Sbragia[48] observed that the false universalism of the EU demonstrates a lack of sensitivity to other regions which occupy unequal positions in the world.

46 DE LOMBAERDE P., SÖDERBAUM, F., VAN LANGENHOVE, L. & BAERT F. The Problem of Comparison in Comparative Regionalism. *Review of International Studies*, 36 (3), 731-753, 2010; MOXON-BROWNE, E. Mercosur and the European Union: polities in the making? In: LAURSEN, F. (Org.) *Comparative regional integration: Europe and beyond*. Farnham: Ashgate, 2010. p. 131-146; SÖDERBAUM, F. What's Wrong with Regional Integration? The Problem of Eurocentrism. *EUI Working Paper* RSCAS 2013/64, 2013.

47 HAAS, E. International Integration: The European and the Universal Process. (1961) In: DE LOMBAERDE, Philippe; SÖDERBAUM, F. (Org.) *Regionalism: Classical Regional Integration (1945–1970)*. London: SAGE, 2013. p. 139-168.

48 SÖDERBAUM, F. & SBRAGIA. A. "EU studies and the New Regionalism: What can be gained from dialogue? *Journal of European Integration*, 32(6), 563–582, 2010.

Still, in the current context, Eurocentrism and coloniality continue being limiting factors for understanding and the recognition of Mercosur's identity. They pose obstacles that affect research on RI and compromise the creation of innovative theoretical inputs.

That said, the core question is whether or not the fields of research on Mercosur can be decolonized. Preliminarily, it is necessary to understand this problem in the context of the theory itself of the International Relations that marginalize narratives and concepts of non-western worlds and subordinate alternative methodologies[49]. In this framework, Decoloniality can pave tracks that are intended to search for possible responses in order to overcome some challenges.

In this sense, the first academic challenge consists in promoting the incorporation of new epistemologies that imply a re-signification of symbols, cognitive models and nomenclatures that incorporate new discursive and communicative actions.

New codes of understanding and interaction should be included in this sphere of knowledge, as Eurocentrism also echoes in categories and classifications. As can be seen, Mercosur's structure is completely succumbed by EU designations. According to Edward Moxon-Browne, the use of imported nomenclatures to appoint things that are not equal leads to confusion, and "not only invites the comparison, but also legitimizes it". The theses that abound in the academy on Mercosur's hypothetical failure reveal the stigma of comparison embedded in "implicit or explicit Eurocentrism"[50]. In this context, comparing is far from being an easy task and requires heroic efforts from researchers. In this sense, it is stated that overcoming "subalternity involves, in particular, criticism of words, grammar"[51]. An interesting exercise in comparative domain would be to investigate what lessons Mercosur can bring to the theories of Regional Integration and to the EU and to what extent the non-western regionalisms can interconnect themselves and offer insights for the sophistication of other models.

49 JONES, B. G. (Org.), *Decolonizing International Relations*. Plymouth: Rowman and Littlefield Publishers, 2006; ACHARYA, Amitav. Dialogue and Discovery: search of International Relations Theories Beyond the West. *Millennium: Journal of International Studies, London,* 39, 3, 619–637, 2011.

50 MOXON-BROWNE, E. Mercosur and the European Union: polities in the making? In: LAURSEN, F. (Org.) *Comparative regional integration: Europe and beyond*. Farnham: Ashgate, 2010. p. 131-146.

51 LISBOA, A. De América a Abya Yala – Semiótica da descolonização. *Revista de Educação Pública*, 23 (53/2), p. 505-506, 2014.

SILVA, Karine de Souza. Beyond the border between the North and the South: towards a decolonization of epistemologies and fields of research on Mercosur. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 412-428

In this way, it is easy to understand how colonizing images extended from the process of construction of the State until regional integration, since colonization was not just physical, as it has achieved imaginaries and identities. In other words, it has encompassed material and non-material spatialities.

The second challenge to decolonize fields of research on Mercosur involves denouncing and opposing to the nordomaniac conduct that affects a large extent of political elites in the region. Policy makers have negotiated the Treaty of Asunción as a reflection of the former European Communities. The attempts of institutional isomorphism have combined with local singularities and gave Mercosur a degree of hybridism that originated an unprecedented equation 'incomplete free trade zone + imperfect customs union', which does not fit in the traditional theoretical frameworks. To explain such eccentricity, some sectors of the doctrine and of the political communities argue that the roots of this "deformation" are in the absence of supranationality and/or in the institutional fragility of Mercosur. And the alleged solutions to such "problem" always appear combined with proposals that add more doses of EU, seen as the final horizon of all regional agreements. In practice, what can be seen is that Mercosur cannot "move forward" in the same way and rhythm as the EU.

In this order of ideas, it can be seen that the integration of the Southern Cone has been shaped according to the logic of Modernity that merges a concept of ideal progress, based on a "tyranny of time"[52], with the universalization of European values. The tendency to conceive history based on the European experience is surely detrimental to understanding and making an in--depth analysis of the phenomenon. For this reason, it is imperative to perceive that the "logic of linear time is one among multiple concepts of possible time[53]. In this sense, the characterization of regionalism in the Americas as failed shows "*a teleological prejudice informed by the assumption that 'progress' in regional integration is defined in terms of EU-style institutionalisation*"[54].

The attempt of mere repetition, in other contexts, of the phases of economic integration outlined by Belassa, is a further effort to export a theory of Europe to the world. In the same way, the theories of European political integration, such as Federalism, Functionalism, Neo-functionalism, among others, do not properly apply to South American contexts[55].

Attempts to implement Eurocentric standards have never been successful, and worst of all, have led to more dependencies and favoured the creation of deformed institutions that do not conform to local realities.

As a result of the position of subordination, elites believe that the emulation of external models is a means to improve their legitimacy and hence get aid from international cooperation[56]. That is, they are not properly interested in the success of the models. Söderbaum and Taylor[57], by analysing Sub-Saharan regionalism, found that elites are not interested in improving citizens' quality of life or deepening regionalism. In fact, what happens is the so-called "syndrome of partial reform", i.e., it is a vicious circle in which the gear actors implement parts of the agenda that do not collide with their interests and practices of governance[58]. This finding also applies to the case of Mercosur, i.e., Eurocentrism is not only an external imposition because many policy makers accept, incorporate and perpetuate colonial discourses and practices. The paradoxical behaviour of the negotiators of the Asuncion Treaty, when validating the emulation proposal of EU essays, demonstrates true disinterest in interrupting the dual dynamic that oscillates between discourse of independence and subalternized practices. This occurs because a good part of the elites who govern South American States validate the scenario of *nordomanía* and of coloniality of power, of being

52 MIGNOLO, W. *Historias locales/diseños globales*: Colonialidad, conocimientos subalternos y pensamiento fronterizo. Madrid: Ed. Akal, 2003.

53 SANTOS, Boaventura de Sousa; ARAÚJO, S.; BAUMGARTEN, M. As Epistemologias do Sul num mundo fora do mapa. *Sociologias*, Porto Alegre, ano 18, no 43, set/dez, p. 2016, p. 17.

54 BRESLIN, S.; HIGGOTT, R.; ROSAMOND, B. Regions in comparative perspective. In: S. BRESLIN, C. HUGHES, N. PHILIPS; B. ROSAMOND (Orgs.) *New regionalisms in the global political economy*. London: Routledge, 2002. p. 11.

55 ACHARYA, Amitav. Comparative Regionalism. A field whose time has gone? *The international Spectator: Italian Journal of international Affairs*, 47,(1), 3-15, 2012.

56 PICCOLINO, G. The European Union and the Promotion of Regional Integration: A Viable Approach to the Resolution of Regional Conflicts in Sub-Saharan Africa? 2013. Disponível em: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2455061. Acesso em 03 jun 2016.

57 SÖDERBAUM, Fredrik; Ian TAYLOR. (Org.). Afro-regions: the dynamics of cross-border micro-regionalism in Africa. Stockholm: Northern African Institute, 2008.

58 SÖDERBAUM, Fredrik; Ian TAYLOR. (Org.). Afro-regions: the dynamics of cross-border micro-regionalism in Africa. Stockholm: Northern African Institute, 2008; VAN DE WALLE, N. *African economies and the politics of permanent crisis, 1979-1999*. New York/Cambridge: Cambridge University Press, 2001.

and of knowledge. Thus, even in a context of legal independence, there is no autonomy, since the political elites continue to reproduce European habits, as was the specific case of elaboration of the Asuncion Treaty that incorporated almost automatically many elements and goals of the European institutional architecture.

The third challenge faced by Mercosur researchers refers to elaboration of studies that address the influence and the interests of the EU in the construction of regions in South America. In its role as a global actor, the EU stands out by its ability to induce integration schemes in various parts of the world[59] by means of diffusion mechanisms such as socialization, emulation and persuasion[60]. Strengthening regionalism as a fundamental axis of the EU's external action is part of its intention to export its values and to consolidate internationally as a civilian and normative power.

The hegemonic interests of the EU have made it the largest foreign investor in Mercosur and its main trade partner. In the attempt to repeat its own image, the European Union uses its partnerships as a means to export its values and guarantee advantages. In addition to overt political and economic support, the EU is the most important supplier of services that aim to foster integration over cooperation. Obviously, no donor is neutral or acts only inspired by a spirit of solidarity. Political and economic investments not only have a direct impact on the structure and functioning of Mercosur, but also ensure hegemony in the region of ex-colonies and reinforce the international expansion of European values and the consolidation of Europe as a civil power.

Through emulation, EU models are applied in different contexts and occasions. And when the results are positive, then it is a victory of the EU, but if they are considered as a failure, it is due to the incompetence of those who applied them locally or the conditions that were adverse[61].

In this regard, one of the problems mainly lies in the analysis of the role of regional integration in the reproduction of Eurocentrism and to what extent the European model fits for all regions, in accordance with the default "*our size fits all*" [62]. In particular, one has to question the obvious activism of the EU for repetition of patterns and external categories in favour of institutionalization of regional integration models in the American continent as well as to identify the contradictions and the problems deriving from reproducing the coloniality of power by means of policies of cooperation with Mercosur and its Member States.

That said, it reinforces the hypothesis whereby it is necessary and essential to decolonize the fields of research on Mercosur. In the same way, it should be stressed that the preliminary challenge in this direction is the search for "epistemic decolonization, to give rise to a new intercultural communication, an exchange of experiences and meanings, as the basis for another rationality that can claim, with legitimacy, some universality. Therefore, nothing is less rational than to claim that a specific general worldview, of a particular ethnic group, should be imposed as the universal rationality, albeit that ethnicity in particular is called Western Europe. Because, in fact, it means wishing to give provincialism the title of universal"[63]. And, for this, it is necessary demonumentalize Europe, rescue the subaltern histories, and taking from Europe the condition of subject of all the narratives. One of the challenges of this path constitutes itself in "unlearn the alleged universality of monocultural thought and overcome the dichotomist approach that have for reference the modern cannon"[64].

Finally, a Decolonial behaviour implies the effort of listening to local voices, to enlighten cosmovisions and repositories of knowledge that have been, for centuries,

59 MOXON-BROWNE, E. Mercosur and the European Union: polities in the making? In: LAURSEN, F. (Org.) *Comparative regional integration: Europe and beyond*. Farnham: Ashgate, 2010. p. 131-146.

60 JETSCHKE, A. *Is Regional Integration Contagious? European Integration and Regional Organization in Asia*, Berlin: KFG Working Paper No. 17, 2010; DUINA, F. Frames, Scripts, and the Making of Regional Trade Areas. In: ABDELA, Rawi L; BLYTH, Mark; PARSONS, Craig (Orgs.) *Constructing the International Economy.* Ithaca, London: Cornell University Press, 2010. p. 93-113; LENZ, T. Spurred Emulation: The EU and Regional Integration in Mercosur and SADC. *West European Politics* 35 (1), p. 155–173, 2012; DE LOMBAERDE, P.; M. SCHULZ. (Orgs.) *The EU and World Regionalism: The Makability of Regions in the 21st Century*. Aldershot: Ashgate, 2009; YEO, L. H. EU-ASEAN Relations and Policy-Learning. In: BALME, R.; BRIDGES B. *Europe-Asia Relations: Building Multilateralism*. Houndmills: Palgrave Macmillan, 2008. p. 83-102.

61 MOXON-BROWNE, E. Mercosur and the European Union: polities in the making? In: LAURSEN, F. (Org.) *Comparative regional integration: Europe and beyond*. Farnham: Ashgate, 2010. p. 131-146.

62 BICCHI, F. "Our Size Fits All": Normative Power Europe and the Mediterranean'. *Journal of European Public Policy*, 13(2), 286-303, 2006.

63 QUIJANO, A. Colonialidad y modernidad/racionalidad. *Peru Indígena,* 13 (29), 1992, p. 20.

64 SANTOS, Boaventura de Sousa; ARAÚJO, S.; BAUMGARTEN, M. As Epistemologias do Sul num mundo fora do mapa. *Sociologias*, Porto Alegre, ano 18, no 43, set/dez, 2016. p. 23.

silenced by relations between knowledge *vs*. power from central countries. Based on border thinking, the field of knowledge of RI may be "unwesternized" if one can include the collectivities historically devoid of voice, agency and memory.

5. Final remarks

Colonization meant the domination of cognitive spheres, while it intended, based on the assumptions of modern science, to catechize, evangelize, civilize peoples as a means to achieve the so-called progress. In the case of sub-regional integration, the EU attempts to domesticate through examples and investments.

Because the biggest challenge of Mercosur is to promote its social agenda, the production of knowledge must be committed to realizing the potential of societies and to overcoming problems such as social disparities and external vulnerabilities. In this sense, because critical theories encompass alternative projects for social and political transformation, they have great potential for application in the framework of regional integration.

Through these categories, one can question the reproduction of coloniality of power in relations between the EU and Mercosur, evaluate the nuances and the dangers of mimetization of western models and institutions, and find ways to decolonize the practices and knowledge of Mercosur's regionalism, whose structure was built under the influence of Eurocentric thought.

Being a historical process, Mercosur must be examined from two viewpoints that do not oppose one another: firstly, it is imperative to recognize its colonial heritage; and finally, it should be analysed second to its Bolivarian roots. Although the attempts to integrate the "Patria Grande" have not been consolidated, some important regional instruments, such as Mercosur and a Unasul, represent an effort of regional and sub-regional unity. In fact, the Asuncion Treaty, still fashioned by liberal ideas, clearly affirms in its preamble a political desire of the members "to establish the bases for a union more and more tight among its peoples"[65]. In this sense, it is valuable to note that the very pioneers of regionalism are the Latin Americans and not the European people. As shown by Acharya[66] (2014), the Latin Americans, even though they have not materialized initiatives of intuitionalism, they have already promoted regionalism 100 years before the foundation of the former European Communities. The practices of regionalism spread through the world while theoretic formulations on the subject were confined to the European continent.

Because it is a historical process, Mercosur needs to be examined from its colonial parentage. The Decolonial project points to this fact and the use of its categories can also contribute to the discussions on the difficulties in placing Mercosur in the international system - based on arguments that reinforce the need of dewesternization of international relations - and on the search for theoretical and praxeological alternatives that combat the Western hegemony and the "monistic universalism"[67]. The decolonization of knowledge is intimately related with the decolonization of International Relations. This means, according to Jones, it is necessary to recognize the imperial nature of this field of knowledge and reveal "nonimperial and anti-imperial histories, values, struggles, ideas, and ways of being. This is both a possibility and an imperative"[68].

The decolonization of imaginary fields will be established through the horizontal intercultural dialog between the North-South critical thinkers, inspired by border thinking, in that it will strengthen the multiplicity of decolonial responses and favour the formation of epistemic communities focused on thinking about integration from its core. The Global South must be incorporated as a legitimate place of enunciation of discourses, so that the producers of knowledge can have the ability for self-representation in this context that is still permeated by representational limits.

Interpreting the identity of South American regionalisms based on its heritage means perceiving what makes Mercosur different and what moves it forward.

65 MERCOSUL. Tratado de Assunção. 1991. Disponível em: http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0350.htm Acesso em 20 jun 2015.

66 ACHARYA, Amitav. Global International Relations and Regional Worlds: a new agenda for international studies. *International Studies Quarterly*, 58 (4): 01-13, 2014.

67 ACHARYA, Amitav. Global International Relations and Regional Worlds: a new agenda for international studies. *International Studies Quarterly*, 58 (4): 1-13, 2014

68 JONES, B. G. (Org.), *Decolonizing International Relations*. Plymouth: Rowman and Littlefield Publishers, 2006. p. 13.

It also means admitting that it is the most developed experience of South American integration that has been ever heard of. It is not what it was meant to be, as stated in the Treaty of 1991, but it is something that has essence, has soul and is another possible format of RI. The path of reconciliation with its own origin implies recognizing and appreciating the thought and the efforts of ancestors that are rooted in Simon Bolivar's pan-Americanism. Leaving the biography of South American integration in darkness is the same as condemning Mercosur to the unnecessary work of Sisyphus in search of something unattainable.

Finally, the aim is not only including one more intellectual movement in the spectrum of analytical theories but rather to widen and deepen the visions, transversely positioning the criticism in the realm of RI. In other words, this is not only about opening space for new explanations, but also making room for libertarian practices.

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A aplicabilidade da convenção de Montreal no direito brasileiro*

Application of Montreal convention in Brazil

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Resumo

O presente artigo discute a aplicabilidade da Convenção de Montreal na responsabilidade civil decorrente de contratos de transporte aéreo internacional no Brasil, frente às disposições apresentadas pelo Código de Defesa do Consumidor e pelo Código Civil sobre a responsabilidade do transportador e à matriz constitucional desses diplomas. O estudo fundamentou-se em procedimentos de pesquisa bibliográfica e documental, expondo diferentes posições teóricas e jurisprudenciais sobre os limites de aplicação da Convenção em ordenamentos jurídicos internos. Procedeu-se, assim, a exame da jurisprudência dos tribunais superiores brasileiros, de cortes estrangeiras e do Tribunal de Justiça da União Europeia. O trabalho concluiu que prevalece a aplicação da Convenção de Montreal no ordenamento jurídico brasileiro em respeito aos princípios gerais de Direito Internacional, sedimentados na Convenção de Viena sobre Direito dos Tratados. Ressalva-se, em contrapartida a essa conclusão jurídica, a necessidade de atualização das regras de limitação das indenizações estabelecidas pela Convenção de Montreal, de modo a acompanhar a modernização da indústria do transporte aéreo internacional.

Palavras-chave: Convenção de Montreal. Direito Internacional Público. Direito do Consumidor. Transporte Aéreo Internacional. Responsabilidade Civil.

Abstract

The present article discusses the applicability of Montreal Convention's rules of liability on air transport contracts in Brazil, considering its conflicts with Brazilian law. The study is based on legal literature and legal documents, demonstrating different theoretical and judicial positions regarding the limits of application of the Montreal Convention in distinct jurisdictions. Decisions of Brazilian courts, foreign courts and of the European Court of Justice were examined and compared. The article concludes that the Montreal Convention should be applied by Brazilian courts, in accordance with principles of International Law contained in the Vienna Convention on the Law of Treaties. It notes, however, the need to update the reparations established in the Montreal Convention.

Keywords: Montreal Convention. Public International Law. Brazilian Con-

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sumer Law. International Air Transport. Liability.

1. Introdução

Tem ganhado destaque nos Tribunais Superiores[1] a discussão sobre a aplicabilidade das disposições específicas preceituadas pela Convenção de Varsóvia[2], hoje substituída pela Convenção de Montreal[3], nas relações de transporte aéreo internacional e as disposições gerais preceituadas pelo Código de Defesa do Consumidor[4], notadamente no que toca à indenização tarifada para as hipóteses de dano material e a regra de prescrição da pretensão punitiva, ambas previstas no Tratado e que serão tratadas adiante. Enquanto parte do entendimento doutrinário e jurisprudencial tem se voltado a reconhecer a aplicação das regras firmadas no tratado internacional, verifica-se a recente consolidação do entendimento que o sistema de unificação determinado pela Convenção iria de encontro à proteção do consumidor e sua matriz constitucional.

Para além dessas duas vertentes, comumente invocadas pela doutrina brasileira ao tratar do tema, o presente trabalho almeja traçar outros fundamentos que justificam a aplicabilidade do tratado internacional em questão para as questões por ele reguladas, que não se limitem à especificação de objeto e que, ao mesmo tempo, se coadunem com os ditames constitucionais de proteção ao consumidor.

Para isso, serão analisadas as sobreposições normativas entre a Convenção de Montreal e o direito consumerista sob a ótica do Direito dos Tratados e, paralelamente, sobre a doutrina e a jurisprudência internacionais que tratam da Convenção de Montreal e sua aplicabilidade em regimes jurídicos de outros países signatários.

2. A Convenção de Montreal e a ordem jurídica brasileira: exposição dos conflitos e suas dimensões

Criada com o objetivo de "uma maior harmonização e codificação de certas regras que regulam o transporte aéreo internacional"[5], a Convenção de Montreal estatuiu contornos específicos para as relações contratuais de transporte aéreo internacional, com poucas modificações das regras já definidas pela sua predecessora Convenção de Varsóvia, notadamente o funcionamento da responsabilidade do transportador frente a danos ocorridos ao passageiro ou à carga transportada e a imposição de limites de responsabilidade para fins de indenização desses danos. Tais normas estão dispostas nos artigos 17 a 25 da Convenção e serão abordadas adiante.

Em linhas gerais, a Convenção estipula a responsabilidade do transportador para os casos de (a) morte de passageiro e lesão corporal de passageiro (art. 17.1)[6]; (b) destruição, perda ou avaria de bagagem registrada (art. 17.2)[7]; (d) dano, destruição, perda ou avaria da carga

1 Até a elaboração deste artigo, tramitam no Superior Tribunal Federal o Recurso Extraordinário n. 636.331/RJ, que examina a aplicabilidade dos limites de indenização da Convenção de Varsóvia em casos de extravio de bagagem, sob relatoria do Ministro Gilmar Mendes e o Agravo em Recurso Extraordinário nº 766.618/SP que avalia a aplicação da prescrição bienal prevista na Convenção de Varsóvia para fins de responsabilização civil por atraso em voo internacional.

2 Introduzida no direito brasileiro pelo Decreto 20.704, de 19 de novembro de 1931. BRASIL. Poder Executivo. Decreto n. 20.704, de 24 de novembro de 1931. *Coleção de Leis do Brasil*, Rio de Janeiro, v. 3, p. 527, 1931.

3 BRASIL, Poder Executivo. Decreto n. 5.910, de 29 de maio de 1999. *Diário Oficial da União*, p. 3, 28 set. 2006. A Convenção para Unificação de Certas Regras Relativas ao Transporte Aéreo Internacional, doravante Convenção de Montreal, entrou em vigor no Brasil mediante o Decreto n. 5.910, de 29 de maio de 2006 e substituiu, conforme dispõe o seu artigo 55, os diplomas que até então regulavam o transporte aéreo internacional e formavam o Sistema Varsóvia-Haia, a saber: (a) Convenção de Varsóvia, de 1929; (b) Protocolo de Haia, 28.09.1955; (c) a Convenção de Guadalajara, de 18.09.1961; (d) o Protocolo da Guatemala, de 08.05.1971 e (e) os Protocolos 1, 2, 3 e 4 de Montreal, de 25.09.1975.

4 BRASIL. Poder Legislativo. Lei Ordinária n. 8.078, de 11 de setembro de 1990. *Diário Oficial da União*, p. 1, 12 set. 1990.

5 Convenção de Montreal (CM), Decreto n. 5.910 de 2006, preâmbulo.

6 CM, Art. 17.1. O transportador é responsável pelo dano causado em caso de morte ou de lesão corporal de um passageiro, desde que o acidente que causou a morte ou a lesão haja ocorrido a bordo da aeronave ou durante quaisquer operações de embarque ou desembarque.

7 CM, Art. 17.2. O transportador é responsável pelo dano causado em caso de destruição, perda ou avaria da bagagem registrada, no caso em que a destruição, perda ou avaria haja ocorrido a bordo da aeronave ou durante qualquer período em que a bagagem registrada se encontre sob a custódia do transportador. Não obstante, o transportador não será responsável na medida em que o dano se deva à natureza, a um defeito ou a um vício próprio da bagagem. No caso da bagagem não registrada, incluindo os objetos pessoais, o transportador é responsável, se o dano se deve a sua culpa ou a de seus prepostos.

transportada (art. 18.1)[8] e (e) o atraso no transporte de passagens, bagagens ou cargas (art. 19)[9].

Extrai-se da redação dos artigos que a responsabilidade do transportador nos casos de morte ou lesão de passageiros é objetiva[10], na medida em que independe de dolo ou culpa do agente.

Por outro lado, a responsabilidade do transportador por dano, destruição, perda ou avaria da carga e de bagagem, não obstante prescinda da realização de prova pela vítima, pode ser elidida em algumas hipóteses, como o artigo 17.2[11] (extravio de bagagem que decorra da natureza, defeito ou vício da própria bagagem) e artigo 18.2 (rol de hipóteses para os casos perda ou extravio de carga)[12]. No mesmo sentido, a responsabilidade por atraso no transporte de passageiros, bagagens e cargas, também, admite exclusão quando a transportadora demonstrar que "ele e seus prepostos adotaram todas as medidas que eram razoavelmente necessárias para evitar o dano ou que lhes foi impossível, a um e a outros, adotar tais medida" (art. 19).

A previsão desses limites nas hipóteses de atrasos ou danos à bagagem e carga faz concluir que a responsabilidade do transportador é subjetiva, com presunção de culpa *iuris tantum*, caracterizada pela inversão do ônus da prova e pela obrigação do transportador de comprovar as circunstâncias excepcionais previstas em lei para elidir sua responsabilidade.[13]

Pode-se concluir, em primeira análise, que a Convenção de Montreal prevê a responsabilidade objetiva para os casos de lesão e morte de passageiros e a responsabilidade subjetiva com presunção de culpa nos casos de dano, destruição, avaria ou perda de bagagens e cargas, assim como no caso de atrasos no transporte de passageiros, bagagens e cargas.

Ocorre que a Convenção apresenta outras limitações a esse funcionamento de responsabilidade do transportador, as quais constituem pontos cruciais para as antinomias com outras normas do direito doméstico brasileiro.

Em seu artigo 21, a Convenção estabelece que a responsabilidade por morte ou lesão dos passageiros é limitada até o montante que não exceda a 100.000 (cem mil) Direitos Especiais de Saque[14]. A partir desse montante, a responsabilidade do transportador passa a depender de sua culpa, cabendo a ele a comprovação da inexistência de negligência, ação ou omissão sua ou de seus prepostos ou, ainda, que o dano decorreu de culpa exclusiva da vítima[15].

Trata-se do denominado two-tier system (sistema de dois níveis), artifício que divide a responsabilidade do transportador na medida do valor a ser pago a título de

8 CM, Art. 18.1. O transportador é responsável pelo dano decorrente da destruição, perda ou avaria da carga, sob a única condição de que o fato que causou o dano haja ocorrido durante o transporte aéreo.

9 CM, Art. 19. O transportador é responsável pelo dano ocasionado por atrasos no transporte aéreo de passageiros, bagagem ou carga. Não obstante, o transportador não será responsável pelo dano ocasionado por atraso se prova que ele e seus prepostos adotaram todas as medidas que eram razoavelmente necessárias para evitar o dano ou que lhes foi impossível, a um e a outros, adotar tais medidas.

10 "O que caracteriza a responsabilidade objetiva é a norma indicar a responsabilidade de alguém, sem mencionar ou exigir determinada conduta. Irrelevante, portanto, a expressão 'independentemente de culpa' para configurar a responsabilidade objetiva." JÚNIOR, Nelson Nery; NERY, Rosa Andrade. *Código de processo Civil e legislação processual civil extravagante em vigor*. São Paulo: RT, 1994, p. 988. No mesmo sentido: ROLAND, Beatriz da Silva. O diálogo das fontes no Transporte aéreo internacional de passageiros: ponderações sobre a aplicabilidade da Convenção de Montreal e/ou CDC. *Revista de Direito do Consumidor*, v. 99, p. 38-70, maio/jun. 2015.

11 Nota 8, supra.

12 CM, Art. 18.2. 2. Não obstante, o transportador não será responsável na medida em que prove que a destruição ou perda ou avaria da carga se deve a um ou mais dos seguintes fatos: a) natureza da carga, ou um defeito ou um vício próprio da mesma; b) embalagem defeituosa da carga, realizada por uma pessoa que não seja o transportador ou algum de seus prepostos;c) ato de guerra ou conflito armado; d) ato de autoridade pública executado em relação com a entrada, a saída ou o trânsito da carga.

13 Nesse sentido concluiu Cláudia Lima Marques, ao comentar a Convenção de Varsóvia, que, além das excludentes indicadas na Convenção de Montreal, também permitia a exclusão de responsabilidade no caso de morte e lesão de passageiros: "concluindo, trata-se, no sistema da Convenção de Varsóvia, da imposição de uma responsabilidade subjetiva, e não objetiva, como afirmam alguns, baseada na presunção de culpa juris tantum, que inverte o ônus da prova a favor do consumidor, mas que limita a responsabilidade total do transportador a patamares que, como veremos, são considerados baixos." MARQUES, Cláudia Lima. A responsabilidade do transportador aéreo pelo fato do serviço e o Código de Defesa do Consumidor: Antonimia entre norma o CDC e de Leis Especiais. *Doutrinas Essenciais de Direito do Consumidor*, v. 1, p. 601-642, abr. 2011.

14 *Unidade de valor utilizada pelo Fundo Monetário Internacional para composição de ativo de reserva.* Disponível em: <http://www.imf.org/external/np/sec/pr/2010/pr10434.htm>. Acesso em: 15 jul. 2016.

15 Art. 20.2: 2. O transportador não será responsável pelos danos previstos no número 1 do Artigo17, na medida em que exceda de 100.000 Direitos Especiais de Saque por passageiro, se prova que: a) o dano não se deveu a negligência ou a outra ação ou omissão do transportador ou de seus prepostos; ou b) o dano se deveu unicamente a negligência ou a outra ação ou omissão indevida de um terceiro.

compensação. A ideia central é garantir certa previsibilidade e uniformidade nas indenizações decorrentes de danos ou da má execução do serviço, de modo a evitar gastos excessivos das companhias com a aquisição de seguros, bem como incentivar a ampliação da atuação destas companhias em outros países, garantindo maior acesso aos usuários.[16]

A limitação da responsabilidade, também, remete ao cenário de formação da Convenção de Varsóvia, que se deu em período ainda incipiente e inovador do transporte aeronáutico, o que envolvia incertezas e riscos.[17] Com maior detalhe, a doutrina clássica que defende a limitação de responsabilidade no transporte aéreo elenca determinadas razões preponderantes para justificá-la, a saber: (i) analogia com o direito marítimo; (ii) proteção de uma indústria até então fraca em termos financeiros; (iii) reconhecimento de que o risco de catástrofes não pode ser assumido, apenas, pela companhia aérea; (iv) desejo de que haja limites para a contratação de seguros pelas companhias; (v) possibilidade dos usuários assumirem seguros por conta própria; (vi) limitação da responsabilidade como compensação ao sistema de responsabilidade objetiva/com presunção de culpa estabelecido na convenção, mais rígido aos transportadores; (vii) evitar um comportamento litigante e facilitar a formação de acordos para pagamento de indenizações e (viii) propósito de unificação do direito e dos entendimentos acerca dos valores pagos por estes danos.[18]

Ocorre que a limitação de responsabilidade apresentada pelo two-tier system conflita com o regramento de responsabilidade do fornecedor de serviços determinada pelo Código de Defesa do Consumidor (Lei Federal nº 8.078/1990) e as diretrizes apresentadas pelo Código Civil (Lei Federal nº 10.406/2002)[19] no que tange o Contrato de Transporte.

Isto porque tanto as regras do contrato de transporte do Código Civil (art. 734)[20] quanto o art. 14[21] do Código de Defesa do Consumidor definem a responsabilidade objetiva do transportador/fornecedor de serviço, sem a apresentação de nenhum limite indenizatório. Logo, a apreciação da responsabilidade do transportador sob a ótica do direito brasileiro é mais protetiva, na medida em que assegura a aplicação da responsabilidade objetiva na indenização integral do dano, não sendo cabível qualquer excludente de responsabilidade – salvo a excludente universal da força maior, caracterizada pela inevitabilidade e por estar fora do alcance do ser humano[22].

No domínio da responsabilidade aquiliana (Código Civil, artigos 186[23] e 927[24]), o direito brasileiro, também, não aborda o grau de culpa para a responsabilização do agente, sendo critério tão somente para apreciação do montante de indenização – o que pode ser inferido do art. 944, parágrafo único[25], que permite a diminuição da

16 Trata-se, inclusive, de um fenômeno que atinge a formação do direito do transporte aéreo em todos os seus aspectos. Nesse sentido: "desde a Segunda Guerra Mundial, sob vários aspectos, o direito do transporte aéreo tem se emancipado do direito nacional, desenvolvendo-se normas e padrões transnacionais de aplicação uniforme sem consideração aos territórios". VIGLINO, Mickael R. Transporte aéreo e direito transnacional: da convergência à uniformidade. *Revista de Direito Internacional*, Brasília, v. 13, n. 3, p. 159-174, 2016.

17 Por um lado, a indústria surgiu sob um clima original de aventura, de insegurança geral e tecnológica, de sofisticação, de aparência supérflua e elitista. Tudo isso bastava para explicar, suficientemente, a existência de mecanismos exoneratórios ou limitativos de responsabilidade civil. Pesava, em particular, a percepção do nascente serviço como beneficiando um grupo pequeno de privilegiados, admiradores da novidade, mais ainda quando acoplada ao perigo. Qualquer fechamento dos mecanismos jurisdicionais asseguradores da plena reparação não traria consigo efeitos antidistributivos, posto que limitado, no plano subjetivo, a uma casta diminuta de usuários. BENJAMIN, Antônio Herman V. O Transporte aéreo e o Código de Defesa do Consumidor. *Revista de Direito do Consumidor*, v. 100, p. 23-37, jul./ago. 2015.

18 DRION, Huib. Limitation of Liabilities in International Air Law. Holland, Matinus Nijhoff, 1954. Cf. também TOBOLEWSKI, Aleksander. *Monetary Limitations of Liability in Air Law*: Legal, Economic and Socio-Political Aspects. Montreal: De Daro Publishing, 1986, p. 75 apud BENJAMIN, Antônio Herman V. O Transporte aéreo e o Código de Defesa do Consumidor. *Revista de Direito do Consumidor*, v. 100, p. 23-37, jul./ago. 2015.

19 BRASIL. Poder Legislativo. Lei Ordinária n. 10.406, de 10 de janeiro de 2002. *Diário Oficial da União,* p. 1, 11 jan. 2002.

20 Art. 734. O transportador responde pelos danos causados às pessoas transportadas e suas bagagens, salvo motivo de força maior, sendo nula qualquer cláusula excludente da responsabilidade. Parágrafo único. É lícito ao transportador exigir a declaração do valor da bagagem a fim de fixar o limite da indenização.

21 Art. 14. O fornecedor de serviços responde, independentemente da existência de culpa, pela reparação dos danos causados aos consumidores por defeitos relativos à prestação dos serviços, bem como por informações insuficientes ou inadequadas sobre sua fruição e riscos.

22 GONÇALVES, Carlos Roberto. *Responsabilidade Civil*. 7. ed. São Paulo: Saraiva, 2012.

23 Art. 186. Aquele que, por ação ou omissão voluntária, negligência ou imprudência, violar direito e causar dano a outrem, ainda que exclusivamente moral, comete ato ilícito.

24 Art. 927. Aquele que, por ato ilícito (arts. 186 e 187), causar dano a outrem, fica obrigado a repará-lo.
Parágrafo único. Haverá obrigação de reparar o dano, independentemente de culpa, nos casos especificados em lei, ou quando a atividade normalmente desenvolvida pelo autor do dano implicar, por sua natureza, risco para os direitos de outrem.

25 Art. 944. A indenização mede-se pela extensão do dano. Pará-

quantia indenizatória quando se verificar desproporção entre o dano e a culpa do agente.

A análise comparativa dos dispositivos da Convenção e dos diplomas normativos citados (CDC e CC) revela uma antinomia, com uma responsabilidade mais frágil do transportador no tratado internacional. Ainda que não impeça a indenização acima do valor limite apresentado no tratado, os artigos 21 e 22 da Convenção formam um cenário mais prejudicial ao consumidor, visto que retiram a responsabilidade objetiva e aplicam a responsabilidade subjetiva com presunção de culpa.[26]

Outro ponto que traz conflito entre os diplomas citados e a Convenção diz respeito ao prazo prescricional para exercício da pretensão de indenização. Enquanto o CDC determina o prazo de cinco anos para a pretensão para reparação de danos por fato do serviço (art. 27)[27] e o CC prazo de três anos para a reparação civil (art. 206, §3º, V)[28], a Convenção de Montreal estipula que o direito à indenização se extinguirá se a ação não for iniciada num prazo de dois anos contados a partir da chegada ao destino, do dia da chegada da aeronave ou do dia da interrupção do transporte (artigo 35)[29].

Em análise tradicional da solução de antinomias, as disposições genéricas das leis nacionais não se sobreporiam à Convenção de Montreal, uma vez ser esta posterior (ratificação em 2006) e de âmbito específico, qual seja o contrato de transporte na modalidade aérea internacional[30]. Coaduna com esse entendimento a existência de disposição constitucional que preceitua a ordenação do transporte internacional observar os tratados firmados pela União[31].

Apesar da existência de doutrina favorável a esse entendimento[32], recentes publicações da doutrina consumerista brasileira têm refutado a aplicação da Convenção, tendo como fundamento o caráter especialíssimo do direito do consumidor e sua matriz constitucional, conforme tratar-se-á adiante.

3. O entendimento da doutrina brasileira: razões para aplicação do CDC em detrimento da Convenção de Montreal e a sua repercussão junto ao Supremo Tribunal Federal

A existência de normas de direito interno mais favoráveis aos usuários de transporte aéreo internacional tem motivado a doutrina consumerista brasileira a defender a aplicação do Código de Defesa do Consumidor para regular a responsabilidade do transportador aéreo nesses contratos, em detrimento da Convenção de Montreal e da Convenção de Varsóvia, antes vigente com relação a estes temas. Nesse sentido já se manifestaram autores como Nelson Nery Jr., Rosa Maria B. B. de Andrade Nery, Cláudia Lima Marques, Antônio Herman Vasconcellos e Benjamim, Carlos Roberto Gonçalves, Eduardo Arruda Alvim e Flávio Cheim Jorge.[33]

Esse entendimento tem como premissa o caráter especialíssimo dado ao direito consumerista, na medida em que regula uma relação jurídica marcada pela vulnerabilidade de um de seus sujeitos, o consumidor. Assim, as normas de proteção ao consumidor são de ordem

grafo único. Se houver excessiva desproporção entre a gravidade da culpa e o dano, poderá o juiz reduzir, equitativamente, a indenização.

26 "Tanto o CC, em seu art. 734, como o CDC, em seu art. 14, caput, determinam a responsabilidade objetiva da transportadora. A questão que se deve enfrentar relaciona-se, portanto, com a possível inaplicabilidade do art. 21 da Convenção de Montreal pela expressa exigência de comportamento culposo para ensejar a responsabilidade civil." ROLAND, Beatriz da Silva. O diálogo das fontes no Transporte aéreo internacional de passageiros: ponderações sobre a aplicabilidade da Convenção de Montreal e/ou CDC. *Revista de Direito do Consumidor*, v. 99, p. 38-70, maio/jun. 2015.

27 Art. 27. Prescreve em cinco anos a pretensão à reparação pelos danos causados por fato do produto ou do serviço prevista na Seção II deste Capítulo, iniciando-se a contagem do prazo a partir do conhecimento do dano e de sua autoria.

28 Art. 206. Prescreve: [...]§ 3o Em três anos: [...]V - a pretensão de reparação civil;

29 Artigo 35. 1. O direito à indenização se extinguirá se a ação não for iniciada dentro do prazo de dois anos, contados a partir da data de chegada ao destino, ou do dia em que a aeronave deveria haver chegado, ou do da interrupção do transporte.

30 Lei de introdução às Normas do Direito Brasileiro BRASIL. Poder Executivo. Decreto-Lei n. 4.657, de 04 de setembro de 1942. *Diário Oficial da União*, p. 1, 09 de set. 1942: Art. 2o Não se destinando à vigência temporária, a lei terá vigor até que outra a modifique ou revogue. § 1o A lei posterior revoga a anterior quando, expressamente, o declare, quando seja com ela incompatível ou quando regule, inteiramente, a matéria de que tratava a lei anterior.

31 CR/88, Art. 178. A lei disporá sobre a ordenação dos transportes aéreo, aquático e terrestre, devendo, quanto à ordenação do transporte internacional, observar os acordos firmados pela União, atendido o princípio da reciprocidade. (Redação dada pela Emenda Constitucional n. 7, de 1995)

32 CARVALHO, Luís Camargo Pinto de. O Código do Consumidor e o Direito Aeronáutico. *Revista dos Tribunais*, v. 673, 1991.

33 Nesse sentido, cf. ALVIM, Eduardo Arruda; JORGE, Flávio Cheim. A responsabilidade Civil no Código de Proteção e Defesa do Consumidor e o Transporte Aéreo. *Doutrinas Essenciais de Responsabilidade Civil*, ed. RT, v.2, p. 1229-1268, Out. 2011.

SALIBA, Aziz Tuffi; SOUZA, Alexandre Rodrigues de. A aplicabilidade da convenção de Montreal no direito brasileiro. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 429-448

pública[34], com ressonância constitucional tanto no capítulo dos Direitos Fundamentais (art. 5º, XXXII)[35] quanto nos princípios da ordem econômica (art. 170, V)[36].

Com base nesse raciocínio, o CDC tem alcance inclusive em relações jurídicas que possam ter objeto mais específico, visto que sua aplicabilidade tem como justificativa a defesa de um sujeito específico, e não a regulação do conteúdo da relação contratual.[37]

Favorece esse entendimento o disposto no art. 7º CDC, segundo o qual "os direitos previstos neste código não excluem outros decorrentes de tratados ou convenções internacionais de que o Brasil seja signatário". A interpretação dada a esse dispositivo é de que a aplicação de normas internacionais ao direito do consumidor só tem espaço quando ampliam os direitos do consumidor, e não o contrário:

Sendo assim, o correto seria, em querendo evitar que o transporte aéreo ficasse sob seu guarda-chuva, que o legislador, ao proteger o consumidor, estipulasse, expressamente (como faz em outros países), que suas normas não se aplicariam a tal modalidade de serviço. O Código de Defesa do Consumidor não só não tem tal corte, como, ao contrário, determina que os direitos nele previstos "não excluem outros decorrentes de tratados ou convenções internacional de que o Brasil seja signatário." Vale dizer, os tratados e convenções, nessa matéria, são válidos, desde que sirvam para ampliar os direitos dos consumidores, nunca para reduzi-los.[38]

Os argumentos, até então expostos, têm apresentado repercussão jurisprudencial irregular. Até o momento, o Supremo Tribunal Federal apresentou decisões dissonantes acerca dos limites de aplicabilidade da Convenção de Varsóvia nas relações de Consumo, apresentando diferentes interpretações acerca do artigo 178 da Constituição[39].

A primeira manifestação da Corte Superior sobre o tema foi em 1996, ainda na vigência da Convenção de Varsóvia, ao analisar o Recurso Extraordinário nº 172720, de relatoria do Ministro Marco Aurélio. Em análise estrita à aplicabilidade de danos morais, foi decidido que "[o] fato de a Convenção de Varsóvia revelar, como regra, a indenização tarifada por danos materiais não exclui a relativa aos danos morais"[40].

Nesse julgamento, vale destaque o tratamento dado ao Ministro Francisco Rezek à questão, que não partiu da premissa de um conflito entre a indenização tarifada da Convenção e os incisos V e X do artigo 5º do texto constitucional, objeto de análise pelo recurso extraordinário. Segundo o então Ministro, a Convenção não exclui a indenização por danos morais, apenas a insere no montante de indenização preceituado no acordo, de modo que não existe um conflito entre a norma do tratado e a garantia constitucional, mas um dever do julgador de compor os dois conjuntos de forma harmônica[41].

34 CDC, Art. 1° O presente código estabelece normas de proteção e defesa do consumidor, de ordem pública e interesse social, nos termos dos arts. 5°, inciso XXXII, 170, inciso V, da Constituição Federal e art. 48 de suas Disposições Transitórias.

35 CR/88, Art. 5º. [...]XXXII - o Estado promoverá, na forma da lei, a defesa do consumidor;

36 Art. 170. A ordem econômica, fundada na valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna, conforme os ditames da justiça social, observados os seguintes princípios: [...]V - defesa do consumidor;

37 "De pronto, percebe-se que, tratando-se de relações de consumo, as normas de natureza privada e em leis esparsas deixam de ser aplicadas. O mencionado Código retira da legislação civil, bem como de outras áreas do direito, a regulamentação das atividades humanas relacionadas com o consumo, criando uma série de princípios e regras em que se sobressai não mais a igualdade formal das partes, mas a vulnerabilidade do consumidor, que deve ser protegido." GONÇALVES, Carlos Roberto. *Responsabilidade Civil.* 7. ed. São Paulo: Saraiva, 2012, p. 221.

38 BENJAMIN, Antônio Herman V. O Transporte aéreo e o Código de Defesa do Consumidor. *Revista de Direito do Consumidor*, v. 100, p. 23-37, jul./ago. 2015, p. 6-7. No mesmo sentido MARQUES, Cláudia Lima: "[...]se o Tratado ou lei retira, limita ou impõe a renúncia aos direitos que o sistema do CDC assegura ao consumidor, nesse caso a aplicação do CDC é determinada pelo fato de ser o corpo de normas que assegura, segundo os novos parâmetros e valores orientadores, eficácia ao mandamento constitucional de proteção do consumidor. Assegura-se, em última análise, através da norma do art. 7.º do CDC, a aplicação da norma que mais favorece o consumidor.". A responsabilidade do transportador aéreo pelo fato do serviço e o Código de Defesa do Consumidor: antonimia entre norma o CDC e de Leis Especiais. Doutrinas Essenciais de Direito do Consumidor, v. 1, p. 601-642, Abr. 2011.

39 BRASIL. Constituição (1988), de 05 de outubro de 1988. *Diário Oficial da União*, p. 1, 05 de out. 1988.

40 Ementa: INDENIZAÇÃO - DANO MORAL - EXTRAVIO DE MALA EM VIAGEM AÉREA - CONVENÇÃO DE VARSÓVIA - OBSERVAÇÃO MITIGADA - CONSTITUIÇÃO FEDERAL - SUPREMACIA. O fato de a Convenção de Varsóvia revelar, como regra, a indenização tarifada por danos materiais não exclui a relativa aos danos morais. Configurados esses pelo sentimento de desconforto, de constrangimento, aborrecimento e humilhação decorrentes do extravio de mala, cumpre observar a Carta Política da República - incisos V e X do artigo 5º, no que se sobrepõe a tratados e convenções ratificados pelo Brasil. BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 172720. Relator: Min. MARCO AURÉLIO, Segunda Turma, julgado em 06 de fev. de 1996, *DJ* 21-02-1997 PP-02831 EMENT VOL-01858-04 PP-00727 RTJ VOL-00162-03 PP-01093.

41 "Não encontro dificuldade, no que concerne à justa aplicação

Observa-se que entendimento apresentado pelo Ministro Rezek à época foi similar à conclusão recentemente adotada pelo Tribunal de Justiça da União Europeia ao analisar a possibilidade de condenação em danos morais mediante a aplicação da Convenção de Montreal. Após uma detida análise do texto da Convenção, a Corte concluiu que:

> o conceito de «dano», subentendido no artigo 22.°, n.° 2, da Convenção de Montreal, que fixa o limite da responsabilidade da transportadora aérea pelo prejuízo resultante, designadamente, da perda de bagagens, deve ser interpretado no sentido de que abrange tanto o dano material como o dano moral.[42]

Não obstante a existência dessas posições, o entendimento predominante no Superior Tribunal de Justiça na atualidade é que a Convenção de Montreal não tem aplicabilidade sobre as relações de consumo[43] – premissa que impede a Corte responsável pela uniformização da lei federal que busca adentrar à questão dos danos morais. O STF, por sua vez, não se pronunciou mais sobre esse tema em específico.

Mais recentemente e de forma mais ampla, o STF voltou a se manifestar sobre a incidência da Convenção de Varsóvia aos contratos de transporte aéreo internacional no julgamento do Recurso Extraordinário nº 297901/RN, de Relatoria da Ministra Ellen Gracie. A Corte concluiu que:

> (e)mbora válida a norma do Código de Defesa do Consumidor quanto aos consumidores em geral, no caso específico de contrato de transporte internacional aéreo, com base no art. 178 da Constituição Federal de 1988, prevalece a Convenção de Varsóvia, que determina prazo prescricional de dois anos.[44]

No mesmo ano, esse entendimento foi reiterado em decisão monocrática proferida pelo Ministro Gilmar Mendes, que deu provimento ao Agravo de Instrumento que visava reformar acórdão que negou aplicação da indenização tarifada prevista na então vigente Conversão de Varsóvia.[45]

Em contraponto a essa interpretação, o Tribunal decidiu, de maneira diversa logo em 2009, na ocasião do julgamento do Recurso Extraordinário 351750/RJ, de Relatoria do Min. Marco Aurélio e Relatoria para o acórdão do Ministro Ayres Britto[46]. Entendeu o Tribunal, nesse caso, que "(a)fastam-se as normas especiais [...] da Convenção de Varsóvia quando implicarem retrocesso social ou vilipêndio aos direitos assegurados pelo Código de Defesa do Consumidor".

Vale destacar, nesse julgado, o entendimento apresentado pelo Ministro Ayres Britto em seu Voto-vista[47], no qual assinalou que a interpretação do art. 178 da Constituição deve ser norteada pela defesa do consumidor, que constitui direito fundamental (art. 5º, XXXII) e princípio da ordem econômica (art. 170, V). No mesmo sentido, manifestou-se o Ministro Cezar Peluso, ao dizer que "conquanto o art. 178 [...] determine a ordenação do transporte mediante lei, não pode esta limitar nem tampouco aniquilar, na prática, o princípio da defesa do consumidor"[48].

das normas que o Brasil convencionou com outros países, em conciliar com a solução preconizada pelo Ministro relator com a vigência plena das Convenções de Varsóvia e Haia. Interpreto os textos que se põem à mesa – as Convenções e a Constituição de 1988 - de modo a compô-los e não a ver, entre eles, incompatibilidade. Não há nenhuma controvérsia sobre os fatos: eles são claríssimos e foram bem entendidos pelas duas instâncias ordinárias. Apenas a juíza de primeiro grau entendeu que há direito à indenização, e o colegiado achou que não, que isso não é dano moral, pois para tanto é preciso que a personalidade moral do ser humano seja ultrajada. Parece-me acertada a solução de primeiro grau que o Ministro relator abona – não apenas acertada como bastante parcimoniosa. De tudo resulta uma obrigação de indenizar que não excede a faixa dos cinco mil dólares americanos (quatro mil e tantos reais brasileiros, neste momento)." (p. 5).

42 TJUE, Processo C-63/09 (2010/C 179/15).

43 "A responsabilidade civil das companhias aéreas em decorrência da má prestação de serviços, após a entrada em vigor da Lei n. 8.078/90, não é mais regulada pela Convenção de Varsóvia e suas posteriores modificações (Convenção de Haia e Convenção de Montreal) ou pelo Código Brasileiro de Aeronáutica, subordinando-se ao Código de Defesa do Consumidor." (BRASIL. Superior Tribunal de Justiça. Agravo Regimental nos Embargos Declaratórios no Agravo em Recurso Especial n. 418.875/RJ. Relator: Ministro João Otávio De Noronha, Terceira Turma, julgado em 17 de maio de 2016, Diário da Justiça, 2016. No mesmo sentido AgRg no AREsp 610.815/RJ, Rel. Ministro PAULO DE TARSO SANSEVERINO, DJe 25/02/2016 e AgRg no AREsp 145.329/RJ, Rel. Ministro MARCO BUZZI, QUARTA TURMA, DJe 27/10/2015, dentre outros.

44 BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 297901, Relator: Min. ELLEN GRACIE, Segunda Turma, julgado em 07 de mar de 2006, Diário da Justiça, 2006.

45 BRASIL. Supremo Tribunal Federal. Agravo de Instrumento n. 593.779, Relator: Min. Gilmar Mendes, julgado em 04 de dez. de 2006.

46 BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 351750. Relator: Min. Marco Aurélio; Min. Carlos Britto, Primeira Turma, julgado em 17 de mar. De 2009, DJe-181.

47 "Entre essas previsões, enfatizo o inciso V do art. 170 para dizer que a defesa do consumidor, além de direito fundamental (art. 5º, inciso XXXII), é princípio geral de toda a atividade econômica. E é sobre esse prisma que deve ser examinado o artigo 178 da nossa Lei das Leis." (p. 9).

48 Voto-Vista no RE 35750/RJ, p. 12.

Esse entendimento foi repetido em 2011 em decisão monocrática proferida pelo Ministro Marco Aurélio, que negou seguimento a recurso extraordinário que buscava a aplicação da Convenção de Varsóvia sob o fundamento de que "descabe cogitar, na espécie, de violência aos artigos 5º, § 2°, e 178 do Diploma Maior, cujo preceito restou atendido, valendo notar que os tratados subscritos pelo Brasil não se superpõem à Constituição". [49]

Até esse momento, então, pode-se perceber certa ressonância no STF dos argumentos apresentados por grande parcela da doutrina consumerista brasileira, no sentido de que os limites indenizatórios da Convenção de Montreal e Convenção de Varsóvia violam a garantia fundamental de proteção ao consumidor, e que o conteúdo da norma inscrita no artigo 178 da Carta Maior não elide o dever de aplicação da norma mais favorável àquele.

O cenário, entretanto, parece ter sido alterado com o início do julgamento conjunto do Recurso Extraordinário nº 636.331/RJ, de relatoria do Ministro Gilmar Mendes, e do Agravo em Recurso Extraordinário nº 766.618/SP, de relatoria do Ministro Luís Roberto Barroso. Os recursos discutem a aplicação dos limites indenizatórios da Convenção de Varsóvia em sobreposição à indenização integral do CDC e a aplicação do prazo bienal do mesmo tratado em sobreposição ao prazo de cinco anos da norma consumerista.

No RE 636.331, o Min. Gilmar Mendes concluiu pela prevalência da Convenção de Varsóvia, determinando a aplicação do limite de valor da condenação determinado pelo Tratado ou pelos acordos internacionais a ele posteriores. O Ministro refutou a argumentação de que o princípio constitucional impõe a defesa do consumidor (art. 5º, XXXII e art. 170, V) impossibilitaria a derrogação do CDC por norma mais restritiva ao consumidor, afirmando que a proteção ao consumidor não seria a única diretriz a orientar a ordem econômica. Também deu interpretação mais ampla ao artigo 178, assentando que este determina a ordenação do transporte aéreo internacional mediante a observância dos tratados internacionais.

Quanto ao ARE 766.618/SP, o Ministro Luís Roberto Barroso assinalou que, por força do art. 178 do texto constitucional, as normas que regem o transporte aéreo internacional se sobreporiam àquelas previstas pelo CDC, adotando os critérios tradicionais de solução de antinomias. O Ministro seguiu o voto do relator no RE 636.661/RJ, enquanto o Ministro Teori Zavascki acompanhou os dois relatores.

Conquanto ainda não tenha sido concluído o julgamento[50], a doutrina nacional já rechaçou o entendimento antecipado dos ministros citados, indicando que a aplicação da Convenção para voos internacionais gerará uma situação de disparidade no plano prático. Argumentam, em síntese, que caso haja algum fato de serviço em um voo doméstico que seja escala para um voo internacional, passageiros que tenham como destino cidades dentro do Brasil serão beneficiados pelo CDC, em detrimento daqueles cujo destino era outro país, que se submeterão a uma limitação no valor da indenização e um prazo prescricional mais curto. Logo, uma mesma situação fática implicaria diferentes regimes jurídicos, em ofensa à isonomia e à dignidade da pessoa humana.[51]

Com todas as ressalvas possíveis, entendemos que esse posicionamento é questionável na medida em que não existe um conflito no escopo de aplicação da Convenção de Montreal e o Código Brasileiro de Aeronáutica no que tange a realização de voos domésticos e voos internacionais. Conquanto o artigo 1º da Convenção dê a entender, em primeira leitura, que apenas a existência de um destino internacional já faz incidir as regras do tratado, o final do dispositivo elucida que "(o) transporte entre dois pontos dentro do território de um só Estado Parte, sem uma escala acordada no território de outro Estado, não se considerará transporte internacional, para os fins da presente Convenção."[52].

49 BRASIL. Supremo Tribunal Federal. *Agravo de Instrumento n. 824673 de São Paulo*. Relator: Min. Marco Aurélio, Data de Julgamento: 08/09/2011, Data de Publicação: 21/09/2011 PUBLIC 22/09/2011

50 Até o momento de elaboração deste artigo, os autos estavam conclusos sob vista da Ministra Rosa Weber.

51 Nesse sentido ROLAND, Beatriz da Silva. O diálogo das fontes no Transporte aéreo internacional de passageiros: ponderações sobre a aplicabilidde da Convenção de Montreal e/ou CDC. *Revista de Direito do Consumidor*, v. 99, p. 38-70, maio/jun. 2015, p. 11-12. Exemplo similar é apresentado por BENJAMIN, Antônio Herman V. O Transporte aéreo e o Código de Defesa do Consumidor. *Revista de Direito do Consumidor*, v. 100, p. 23-37, jul./ago. 2015. p. 7, tendo como base o Acordo de Kuala Lumpur, anterior à Convenção de Montreal e que não constituía um tratado, mas apenas um acerto entre algumas transportadoras aéreas.

52 CM, Art. 1.2: Para os fins da presente Convenção, a expressão transporte internacional significa todo transporte em que, conforme o estipulado pelas partes, o ponto de partida e o ponto de destino, haja ou não interrupção no transporte, ou transbordo, estão situados, seja no território de dois Estados Partes, seja no território de um só Estado-parte, havendo escala prevista no território de qualquer

Pelo disposto, pode-se dizer que voos com início e término dentro do território de um mesmo Estado-parte, ainda que constituam escala para um voo internacional de determinados passageiros que nele estejam, não são transporte internacional para fins de aplicação da Convenção.

Note-se que esse disposição normativa está em consonância com artigo 215 do Código Brasileiro de Aeronáutica (Lei Federal nº 7.565/1986), que considera como voo doméstico todo transporte em que o ponto de partida e o de chegada estejam no território brasileiro, mesmo se tratando de voos intermediários.[53] Esse entendimento já foi reconhecido, outrossim, pela doutrina de direito aeronáutico.[54]

Significa concluir, assim, que ainda que o Supremo Tribunal Federal entenda pela aplicação da Convenção de Montreal em detrimento das normas apresentadas pelo CDC, não se verificará, sob nosso olhar, violação ao princípio da isonomia e da dignidade da pessoa humana. Qualquer dano, atraso, lesão ou morte ocorridas em voos dentro do território nacional estão fora do alcance da Convenção de Montreal, ainda que sejam parte da execução de um contrato de transporte internacional.

É possível, portanto, que o Supremo Tribunal Federal conclua no sentido já apresentado pelos ministros Gilmar Mendes e Luís Roberto Barroso, reconhecendo a eficácia das normas do Tratado. Superado esse ponto, entretanto, é importante ponderar, também, sobre as consequências, do ponto de vista do Direito Internacional Público, que uma decisão contrária à aplicação da Convenção pode gerar ao Estado Brasileiro. É o que será apresentado adiante.

outro Estado, ainda que este não seja um Estado Parte. O transporte entre dois pontos dentro do território de um só Estado Parte, sem uma escala acordada no território de outro Estado, não se considerará transporte internacional, para os fins da presente Convenção.

53 Art. 215. Considera-se doméstico e é regido por este Código, todo transporte em que os pontos de partida, intermediários e de destino estejam situados em Território Nacional.

54 "Somente poderia haver conflito entre o Código Brasileiro de Aeronáutica e a Convenção de Montreal se as definições de transporte doméstico e de transporte internacional se sobrepusessem. No entanto, este não é o caso, pois as definições são integralmente compatíveis. De ambos os textos legais resulta que um vôo cujos pontos de origem, de destino ou intermediário estejam todos localizados no Brasil, será um vôo doméstico e que um vôo cujos pontos de origem, de destino ou intermediário esteja localizado fora do território nacional será considerado vôo internacional. Mais ainda, ambos os textos indicam que uma escala intermediária não prevista fora do território brasileiro não prejudica a natureza doméstica do vôo." ALMEIDA, José Gabriel Assis de. A Convenção de Montreal de 1999 e o Transporte Aéreo Internacional no Brasil. *Revista de Direito Aeronáutico e Especial*, v. 91, p. 36, dez. 2008.

4. A não aplicação da Convenção de Montreal sob os olhos do Direito Internacional: ofensa ao pacta sunt servanda e responsabilidade de Estado no âmbito internacional

Sabendo-se que a Convenção de Montreal é um tratado multilateral, assinado por cento e dezenove países mais a União Europeia, e que foi devidamente ratificado e recepcionado na ordem jurídica brasileira, cumpre antever as possíveis consequências do descumprimento do acordo frente à ordem internacional, inclusive sob a perspectiva das razoáveis justificativas apresentadas pela doutrina e jurisprudência internas.

Para isso, necessário examinar as normas da Convenção conforme os princípios gerais de direito internacional e costumes internacionais relativos ao Direito dos Tratados.

Grande parte destas normas estão hoje codificadas na Convenção de Viena de Direito dos Tratados[55], tratado multilateral que traz normas referentes à interpretação dos tratados, suas obrigações e sua observância pelos países signatários. Embora o Brasil tenha se tornado parte deste tratado apenas em 2009, o que retira sua incidência sobre a Convenção de Montreal por Força do seu artigo 4º[56], é cediço que as normas estatuídas na Convenção de Viena também possuem lastro como direito consuetudinário e como princípios gerais do direito[57], de modo que permanece[58] a incidência de suas

55 BRASIL. Poder Executivo. Decreto n. 7.030, de 14 de dezembro de 2009. *Diário Oficial da União*, p. 59, 15 de dez. 2009.

56 Artigo 4º. Sem prejuízo da aplicação de quaisquer regras enunciadas na presente Convenção a que os tratados estariam sujeitos em virtude do Direito Internacional, independentemente da Convenção, esta somente se aplicará aos tratados concluídos por Estados após sua entrada em vigor em relação a esses Estados

57 É vastamente reconhecido que as fontes de direito internacional encontram-se enumeradas, num rol não exaustivo, pelo artigo 38 do Estatuto da Corte Internacional de Justiça, estando inseridos o costume e os princípios gerais do direito. In verbis: Art. 38. A Corte, cuja função é decidir de acordo com o direito internacional as controvérsias que lhe forem submetidas, aplicará: a. as convenções internacionais, quer gerais, quer especiais, que estabeleçam regras expressamente reconhecidas pelos Estados litigantes; b. o costume internacional, como prova de uma prática geral aceita como sendo o direito; c. os princípios gerais de direito, reconhecidos pelas nações civilizadas; d. sob ressalva da disposição do Artigo 59, as decisões judiciárias e a doutrina dos juristas mais qualificados das diferentes nações, como meio auxiliar para a determinação das regras de direito.

58 Vale destacar, outrossim, que a Corte Internacional de Justiça já reconheceu a aplicabilidade da Convenção de Viena mesmo em

normas no exame da Convenção de Montreal que ora se propõe.

O artigo 26 da Convenção de Viena dispõe que "Todo tratado em vigor obriga as partes e deve ser cumprido por elas de boa fé.", regra que traduz o princípio geral de direito pacta sunt servanda, e que nada mais é do que o resultado da conjunção dos princípios da obrigatoriedade e da boa-fé no direito internacional, o que se extrai inclusive do preâmbulo da Convenção[59]. No mesmo caminho, ademais, a Corte Permanente Justiça Internacional (CPJI) trilhou sua jurisprudência no sentido de que "(a)s regras de direito que vinculam os Estados [...] emanam de seu livre consentimento, expressa em convenções [...] que visam a regular as relações entre comunidades independentes que coexistem"[60]. Já o princípio da boa-fé junto ao pacta sunt servanda foi consignado pela sucessora Corte Internacional de Justiça (CIJ)[61], ao julgar o caso de Testes Nucleares, entre França e Nova Zelândia.

Em relação a essa breve explicação, pode-se concluir que: (i) no plano internacional, a assunção de obrigações de um tratado internacional vincula o Estado signatário ao seu cumprimento, uma vez que a assunção daquela obrigação internacional derivou de seu livre consentimento e (ii) o cumprimento dessa obrigação internacional, também, deriva do princípio da boa-fé nas relações internacionais.

Cabe, agora, indagar se o Judiciário Brasileiro, ao negar aplicação da Convenção de Varsóvia ou Montreal nos casos de transporte aéreo internacional, está descumprindo uma obrigação internacional consuetudinária.[62]

A princípio, é possível concluir que sim, uma vez que os objetivos da Convenção de Montreal não se resumem à máxima proteção ao usuário do transporte aéreo internacional, mas também em "uma maior harmonização e codificação de certas regras que regulam o transporte aéreo internacional"[63]. Essa finalidade já foi observada no tocante à Convenção de Varsóvia pela Suprema Corte Norte-Americana, que declarou que "o objetivo cardinal da Convenção de Varsóvia é alcançar uniformidade nas regras que regem as pretensões advindas do transporte aéreo internacional"[64]. A doutrina internacional sobre o tema, também, reconhece como um dos principais propósitos da Convenção o alcance de uniformidade no direito relativo ao transporte aéreo

tratados firmados antes de sua assinatura pelos países da Convenção. Nesse sentido: "Despite the reservations made on ratification of the VCLT (see Multilateral Treaties Deposited with the Secretary-General, ch XXIII 1), which were mostly on dispute settlement, this is certainly the approach taken by the ICJ, as well as by other courts and tribunals, international and national. In the Kasikili/Sedudu Islands Case (Botswana/Namibia) the ICJ interpreted and applied the Heligoland-Zanzibar Treaty of 1890 between the United Kingdom and Germany (see also Heligoland) in accordance with the rules in Arts 31 and 32 VCLT, despite the Art. 4 VCLT rule against retrospection, and the fact that neither of the States was a party to the VCLT ([1999] ICJ Rep 1045 para. 18; MN Shaw 'Case concerning Kasikili/Sedudu Island (Botswana/Namibia)' (2000) 49 ICLQ 967–8). Earlier, in 1971, the ICJ held that the rules of the VCLT concerning termination of a treaty for breach 'may in many respects be considered as codification of existing customary law' (Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] [1971] ICJ Rep 3 para. 94) and applied Art. 60 (termination of a treaty for breach) (South West Africa/Namibia [Advisory Opinions and Judgments]). In 1973 the ICJ held that Art. 52 VCLT recognized that treaties concluded by the threat or use of force were void, and that Art. 62 VCLT (fundamental change of circumstances or clausula rebus sic stantibus; Treaties, Fundamental Change of Circumstances) reflected, or was in many respects a codification of, customary international law (Fisheries Jurisdiction Case [Federal Republic of Germany v Iceland] [1973] ICJ Rep 49 paras 24 and 36 respectively). In 1997 in the Gabčíkovo-Nagymaros Case (Hungary/Slovakia) ('Gabčíkovo-Nagymaros Case'), the principal treaty at issue predated the entry into force of the VCLT for the parties to the case ([1997] ICJ Rep 7 paras 42–46 and 99).". AUST, Anthony. *Vienna Convention on The Law of Treaties*. Oxford University Press. Disponível em: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498>. Acesso em: 06 nov. 2016.

59 CV, Preâmbulo: "Constatando que os princípios do livre consentimento e da boa fé e a regra pacta sunt servanda são universalmente reconhecidos"

60 The rules of law binding upon States [. . .] emanate from their own free will as expressed in conventions […] in order to regulate the relations between these co-existing independent communities" (tradução livre) (PCIJ Lotus Ser A No 10, 18).

61 "Um dos princípios básicos que governam a criação e o cumprimento de obrigações legais, independente de sua fonte, é o princípio da boa-fé. Confiança e segurança são inerentes à cooperação internacional, em particular numa época em que a cooperação tem se tornado cada vez mais essencial. Assim como a regra do pacta sunt servanda no direito dos tratados é baseado na boa-fé, também o é o caráter vinculante de uma obrigação internacional assumida por declaração unilateral." (tradução livre) (ICJ Nuclear Tests (New Zealand v France) [1974] ICJ Rep 457, para 49).

62 Acerca da aplicabilidade de normas decorrentes de tratados internacionais em relações privadas, conferir CARVALHO, Alexander Perazo Nunes de. Convencionalização do direito civil: a aplicação dos tratados e convenções internacionais no âmbito das relações privadas. *Revista de Direito Internacional*, Brasília, v. 12, n. 2, p. 351, 2015.

63 CM, Preâmbulo.

64 "[t]he cardinal purpose of the Warsaw Convention is to achieve uniformity of rules governing claims arising from international air transportation" (tradução livre) (El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 US 155 (1999), p. 169). O Tribunal também já levantou este entendimento anteriormente, no julgamento do caso Zicherman v. Korean Airlines, 516 US 217, 230 (1996), p. 230.

internacional.[65]

Ao negar aplicação às limitações indenizatórias presentes nas Convenções de Varsóvia e Montreal, portanto, nosso Judiciário estaria violando uma obrigação internacional assumida pelo Estado Brasileiro, sendo considerado um ato ultra vires[66]. Ainda que se verifique a eventual observância de outras regras do Tratado, a apresentação de limites indenizatórios concretiza um dos principais objetivos das Convenções em questão, qual seja a uniformidade no tratamento dos conflitos relacionados ao transporte aéreo. Este viés interpretativo pode ser extraído, inclusive, da exclusividade de aplicação dos tratados, conforme disposto no art. 24 da Convenção de Varsóvia[67] e artigo 29 da Convenção de Montreal[68].

No mesmo sentido, a doutrina entende que o artigo 26 da Convenção de Viena determina que o cumprimento dos tratados em boa-fé "exige que cada parte deva abster-se de qualquer ato calculado para evitar o devido cumprimento do tratado ou de algum modo frustrar seus objetivos"[69].

Adicionalmente, merece destacar que a justificativa apresentada pela doutrina brasileira para não aplicação da Convenção de Montreal, qual seja a existência de normas contrárias no direito interno, encontra óbice no princípio geral de direito internacional que impede um Estado de deixar de cumprir uma obrigação internacional firmada em um tratado com base em disposições de seu direito interno[70], sejam elas de qualquer ordem (legal ou constitucional)[71].

Este princípio está hoje estatuído no Artigo 27 da Convenção de Viena, in verbis: "Uma parte não pode invocar as disposições de seu direito interno para justificar o inadimplemento de um tratado. Esta regra não prejudica o artigo 46."

Não obstante a Convenção de Viena ter sido ratificada pelo Estado Brasileiro após a ratificação da Convenção de Montreal, o que em tese[72] afastaria a incidência do artigo 27 por força do artigo 4º, examinaremos o princípio de direito em questão com base nos trabalhos feitos com base neste dispositivo, visto ter sido construída a partir dele a interpretações atuais sobre o tema.

A ideia principal do artigo 27 é reiterar uma regra decorrente da boa-fé internacional: após a assunção de um tratado, eventuais alterações da legislação interna ou sua reinterpretação não podem ser utilizadas como esquiva para o descumprimento das obrigações assumidas.[73]

É de se destacar, também, que o termo "disposições

65 DEMPSEY, Paul Stephen. *Public International Air Law*. McGill: Canada, 2008. p. 4–5; p. 66–67; DEMPSEY, Paul Stephen; MILDE, Michael. *International Air Carrier Liability*: The Montreal Convention of 1999. Canada: McGill, 2005. p. 49-53.

66 Esse entendimento já foi destacado pela doutrina europeia ao analisar a eventual sobreposição de regulações da União Europeia sobre o disposto na Convenção de Montreal: "The overall thesis is that such complementary regulations, in so far as they cover the same area as a convention, conflict with the international conventions and the exclusivity of their application". DEMPSEY, Paul Stephen; JOHASSON, Svante O. Montreal v. Brussels: The Conflict of Laws on the issue of Delay in International Air Carriage. Air and Space Law, 35, no. 3, 2010, p. 208.

67 Art.. 24. (1) Nos casos previstos pelos arts. 18 e 19, toda ação de responsabilidade, qualquer que seja o titulo em que se funde, só poderá exercer-se nas condições e limites previstos pela presente Convenção. (2) Nos casos previstos pelo artigo 17, também se aplicam as disposições da alínea precedente, sem prejuízo da determinação das pessoas que têm direito de ação, e dos direitos que lhes competirem.

68 Art. 29. No transporte de passageiros, de bagagem e de carga, toda ação de indenização de danos, seja com fundamento na presente Convenção, em um contrato ou em um ato ilícito, seja em qualquer outra causa, somente poderá iniciar-se sujeita a condições e limites de responsabilidade como os previstos na presente Convenção, sem que isso afete a questão de que pessoas podem iniciar as ações e quais são seus respectivos direitos. Em nenhuma das referidas ações se outorgará uma indenização punitiva, exemplar ou de qualquer natureza que não seja compensatória.

69 "Good faith, inter alia, requires that a party to a treaty shall refrain from any act calculated to prevent the due execution of the treaty or otherwise to frustrate its objects." (tradução livre). Waldock III 7 (Draft Art 55 para 2) apud DÖRR, Oliver; SCHMALENBACH, Kirsten (Ed.) *Vienna Convention on The Law of Treaties*: A commentary. Springer-Verlag Berlin Heidelberg, 2012. p. 501.

70 "It is a generally accepted principle of international law, going back to the Alabama Claims Arbitration of 1872,1 that in the relations between States parties to a treaty the provisions of domestic law cannot prevail over those of the treaty.2 Furthermore, it is the duty of a treaty party to ensure that the organs of internal law apply and give eff ect to the treaty. Th e principle applies also in respect of the provisions of a constitution.". VILLIGER, Mark. E. *Commentary on the 1969 Vienna Convention on The Law of Treaties*. Brill, 2009. p. 370. No mesmo sentido, cf. Greco-Bulgarian Communities PCIJ Ser B No 17, 32 (1932) e Applicability of the Obligation to Arbitrate under Section 21 of the UN Headquarters Agreement of 26 June 1947 Advisory Opinion, ICJ Reports 34, par. 57 (1988).

71 Quanto à aplicação inclusive a normas de ordem constitucional, cf. Treatment of Polish Nationals in Danzig Case, PCIJ, Series A/B n. 44, 24 (1932). Este entendimento também é sedimentado no que toca à interpretação do artigo 27 da Convenção de Viena.

72 Sobre a aplicação da Convenção mesmo em tratados cuja assinatura e ratificação é anterior à CVDT, cf. nota 56 supra.

73 FOX, Gregory, H. Constitutional Violations and Treaty Invalidity: Will Iraq Give Lawful Consent to a Status of Forces Agreement?. *Wayne State University Law School Legal Studies Research Paper Series*, n. 08–25, 2008 apud. DÖRR, Oliver; SCHMALENBACH, Kirsten (Ed.). *Vienna Convention on The Law of Treaties*: A commentary. Springer-Verlag Berlin Heidelberg, 2012. p. 453.

de direito interno" engloba inclusive normas de ordem constitucional[74], de modo que a justificativa de inconstitucionalidade das limitações indenizatórias sob o viés da proteção ao consumidor no texto constitucional não elidiria a incidência do artigo 27, constituindo, ainda assim, uma violação de uma obrigação internacional.

Durante a ratificação da Convenção de Viena, a Guatemala apresentou reserva ao artigo 27 assinalando que seu conteúdo se restringiria às normas infraconstitucionais do Estado, não atingindo a sua Constituição, a qual se sobreporia a qualquer lei ou tratado. A reserva foi considerada pela maioria dos países como contrária ao conteúdo e aos objetivos da Convenção como um todo[75].

No mesmo sentido, a Corte Permanente de Justiça Internacional já aduziu que "... um Estado não pode alegar contra outro Estado sua própria Constituição com o objetivo de se evadir as obrigações a ele incumbidas no plano do direito internacional ou de tratados vigentes"[76].

Note-se que essa interpretação dada aos tratados pelo Direito Internacional vai de encontro ao atual entendimento do STF, já criticado pela doutrina nacional[77], segundo o qual:

> No sistema jurídico brasileiro, os tratados ou convenções internacionais estão hierarquicamente subordinados à autoridade normativa da Constituição da República. Em consequencia, nenhum valor jurídico terão os tratados internacionais, que, incorporados ao sistema de direito positivo interno, transgredirem, formal ou materialmente, o texto da Carta Política.[78]

O panorama exposto faz concluir que, conquanto a argumentação apresentada pela doutrina brasileira para evitar a aplicabilidade das Convenções de Varsóvia e Montreal aparente solidez no âmbito do direito interno, notadamente pela aplicação da proteção da defesa do consumidor e sua matriz constitucional, é inevitável reconhecer que essa posição judicial implicaria violação de uma obrigação internacional pelo Estado Brasileiro. Decorre da boa-fé internacional a ideia de que não é aceitável justificar o não cumprimento de uma obrigação contratual com base em normas do direito interno, ainda que de matriz constitucional. E, no caso, tem-se que os limites indenizatórios são elemento crucial para o cumprimento dos objetivos das Convenções de Varsóvia e Montreal, na medida em que visam dar uniformidade ao tratamento do transporte aéreo internacional.

A aplicação de decisões judiciais que neguem eficácia à disposições das Convenções de Varsóvia e Montreal, seja quanto à limitação indenizatória ou ao prazo prescricional para propositura da ação, caracterizará um descumprimento de uma obrigação internacional, capaz de gerar as consequências decorrentes da responsabilidade de Estado no âmbito internacional[79], inclusive com a possibilidade de que outro Estado signatário proponha ação contra o Estado Brasileiro junto à Corte Internacional de Justiça[80].

Frente a esse contexto e com todas as ressalvas ao saber jurídico e à qualidade dos trabalhos que tratam

74 Nesse sentido, cf. DÖRR, Oliver; SCHMALENBACH, Kirsten (Ed.). *Vienna Convention on The Law of Treaties*: A commentary. Springer-Verlag Berlin Heidelberg, 2012. p. 453.

75 DÖRR, Oliver; SCHMALENBACH, Kirsten (Ed.). *Vienna Convention on The Law of Treaties*: acommentary. Springer-Verlag Berlin Heidelberg, 2012. p. 456.

76 "a State cannot adduce as against another State its one Constitution with a view to evading obligations incumbent upon It under international law or treaties in force" (tradução livre) (PCIJ Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory PCIJ Ser A/B No 44, 24, 1932). Em diversos outros casos a Corte Permanente apresentou o mesmo sentendimento, a saber: PCIJ 'Wimbledon' (n 6); Greco-Bulgarian Communities PCIJ Ser B No 17, 32 (1932); Free Zones of Upper Savoy and the District of Gex (Second Phase) PCIJ Ser A No 24, 12 (1930); PCIJ Ser A/B No 46, 167 (1932). For arbitral tribunals see the 'Alabama' Claims case of 1872 (n 7); Norwegian Shipowners' Claims (Norway v United States of America) 1 RIAA 307, 331 (1922); Aguilar-Amory and Royal Bank of Canada Claims (Tinoco Case) (United Kingdom v Costa Rica) 1 RIAA 369, 386 (1923); Shufeldt Claim (Guatemala v United States) 2 RIAA 1079, 1098 (1930).

77 Cf., dentre outros, BICHARA, Jahyr-Philippe. O Controle da Aplicação do Direito Internacional pelo Poder Judiciário Brasileiro: uma análise crítica. Revista dos Tribunais, vol. 958, Ago. 2015, p. 233-268.

78 BRASIL. Supremo Tribunal Federal. Ação Direta de Inconstitucionalidade n. 1.480/DF, Relator: Min. Celso de Mello. Diário da Justiça, 08 ago. 2001:

79 Cf., nesse sentido, o art. 2º do *Draft Articles on Responsibility of States for International Wrongful Acts*: There is an internationally wrongful act of a State when conduct consisting of an action or omission: […] (b) constitutes a breach of an international obligation of the State. Disponível em:< http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. Acesso em: 16 jul. 2016.

80 Hipótese similar já foi citada quanto à edição de atos regulamentares do transporte aéreo pela União Europeia e seus conflitos com a Convenção de Montreal, cf. DEMPSEY, Paul Stephen; JOHASSON, Svante O. Montreal v. Brussels: The Conflict of Laws on the issue of Delay in International Air Carriage. Air and Space Law, 35, no. 3, 2010, p. 220. Cf. Também DEMPSEY, Paul. 'Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation', Georgia Journal of International & Comparative Law 32 (2004): 231.

SALIBA, Aziz Tuffi; SOUZA, Alexandre Rodrigues de. A aplicabilidade da convenção de Montreal no direito brasileiro. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 429-448

do tema na literatura nacional, não nos afigura, tecnicamente, adequada a livre negativa de aplicação das disposições provenientes na Convenção de Montreal, como tem sido apresentada por grande parte da doutrina e jurisprudência.

Com efeito, o Estado Brasileiro é signatário de diversos acordos internacionais, aos quais deve observância de boa-fé, inclusive (e sobretudo) no âmbito do direito interno. Nesse sentido, ao aderir à sistemática de uniformização apresentada pelas Convenções de Varsóvia e Montreal, cabe a ele dar atenção específica às suas proposições, não sendo possível negar sua aplicabilidade frente às disposições de direito interno – inclusive de ordem constitucional.

Vale destacar, inclusive, que a Convenção de Montreal não mitiga a proteção ao consumidor, mas apenas adéqua-a aos contornos específicos desse setor de transporte, que exige regras universais frente à ampla atuação geográfica das companhias aéreas. Para além da máxima proteção do consumidor, a ordem jurídica deve atender, também, o máximo acesso aos meios de transporte e à unificação de regras de transporte internacional – interpretação que se afigura compatível, inclusive, com o art. 178 do texto constitucional[81].

A exclusividade na aplicação das Convenção de Varsóvia e Montreal também tem sido, reiteradamente, aplicada pela jurisprudência internacional. A Suprema Corte americana declarou que "o pleito de reparação de dano pessoal ocorrido dentro de um avião ou no curso das operações de embarque e desembarque, se não permitido pela Convenção de Varsóvia, não é válido"[82].

A Corte de Apelação do Nono Circuito dos Estados Unidos, em acórdão publicado em 2014, também reconheceu a aplicabilidade do prazo bienal da Convenção de Montreal em prejuízo de qualquer legislação interna, visto se tratar de um prazo que atinge todas as ações a serem postuladas quanto ao transporte aéreo internacional, nos termo do artigo 35 da Convenção de Montreal[83].

Mais que isso, o acórdão faz referência jurisprudência americana antiga, a qual consigna que "alterar, emendar ou inserir a qualquer tratado, por inserir qualquer cláusula, seja simples ou grandiosa, seria por nós [Corte] uma usurpação de poder, e não um exercício das funções judiciais"[84].

No mesmo sentido, decisão do Tribunal de Justiça da União Europeia (TJUE) consignou que todos os países-membros da comunidade estão, legalmente, vinculados às obrigações da Convenção de Montreal:

> A Convenção de Montreal é um acordo internacional e é, enquanto tal, vinculativo para as partes contraentes e deve ser executado de boa fé. Assim sendo e apesar de a Comunidade ainda não ter formalmente depositado o instrumento de ratificação, as instituições comunitárias não podem agir em contra dos acordos internacionais. As instituições estão obrigadas, a partir do dia 9 de Dezembro de 1999, data da assinatura, a absterse de praticar actos que vão contra o objecto e a finalidade da convenção. Portanto, existe a

81 "a Convenção de Montreal insere-se no contexto da regulamentação e do desenvolvimento dos intercâmbios econômicos, especificamente, do comércio internacional do transporte, que possui carcaterísticas próprias da indústria. Isso não significa dizer que o objetivo de uniformização dos comportamentos obrigacioanis dos Estados em relação a tal indústria entra em contradição com o direito fundamental de proteção ao consumidor, mas, sim, que essa relação de consumo é peculiar e obedece a um regime jurídico específico decorrente de um compromisso internacional de tipo universal, consistente na limitação da repsonsabilidade do transportador, sendo igualmente um mecanismo protetivo dos direitos da livre iniciativa. Essa percepção do direito internacional encontra, inclusive, no art. 178 da Constituição e no art. 732 do CC/2002 respaldo jurídico no plano interno.". BICHARA, Jahyr-Philippe. O Controle da Aplicação do Direito Internacional pelo Poder Judiciário Brasileiro: uma análise crítica. *Revista dos Tribunais*, v. 958, p. 9 (versão online), ago. 2015. No mesmo sentido: PAIVA, Carlos. Avarias e claims no Direito Marítimo e Direito Aeronático. *Revista Brasileira de Direito Aeronáutico e Espacial*, v. 1822, abr. 2010.

82 El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 US 155 (1999), p. 161. Este mesmo entendimento foi reiterado em 2009, já sob a vigência da Convenção de Montreal, pela Corte do Distrito-Leste da Pennsylvania ao concluir que a Convenção precede à incidência de normas estatais sobre pretensões indenizatórias de transporte aéreo internacional. Segundo a decisão "a referência do Artigo 29 a 'pretensões fundadas em contrato ou ato ilícito' é melhor interpretada não no sentido de que tais pretensões existem fora da Convenção, mas que tais pedidos, ainda que formulados sem referência ao tratado, só podem ser postulados nos limites e condições naquele apresentados.". Original: "As discussed earlier, the reference in Article 29 to claims 'in contract or in tor otherwise' is best interpreted to mena, no that such claims can exist outside the Convention, but rather such claims, however formulated, 'can only be brought' under the Convention's terms.". Judith Schaefer-Condulmari v. US Airways Group, INC., US District Court For The Eastern District of Pennsylvania 09-1146, 8 december 2009.

83 "Any lingering confusion is further alleviated by Article 29, which confirms that "any action for damages . . . can only be brought subject to the conditions and such limits of liability as are set out in th[is] [Montreal] Convention . . . ." Montreal Convention art. 29 (emphasis added). This means, in other words, that any action seeking damages—regardless of when the cause of action accrued—is subject to, inter alia, the requirements of Article 35." Narayananv. British Airways, No. 11-55870 D.C. No. 2:11-cv-02175- JFW-CW

84 The Amiable Isabella, 6 Wheat. 1, 71, 5 L.Ed. 191 (1821) in Narayananv. British Airways.

> obrigação de abstenção de adopção de legislação comunitária que possa ser incompatível com a Convenção de Montreal." (tradução livre) (Case C-344/04, International Air Transport Association and European Low Fares Airline Association v. Department for Transport.)[85]

No mesmo caso, o TJUE registrou que a Convenção de Montreal não perde aplicabilidade com frente aos Regulamentos que tratam do transporte aéreo entre países membros da Comunidade europeia (Regulamento nº 2.027/97 e Regulamento nº 261/2004).

Significa dizer, assim, que a experiência jurisprudencial estrangeira tem sido atenciosa às obrigações internacionais contraídas por seus estados, não obstante a existência de legislação interna que possa ter algum nível de aplicabilidade sobre a regulação do transporte aéreo internacional.

Frente a esses indicativos, parece-nos não haver dúvidas quanto à necessidade de aplicação da Convenção de Montreal no ordenamento jurídico brasileiro. Mais que uma aplicação do princípio da especialidade, há de se convir que (i) as regras da Convenção de Montreal não desalentam o consumidor na sua posição de vulnerabilidade, mas apenas adequam suas garantias à necessidade de uniformização do transporte aéreo internacional; e (ii) a observância da Convenção é imperativo do pacta sunt servanda e da boa-fé do Estado Brasileiro perante à ordem internacional, sendo eventual negativa de aplicação motivos para suscitar a responsabilidade internacional do Estado.

Sem prejuízo dessa conclusão, que se restringe à análise dos conflitos apresentados sob seu viés normativo, buscar-se-á traçar alguns pontos históricos acerca da Convenção de Montreal que possam dar algum subsídio ao entendimento apresentado pela doutrina brasileira. Com efeito, o cenário atual do transporte aéreo internacional é marcado por notável segurança, força financeira e essencialidade[86], o que fragiliza a uniformização da responsabilidade do transportador aéreo. Essa questão foi trazida à lume pela doutrina estrangeira e será tratada adiante.

5. O sistema de responsabilidade do transporte aéreo internacional e suas vicissitudes

Frente às conclusões já apresentadas neste estudo, faremos uma breve análise da Convenção de Montreal como produto histórico dos benefícios concedidos ao transporte aéreo internacional frente aos seus usuários e sua real adaptação no atual contexto desse braço da indústria.

Conquanto a Convenção de Montreal seja relativamente recente do ponto de vista dos tratados internacionais (celebrada em 1999), seu conteúdo veio abarcar e unificar uma série de outros acordos internacionais que remontam à inauguração da aviação civil internacional, o denominado sistema "Varsóvia-Haia", que foi inaugurado pela Convenção de Varsóvia em 1929 e que também incluía os já referenciados Protocolo de Haia, 28.09.1955; a Convenção de Guadalajara, de 18.09.1961; o Protocolo da Guatemala, de 08.05.1971 e os Protocolos 1, 2, 3 e 4 de Montreal, de 25.09.1975[87].

Frente aos limites do presente estudo, focar-se-á, apenas, nos últimos acontecimentos que motivaram a formação da Convenção de Montreal.

Apesar das sucessivas modificações normativas citadas, a década de 90 presenciou diversos questionamentos sobre o sistema estatuído originalmente pela Convenção de Varsóvia e a necessidade de sua modernização, de modo que diversos países se insurgiram para tentar tornar o sistema mais favorável aos usuários, com o apoio de determinadas iniciativas internacionais. Nesse sentido, Japão, Austrália e Itália tomaram medidas para tornar o transportador aéreo internacional responsável pelo dano causado aos passageiros na sua integralidade. A empresa Nippon Airways declarou, voluntariamente, em 1992 que os limites de responsabilidade deveriam ser dispensados, enquanto o governo

85 ". No mesmo sentido: Case C-173/07, Emirates Airlines v. Schenkel [2009] All ER (EC) 436.

86 "Atualmente, o avião transformou-se no veículo de transporte mais rápido, seguro e eficaz entre todos os existentes, atividade verdadeiramente massificada, servindo a milhões de pessoas em todo o mundo. A aviação civil abriu as portas de um admirável mundo novo, repleto de benefícios, oportunidades e, como não poderia deixar de ser, também de conflitos. O transporte aéreo pode ser mesmo caracterizado como serviço essencial, nos termos do art. 22 do CDC, exigindo e aceitando, como nenhum outro meio de transporte, a intervenção estatal, que regula desde os seus atributos de segurança até a distribuição de rotas (a "política de céus abertos", por exemplo, ainda é uma miragem, na grande maioria dos países)." HERMAN, Benjamin. O Transporte aéreo e o Código de Defesa do Consumidor. *Revista de Direito do Consumidor*, v. 100 p. 23-37, p. 4, jul./ago. 2015.

87 CM, Artigo 55.

australiano editou normativas internas aumentando o limite de responsabilização dos agentes de transporte nacionais e internacionais. Pouco mais tarde, em 1996, a Comissão da União Europeia apresentou proposta de regularização do transporte aéreo dentro da comunidade, estipulando um limite maior de indenização e retirando qualquer limite de responsabilização objetiva aos transportadores.[88]

No plano internacional, a necessidade de modernização do sistema de Varsóvia motivou a formação de um acordo junto à Internacional Air Transport Association (IATA) em 1995, denominado Acordo de Kuala Lumpur[89]. Embora não consista num tratado internacional, o pacto benficiava os usuários ao restringir a aplicação de um teto de indenização apenas para a responsabilidade objetiva[90] – esquema bastante similar ao apresentado na atual Convenção de Montreal.

Não obstante essas mudanças, a Internacional Civil Aviation Organization estabeleceu um grupo de estudos para auxiliar seu núcleo jurídico a propor ideias para a modernização definitiva do sistema de responsabilidade do transportador aéreo[91]. Esse grupo foi responsável pela apresentação do Projeto da Convenção na Conferência Diplomática sediada em Montreal – ocasião em que se concluiu o tratado.

Sem prejuízo da evolução apresentada pelo texto final da Convenção de Montreal quando comparada ao sistema da Convenção de Varsóvia, alguns pontos de relevo sobre o estudo que motivou sua elaboração devem ser destacados.

Em primeiro lugar, um questionário foi enviado a todos os Estados-parte da ICAO e transportadoras aéreas que são membros da IATA, visando analisar a visão das transportadoras sobre a necessidade ou não de revisão dos limites de responsabilidade do transportador aéreo nos casos de dano de bagagem e carga. Em relação aos cento e oitenta e quatro países, apenas setenta e dois responderam ao questionário (cerca de 40%). Desse grupo, a grande maioria (cinquenta e dois Estados, cerca de oitenta por cento) expressaram insatisfação com os limites de responsabilidade então vigentes.[92] Embora esse grupo de países represente, apenas, vinte e oito por cento dos Estados membros do ICAO, sua proporção frente ao grupo que respondeu ao questionário conota a necessidade de alteração das regras de responsabilidade do transportador aéreo.

O mesmo estudo concluiu, também, que a eventual majoração dos limites de indenização implicaria um aumento do gasto das transportadoras com seguros numa média de apenas dois dólares por trecho aéreo, valor definitivamente baixo no plano de análise econômica das indústrias de transporte aéreo.

Outro ponto de destaque consiste no grupo de experts no campo do direito internacional privado chamados para participar do estudo. Embora o grupo de experts represente, em termos formais, quatro dos cinco continentes, grande parte de seus membros eram provenientes de países desenvolvidos, tais como Alemanha, Estados Unidos, Canadá, Nova Zelândia e França. Apenas dois experts de países em desenvolvimento estavam inseridos, um da Ásia e um da África. Nenhum perito de país da América Latina participou desse grupo de estudos[93]. Tal ausência pode denotar um problema de representatividade.

Por fim, é de maior destaque a conclusão apresentada pelo estudo, ao arrematar que:

> [...] Os limites da Convenção de Varsóvia existentes não são aceitáveis num plano mundial em razão da diversidade das circunstâncias socio-econômica e a variação de custos de vida em partes diferentes do mundo. Qualquer limite imposto internacionalmente iria com razoável certeza encorajar novas demandas a tentar contornar estes limites com base em procedimentos judiciais internos. [94]

Após o diagnóstico apresentado pelo grupo de experts responsáveis pela elaboração de uma primeira versão da Convenção de Montreal, pode-se dizer que

88 BATRA, J. C. Modernization of Warsaw System - Montreal 1999. *Journal of Air Law and Commerce*, v. 65, p. 432, 1999-2000.

89 *Intercarrier Agreement on Passenger Liability*. Disponível em: <http://kenyalaw.org/treaties/treaties/70/Intercarrier-Agreement-on-Passenger-Liability-1995>. Acesso em: 28 ago. 2016.

90 BATRA, J. C. Modernization of Warsaw System - Montreal 1999. *Journal of Air Law and Commerce*, v. 65, p. 433, 1999-2000.

91 Cf. ICAO, Doc. 9693-LC/190 (1997).

92 BATRA, J. C. Modernization of Warsaw System - Montreal 1999. *Journal of Air Law and Commerce*, v. 65, p. 434, 1999-2000.

93 BATRA, J. C. Modernization of Warsaw System - Montreal 1999. *Journal of Air Law and Commerce*, v. 65, p. 434, 1999-2000.

94 BATRA, J. C. Modernization of Warsaw System - Montreal 1999. *Journal of Air Law and Commerce*, v. 65, p. 435, 1999-2000. No mesmo sentido: ICAO, Socio-Economic Analysis of Air Carrier Liability Limits (Presented by the Secretariat), ICAO Doc. AT-WP/1769 (4 January 1996). O mesmo diagnóstico foi reconhecido pela doutrina brasileira em ROLAND, Beatriz da Silva, ROLAND, Beatriz da Silva. O diálogo das fontes no Transporte aéreo internacional de passageiros: ponderações sobre a aplicabilidde da Convenção de Montreal e/ou CDC. *Revista de Direito do Consumidor*, v. 99, p. 38-70, p. 7 (versão online), maio/jun. 2015.

o tratado é "um vinho antigo apresentado numa nova garrafa"[95].

Em outras palavras, dizer que a convenção extinguiu a limitação da responsabilidade das transportadoras ainda soa falacioso, não obstante existirem vantagens e inovações. No entanto, é de se acordar com a doutrina pós celebração da Convenção de Montreal, a qual diz que "(e)m um mundo de liberdade comércio e liberdade de contratação/iniciativa, globalização e liberalização, a liberdade de indenização compensatória sem nenhuma imposição de limites seria uma sugestão ideal"[96].

Significa afirmar que a imposição de limites de indenização à responsabilidade do transporte aéreo internacional tornou-se vazia há algumas décadas, na medida em que a indústria aérea teve um enorme crescimento e inovação ao longo do Século XX, de modo a plenamente ser capaz de arcar com os custos das indenizações que causa.

Essa interpretação é corroborada pela análise da doutrina internacional, que já refutou com propriedade as justificativas tradicionais[97] à existência de limitação da responsabilidade ao transportador aéreo há décadas.[98] Até mesmo os argumentos históricos, nos quais a aviação civil só seria economicamente viável com as limitações de responsabilidade, foram contraditadas pelos fatos: no período em que os Estados Unidos denunciaram a Convenção de Varsóvia e deixaram de aplicar limites de responsabilidade o país permaneceu sendo um dos marcos do desenvolvimento da aviação civil.[99]

Todas essas informações nos dão uma versão holística da Convenção de Montreal, a qual indica para um certo anacronismo entre sua regulação e a realidade da indústria de transportes atual, e o conflito apresentado pela aplicação da Convenção de Montreal e o direito do consumidor brasileiro é um sintoma deste anacronismo. Com efeito, a existência de uma limitação da responsabilidade do transportador aéreo deixou de ser uma exigência frente ao consumidor deste serviço para justificar a sua existência e passou a ser um benefício imotivado à indústria, que pode planejar com mais certeza os limites de sua responsabilidade judicial em todos quase todo o planeta, considerando todos os países signatários da Convenção.

6. Considerações finais

O presente estudo teve como objetivo traçar os principais conflitos delineados no direito brasileiro acerca da aplicabilidade dos limites de responsabilidade da Convenção de Varsóvia e da Convenção de Montreal aos contratos de transporte aéreo internacional, notadamente os contratos de consumo que estejam sob o âmbito destes acordos internacionais, aos quais o Estado Brasileiro é signatário e que já foram ratificados.

Demonstrou-se que o ordenamento jurídico brasileiro fornece proteções mais vantajosas aos consumidores que as disposições normativas apresentadas pela Convenção de Montreal, especialmente com relação (i) aos limites indenizatórios de responsabilidade objetiva nos casos de dano ao passageiro, bagagem e carga transportada e (ii) prazo prescricional para postular pretensões indenizatórias frente ao Judiciário.

No entanto, argumentou-se no sentido de que a mera existência de sistema interno mais vantajoso a uma das partes desse contrato não elide o Estado Brasileiro de observância das normas internacionais às quais contraiu pelas Convenções citadas, ainda que estas normas internas derivem de preceito constitucional. Trata-se da aplicação das regras da Convenção de Viena sobre Direito dos Tratados, bem como dos deveres de observância das obrigações internacionais pelo Brasil em respeito à

95 "The Montreal Convention's unlimited liability provisions may appear to be an eyewash, however, because the limitation caps still exists. The Warsaw System has been retained in the Montreal Convention. Its an old wine in a new bottle." BATRA, J. C. Modernization of Warsaw System - Montreal 1999. *Journal of Air Law and Commerce*, v. 65, p. 443, 1999-2000.

96 BATRA, J. C. Modernization of Warsaw System - Montreal 1999. *Journal of Air Law and Commerce*, v. 65, p. 443, 1999-2000.

97 Citadas na segunda seção deste capítulo, a saber: (i) analogia com o direito marítimo; (ii) proteção de uma indústria até então fraca em termos financeiros; (iii) reconhecimento de que o risco de catástrofes não podem ser assumidos apenas pela companhia aérea; (iv) desejo de que haja limites para a contratação de seguros pelas companhias; (v) possibilidade de que os usuários possam assumir seguros por conta própria; (vi) limitação da responsabilidade como compensação ao sistema de responsabilidade objetiva/com presunção de culpa estabelecido na convenção, mais rígido aos transportadores; (vii) evitar um comportamento litigante e facilitar a formação de acordos para pagamento de indenizações e (viii) propósito de unificação do direito e dos entendimentos acerca dos valores pagos por estes danos.

98 DRION, Huib. Limitation of Liabilities in International Air Law, Holland, *Matinus Nijhoff*, p. 12-41, 1954.

99 DRION, Huib. Limitation of Liabilities in International Air Law, Holland, *Matinus Nijhoff*, p. 16, 1954.

boa-fé internacional.

Nesse sentido, compreendemos neste artigo que é mais adequado, frente às normas que circundam a questão ora discutida, que o Judiciário brasileiro assegure a eficácia das normas específicas apresentadas na Convenção de Montreal. Trata-se não só de um cumprimento das obrigações internacionais contraídas pelo Estado Brasileiro como um todo, mas também de um dever da função jurisdicional de não alterar as disposições e objetivos de um tratado durante a sua execução.

Por fim, sem prejuízo dessa conclusão de ordem técnica e jurídica, uma rápida análise na construção histórica da Convenção de Montreal nos fez concluir também pela necessidade de revisitar suas disposições. As razões que motivaram a existência de um regime de responsabilidade específica estão enraizadas à uma incipiência da indústria aérea internacional que já foi superada há décadas, sendo um setor da economia internacional que presta serviços de qualidade e que detém altíssimo fluxo financeiro.

Asseverar esse anacronismo não significa olvidar que a proteção transnacional e internacional do consumidor não pode se transformar em barreiras ao comércio internacional.[100]

No já citado caso norte-americano Narayanan v. British Airways, que decidiu pela aplicação do prazo bienal da Convenção de Montreal, a opinião dissidente do juiz Pregerson parece sintetizar com exímia qualidade o cenário em questão:

> A Convenção de Varsóvia foi escrita quando a indústria aérea estava em sua vulnerável infância, época na qual o transporte aéreo era considerado arriscado. A Convenção de Montreal, contudo, foi celebrada em 1999, quando o transporte aéreo internacional já havia se tornado uma indústria multibilionária, e os riscos do transporte já haviam caído exponencialmente. [...] Por ora, a Convenção de Montreal, ao manter o rígido estatuto de limitações da Convenção de Varsóvia, continua a proteger os transportadores aéreos à custa de seus passageiros, e proíbe a família do Sr. Narayana de compensar por sua conduta ilícita. Por causa do resultado injusto e excessivo desse caso e de talvez outros, eu tenho a esperança de que a Convenção de Montreal seja revisitada e revisada, com o fito de proteger famílias como os Narayanans.[101]

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BRASIL. Superior Tribunal de Justiça. Agravo Regimental no Agravo em Recurso Especial n. 610.815/RJ, Relator: Ministro Paulo De Tarso Sanseverino, *Diário da*

100 A ponderação entre a proteção ao consumidor e o desincentivo ao comércio internacional foi verificada por Héctor Valverde Santana. Ao comentar a Resolução 39/248 da ONU, referente à proteção ao consumidor, o autor constatou que a normativa apresenta "preocupação no sentido de dispensar o devido cuidado para que a proteção do consumidor não se transforme em barreiras ao comércio internacional e óbice ao cumprimento das obrigações comerciais internacionais". SANTANA, Héctor Valverde. Proteção Internacional do consumidor: necessidade de harmonização da legislação. Revista de Direito Internacional, v. 11, n. 1, p. 58, 2014.

101 The Warsaw Convention was written when the airline industry was in its vulnerable infancy, and when air travel was considered risky. The Montreal Convention, however,was adopted in 1999, after international air travel became a multi-billion dollar industry, and the risks of flying had decreased exponentially. In fact, Mr. Narayanan's injury was not among the dangers typically associated with air travel (such as mechanical failures and pilot error), but was due solely to the negligence of British Airways's employees. Yet the Montreal Convention, by retaining the Warsaw Convention's rigid statute of limitations, continues to protect international airline carriers at the expense of its passengers, and bars Mr. Narayanan's family from holding British Airways accountable for its misconduct. Because of the unfair and unconscionable result in this case and perhaps others, I hope that the Montreal Convention will be revisited and revised to protect families like the Narayanans." (tradução livre), p. 18.

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Regime de transparência fiscal na tributação dos lucros auferidos no exterior (CFC Rules): lacunas e conflitos no direito brasileiro

Tax Transparency Regime in Taxation of Profits Abroad (CFC Rules): Gaps and Conflicts in Brazilian Law

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Regime de transparência fiscal na tributação dos lucros auferidos no exterior (CFC Rules): lacunas e conflitos no direito brasileiro*

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Resumo

O objetivo geral do presente artigo é tratar da aplicabilidade do regime de transparência fiscal internacional na tributação dos lucros auferidos no exterior (*CFC Rules*), por meio da análise de suas características e seu papel no cenário transnacional. Como objetivo específico, são examinados os conflitos presentes no direito brasileiro, devido à adoção de um modelo diferente do que é praticado mundialmente, por meio de tributação em bases universais, independentemente da disponibilização dos lucros. A metodologia desenvolvida é analítico-dedutiva, por meio de uma pesquisa bibliográfica e jurisprudencial, e de uma análise crítica dos casos relevantes. Limita-se, portanto, a uma análise dogmática e qualitativa do direito positivo. O argumento central do presente trabalho é a aplicação de critérios seletivos, em referência ao que fora recomendado pela OCDE, para o devido uso do regime de transparência fiscal, ressaltando o seu caráter antielisivo para impedir práticas concorrenciais nocivas. Nessa perspectiva, o trabalho conclui que o escopo antielisivo do regime de transparência fiscal internacional no Brasil não passa de mais uma forma ampla de se tributar a renda. O presente trabalho é original e importante ao apontar as incertezas e lacunas normativas remanescentes após o julgamento da ADI 2.588/2001 e suas consequências no judiciário e no Conselho Administrativo de Recursos Fiscais, mesmo após a edição da Lei nº 12.973/2014, e demonstrar que o Poder Judiciário será cada vez mais exigido diante da incerteza jurídica.

Palavras-chave: Transparência Fiscal Internacional. Concorrência Fiscal Prejudicial. Tributação Favorecida. Paraísos Fiscais.

Abstract

The general objective of this article is to discuss the applicability of the international tax transparency regime to the taxation of profits obtained abroad (*CFC Rules* regime), by analyzing its characteristics and its role in the transnational scenario. As a specific objective, the exiting conflicts in Brazilian law are examined, due to the adoption of a different model from

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what is practiced around the world, through taxation on a universal basis, regardless of the availability of profits. The methodology is analytical-deductive, which consists of a bibliographical and jurisprudential research, and a critical analysis of the relevant case law. It limits itself to a dogmatic and qualitative study of positive law. The central argument of the present paper is the application of selective criteria, regarding what was recommended by the OECD, for the proper use of the tax transparency regime, highlighting its anti-tax avoidance nature to prevent harmful tax competition. From this perspective, the paper concludes that the anti-avoidance scope of the international fiscal transparency regime in Brazil is just another broad way of taxing income. This paper is original and important in pointing out the remaining uncertainties and regulatory gaps after the judgment of ADI 2,588/2001 and its consequences in the judiciary and in the Administrative Council of Tax Appeals (CARF), even after the publication of Law No. 12,973/2014, and in demonstrating that the Judiciary will be increasingly demanded in the face of these legal uncertainty.

Keywords: CFC rules. Harmful Tax Competition.

1. Introdução

Com a globalização e a integração da economia, torna-se cada vez mais atraente para empresários e investidores estabelecerem empresas no exterior, com o intuito de ampliar o horizonte comercial e diversificar lucros explorando novos mercados. O planejamento tributário é utilizado por empresários como meio de minimizar a carga tributária pela escolha de países mais favoráveis aos seus investimentos. Entretanto, mediante o intermédio de paraísos fiscais e países com regime de tributação favorecida, que oferecem benefícios fiscais para atrair investimentos estrangeiros, acaba-se estimulando uma concorrência fiscal desleal.

A Organização para Cooperação e Desenvolvimento Econômico (OCDE), em conjunto com os países que a integram, estabeleceu políticas de combate a estas formas prejudiciais de concorrência, dos quais se destacam o *Harmful Tax Competition – an Emerging Global Issue*[1] e o *Base Erosion and Profit Shifting Action Plan*[2], publicados em 1998 e 2013, respectivamente.

O primeiro trouxe recomendações aos países para instituírem as regras chamadas *Controlled Foreign Corporations* (companhias controladas no exterior) ou simplesmente regras *CFC*, no seu acrônimo em inglês, um mecanismo de combate à concorrência fiscal danosa. Este regime tributa os lucros de empresas controladas – e, em alguns casos, também as coligadas –, estabelecidas em paraísos fiscais e países com regime de tributação favorecida, diretamente na pessoa de seu sócio residente.

O Brasil, diferente do formato indicado pelo estudo da OCDE, utilizou modelo próprio para tributação dos lucros de empresas controladas e coligadas no exterior, ignorando o caráter antielisivo do regime *CFC* e tributando toda e qualquer forma de renda auferida, independentemente de sua disponibilização ao sócio residente e da jurisdição em que a empresa estrangeira está sediada.

O presente trabalho está dividido em seis partes. Na primeira seção, procurou-se tratar sobre a concorrência fiscal prejudicial e as ameaças de tais práticas nocivas ao cenário econômico internacional. Na segunda seção, é apresentado o regime de transparência fiscal, em seus múltiplos aspectos, e a terceira seção relata a forma como é tratado na legislação brasileira no decorrer do tempo. Na quarta seção, é analisado o julgamento pelo STF na ADI 2.588, quanto à constitucionalidade do art. 74 da MP 2.158-35/2001. Na quinta seção, discute-se o cenário atual da tributação dos lucros de controladas e coligadas pela legislação brasileira, após a edição da Lei n. 12.973/2014, que trouxe modificações nesse regime, após o julgamento da referida ADI. Por fim, na última seção, discute-se recente posicionamento do CARF que decidiu a respeito dos lucros de uma empresa controlada sediada nos Países Baixos, procurando-se evidenciar as remanescentes lacunas que ainda restam sobre o tema.

2. A concorrência fiscal prejudicial

A decisão a respeito de investimentos no exterior passa pela legislação interna de cada país, naquilo que

1 OECD. *Harmful Tax Competition*: an Emerging Global Issue, Paris, 1998. Disponível em: <http://www.oecd.org/tax/transparency/44430243.pdf>.

2 OECD. *Addressing Base Erosion and Profit Shifting*, 2013. Disponível em: <http://www.keepeek.com/Digital-Asset Management/ oecd/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#page3>. Acesso em: 24 maio 2016.

pode oferecer melhores garantias ou facilidades de retorno do capital investido. É principalmente desta competitividade internacional que surgem as oportunidades de elisão fiscal.

Nas palavras de Alberto Xavier:

> A essência da figura da elisão fiscal reside precisamente nesta faculdade de eleição da ordem tributária aplicável, não por uma via direta (como sucede no Direito Internacional Privado em matéria de contratos), incompatível com o princípio da legalidade em matéria de tributos, mas pela via indireta de "localizar" certo fato ou fatos num dado ordenamento ou território, exercendo uma influência voluntária no *elemento conexão* da norma de conflitos, em termos tais que o fato jurídico em que este se traduz arraste a aplicação do ordenamento mais favorável. [3]

A competitividade para a captação de investimentos estimula uma melhor estruturação para que cada Estado possa receber o capital estrangeiro, além de favorecer uma melhor distribuição da arrecadação entre os países[4]. Ao mesmo tempo, oferece ao investidor opções de escolha, na procura pelo ambiente mais propício para o seu crescimento.

Entretanto, o surgimento de práticas prejudiciais e ilícitas por parte de alguns Estados, com o intuito de oferecer benefícios exclusivamente fiscais para a atração de investimentos em seu território, representa uma ameaça aos demais países no cenário econômico internacional.[5]

Sobre o tema, acrescenta Heleno Tôrres:

> Considerando que só há "paraísos fiscais" porque existem os "infernos fiscais" criados pelas nações mais desenvolvidas, a concorrência fiscal internacional poderá prestar-se exatamente para a redução do quanto os sistemas tributários vigentes tenham de atormentador, gerando inclusive benefícios de ordem técnica, como aperfeiçoamento qualitativo dos atos de arrecadação, fiscalização e administração dos tributos, além de um tratamento mais eficiente ao cuidar dos interesses dos contribuintes, em face do princípio da isonomia, ao que todas as administrações se obrigam.[6]

Os paraísos fiscais são países ou regiões com tributação inexistente ou consideravelmente reduzida, incidente sobre os investimentos internacionais, sobre o rendimento auferido e sobre a constituição de empresas dentro de seu território.[7]

Além dos paraísos fiscais, acrescentam-se como praticantes da concorrência fiscal danosa os países que possuem regime de tributação favorecida. Estes são utilizados exclusivamente para facilitar a aplicação de investimentos internacionais, seduzindo contribuintes não-residentes, e não fornecendo informações destes beneficiados a outros Estados. Tais países eventualmente podem adotar um nível de tributação mínima e não-transparente. Estes favorecimentos apenas se aplicam ao capital estrangeiro, mantendo-se a tributação dos contribuintes residentes sem os mesmos benefícios fiscais.[8]

Diante dos prejuízos ocasionados à comunidade internacional por parte dos paraísos fiscais e dos países com regime de tributação favorecida, a OCDE, desde 1998[9], tem se debruçado sobre a concorrência fiscal danosa, expondo aqueles que a praticam, suas características, consequências e os mecanismos utilizados em seu favorecimento, bem como modos de defesa contra essa atuação danosa.[10]

As recomendações publicadas pela OCDE orientam a forma com que a legislação doméstica de cada país membro pode ser utilizada como modo de defesa e contenção dos danos praticados pela concorrência fiscal. Dentre tais sugestões, está o emprego do mencionado regime de transparência fiscal (*CFC rules*)[11].

Ademais, a formulação de estratégias e políticas de combate aos paraísos fiscais e aos países de regime tri-

3 XAVIER, Alberto. *Direito Tributário Internacional do Brasil*. 8. ed. São Paulo: Forense, 2015. p. 272.

4 BORGES, Franciele de Simas Estrela. *O direito tributário sobre uma perspectiva transnacional*. Disponível em: <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/4375/pdf>.

5 OECD. *Harmful Tax Competition*: an Emerging Global Issue, Paris, 1998. Disponível em: <http://www.oecd.org/tax/transparency/44430243.pdf>. Acesso em: 21 maio 2016.

6 TÔRRES, Heleno Taveira. *Direito Tributário Internacional*: planejamento tributário e operações transnacionais. São Paulo: Revista dos Tribunais, 2001. p. 69.

7 BIANCO, João Francisco. *Transparência Fiscal Internacional*. São Paulo: Dialética, 2007. p. 18.

8 BIANCO, João Francisco. *Transparência Fiscal Internacional*. São Paulo: Dialética, 2007. p. 18.

9 OECD. *Harmful Tax Competition*: an Emerging Global Issue, Paris, 1998. Disponível em: <http://www.oecd.org/tax/transparency/44430243.pdf>. Acesso em: 21 maio 2016.

10 PEREIRA, Roberto Codorniz Leite. *O Regime Brasileiro de Tributação de Lucros Auferidos por Controladas e Coligadas no Exterior*: um estudo empírico sobre suas causas e efeitos. Disponível em: <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/10165/Disserta%C3%A7%C3%A3o%20de%20Mestrado_Vers%C3%A3o%20Protocolo%20Final.pdf?sequence=1>. Acesso em: 22 maio 2016.

11 Para efeitos deste artigo, regime de transparência fiscal e *CFC rules* serão utilizados como sinônimos.

butário favorecido consistem de um trabalho contínuo. Em 2013, a OCDE, com o apoio político do G20[12], apresentou o referido plano de ação BEPS[13], que combate a erosão da base tributária e a desvio de lucros.

A erosão da base tributária é ocasionada, sobretudo, por esquemas de planejamento tributário agressivos, praticados por empresas que direcionam seus lucros tributáveis para jurisdições com uma pressão fiscal baixa ou inexistente, resultando no desgaste do sistema tributário do país em que é residente.[14] O plano de ação BEPS consiste em quinze diretrizes (*actions*) a serem aplicadas pelos países membros e outros signatários para impedir a evasão fiscal internacional.

Cada ação indicada pela OCDE possui um prazo para sua implementação, sendo dever dos países enviar relatórios expondo a sua prática. Entretanto, mesmo diante da necessidade de aplicação destas ações, o plano criado pela OCDE apenas terá êxito se introduzido de forma conjunta e simultânea pelos países membros e não-membros.

Percebe-se a enorme relevância do BEPS, criado pela OCDE justamente com a finalidade de combater as práticas abusivas de erosão da base tributável, diante da perda de arrecadação dos Estados de receitas tributárias para locais com tratamento mais vantajoso[15]. Junto com o regime de tributação das CFC, fica claro o esforço entre países e organizações internacionais a fim de evitar e de combater as práticas nocivas de concorrência tributária.

3. A transparência fiscal internacional: conceito e função

A transparência fiscal internacional, ou CFC *rules*, é um regime antielisivo aplicável às sociedades controladas e coligadas estabelecidas no exterior, sendo medida de defesa contra o desenvolvimento da competição internacional prejudicial e a erosão das bases tributáveis em detrimento da arrecadação tributária dos fiscos nacionais.

Este regime tem por fundamento a tributação dos lucros auferidos por pessoas jurídicas estrangeiras diretamente na figura de seus sócios ou acionistas residentes em outro país. As sociedades em questão consideram-se transparentes (*pass-through entity*) para efeitos fiscais, sendo eleitos como contribuintes os respectivos sócios das mesmas, arcando com o ônus tributário de acordo com a legislação do país em que residem.

Nas palavras de João Francisco Bianco, caracteriza-se a transparência fiscal:

> [...] como regime de tributação segundo o qual ocorre a atribuição de determinadas classes de rendimentos, auferidos por uma sociedade controlada não residente, aos seus sócios residentes, desde que atendidas certas condições, com o objetivo de evitar que a simples interposição de sociedades no exterior, entre os contribuintes e a fonte produtora dos rendimentos, possa afastar a plena aplicação do regime de tributação da renda em bases universais.[16]

Como mencionado acima, o princípio da universalidade (*world-wide income taxation)* trata da possibilidade de tributação da renda auferida em sua totalidade por contribuintes residentes independentemente do local onde ocorra o fato gerador.

Devido ao caráter transparente das empresas controladas e coligadas, seus sócios são tributados pelos lucros das mesmas antes da efetiva disponibilização e distribuição de dividendos, desconsiderando-se, assim, a personalidade jurídica da entidade estrangeira, mesmo sendo ela quem tenha realizado o fato gerador. Cria-se uma hipótese de ficção jurídica de distribuição de lucros e dividendos, para se tributar diretamente a pessoa física dos sócios ou acionistas.[17]

12 G20 é a abreviatura de Grupo dos 20, fórum de discussões do sistema financeiro internacional, criado em 1999, e formado pelos ministros de finanças e chefes dos bancos centrais das 19 maiores economias do mundo (países desenvolvidos e emergentes) e a União Europeia.

13 OECD. *Addressing Base Erosion and Profit Shifting*, 2013. Disponível em: <http://www.keepeek.com/Digital-Asset Management/ oecd/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#page3>. Acesso em: 24 maio 2016.

14 OECD. *Addressing Base Erosion and Profit Shifting*, 2013. Disponível em: <http://www.keepeek.com/Digital-Asset Management/ oecd/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#page3>. Acesso em: 24 maio 2016.

15 ROCHA, Sérgio André. *Tributação de Lucros Auferidos por Controladas e Coligadas no Exterior*. 2. ed. rev. e ampl. São Paulo: Quartier Latin, 2016. p. 242.

16 BIANCO, João Francisco. *Transparência Fiscal Internacional*. São Paulo: Dialética, 2007. p. 21.

17 ROSENBLATT, Paulo. Transparência Fiscal Internacional no Brasil: uma Interpretação Antielisiva. In: MONTEIRO, Alexandre Luiz Moraes do Rêgo; CASTRO, Leonardo Freitas de Moraes;

A necessidade de aplicação do referido regime de transparência se dá com o intuito de evitar a concorrência fiscal danosa e a diferenciação da base de cálculo no momento em que os lucros seriam distribuídos e consequentemente pagos, reduzindo ou até eliminando o que seria tributado.[18]

Para que o regime de tributação das CFC possa incidir, certas condições devem ser cumpridas. Primeiro, é necessário que a empresa seja uma entidade autônoma e independente[19], situada em determinado país A e tenha um controle exercido sobre si por parte de sujeito residente em país B. Este controle, nas palavras de Heleno Tôrres: "(...) é sempre considerado como uma relação de dominação, um poder que transcende, inclusive, as prerrogativas da própria assembleia, órgão máximo de deliberações"[20], sendo normalmente estabelecido por meio da capacidade de voto e de participação no capital social.

É também condição o fato de a CFC estar situada em território de baixa ou nula tributação, no caso, paraísos fiscais e países com regime de tributação favorecida. Tal condição é chamada de *jurisdictional approach* e, segundo João Francisco Bianco, "é a partir da jurisdição do país de sede da CFC que irá ser determinada a aplicação ou não do regime de transparência"[21].

Última condição de aplicação do regime de transparência é o *transactional approach,* método que consiste na observância da natureza do rendimento auferido pela sociedade estrangeira. Os rendimentos passivos (royalties, dividendos, juros), provenientes de atividades que não sejam diretamente comerciais ou industriais, são considerados contaminados (*tainted income)*, ensejando assim a aplicação automática do regime para a sua tributação.[22]

UCHÔA FILHO, Sérgio Papini de Mendonça (Coord.). *Tributação, Comércio e Solução de Controvérsias Internacionais*. São Paulo: Quartier Latin, 2011. p. 95.

18 ALTAMIRANO, Alejandro C. Transparencia fiscal internacional: normas tributarias para la prevención de la elusión tributaria. In: *Revista del Instituto Peruano de Derecho Tributario*, IPDT, Lima, v. 43, p. 12, ago. 2005.

19 BIANCO, João Francisco. *Transparência Fiscal Internacional*. São Paulo: Dialética, 2007. p. 25.

20 TÔRRES, Heleno Taveira. *Direito Tributário Internacional*: planejamento tributário e operações transnacionais. São Paulo: Revista dos Tribunais, 2001. p. 129.

21 BIANCO, João Francisco. *Transparência Fiscal Internacional*. São Paulo: Dialética, 2007. p. 26.

22 XAVIER, Alberto. *Direito Tributário Internacional do Brasil*. 8. ed. São Paulo: Forense, 2015. p. 346.

O regime deve ser praticado mediante situações enquadradas em suas condições, expostas pela autonomia das sociedades, sua localização e de seus sócios controladores, bem como do tipo de renda auferida, para que assim possa ocorrer a efetiva tributação dos lucros destas sociedades coligadas e controladas no exterior diretamente na figura de seus sócios residentes, sendo caracterizada a transparência do regime em questão.

4. A evolução histórica do regime de tributação das CFC na legislação brasileira

A tributação da renda auferida no exterior por contribuintes brasileiros (tributação da renda em bases universais) foi estabelecida pelo Decreto-lei n. 1.168, de 22 de março de 1939, entretanto, aplicável apenas para pessoas físicas. Em se tratando de pessoas jurídicas, regulava-se pelo princípio da territorialidade (*source income taxation)*, que possui a premissa de que a lei nacional é aplicada para tributar a renda auferida apenas dentro do seu território.

Em 1995, a Lei 9.249 inovou a matéria, rompendo com a até então aplicada territorialidade e consagrando o princípio da universalidade. Foi o artigo 25 da referida lei que instituiu a tributação de lucros, rendimentos e ganhos de capitais auferidos no exterior, sendo estes tributados na figura do contribuinte residente e computados na data correspondente ao seu balanço, levantado a cada 31 de dezembro, para fins de apuração do lucro real.

A Lei nº 9.249/95 adotou a presunção de disponibilidade dos lucros auferidos pela empresa estrangeira, mesmo inexistindo a sua devida distribuição aos contribuintes residentes no Brasil.

O fato de lucros auferidos por estas empresas serem tributados na data de balanço de cada ano implicaria na tributação antes mesmo de sua devida distribuição aos sócios residentes, não ocorrendo, assim, o fato gerador previsto no texto do artigo 43 do Código Tributário Nacional, *in verbis:*

> Art. 43. O imposto, de competência da União, sobre a renda e proventos de qualquer natureza tem como fato gerador a aquisição da disponibilidade econômica ou jurídica:
>
> I - de renda, assim entendido o produto do capital, do trabalho ou da combinação de ambos;

> II - de proventos de qualquer natureza, assim entendidos os acréscimos patrimoniais não compreendidos no inciso anterior.

Nas palavras de Sacha Calmon Navarro Coêlho:

> O lucro tributável é o acréscimo patrimonial do sócio, disponível em função de sua participação societária – ou, em outras palavras, o acréscimo, em cada exercício social, do patrimônio líquido da sociedade, além do capital social.[23]

A lei em questão veio com o intuito de combater a elisão fiscal, pois, se mantido o critério da territorialidade, residentes no país poderiam atuar no cenário global para estabelecer filiais e adquirir participações em controladas e coligadas estrangeiras, já que a renda adquirida não seria tributada devido ao seu fato gerador ocorrer fora do território nacional.[24]

Entretanto, o artigo 25 da Lei nº 9.249 não faz qualquer diferenciação quanto à localidade em que estas empresas controladas e coligadas estariam situadas. A legislação brasileira não observou o *jurisdictional approach* como critério da transparência fiscal, não aplicando devidamente o regime como forma de combate à concorrência fiscal danosa.

Foi, então, editada pela Secretaria da Receita Federal, em 27 de Junho de 1996, a Instrução Normativa n. 38. Ela estabeleceu que os lucros provenientes de controladas e coligadas só seriam submetidos à tributação no momento em que fossem disponibilizados, como também previu o momento em que se daria esta disponibilização.[25]

Fica claro que a Instrução Normativa n. 38 teve a intenção de remendar o impasse criado pela Lei nº 9.249/95. A IN passou a considerar a personalidade jurídica das empresas controladas e coligadas, levando em conta os lucros auferidos por estas empresas e sua devida disponibilização para o sócio residente, na tentativa de alinhar o fato gerador do tributo ao que está contido no artigo 43 do CTN.

Posteriormente, a Lei nº 9.532, de 10 de dezembro de 1997, veio para consagrar o que fora estabelecido na instrução normativa em questão e sanar os problemas existentes na Lei nº 9.249/95. Aquela lei, como exposto em seu art. 1º, manteve os dois pilares trazidos pela instrução normativa, na medida em que continuou a considerar a personalidade jurídica das controladas e coligadas estabelecidas no exterior e a necessidade de disponibilização do lucro auferido por estas empresas.[26]

Seguindo a evolução legislativa do tema, no dia 11 de janeiro de 2001, foi publicada a Lei Complementar n. 104. Entre as alterações realizadas no CTN, a referida lei adicionou o parágrafo segundo ao art. 43:

> § 2º Na hipótese de receita ou de rendimento oriundos do exterior, a lei estabelecerá as condições e o momento em que se dará sua disponibilidade, para fins de incidência do imposto referido neste artigo.

O aludido parágrafo foi acrescido com o intuito de delegar ao legislador ordinário a competência para estabelecer as condições e o momento em que seriam tributados os lucros auferidos no exterior.[27] O fato de a lei complementar ter dado abertura para que lei ordinária definisse o momento de disponibilização dos lucros auferidos no exterior para sua tributação gerou insegurança, pois se acreditava tratar de uma regressão ao que estava estabelecido na Lei nº 9.249/95.

Devido a este espaço criado pela Lei Complementar n. 104/01, foi editada a Medida Provisória n. 2.158-35 de 2001, que em seu art. 74 estabelecia:

> Art. 74. Para fim de determinação da base de cálculo do imposto de renda e da CSLL, nos termos do art. 25 da Lei nº 9.249, de 26 de dezembro de 1995, e do art. 21 desta Medida Provisória, os lucros auferidos por controlada ou coligada no exterior serão considerados disponibilizados para a controladora ou coligada no Brasil na data do balanço no qual tiverem sido apurados, na forma do regulamento.
>
> Parágrafo único. Os lucros apurados por controlada ou coligada no exterior até 31 de dezembro de 2001 serão considerados disponibilizados em 31 de dezembro de 2002, salvo se ocorrida, antes desta data, qualquer das hipóteses de disponibilização previstas na legislação em vigor.

O artigo em questão demonstra pleno regresso ao

23 COÊLHO, Sacha Calmon Navarro. *Curso de Direito Tributário Brasileiro*. 14. ed. Rio de Janeiro: Forense, 2015. p. 435.

24 FUSO, Rafael. *Da Tributação Sobre os Lucros no Exterior no Direito Brasileiro. Direito Tributário Internacional*: Teoria e Prática. São Paulo: Revista dos Tribunais, 2015. p. 44.

25 ROCHA, Sérgio André. *Tributação de Lucros Auferidos por Controladas e Coligadas no Exterior*. 2. ed. rev. e ampl. São Paulo: Quartier Latin, 2016. p. 27.

26 COÊLHO, Sacha Calmon Navarro; DERZI, Misabel Abreu Machado. Tributação pelo IRPJ e pela CSLL de Lucros Auferidos por Empresas Controladas ou Coligadas no Exterior – Inconstitucionalidade do art. 74 da Medida Provisória n. 2.158-35 de 2001. *Revista Dialética de Direito Tributário*, São Paulo, n. 130, p. 138, 2004.

27 ROCHA, Sérgio André. *Tributação de Lucros Auferidos por Controladas e Coligadas no Exterior*. 2. ed. rev. e ampl. São Paulo: Quartier Latin, 2016. p. 29.

que estava regulado na Lei nº 9.249/95, pela maneira que estabelece que a tributação dos lucros provenientes de empresas controladas e coligadas no exterior deveriam ser considerados fictamente disponibilizados na sua data de balanço no último dia de cada ano, independentemente de sua distribuição.[28]

Percebe-se que o art. 74 da Medida Provisória em questão conflita com o que está regulado no art. 43 do CTN, na medida em que estabelece o momento de tributação dos lucros sem dar relevância a sua devida disponibilização.

Constitui o dispositivo acima citado uma afronta ao art. 146, III, *a*, da Constituição, onde está fixado que cabe à lei complementar estabelecer normas gerais em matéria de legislação tributária. E também ao seu art. 145, § 1º, desconsiderando o princípio da capacidade contributiva, pois não há como os rendimentos do contribuinte serem auferidos devido a sua não distribuição, configurando-se apenas uma mera expectativa de uma renda ainda não disponibilizada.[29]

Do ponto de vista internacional, o Brasil seguiu na contramão do que fora estabelecido pelo estudo publicado pela OCDE. A descaracterização da personalidade jurídica das empresas controladas e coligadas, de forma que as mesmas seriam vistas como transparentes, ocorria como medida antielisiva, já que este regime é aplicado especificamente para combater a concorrência prejudicial realizada por paraísos fiscais e países com regime de tributação favorecida.

5. O posicionamento do STF no julgamento da ADI 2.588/2001: lacunas e incertezas

Em dezembro de 2001, foi proposta, pela Confederação Nacional da Indústria (CNI), a Ação Direta de Inconstitucionalidade nº 2.588, perante o Supremo Tribunal Federal.[30] Por meio desta, foi questionada a constitucionalidade do artigo 74 da Medida Provisória nº 2.158-35/2001.

A entidade autora alegava, preliminarmente, que o referido artigo seria uma ofensa ao artigo 62 da Constituição Federal[31], devido à ausência de urgência e relevância para a edição da Medida Provisória. Afirmava também que o artigo 74 seria uma violação ao artigo 153, III da Constituição[32], na medida em que a tributação incidiria sobre lucros fictamente distribuídos. E argumentava que, assim como previsto no artigo 43 do CTN, deveriam ser tributados renda e proventos de qualquer natureza que fossem jurídica ou economicamente disponibilizados.

O julgamento da referida ADI seguiu por mais de 10 (dez) anos no STF, sendo concluído no dia 10 de abril de 2013. Diante da forma como o julgamento se estendeu, não foi possível estabelecer uma decisão única e específica para a matéria. Os Ministros se dividiram, defendendo posicionamentos diferentes durante o curso do processo.

A Ministra Ellen Gracie (hoje aposentada), relatora originária, após rejeitar as preliminares arguidas, proferiu seu voto julgando parcialmente procedente a ação. Para ela, haveria hipótese de disponibilização automática dos lucros auferidos por controladas, devido ao poder de controle do contribuinte residente, exercido sobre a distribuição dos resultados obtidos no exterior pela controlada. Desta forma, decidiu pela sua constitucionalidade.[33]

Em contrapartida, a Ministra relatora declarou a inconstitucionalidade do termo "ou coligada" contido no *caput* do artigo 74 da MP nº 2.158-35/2001. O sócio residente não teria o mesmo poder de controle sobre os lucros auferidos pela coligada situada no exterior, e sua tributação na data do balanço seria caso de ficção legal,

28 BIANCO, João Francisco. *Transparência Fiscal Internacional*. São Paulo: Dialética, 2007. p. 55.

29 ROSENBLATT, Paulo. Transparência Fiscal Internacional no Brasil: uma Interpretação Antielisiva. In: MONTEIRO, Alexandre Luiz Moraes do Rêgo; CASTRO, Leonardo Freitas de Moraes; UCHÔA FILHO, Sérgio Papini de Mendonça (Coord.). *Tributação, Comércio e Solução de Controvérsias Internacionais*. São Paulo: Quartier Latin, 2011. p. 101.

30 BRASIL. Supremo Tribunal Federal. ADI n. 2588/DF. Relator: Min. Ellen Gracie, Tribunal Pleno, 10 de abril de 2013. *Diário da Justiça*, Brasília, DF, 10 fev. 2014.

31 Art. 62. Em caso de relevância e urgência, o Presidente da República poderá adotar medidas provisórias, com força de lei, devendo submetê-las de imediato ao Congresso Nacional.

32 Art.153. Compete a União instituir impostos sobre:
[...]
III – renda e proventos de qualquer natureza.

33 PEREIRA, Roberto Codorniz Leite. *O Regime Brasileiro de Tributação de Lucros Auferidos por Controladas e Coligadas no Exterior*: um estudo empírico sobre suas causas e efeitos. Disponível em: <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/10165/Disserta%C3%A7%C3%A3o%20de%20Mestrado_Vers%C3%A3o%20Protocolo%20Final.pdf?sequence=1>. Acesso em: 31 jul. 2016.

devido à aquisição de sua disponibilidade sem a devida distribuição.[34]

O Ministro Nelson Jobim (aposentado) votou pela constitucionalidade dos dispositivos em julgamento, decidindo pela improcedência da ação, sendo acompanhado pelos Ministros Cezar Peluso e Eros Grau (ambos aposentados). Para ele, dever-se-ia aplicar o Método de Equivalência Patrimonial (MEP) para apuração dos resultados auferidos por coligadas e controladas situadas no exterior. Tal método determina o investimento de cada sócio, analisando a participação de cada um no capital social da empresa situada no exterior, dando relevância exclusiva ao acréscimo patrimonial.

Afirmava que o momento de disponibilidade da renda auferida poderia ser o da apuração de seus resultados (regime de competência), independente de sua distribuição.[35]

O Ministro Marco Aurélio votou pela inconstitucionalidade do artigo 74 da Medida Provisória em questão, acompanhado pelo voto do Ministro Sepúlveda Pertence (aposentado). Em seu voto, argumentou que a personalidade jurídica das sociedades no exterior não poderia ser desconsiderada.

O Ministro Ricardo Lewandowski seguiu o Ministro Marco Aurélio quanto à inconstitucionalidade do regime e procedência da ação. Aduz o Ministro que o § 2º do artigo 43 do CTN ao definir o momento em que irá ocorrer a disponibilidade, deve ser interpretado em conjunto com o *caput* do próprio artigo, que estabelece como fato gerador do imposto de renda a efetiva disponibilização destes lucros.

Concluindo seu voto, afirmou ainda que, apesar do propósito louvável de combater a elisão fiscal, o regime é executado de forma a atingir o princípio da proporcionalidade. Este regime de tributação de controladas e coligadas no exterior deveria ser aplicado para impedir a elisão fiscal realizada por paraísos fiscais e países com regime de tributação favorecida, mas acaba incidindo de forma abrangente.

O Ministro Ayres Britto (aposentado) também votou pela improcedência da ação, considerando a constitucionalidade da disposição legal impugnada. O Ministro afirmou em seu voto que os lucros obtidos por empresas controladas e coligadas no exterior repercutiam positivamente na balança do contribuinte residente.

Ao concluir seu voto, o Ministro fez importante ressalva quanto aos tratados internacionais tributários fixados pelo Brasil, que deveriam ser respeitados com o intuito de se evitar a bitributação.[36]

O voto final, feito pelo então Presidente Ministro Joaquim Barbosa (aposentado), trouxe uma nova abordagem para o julgamento. O Ministro julgou parcialmente procedente a ação, limitando a aplicação do artigo 74 da Medida Provisória 2.158-35/2001 para pessoas jurídicas residentes cujas controladas ou coligadas no exterior estivessem estabelecidas em paraísos fiscais ou países com regime de tributação favorecida.

Em seu voto, rejeitou a aplicação do Método de Equivalência Patrimonial (MEP). Este seria suficiente para auferir uma expectativa de acréscimo patrimonial, mas que a efetiva confirmação deste acréscimo só seria possível mediante a disponibilização dos lucros provenientes de atividades das controladas ou coligadas no exterior.[37]

O Ministro considerou constitucional o regime, mas apenas nos casos em que controladas e coligadas no exterior estivessem estabelecidas em paraísos fiscais ou países com regime de tributação favorecida. Nestes casos, poderia ocorrer a tributação automática dos lucros, na figura do sócio residente, tendo como fato gerador do imposto a data de balanço nos dias 31 de dezembro de cada ano.

Desta forma, foram estabelecidas as quatro vertentes que orientaram o julgamento.[38] Diante dos votos supracitados e analisados, podem-se caracterizá-las da forma a seguir.

A primeira, sustentada apenas pela Ministra e relatora originária Ellen Gracie, considerava constitucional a tributação estabelecida no regime, mas apenas nos casos

34 ROSENBLATT, Paulo. Transparência Fiscal Internacional no Brasil: uma Interpretação Antielisiva. In: MONTEIRO, Alexandre Luiz Moraes do Rêgo; CASTRO, Leonardo Freitas de Moraes; UCHÔA FILHO, Sérgio Papini de Mendonça (Coord.). *Tributação, Comércio e Solução de Controvérsias Internacionais*. São Paulo: Quartier Latin, 2011. p. 104.

35 ROCHA, Sérgio André. *Tributação de Lucros Auferidos por Controladas e Coligadas no Exterior*. 2. ed. rev. e ampl. São Paulo: Quartier Latin, 2016. p. 50.

36 ROCHA, Sérgio André. *Tributação de Lucros Auferidos por Controladas e Coligadas no Exterior*. 2. ed. rev. e ampl. São Paulo: Quartier Latin, 2016. p. 59.

37 XAVIER, Alberto. *Direito Tributário Internacional do Brasil*. 8. ed. São Paulo: Forense, 2015. p. 442.

38 XAVIER, Alberto. *Direito Tributário Internacional do Brasil*. 8. ed. São Paulo: Forense, 2015. p. 442.

de controladas estabelecidas no exterior. No caso das coligadas, o regime seria inconstitucional, devido ao sócio não possuir poder suficiente sobre a empresa para determinar a disponibilização de seus lucros.

A segunda, do qual fizeram parte os Ministros Nelson Jobim, Eros Grau, Ayres Britto e Cezar Peluso, considerava totalmente constitucional o regime de tributação estabelecido pelo artigo 74 da Medida Provisória nº 2.158-35/2001.

A terceira, em que se filiaram os Ministros Marco Aurélio, Sepúlveda Pertence e Ricardo Lewandowski, considerava o regime totalmente inconstitucional. Este seria inconstitucional por se tratar de uma ficção legal, ignorando a personalidade jurídica da empresa estabelecida no exterior, e tributando seus lucros diretamente na pessoa do seu sócio residente, antes de sua disponibilização.

A quarta e última vertente, sustentada apenas pelo Ministro Joaquim Barbosa, considerou a aplicação do regime apenas nos casos em que tanto controladas como coligadas estivessem estabelecidas em paraísos fiscais ou países com regime de tributação favorecida. Se estas empresas não estivessem estabelecidas em países com favorecimentos fiscais, a aplicação do regime deveria exigir provas concretas de elisão ou evasão fiscal.

Concluído o julgamento, o Plenário do STF decidiu:

I. Pela inconstitucionalidade da tributação dos lucros de coligadas sediadas em locais que não se caracterizam como paraísos fiscais ou países com regime de tributação favorecida;

II. Pela constitucionalidade da tributação de lucros de controladas, sediadas em locais caracterizados como paraísos fiscais ou países com regime de tributação favorecida;

III. Devido a empate durante a sua votação, a constitucionalidade da tributação das controladas que não se encontrem sediadas em paraísos fiscais e países com regime de tributação favorecida, e das coligadas que se encontrem em locais assim caracterizados não pode ser decidida com eficácia *erga omnes* e efeito vinculante.[39]

Os Ministros Luiz Fux, Rosa Weber, Teori Zavascki, Cármen Lúcia e Dias Toffoli não participaram do julgamento por sucederem a Ministros aposentados que já haviam proferido seus votos.

Mesmo depois de decorridos mais de dez anos de julgamento, a decisão proferida pelo Plenário do STF deixou lacunas. A fragmentação das decisões não permite a formação de um entendimento homogêneo quanto à matéria.

Trazida pelo Ministro Joaquim Barbosa, a análise da localidade em que estariam situadas as empresas sediadas no exterior demonstra observância ao que foi indicado pelo estudo da OCDE, configurando uma pequena, mas válida proximidade do regime brasileiro com o que é praticado internacionalmente.

É inegável que a legislação brasileira ainda precisa suprir essas lacunas e incertezas. Apesar de tudo, o julgamento da ADI 2.588 servirá como vetor para aplicação do regime de tributação das CFC em território nacional, já que parte de suas decisões fragmentadas possuem eficácia *erga omnes* e efeito vinculante.

E na mesma sessão da ADI 2.588/2001, foram julgados, ainda, os recursos extraordinários nº 611.586[40], interposto pela Cooperativa Agropecuária Mourãoense Ltda., e nº 541.090[41], interposto pela União contra a Empresa Brasileira de Compressores S/A (Embraco), tratando sobre o mesmo tema. No primeiro, julgado sob repercussão geral, estava em discussão atividades praticadas por controlada sediada em Aruba. Por se tratar de paraíso fiscal foi aplicado no recurso o entendimento estabelecido no julgamento da ADI 2.588/2001, pois é considerado constitucional o regime de tributação devido à localidade em que está sediada a controlada.

E o julgamento do RE nº 541.090 tratou do caso de controladas sediadas em países de tributação regular (China, Estados Unidos, Uruguai e Itália). Por se tratarem de locais não caracterizados como paraísos fiscais ou países com regime de tributação favorecida, seu julgamento não foi abrangido pelo efeito vinculante da decisão preferida na ADI 2.588/2001. Foi considerada constitucional a tributação de controladas que não estavam estabelecidas em países com regime de tributação favorecido, com base no artigo 74 da Medida Provisória nº 2.158-35/2001.

39 XAVIER, Alberto. *Direito Tributário Internacional do Brasil.* 8. ed. São Paulo: Forense, 2015. p. 441.

40 BRASIL. Supremo Tribunal Federal. RE n. 611586/PR. Relator: Min. Joaquim Barbosa, Tribunal Pleno, 10 de abril de 2013. *Diário da Justiça*, Brasília, DF, 10 out. 2014.

41 BRASIL. Supremo Tribunal Federal. RE n. 541090/SC. Relator: Min. Joaquim Barbosa, Tribunal Pleno, 10 de abril de 2013. *Diário da Justiça*, Brasília, DF, 30 out. 2014.

6. O cenário da tributação das CFC após a Lei 12.973/2014

Seguindo-se ao julgamento da ADI 2.588, foi editada a Lei 12.973, de 13 de maio de 2014, resultado da conversão em lei da Medida Provisória nº 627/2013, que estabeleceu, entre seus artigos 76 e 92, um novo regime de tributação em bases universais de pessoas jurídicas. A referida lei incorporou os novos entendimentos do julgamento da ADI supracitada e revogou o artigo 74 da Medida Provisória nº 2.158-35.

Nas palavras de Alberto Xavier:

> A sistemática da nova lei, que foi muito além do regime de transparência fiscal internacional introduzida pela Lei nº 9.249/1995, visou essencialmente um duplo objetivo: (i) evitar que prejuízos incorridos no exterior, diretamente ou indiretamente, erodissem a base de tributação das sociedades investidoras brasileiras; e (ii) dificultar tecnicamente a interposição de entidades domiciliadas em países signatários de tratados contra a dupla tributação contendo cláusulas proibitivas ou limitativas das pretensões fiscais do país de residência da investidora.[42]

Em se tratando de Controladas, a Lei 12.973/2014 não fez distinção quanto à forma de determinação da base de cálculo para tributação dos lucros, que estava prevista no artigo 74 da Medida Provisória 2.158-35. Os lucros auferidos por sociedade controlada estabelecida no exterior continuam a ser tributados automaticamente na data de balanço da controladora residente. Manteve-se a tributação em bases universais, que ocorreria independentemente de disponibilização. Dispõe o *caput* do seu artigo 77:

> Art. 77. A parcela do ajuste do valor do investimento em controlada, direta ou indireta, domiciliada no exterior equivalente aos lucros por ela auferidos antes do imposto sobre a renda, excetuando a variação cambial, deverá ser computada na determinação do lucro real e na base de cálculo da Contribuição Social sobre o Lucro Líquido - CSLL da pessoa jurídica controladora domiciliada no Brasil, observado o disposto no art. 76.

Percebe-se que, ao se referir à "parcela do ajuste do valor do investimento", o legislador estabeleceu como objeto de tributação o acréscimo patrimonial gerado na controladora. Assim, o contribuinte residente não seria o responsável pelo pagamento de tributo incidente sobre os lucros de empresa situada no exterior, mas seria responsável pelo recolhimento de tributo incidente sobre o acréscimo patrimonial gerado por estes lucros.[43]

Dando seguimento ao art. 77, o seu parágrafo primeiro estabelece que:

> § 1º A parcela do ajuste de que trata o caput compreende apenas os lucros auferidos no período, não alcançando as demais parcelas que influenciaram o patrimônio líquido da controlada, direta ou indireta, domiciliada no exterior.

Ao excluir todas as demais parcelas que influenciaram o patrimônio da controlada, é tributada a parcela do ajuste referente exclusivamente ao lucro. Desta forma, o acréscimo patrimonial da sociedade controladora, objeto da tributação, nada mais é que a parcela referente ao lucro auferido pela controlada no exterior.

O termo "parcela do ajuste do valor do investimento" não passa de uma nova terminologia para a tributação que continua com o mesmo objeto: os lucros auferidos no exterior. O uso desse termo teria sido uma forma que o Fisco encontrou, ao utilizar uma nova nomenclatura, de afastar a aplicação de tratados internacionais tributários para evitar a bitributação. Ao não utilizar a palavra "lucro", não seria aplicada a regra fixada no artigo 7º das convenções internacionais pelo Brasil, nas quais se estabelece que os lucros de empresas estabelecidas no exterior só poderiam ser tributados pelo Estado contratante.[44]

Por fim, deve-se ressaltar, como previsto no artigo 80 da lei em análise, que todo o disposto em relação a controladas também se aplica às coligadas equiparadas a controladoras. No caso das coligadas, a Lei n. 12.973/2014 tentou harmonizar-se com o que foi estabelecido na decisão da ADI 2.588/2001. A lei previu duas modalidades de tributação: a que ocorre somente com a distribuição dos lucros e a automática dos lucros não distribuídos. De acordo com o artigo 81 da Lei 12.973/2014:

> Art. 81. Os lucros auferidos por intermédio de coligada domiciliada no exterior serão computados na determinação do lucro real e da base de cálculo

42 XAVIER, Alberto. *Direito Tributário Internacional do Brasil*. 8. ed. São Paulo: Forense, 2015. p. 445.

43 PEREIRA, Roberto Codorniz Leite. O novo regime de tributação em bases universais das pessoas jurídicas previsto na Lei n. 12.973 de 2014: as velhas questões foram resolvidas? *Revista Direito Tributário Atual*, São Paulo, v. 33, p. 432,

44 Vide, por exemplo, Convenção destinada a Evitar a Dupla Tributação e Previne a Evasão Fiscal em Matéria de Impostos sobre a Renda Brasil/Espanha, promulgada pelo Decreto nº 76.975, de 2 de janeiro de 1975.

> da CSLL no balanço levantado no dia 31 de dezembro do ano-calendário em que tiverem sido disponibilizados para a pessoa jurídica domiciliada no Brasil, desde que se verifiquem as seguintes condições, cumulativamente, relativas à investida:
>
> I - não esteja sujeita a regime de subtributação, previsto no inciso III do caput do art. 84;
>
> II - não esteja localizada em país ou dependência com tributação favorecida, ou não seja beneficiária de regime fiscal privilegiado, de que tratam os arts. 24 e 24-A da Lei nº 9.430, de 27 de dezembro de 1996;
>
> III - não seja controlada, direta ou indiretamente, por pessoa jurídica submetida a tratamento tributário previsto no inciso I.

Percebe-se que o artigo 81 estabelece um regime de tributação aplicável aos lucros auferidos no exterior efetivamente disponibilizados, como era previsto tanto para controladas como para as coligadas na Lei 9.532/97. Entretanto, ele determina quais seriam as pessoas jurídicas no exterior podem se beneficiar do regime de tributação de lucros disponibilizados. São qualificadas as pessoas jurídicas no exterior que, cumulativamente, obedecerem ao disposto em seus incisos I, II, e III, transcritos anteriormente no presente trabalho.

A segunda modalidade de tributação das coligadas tributa automaticamente os lucros auferidos no exterior, como dispõe o artigo 82 da Lei 12.973/2014:

> Art. 82. Na hipótese em que se verifique o descumprimento de pelo menos uma das condições previstas no caput do art. 81, o resultado na coligada domiciliada no exterior equivalente aos lucros ou prejuízos por ela apurados deverá ser computado na determinação do lucro real e na base de cálculo da CSLL da pessoa jurídica investidora domiciliada no Brasil, nas seguintes formas:
>
> I - se positivo, deverá ser adicionado ao lucro líquido relativo ao balanço de 31 de dezembro do ano-calendário em que os lucros tenham sido apurados pela empresa domiciliada no exterior; e
>
> II - se negativo, poderá ser compensado com lucros futuros da mesma pessoa jurídica no exterior que lhes deu origem, desde que os estoques de prejuízos sejam informados na forma e prazo estabelecidos pela Secretaria da Receita Federal do Brasil - RFB.

Esta modalidade é aplicada às empresas que não se enquadram nas condições contidas nos incisos do artigo 81, sendo seus lucros tributados independentemente de sua disponibilização.[45] E, de acordo com o artigo 83, a pessoa jurídica residente no Brasil que possuir mais de 50% do capital votante de coligada situada no exterior será equiparada a controladora para efeitos de tributação.[46]

Conclui-se, então, que no caso das coligadas, existem três maneiras diferentes de tributação dos seus lucros auferidos no exterior. Regra geral, os lucros apenas serão tributados quando efetivamente disponibilizados. Caso não ocorra obediência aos requisitos contidos nos incisos do artigo 81, haverá a tributação automática, independente de disponibilização.[47]

A exceção é o caso das coligadas residentes equiparadas a controladoras, pois sua tributação ocorrerá como previsto no regime de tributação das controladas residentes no exterior, de forma automática.

Por fim, deve-se ressaltar as deduções presentes no artigo 85, *in verbis:*

> Art. 85. Para fins de apuração do imposto sobre a renda e da CSLL devida pela controladora no Brasil, poderá ser deduzida da parcela do lucro da pessoa jurídica controlada, direta ou indireta, domiciliada no exterior, a parcela do lucro oriunda de participações destas em pessoas jurídicas controladas ou coligadas domiciliadas no Brasil.

Tais deduções, que poderão ser realizadas por controladas e por coligadas, tem como objetivo evitar que ocorra a dupla tributação no Brasil de lucros que já teriam sido tributados no exterior.[48]

O regime de tributação sobre bases universais, trazido pela Lei 12.973/2014, trouxe inovações para a matéria no Brasil. Entretanto, ao analisar o que está contido em seus artigos, percebe-se que o tema continua vago, sem uma aplicação condizente com as normas constitucionais brasileiras e com o padrão de tributação das CFC aplicado internacionalmente.

Deve ser questionado, em se tratando de controladas, o uso do termo "parcela do ajuste do valor do investimento" e a forma como este iria contra o estabe-

45 ROCHA, Sérgio André. *Tributação de Lucros Auferidos por Controladas e Coligadas no Exterior*. 2. ed. rev. e ampl. São Paulo: Quartier Latin, 2016. p. 187.

46 Art. 83. Para fins do disposto nesta Lei, equipara-se à condição de controladora a pessoa jurídica domiciliada no Brasil que detenha participação em coligada no exterior e que, em conjunto com pessoas físicas ou jurídicas residentes ou domiciliadas no Brasil ou no exterior, consideradas a ela vinculadas, possua mais de 50% (cinquenta por cento) do capital votante da coligada no exterior.

47 ROCHA, Sérgio André. *Tributação de Lucros Auferidos por Controladas e Coligadas no Exterior*. 2. ed. rev. e ampl. São Paulo: Quartier Latin, 2016. p. 189.

48 XAVIER, Alberto. *Direito Tributário Internacional do Brasil.* 8. ed. São Paulo: Forense, 2015. p. 465.

lecido pelas convenções internacionais tributárias, pois o fato econômico tributável permaneceria sendo os lucros auferidos no exterior[49].

Ademais, permanece a inconstitucionalidade decorrente da tributação dos lucros auferidos no exterior sem que estes sejam disponibilizados, atingindo as empresas controladas, coligadas que não obedecem aos requisitos fixados pela lei, e coligadas equiparadas a controladora. A tributação automática dos lucros, além de ir contra o que já fora previamente estabelecido na legislação brasileira, como no caso do artigo 43 do CTN, não possui ligação com o regime de tributação das CFC indicado pela OCDE.

7. O recente posicionamento do Conselho Administrativo de Recursos Fiscais

No primeiro semestre de 2016, a Petróleo Brasileiro S.A. (Petrobrás) sofreu uma dura derrota na 1ª Câmara da Turma Superior do CARF. Ficou decidido que os lucros de empresa controlada sediada nos Países Baixos deveriam ser tributados de acordo com a legislação brasileira. O aludido acórdão restou assim ementado[50]:

> Assunto: Imposto sobre a Renda de Pessoa Jurídica - IRPJ
>
> Ano-calendário: 2007
>
> LUCROS OBTIDOS POR CONTROLADA NO EXTERIOR. DISPONIBILIZAÇÃO. Para fim de determinação da base de cálculo do imposto de renda da pessoa jurídica (IRPJ) e da CSLL os lucros auferidos por controlada ou coligada no exterior são considerados disponibilizados para a controladora no Brasil na data do balanço no qual tiverem sido apurados. Lançamento procedente.
>
> LUCROS OBTIDOS POR CONTROLADA NO EXTERIOR. CONVENÇÃO BRASIL-PAÍSES BAIXOS DESTINADA A EVITAR A DUPLA TRIBUTAÇÃO E PREVENIR A EVASÃO FISCAL EM MATÉRIA DE IMPOSTO SOBRE A RENDA. ART. 74 DA MP Nº 2.158 35/2001. NÃO OFENSA. Não há incompatibilidade entre a Convenção Brasil-Holanda (Países Baixos) e a aplicação do art. 74 da Medida Provisória nº 2.158-35/2001, não sendo caso de aplicação do art. 98 do CTN, por inexistência de conflito.
>
> Recurso Especial do Contribuinte Negado.

Ao término o julgamento de Recurso Especial interposto pelo contribuinte, o acórdão proferido determinou que os lucros auferidos pela controlada seriam considerados disponibilizados na data na data do balanço do qual tiverem sido apurados, não havendo incompatibilidade entre a Convenção celebrada entre Brasil e Holanda (Países Baixos) e a aplicação do art. 74 da MP nº 2.158-35, ainda vigente na época.

O contribuinte defendia a aplicação do art. 7º da Convenção, que determina que os lucros de uma empresa de um Estado Contratante só são tributáveis nesse Estado. Entretanto, a 1º Turma concluiu que a referida Convenção contra a dupla tributação não traz norma específica referente as regras CFC situadas no art. 74, não cabendo a aplicação da regra de solução de conflitos disposta no art. 98 do CTN.

Apesar dessa derrota, a Petrobrás pode se valer de importante precedente no judiciário. Em 2014, o Superior Tribunal de Justiça, ao julgar Recurso Especial interposto pela Vale do Rio Doce, afastou a tributação sobre o lucro de controladas em Luxemburgo, Bélgica e Dinamarca, alegando que no caso de empresa controlada, dotada de personalidade jurídica própria e distinta da controladora, os lucros por ela auferidos são próprios e assim tributados somente no País do seu domicílio.[51]

De acordo com essa decisão, os lucros auferidos nos Países em que estão instaladas as empresas controladas serão tributados apenas nos seus territórios, em respeito ao art. 98 do CTN e aos Tratados Internacionais celebrados com o Brasil.

Assim, fica evidente a insegurança jurídica que ainda resta sobre o tema, muito devido às lacunas deixadas pelo STF no julgamento da ADI 2.588. É necessário o posicionamento do judiciário em julgamentos como o supracitado, para que se tenha uma interpretação a ser seguida nesta matéria que ainda se encontra em aberto na legislação nacional.

49 ROCHA, Sérgio André. *Tributação de Lucros Auferidos por Controladas e Coligadas no Exterior*. 2. ed. rev. e ampl. São Paulo: Quartier Latin, 2016. p. 143.

50 CSRF. Processo n. 11052.000921/2010-63. Relator: Luis Flávio Neto, 04 de maio de 2016. *Diário Oficial [da] República Federativa do Brasil*, Brasília, 14 jul. 2016.

51 BRASIL. Supremo Tribunal Federal. REsp n. 1325709/RJ 2012/0110520-7. Relator: Ministro Napoleão Nunes Maia Filho, T1 - Primeira Turma, 24 de abril de 2014. *Diário da Justiça*, Brasília, DF, 20 maio 2014.

8. Considerações finais

O regime de transparência fiscal internacional se configura como uma forma de defesa indicada pela OCDE, com o intuito de combater a concorrência fiscal prejudicial praticada por paraísos fiscais e países com regime de tributação favorecida.

Ocorre que o referido modelo foi implantado de forma diferente pela legislação brasileira, sendo os lucros das empresas situadas no exterior considerados fictamente disponibilizados ao contribuinte residente no dia 31 de dezembro de cada ano. Enquanto que internacionalmente seu caráter antielisivo era ressaltado, no território nacional o regime de tributação das CFC foi utilizado apenas como uma forma de ampliar e facilitar a tributação.

A constitucionalidade do artigo 74 da MP 2.158-35 foi discutida no STF por meio do julgamento da ADI 2.588. Entretanto, este julgamento, que perdurou por mais de uma década, não conseguiu obter uma decisão única e concreta sobre o tema. Deve-se ressaltar o posicionamento do já aposentado Ministro Joaquim Barbosa. Ele trouxe para o julgamento o real motivo da aplicação deste modelo, a ser estabelecido como um regime antielisivo, decorrente de práticas de concorrência abusivas. O ex-Ministro argumentou que o modelo de tributação definido deveria utilizar critérios de seletividade, analisando a natureza e a origem do rendimento auferido.

Após o julgamento da referida ADI, foi editada a Lei nº 12.973/2014 com o intuito de concretizar os posicionamentos fixados pelos ministros do STF. Entretanto, a referida lei não trouxe inovações para a aplicação de forma eficiente do regime de tributação das CFC, continuando distante do modelo antielisivo recomendado pela OCDE. Permaneceu a divergência entre a tributação dos lucros previstas na lei e os dispositivos da Constituição e do Código Tributário Nacional.

A Lei nº 12.973/2014 resultou em novos questionamentos, principalmente no tocante a "tributação da parcela do ajuste do valor do investimento" de controladas, que compreende apenas os lucros auferidos pela empresa, permanecendo o mesmo objeto da tributação, mas que agora sob a nova terminologia contida no art. 77 da lei. Desta forma, sendo que a parcela do ajuste se refere apenas ao lucro, seria aplicado o art. 7º dos tratados celebrados pelo Brasil, impedindo a tributação pela legislação nacional.

Mesmo após todo o desenrolar legislativo, da ADI julgada no STF dentro de imenso lapso temporal e da edição da recente Lei nº 12.973, a matéria ainda não se encontra pacificada no Brasil. As lacunas que permanecem sobre o tema resultarão em cada vez mais julgamentos no judiciário e no CARF, ocasionados pelo conflito de interesses entre Fisco e contribuintes.

Desta forma, será cada vez mais exigido o judiciário, posicionando-se diante dessa insegurança jurídica e lacunas. Deve-se ressaltar a já citada decisão do STJ no caso Vale, que em referência ao art. 98 do CTN e as convenções celebradas pelo Brasil, afastou a tributação de controladas, sendo estas empresas tributadas apenas nos territórios onde estão estabelecidas.

A legislação brasileira precisa acompanhar a real motivação do regime de transparência fiscal, observando-se a sua seletividade, a localização da empresa e o tipo de renda auferida, para combater a concorrência prejudicial. O tema permanecerá em aberto até que se compreenda este fundamento.

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As Regras Brasileiras de Tributação de Controladas e Coligadas no Exterior: verdadeiras Controlled Foreign Company (CFC) Rules?

The Brazilian Taxation Rules for Foreign Controlled and Affiliates: true Controlled Foreign Company (CFC) Rules?

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As Regras Brasileiras de Tributação de Controladas e Coligadas no Exterior: verdadeiras Controlled Foreign Company *(CFC) Rules?**

The Brazilian Taxation Rules for Foreign Controlled and Affiliates: true Controlled Foreign Company (CFC) Rules?

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Resumo

Este artigo pretende analisar se as regras criadas até então no Brasil para tributação de controladas e coligadas no exterior seguem o modelo das *Controlled Foreign Company (CFC) Rules* adotado em outros países. A metodologia utilizada foi a análise comparativa da legislação nacional e internacional bem como pesquisa bibliográfica. Após o exame da estrutura das regras CFC criadas em outros países e segundo as diretivas da OCDE, definimos o modelo internacional e comparamos as normas brasileiras a esse modelo. As regras do país não adotam os critérios que utilizam a maioria das *CFC rules* — localização da investida e natureza das rendas — para determinar a possibilidade de tributação, mas somente para diferenciar a forma pela qual se dá a tributação. Dessa forma, pode-se concluir que o Brasil não adota uma regra nos parâmetros das *CFC Rules* estrangeiras.

Palavras-chave: Tributação. Controladas. Coligadas. Exterior. *CFC Rules*.

Abstract

This article intends to analyze if the rules created until then in Brazil for the taxation of foreign subsidiaries and affiliates follow the model of the Controlled Foreign Company (CFC) Rules adopted in other countries. The methodology used was a comparative analysis of national and international legislation as well as bibliographic research. After examining the structure of CFC rules created in other countries, we defined the international model and compared Brazilian standards to this model. The country's rules do not adopt the criteria that use most CFC rules - location of the investee and the nature of the incomes - to determine the possibility of taxation, but only to differentiate the way in which taxation takes place. In this way, it can be concluded that Brazil does not adopt a rule in the parameters of foreign CFC rules.

Keywords: Taxation. Controlled Foreign Companies. CFC Rules.

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1. Introdução

No atual cenário econômico, com a constante evolução da tecnologia e da globalização, os mercados cresceram e se internacionalizaram de modo que as grandes empresas não mais atuam dentro dos limites de seus territórios nacionais. Ao contrário, para que as empresas pudessem manter ou ampliar seus níveis de competitividade e até mesmo subsistissem, fez-se necessário que se globalizassem para atuarem nos diversos mercados mundiais, razão pela qual foram criados grandes grupos econômicos internacionais. Assim, os conglomerados de sociedades coligadas e controladas tiveram um crescimento considerável nas últimas décadas no cenário internacional.

O crescimento de investimentos no exterior aliado à mobilidade das empresas e do capital fez com que, de um lado, as empresas buscassem maior eficiência tributária no plano internacional e, de outro lado, os países ajustassem os seus sistemas tributários de modo a combater a realização de operações abusivas que visam evitar o pagamento de tributos[1]. É nesse contexto que os países editam as *Controlled Foreign Company (CFC) Rules,* normas internas que buscam evitar o diferimento da tributação da pessoa jurídica por meio de controladas e coligadas normalmente localizadas em países de baixa tributação. No Brasil, conforme será a seguir exposto, a Lei nº 9.249/95, ao instituir o princípio da universalidade às pessoas jurídicas, passou a tributar a renda auferida pelas empresas brasileiras no exterior por meio de controladas e coligadas. Após diversas modificações legais e debates doutrinários acerca da questão, mais recentemente, a Lei nº 12.973/14 modificou os parâmetros de tributação da renda da pessoa jurídica auferida no exterior por meio de controladas e coligadas.

Assim, o presente artigo tem por objetivo analisar se as regras de tributação de coligadas e controladas no exterior adotadas pela legislação brasileira desde a edição da Lei nº 9.249/95 até as novas regras de tributação internacional introduzidas pela Lei nº 12.973/2014 podem ser consideradas como regras *CFC* (*Controlled Foreign Company),* tal como os modelos adotados internacionalmente. Desse modo, a pesquisa visa suprir as lacunas existentes no que tange ao estudo da interpretação da lei nacional em comparação com as normas e práticas internacionais, respondendo à problemática da compatibilidade dos diplomas legais estabelecidos na nova lei tributária com as diversas normas internacionais sobre tributação de lucros de coligadas e controladas no exterior. Os sistemas são compatíveis? Quais as diferenças? Essas diferenças são relevantes no plano fático? Enfim, as regras de tributação para coligadas e controladas no exterior adotadas no Brasil podem ser consideradas um verdadeiro sistema CFC (*Controlled Foreign Company)*?

Na primeira parte do artigo, analisaremos o regime jurídico das *Controlled Foreign Company Rules:* como são estruturadas, seus objetivos e como regulam a tributação da renda por meio de coligadas e controladas no exterior. Nesta parte buscaremos fazer uma comparação internacional das regras CFC de países selecionados com a finalidade de, ao buscarmos traços comuns entre as normas, estabelecermos um padrão mundial de regras CFC.

Na segunda parte, analisaremos o contexto brasileiro: qual a metodologia utilizada pelo Brasil para tributar a renda auferida por meio de coligadas e controladas no exterior, por meio das diversas normas que se sucederam – Lei nº 9.249/95, MP nº 2.158-35/2001 e Lei nº 12.973/14. A partir da análise desses instrumentos legais, analisaremos se o regime jurídico adotado pelo Brasil pode ser considerado como uma *CFC rule*, tal como os modelos adotados internacionalmente.

2. Controlled Foreign Company (CFC) Rules

2.1. Regime jurídico das *CFC rules*

No relatório "*Harmful Tax Competition: an Emerging Global Issue*"[2], publicado em 1998 pela OCDE, houve a recomendação, dentre outras medidas, de adoção de legislações CFC (*Controlled Foreign Company*) pelos paí-

1 Borges afirma que com os planejamentos tributários elaborados pelas empresas transnacionais instaura-se a necessidade de uma reflexão sobre um direito tributário em uma perspectiva transnacional, envolvendo não somente os sistemas tributários nacionais, mas também os tratados internacionais e as normas modelos emanadas das organizações internacionais (BORGES, Franciele de Simas Estrela. O Direito tributário sob uma perspectiva transnacional. *Revista Brasileira de Direito Internacional*, v. 13, n. 3, 2016).

2 OCDE. *Harmful Tax Competition – an Emerging Global Issue, Paris, 1998*.

ses, como forma de combater a competição fiscal internacional prejudicial. De acordo com o relatório, as regras CFC fazem com que determinados rendimentos de uma companhia controlada estrangeira sejam atribuídos e tributados nos seus acionistas residentes em um país. Essas regras têm o objetivo de "eliminar os benefícios do diferimento do imposto doméstico sobre parte ou todo rendimento de fonte estrangeira de uma CFC" e a função de combater a evasão fiscal ao desencorajar a "migração legal de certos tipos de renda como, por exemplo, [...] renda passiva para empresas não residentes"[3]. Um relatório de 1996 sobre *Controlled Foreign Company Legislation* mostrou que 14 países-membros da OCDE tinham à época legislação CFC e, embora houvesse "uma variação considerável nos detalhes técnicos dessas legislações, os objetivos estabelecidos para esses regimes são notavelmente similares em quase todos os países e as características estruturais são bastante semelhantes em muitos países"[4].

As normas CFC, normalmente, são aplicadas quando a empresa controlada está localizada em país diferente ao da controladora. Tais regras têm como objetivo evitar a diminuição da tributação sobre a renda pelo fato da empresa alocar os lucros em controlada localizada em países com alíquotas baixas de Imposto de Renda ou em paraísos fiscais. Em outras palavras, as normas CFC visam combater a estratégia utilizada pelos contribuintes de determinado país de constituir uma subsidiária no exterior, geralmente em países de baixa tributação como paraísos fiscais. Essa subsidiária é utilizada para o deslocamento da renda, seja por meio de investimentos (juros e dividendos), renda passiva (aluguel e royalties) ou vendas e serviços entre partes relacionadas *(transfer pricing*) do país de origem para o país de baixa tributação. Na ausência de normas *CFC*, a tributação ficaria diferida até que os dividendos fossem distribuídos, já que estes, normalmente, são tributados quando disponibilizados (regime de caixa)[5]. Diante dessa possibilidade, a distribuição dos lucros era, portanto, "evitada" ao longo do tempo e disfarçada por empréstimos aos acionistas ao país de origem.

Para combater a essa possibilidade de diferimento da tributação, os países passaram a criar normas internas para tributar o lucro sem a necessidade de distribuição. Tôrres afirma que a norma CFC "significa imputar aos sócios ou acionistas residentes, por transparência, os lucros produzidos pela sociedade constituída e localizada em países com tributação favorecida, fazendo incidir o imposto aplicável aos lucros produzidos no exterior, pelas sociedades ali localizadas, e das quais aqueles sujeitos são acionistas, automaticamente, como se fossem produzidos internamente, mesmo se não distribuídos sob a forma de dividendos"[6]. No mesmo sentido, Maciel conceitua as regras CFC como aquelas que "visam neutralizar as atuações de seus residentes (pessoas físicas ou jurídicas) que desviam ou acumulam renda (geralmente passiva, ou seja, não empresarial) situadas em outro Estado, que a submete a um tratamento fiscal privilegiado, submetendo à tributação a totalidade da renda, tal como se o residente a tivesse auferido diretamente (*disregard of legal entity*), ou, dependendo da legislação, como se houvesse a presunção ou ficção de distribuição de dividendos (*fictive dividend approach*)"[7].

Por se tratar de norma interna, cada país adota critérios próprios, conforme veremos no próximo item. As legislações, porém, principalmente dos países europeus, seguem determinados padrões e têm características comuns. A tributação se dá de acordo com certos critérios, como a natureza das rendas (passivas, tendo por fonte partes relacionadas, não operacionais), o grau de participação do acionista e se a controlada está localizada em país de baixa tributação. Assim, a regra CFC, para ser classificada como tal, não pode englobar toda e qualquer situação que envolva empresas controladas estrangeiras, uma vez que esta possui como finalidade essencial evitar comportamentos abusivos. Dessa forma, para ser classificada como CFC, a legislação deve possuir certos elementos que apontem para essa finalidade.

Nesse sentido, Diogo Ferraz[8] afirma que os países

3 OCDE. *Harmful Tax Competition – an Emerging Global Issue*, Paris, 1998. p. 41.

4 OCDE. *Harmful Tax Competition – an Emerging Global Issue*, Paris, 1998. p. 41.

5 Segundo Tôrres, "caso a empresa controlada encontre-se em um país com tributação favorecida que não tribute ou tribute com uma alíquota muito baixa os lucros ali produzidos, o controlador ou acionista obterá uma ótima economia de tributos sobre esses lucros produzidos pela sociedade controlada, evitando a disponibilização sob a forma de dividendos e diferindo o pagamento dos tributos para o futuro, mediante reinvestimento". TÔRRES, Heleno Taveira. *Direito Tributário Internacional*: Planejamento tributário e operações transnacionais. São Paulo: Revista dos Tribunais, 2001. p. 125.

6 TÔRRES, Heleno Taveira. *Direito Tributário Internacional*: Planejamento tributário e operações transnacionais. São Paulo: Revista dos Tribunais, 2001. p. 126.

7 MACIEL, Taísa Oliveira. *Tributação dos Lucros das Controladas e Coligadas Estrangeiras*. Rio de Janeiro: Renovar, 2007. p. 14.

8 FERRAZ, Diogo. O possível conflito entre os preços de trans-

que adotam as regras CFC podem ser classificados em dois grupos: "um primeiro grupo de países define que tal legislação especial será aplicável sempre que a sociedade vinculada à pessoa residente ou domiciliada em seu território for domiciliada em um Estado de baixa tributação (paraísos fiscais)". Um outro grupo de países se caracteriza por valorizar a "natureza do rendimento auferido pelas sociedades domiciliadas fora dos seus territórios, mas que possuem relações com seus nacionais". Para esse grupo, "aplica-se a legislação CFC nos casos de determinados rendimentos, geralmente aqueles considerados 'passivos' (juros, aluguéis, royalties etc.), tornando-se irrelevante o exato local de domicilio da sociedade estrangeira vinculada"[9].

Conforme os países pesquisados, cujas caraterísticas foram detalhadas na tabela do anexo, a maior parte deles adota o primeiro critério — localização da investida em país de baixa tributação — sozinho ou em conjunto com o segundo critério — rendas passivas. Com relação ao critério da localização, para definição de país de baixa tributação, algumas normas adotam uma alíquota parâmetro fixa abaixo da qual se tributa no país de origem (como é o caso da Alemanha, que adota a alíquota de 25%, Japão, 20%, Coreia e Israel,15%, Grécia, 13%; Suécia, 12,1%, Uruguai, 12%, Hungria e Turquia 10%;). Outros países definem uma alíquota mínima proporcionalmente à alíquota aplicada no país (como na China, França e Itália, em que se estipula uma alíquota, na jurisdição estrangeira, inferior a 50% da alíquota interna; na Espanha, Egito, Lituânia, México e Peru, alíquota inferior 75% menor que a interna; Estônia, um terço da sua alíquota; Finlândia, três quintos; Islândia e Noruega, dois terços). Por fim, há, ainda, países que adotam um sistema de lista de países ou jurisdições não cooperativas. É o caso da Argentina e Austrália, que aplicam a legislação CFC às investidas localizadas em suas respectivas listas.

No que diz respeito ao segundo critério — natureza das rendas — alguns poucos países, como o Canadá, Dinamarca e Nova Zelândia, o adotam como único parâmetro para tributação segundo as normas CFC. Nos demais países que utilizam esse critério, preveem, também, o critério da localização. Outros países como China, Coreia, Estônia, Finlândia, França, Hungria, Islândia, Indonésia não fazem referência ao tipo de renda para aplicação de suas regras CFC. Aqui, também, se adotam diferentes fórmulas: pode-se estipular um máximo de recebimento de rendas passivas pela investida para que não se aplique a regra CFC (50% na Argentina e Itália, 70% no Egito, 30% na Grécia). As rendas, normalmente, definidas como passivas são dividendos, juros, royalties e ganhos de capital. A legislação alemã, por outro lado, oferece uma lista de rendas consideradas ativas. Assim, todo o tipo de renda que não estiver incluído nessa lista é considerado renda passiva.

É possível, portanto, perceber que existem dois critérios para a aplicação de legislação CFC. Um primeiro, quando o dispositivo determina a sua aplicabilidade sempre quando houver a existência de uma sociedade controlada ou coligada localizada em paraíso fiscal ou país de baixa tributação. Um segundo critério, quando a regra CFC é aplicável de acordo com os tipos de rendimento, geralmente passivos, auferidos pela sociedade controlada ou coligada estrangeira. Os países podem adotar ambos os critérios ou somente um deles.

Cumpre ainda salientar que a maior parte da legislação dos países ainda determina um percentual mínimo de participação na sociedade não residente para a aplicação da regra CFC. Segundo Maciel, o que se almeja com tal disposição "é que sejam atingidos apenas os sócios com significativa influência na sociedade — seja através do direito de voto, seja através da participação no capital ou nos ativos da sociedade"[10].

O objetivo da aplicação de uma *CFC rule* é, assim, tributar a renda da pessoa jurídica nos moldes do país da controladora. Tal tributação pode ocorrer de duas formas: atribuindo-se lucro da controlada/coligada es-

ferência e a legislação CFC. *Revista Dialética de Direito Tributário*, São Paulo, n. 212, p. 22-33, out. 2005.

9 Tôrres ainda identifica outros testes existentes para definir a aplicabilidade das regras de controle, "bastando que um único seja negativo para que a atribuição da renda ao sujeito torne-se justificável". Os testes por ele mencionados são os seguintes: confrontação das alíquotas vigentes em ambos os ordenamentos (alíquota do país da FC não pode ser inferior a determinada alíquota), escopo social (que serve para verificar se a sociedade exerce um fim negocial legítimo), cotação em bolsa, "distribuição aceitável" (percentual preestabelecido de rendimento disponível para distribuição é recebido dentro de um prazo razoável), data contábil (atribuição de vínculo de participação pelo período de tempo em que se manteve vinculado à sociedade e, teste de *minimis* (teto mínimo aceitável de distribuição comparado com o volume de investimentos em um dado período de tempo) TÔRRES, Heleno Taveira. *Direito Tributário Internacional*: Planejamento tributário e operações transnacionais. São Paulo: Revista dos Tribunais, 2001. p. 127-128.

10 MACIEL, Taísa Oliveira. *Tributação dos Lucros das Controladas e Coligadas Estrangeiras*. Rio de Janeiro: Renovar, 2007. p. 32-33.

trangeira à controladora nacional ou presumindo-se distribuição dos lucros da empresa estrangeira aos acionistas nacionais. A tributação poderá, também, abranger a renda total ou somente de certas atividades relacionadas à pessoa jurídica.

Por conseguinte, é possível concluir que as legislações CFC se aplicam a lucros que, devido a sua posição geográfica (paraíso fiscal ou país de baixa tributação) ou à natureza dos rendimentos (passivos), teriam sido afastados da tributação do país da sociedade investidora. Alberto Xavier, igualmente, considera haver um modelo de regra CFC. Segundo ele, "a expressão "regras CFC" faz alusão a um tipo específico de normas antiabuso que pressupõe para a sua aplicação que a controlada estrangeira esteja domiciliada em país de tributação favorecida e/ou aufira apenas rendas passivas"[11]. Ou seja, por essas conceituações, o modelo internacional de regras CFC determina a tributação no país da investidora *apenas* se presentes certos critérios — localização em país de tributação favorecida e/ou recebimento de rendas passivas. Conforme será exposto abaixo, a legislação brasileira parece não seguir esses parâmetros, pois determina a tributação dos rendimentos decorrentes da participação na investida sempre que esta apurar lucro, independentemente da presença de qualquer critério.

2.2. As regras CFC e o projeto BEPS (Base erosion and profit shifting)

Em 2013, a OCDE detectou certas lacunas nas regras de direito tributário internacional que facilitavam a erosão da base tributável e a transferência dos lucros empresariais para o exterior. Diante disso, a organização iniciou o projeto BEPS (*Base erosion and profit shifting*) e, juntamente aos países-membros do G-20 da Organização das Nações Unidas, adotaram um plano de ação consistente em 15 pontos para combater a referida erosão da base tributável e a transferência de lucros[12]. Um desses pontos de ação, a "Ação 3", trata das diretivas sugeridas pela OCDE para a criação de regras CFC efetivas. O projeto BEPS tem como objetivo final a mudança das legislações domésticas relativas ao assunto e, também, dos tratados internacionais[13].

Assim, dos 6 pilares básicos (tratados de forma exaustiva pelo relatório) presentes na Ação 3 (legislação CFC) do projeto BEPS, serão brevemente explicados apenas três desses pontos, por serem os mais importantes para fins deste estudo: as regras de definição das regras CFC, as exceções e limites para a aplicação de regras CFC, e a definição dos rendimentos que abrangem a regra CFC.

Com relação à definição das regras CFC internas, a recomendação da OCDE é de que os países devem procurar definir as entidades sujeitas às regras CFC de maneira mais abrangente, de forma que estas não somente atinjam entidades corporativas, mas também estabelecimentos permanentes e fundos de investimentos em certas situações específicas[14]. Isto porque, segundo a OCDE, os países poderiam modificar a natureza jurídica das empresas investidas de forma a tentar fugir às regras CFC[15].

Nesse mesmo sentido, a OCDE, também, aponta que as regras CFC devem definir o significado de controle. Se o objetivo é de abranger todos os casos em que a controladora possa transferir os lucros para a companhia estrangeira, então a recomendação da OCDE é de que controle legal ou econômico[16] seja definido como

11 XAVIER, Alberto. *Direito Tributário Internacional do Brasil*. 8. ed. Rio de Janeiro: Forense, 2015. p. 494.

12 OCDE. *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report. OECD/G20 Base Erosion and Profit Shifting Project*, Paris, OECD Publishing, 2015. p. 3. Disponível em: <http://dx.doi.org/10.1787/9789264241152-en>.

13 OCDE. *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report. OECD/G20 Base Erosion and Profit Shifting Project*, Paris, OECD Publishing, 2015. p. 3. Disponível em: <http://dx.doi.org/10.1787/9789264241152-en>.

14 A OCDE explica que há duas circunstâncias em que os estabelecimentos permanentes deveriam estar sujeitos às regras CFC. Primeiramente, elucidam que a regra CFC deve ser abrangente o suficiente para alcançar um estabelecimento permanente instituído no exterior. E, em segundo lugar, alertam que há situações em que a companhia-mãe escolhe isentar os rendimentos advindos do estabelecimento permanente e, então, quando estes rendimentos gerarem as mesmas preocupações de rendimentos advindos de uma subsidiária estrangeira (isto é, aponte para uma possível elisão fiscal), o país de residência da empresa-mãe deverá negar tal isenção ou aplicar as regras CFC ao estabelecimento permanente (OCDE. *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report. OECD/G20 Base Erosion and Profit Shifting Project*, Paris, OECD Publishing, 2015. p. 22. Disponível em: <http://dx.doi.org/10.1787/9789264241152-en>.).

15 OCDE. *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report. OECD/G20 Base Erosion and Profit Shifting Project*, Paris, OECD Publishing, 2015. p. 21. Disponível em: <http://dx.doi.org/10.1787/9789264241152-en>.

16 A OCDE define controle legal como a participação do sócio residente no país da companhia-mãe de modo a determinar a sua percentagem de direito de voto na subsidiária estrangeira. Por outro lado, controle econômico é definido como o direito aos lucros, capital e ativos da companhia no caso de dissolução ou liquidação

sendo 50% das ações da companhia de titularidade do residente do país da companhia-mãe. Entretanto, a OCDE reconhece que países que procuram combater a evasão às regras CFC podem estabelecer um limite de controle inferior a 50%[17].

Com relação ao pilar sobre as exceções e limites para a aplicação de regras CFC, o relatório da OCDE reforça a ideia de que tais normas não devem ser utilizadas como regra geral de tributação, mas somente para fins antiabuso e com a finalidade de evitar a erosão da base tributável pela transferência de lucros a países de baixa tributação. Segundo o relatório, as exceções e limites podem ser usados para limitar o alcance das regras de CFC, excluindo entidades que, provavelmente, apresentam pouco risco de erosão da base e transferência de lucros e, em vez disso, focalizando a atenção em casos de maior risco porque apresentam alguma característica ou comportamento que significa que há uma maior chance de transferência de lucro"[18]. Assim, a OCDE recomenda que se inclua uma regra de alíquota mínima que permita que "as empresas que estão sujeitas a uma alíquota de imposto efetiva que é suficientemente semelhante à alíquota de imposto aplicada na jurisdição-mãe não estarão sujeitas à tributação de CFC". Essa regra poderia se dar de três formas: 1) pela definição de um patamar de rendimentos abaixo do qual as regras CFC não se aplicariam, 2) por meio de um requisito antievasão que concentraria a aplicação das regras de CFC em situações em que haja um motivo ou propósito de evasão fiscal e 3) estabelecendo-se um mínimo de alíquota de imposto em que as regras de CFC só se aplicariam aos CFC residentes em países com uma alíquota menor que a empresa-mãe[19].

Esse pilar claramente reforça a ideia de que as regras CFC não devem ser usadas indiscriminadamente, mas somente com propósito antiabuso. Devem, portanto, conter requisitos justamente para excluir situações que não podem ser consideradas como potencialmente abusivas ou capazes de erodir a base tributável.

Finalmente, no que tange ao tipo de rendimento sujeito à CFC, a OCDE explicita que, após a legislação definir se uma empresa estrangeira é uma CFC (conforme critérios acima listados), o próximo passo seria determinar quais os rendimentos que são mais preocupantes em termos de facilitar a erosão da base tributável[20]. A OCDE denomina esses rendimentos como "rendimentos CFC". Embora a organização esclareça que cada jurisdição tem liberdade para definir suas próprias regras para delimitar os "rendimentos CFC", ela oferece uma lista não exaustiva de métodos[21] que essas regras podem utilizar para definir os rendimentos que são considerados "*red flags*". Esses rendimentos podem incluir por exemplo, segundo a OCDE,

> [...] rendimentos auferidos por CFCs que são empresas *holding*, rendimentos auferidos por CFCs que prestam serviços financeiros e bancários, rendimentos auferidos por CFCs que lidam com faturação de vendas, rendimentos advindos de bens de propriedade intelectual, rendimentos de produtos e serviços digitais, e rendimentos advindos de seguros e resseguros cativos.[22]

Nesse pilar igualmente se percebe a necessidade de se estabelecer critérios quanto à natureza dos rendimentos para determinação da aplicação de uma norma CFC, tal como presente em algumas normas internacionais vistas acima. Portanto, é possível perceber que o projeto BEPS está em conformidade com a nossa premissa

da sociedade (OCDE. *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report. OECD/G20 Base Erosion and Profit Shifting Project*, Paris, OECD Publishing, 2015. p. 24. Disponível em: <http://dx.doi.org/10.1787/9789264241152-en>.).

17 OCDE. *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report. OECD/G20 Base Erosion and Profit Shifting Project*, Paris, OECD Publishing, 2015. p. 3. Disponível em: <http://dx.doi.org/10.1787/9789264241152-en>.

18 OCDE. *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report. OECD/G20 Base Erosion and Profit Shifting Project*, Paris, OECD Publishing, 2015. p. 33. Disponível em: <http://dx.doi.org/10.1787/9789264241152-en>.

19 OCDE. *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report. OECD/G20 Base Erosion and Profit Shifting Project*, Paris, OECD Publishing, 2015. p. 33. Disponível em: <http://dx.doi.org/10.1787/9789264241152-en>.

20 OCDE. *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report. OECD/G20 Base Erosion and Profit Shifting Project*, Paris, OECD Publishing, 2015. p. 43. Disponível em: <http://dx.doi.org/10.1787/9789264241152-en>.

21 Um destes métodos, segundo a OCDE, é a definição da aplicabilidade da regra CFC sob rendas passivas, sendo estas mais manipuláveis que rendas ativas. Exemplos de renda passivas são: dividendos, *royalties*, dentre outros (OCDE. *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report. OECD/G20 Base Erosion and Profit Shifting Project*, Paris, OECD Publishing, 2015. Disponível em: <http://dx.doi.org/10.1787/9789264241152-en>.).

22 "Income earned by CFCs that are holding companies, income earned by CFCs that provide financial and banking services, income earned by CFCs that engage in sales invoicing, income from IP assets, income from digital goods and services, and income from captive insurance and re-insurance (OCDE. *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report. OECD/G20 Base Erosion and Profit Shifting Project*, Paris, OECD Publishing, 2015. p. 43. Disponível em: <http://dx.doi.org/10.1787/9789264241152-en>.).

de que as regras CFC, sob a ótica da legislação internacional, devem possuir certos elementos específicos para que sejam consideradas como tais. Veremos, a seguir, se a legislação brasileira referente à tributação de coligadas e controladas no Brasil segue tanto os modelos internacionais quanto as diretrizes da OCDE.

3. Modelo brasileiro de tributação de coligadas e controladas no exterior

3.1. Instituição da tributação em bases universais, MP nº 2.158-35/2001 e ADI 2588/2001

No Brasil, por muito tempo, o modelo para a tributação das pessoas jurídicas seguia o princípio da territorialidade[23], ou seja, as empresas somente eram tributadas pelas rendas auferidas dentro do território nacional. Esse sistema adotado no país permitia que os contribuintes estruturassem sociedades localizadas em países de baixa tributação, transferissem os rendimentos para tais sociedades e diferissem a distribuição dos dividendos para a controlada brasileira, evitando, assim, a tributação no Brasil.

Ou seja, é possível perceber que o Brasil se encontrava até então em um impasse: não bastasse o sistema vigente ser o da territorialidade, o país, também, até aquele momento, não possuía regras de *transfer pricing*[24] de forma a evitar tais tipos de condutas elisivas. Assim, as empresas eram tratadas como um grupo unitário e não como entidades independentes (conforme exige uma legislação de preço de transferência). Consequentemente, a sociedade brasileira, ao estabelecer uma controlada ou coligada estrangeira em paraíso fiscal, poderia, facilmente, constituir operações intragrupo de maneira a localizar seus lucros no país de baixa carga tributária em detrimento da tributação brasileira. O regime da territorialidade, apenas, agravava essa situação, pois, no momento em que os lucros fossem considerados auferidos no exterior, não poderiam ser tributados no Brasil.

Com a finalidade de combater tais situações criadas pelo contribuinte com a finalidade de escapar da tributação brasileira, a Lei nº 9.249/95[25] implementou a tributação segundo a renda mundial para as pessoas jurídicas no Brasil. Ou seja, a partir dessa lei, as empresas passaram a ser tributadas em bases universais[26], pela renda auferida não só no território nacional, mas também pelos lucros auferidos diretamente no exterior e por meio de suas controladas e coligadas estrangeiras. Tal lei tinha por meta a implementação da transparência fiscal, harmonização da tributação e evitar a evasão de recursos.

Segundo a metodologia adotada pela Lei nº 9.249/95, prevista no art. 25, a empresa brasileira deveria adicionar ao seu lucro líquido os lucros auferidos pelas controladas e coligadas na proporção de sua participação societária, para fins de apuração do seu lucro real. A tributação dos lucros de controladas e coligadas no Brasil era, portanto, automática. Não havia qualquer discri-

23 Em termos práticos, o princípio da territorialidade é explicado por Michael Lang e Pistone Pasquale da seguinte forma: [...] o escopo do poder de tributar de um Estado é meramente determinado pela **renda auferida ou capital situado dentro desse Estado**. Em contraste ao princípio da universalidade, sob o qual prevalece o nível de tributação do Estado de ou residência do contribuinte, o nível de tributação do **Estado de fonte ou origem e a localização econômica da renda é o elemento decisivo** sob a ótica do princípio da territorialidade. (Tradução e grifo nossos).

24 A legislação específica referente aos preços de transferência só veio a ser instituída no Brasil em 1996, com o advento da Lei nº 9.430 de 27 de dezembro de 1996.

25 Lei nº 9.249/95 Art. 25. Os lucros, rendimentos e ganhos de capital auferidos no exterior serão computados na determinação do lucro real das pessoas jurídicas correspondente ao balanço levantado em 31 de dezembro de cada ano.
§ 2º Os lucros auferidos por filiais, sucursais ou controladas, no exterior, de pessoas jurídicas domiciliadas no Brasil serão computados na apuração do lucro real com observância do seguinte:
I - as filiais, sucursais e controladas deverão demonstrar a apuração dos lucros que auferirem em cada um de seus exercícios fiscais, segundo as normas da legislação brasileira;
II - os lucros a que se refere o inciso I serão adicionados ao lucro líquido da matriz ou controladora, na proporção de sua participação acionária, para apuração do lucro real;
§ 3º Os lucros auferidos no exterior por coligadas de pessoas jurídicas domiciliadas no Brasil serão computados na apuração do lucro real com observância do seguinte:
I - os lucros realizados pela coligada serão adicionados ao lucro líquido, na proporção da participação da pessoa jurídica no capital da coligada;
II - os lucros a serem computados na apuração do lucro real são os apurados no balanço ou balanços levantados pela coligada no curso do período-base da pessoa jurídica;

26 Segundo Michael Lang e Pasquale Pistone, o princípio da universalidade diz respeito a "todos os lucros, independentemente de onde vieram ou foram produzidos, e todo capital, independentemente de sua localidade, de um indivíduo podem ser tributados pelo Estado em questão. Esse princípio está principalmente conectado ao princípio da nacionalidade e da residência" (LANG, Michael; PISTONE Pasquale. *Tax Treaties*: Building Bridges between Law and Economics. IBFD, 2010. p. 311-312).

minação em razão da localização, grau de participação societária e tipos de renda da empresa estrangeira.

Dentre as discussões levantas à época[27], a principal questionava se dita lei era compatível com o artigo 43 do CTN[28], já que criava uma presunção de disponibilidade da renda no momento da simples apuração pela empresa controlada, sem que tais valores fossem efetivamente distribuídos à empresa brasileira. Ou seja, a lei previa a tributação dos lucros da empresa estrangeira pelo regime de competência, independentemente da distribuição à pessoa jurídica brasileira, o que iria contra o conceito de disponibilidade da renda previsto no CTN.

A Lei nº 9.532/97[29] finaliza este debate, ao instituir a tributação somente quando os lucros tiverem sido disponibilizados para a pessoa jurídica domiciliada no Brasil. Tal lei considerou disponibilizado o lucro, portanto, no momento em que os dividendos fossem, efetivamente, pagos (tributação pelo regime de caixa) e não pela mera apuração pela empresa estrangeira.

Entretanto, tal norma restabelecia o mesmo problema que a Lei nº 9.249/95 visava combater: como a lei exigia a disponibilidade da renda para a incidência do imposto no país, a empresa situada no Brasil poderia escolher o momento em que tal lucro se tornaria disponível e, assim, diferir o momento da ocorrência do fato gerador do Imposto de Renda. Ainda, a coligada ou controlada no exterior poderia jamais pagar esses lucros à empresa brasileira investidora, de forma que o fato gerador nunca se configuraria e, dessa forma, jamais se pagaria tributos no Brasil. Estava estabelecida, então, uma via livre para que os contribuintes cometessem evasão fiscal, uma vez que a lei, àquela época, determinava que os lucros só seriam tributados se fossem efetivamente disponibilizados para a investidora localizada no Brasil.

Para combater tal prática, em 2001 a Lei Complementar n°104 alterou o Art. 43 do CTN, incluindo o § 2° nos seguintes termos: Na hipótese de receita ou de rendimento oriundos do exterior, a lei estabelecerá as condições e o momento em que se dará sua disponibilidade, para fins de incidência do imposto referido neste artigo. Com isso, buscou-se, pretensamente, acabar com a discussão acerca do critério de disponibilidade da renda previsto no caput do art. 43 do CTN, que havia gerado uma série de debates acerca da legalidade da Lei nº 9.249/95.

Apesar de tais discussões ainda persistirem mesmo após a edição da Lei Complementar n°104/2001, no mesmo ano, foi editada a Medida Provisória n° 2.158-35/2001 que, em seu art. 74[30], dispunha que *os lucros auferidos por controlada ou coligada no exterior serão considerados disponibilizados para a controladora ou coligada no Brasil na data do balanço no qual tiverem sido apurados*". Com isso, volta-se à sistemática prevista na Lei nº 9.249/95, passando-se, novamente, a tributar no Brasil os lucros de coligadas e controladas quando da sua simples apuração no balanço da empresa estrangeira, independentemente de sua distribuição ou disponibilização efetiva. Ressalta-se que, novamente, qualquer critério ligado à localização da coligada e controlada, grau de participação e tipos de rendas que seriam tributados no Brasil foram considerados pela Medida Provisória n° 2.158-35/2001.

Dessa forma, na ausência de qualquer dos critérios normalmente presentes nas regras CFCs, as normas referentes à tributação de coligadas e controladas no exterior até então criadas pelo Brasil não podem ser consideradas como um regime CFC. Primeiramente porque, ao contrário dos modelos internacionais, são aplicáveis

27 Outras questões levantadas, conforme Xavier, diziam respeito ao desrespeito ao art. 146, II, a da CF, pois a matéria seria objeto de Lei Complementar; conceito de Renda e capacidade econômica; desconsideração da personalidade jurídica e afronta ao art. 98 do CTN e aos Tratados Internacionais de Bitributação (XAVIER, Alberto. *Direito tributário internacional do Brasil.* 6. ed. Rio de Janeiro: Forense, 2004).

28 CTN Art. 43. O imposto, de competência da União, sobre a renda e proventos de qualquer natureza tem como fato gerador a aquisição da disponibilidade econômica ou jurídica:
I - de renda, assim entendido o produto do capital, do trabalho ou da combinação de ambos;
II - de proventos de qualquer natureza, assim entendidos os acréscimos patrimoniais não compreendidos no inciso anterior.

29 Lei nº 9.532/1997 Art. 1º Os lucros auferidos no exterior, por intermédio de filiais, sucursais, controladas ou coligadas serão adicionados ao lucro líquido, para determinação do lucro real correspondente ao balanço levantado no dia 31 de dezembro do ano-calendário em que tiverem sido disponibilizados para a pessoa jurídica domiciliada no Brasil.
§ 1º Para efeito do disposto neste artigo, os lucros serão considerados disponibilizados para a empresa no Brasil:
a) no caso de filial ou sucursal, na data do balanço no qual tiverem sido apurados;
b) no caso de controlada ou coligada, na data do pagamento ou do crédito em conta representativa de obrigação da empresa no exterior.

30 Medida Provisória n° 2.158-35/2001, art. 74: Para fim de determinação da base de cálculo do imposto de renda e da CSLL, nos termos do art. 25 da Lei no 9.249, de 26 de dezembro de 1995, e do art. 21 desta Medida Provisória, os lucros auferidos por controlada ou coligada no exterior serão considerados disponibilizados para a controladora ou coligada no Brasil na data do balanço no qual tiverem sido apurados, na forma do regulamento.

a todas as pessoas jurídicas controladas e coligadas localizadas no exterior, indistintamente. A norma brasileira não apresenta ressalvas e limitações antiabuso tais como: localização em países de baixa tributação, renda essencialmente passiva e grau de participação da empresa brasileira na empresa estrangeira.

Por fim, importante destacar que a Medida Provisória n° 2.158-35/2001 teve a sua constitucionalidade analisada pelo Supremo Tribunal Federal no âmbito da ADIN 2588. O STF declarou, por meio dessa ADIN, a constitucionalidade em relação às controladas situadas em países com tributação favorecida e a inconstitucionalidade no tocante aos rendimentos provenientes das coligadas no exterior localizadas em países de tributação normal. O STF não definiu nesse julgamento a constitucionalidade da regra às controladas fora de paraísos fiscais e coligadas localizadas em paraísos fiscais.

3.2. Mudanças a partir da Lei nº 12.973/14: criação da *CFC rule* brasileira?

A Lei nº 12.973/14 revogou o art. 74 da Medida Provisória nº 2.158-35/2001 e estabeleceu um novo regime, a partir de seu art. 76, para a tributação sob bases universais. Já de antemão, conforme já afirmou Alberto Xavier, é preciso salientar que o regime instituído por essa nova lei ainda se afasta do modelo internacional de regras CFC. Ao considerar a existência de um modelo de regras CFC, Xavier afirma que a lei brasileira não se enquadraria nesse conceito justamente porque se aplica a toda e qualquer controlada e coligada estrangeira. Segundo ele, conforme será desenvolvido a seguir, "a Lei n. 12.973/2014 (tal como as leis anteriormente vigentes) também se aplica a toda e qualquer controlada ou coligada, sujeitas a tributação automática, utilizando critérios de localização da empresa ou da natureza de atividade apenas para efetuar restrições à concessão de regimes mais favoráveis"[31]. Apesar de ainda se afastar do modelo internacional de CFC, conforme se demonstrará, a nova Lei trouxe diversas novidades, dentre as quais, a instituição de um tratamento diferenciado para controladas e coligadas.

Tributação das controladas

No que diz respeito às controladas, o art. 76 da Lei nº 12.973/14 instituiu que a controladora brasileira deverá registrar em sua contabilidade "*o resultado contábil na variação do valor do investimento equivalente aos lucros ou prejuízos auferidos pela própria controlada direta e suas controladas, direta ou indiretamente, no Brasil ou no exterior, relativo ao ano-calendário em que foram apurados em balanço, observada a proporção de sua participação em cada controlada, direta ou indireta*"[32]. Tal artigo, conforme observa Rocha,[33] trata-se de uma regra de contabilização que determina o registro do resultado contábil pelo método de equivalência patrimonial em subconta da conta investimento da controladora brasileira. Ressalta-se o fato de que o dispositivo determina a contabilização dos resultados tanto das controladas diretas quanto das indiretas.

A regra de tributação dos lucros de sociedade controlada localizada no exterior está prevista no artigo 77 da Lei nº 12.973/14[34] que determina que a "*a parcela do ajuste do valor do investimento em controlada, direta ou indireta, domiciliada no exterior equivalente aos lucros por ela auferidos antes do imposto sobre a renda [...] deverá ser computada na determinação do lucro real e na base de cálculo da Contribuição Social sobre o Lucro Líquido - CSLL da pessoa jurídica controladora domiciliada no Brasil*".

Primeiramente, chama-se a atenção para redação do artigo 77: em vez de determinar a tributação da parcela dos lucros da controlada a que a controladora faz jus, estabelece a tributação da "*parcela do ajuste do valor do investimento em controlada*"[35]. A maioria da doutrina defende

31 XAVIER, Alberto. *Direito Tributário Internacional do Brasil*. 8. ed. Rio de Janeiro: Forense, 2015. p. 494.

32 Lei nº 12.973 Art. 76. A pessoa jurídica controladora domiciliada no Brasil ou a ela equiparada, nos termos do art. 83, deverá registrar em subcontas da conta de investimentos em controlada direta no exterior, de forma individualizada, o resultado contábil na variação do valor do investimento equivalente aos lucros ou prejuízos auferidos pela própria controlada direta e suas controladas, direta ou indiretamente, no Brasil ou no exterior, relativo ao ano-calendário em que foram apurados em balanço, observada a proporção de sua participação em cada controlada, direta ou indireta.

33 ROCHA, Sergio André. *Tributação dos Lucros Auferidos no Exterior*: Lei n. 12.973/14. São Paulo: Dialética, 2014.

34 Lei nº 12.973 Art. 77. A parcela do ajuste do valor do investimento em controlada, direta ou indireta, domiciliada no exterior equivalente aos lucros por ela auferidos antes do imposto sobre a renda, excetuando a variação cambial, deverá ser computada na determinação do lucro real e na base de cálculo da Contribuição Social sobre o Lucro Líquido - CSLL da pessoa jurídica controladora domiciliada no Brasil, observado o disposto no art. 76.

35 Quanto à redação do dispositivo, Sérgio André Rocha explica que espelha a vontade da Receita Federal de se aproximar "dos votos que lhe foram favoráveis no julgamento da ADIN 2.588 e da posição sustentada na SC 18/13", pretendendo afastar a alegação de que se tributaria lucro de outra pessoa jurídica. ROCHA, Sergio André. *Tributação de Lucros Auferidos por Controladas e Coligadas no Exterior*. 2. ed. São Paulo: Quartier Latin, 2016.

que, na verdade, não se tributa o ajuste do valor do investimento, mas a parcela do lucro referente à controladora brasileira, tal como na sistemática anterior da MP 2.158. Nesse sentido, Sérgio André da Rocha, afirma que "por mais que se fale em tributação da 'parcela do ajuste do valor do investimento', deixou-se claro que tal parcela será 'equivalente aos lucros'. Em outras palavras, o que se segue tributando são os lucros"[36]. Ao analisar o § 1º do art. 77[37], o autor ainda comenta que "este parágrafo não deixa nenhum espaço para dúvidas quanto ao fato de que o que está tributando é apenas o lucro [...]. Para se poder falar em equivalência patrimonial aqui ter-se-ia que falar em uma equivalência de lucros"[38].

Em outra linha de argumentação, Alberto Xavier defende que, tendo em vista a necessidade de considerar os lucros das controladas indiretas diretamente na empresa brasileira, "a 'parcela de ajuste do valor de investimento' não é equivalência patrimonial, pois não reflete o lucro do sócio, mas o lucro de terceiro, que não mantém com a controladora no Brasil uma relação societária. E 'terceiro' porque o Direito privado não conhece a figura do 'sócio indireto', nem a da equivalência patrimonial *per saltum*" [39].

Note-se, portanto, que ao permanecer a tributação automática dos lucros independentemente de efetiva disponibilização quando a relação for de controle direto ou indireto, "a discussão a respeito da inconstitucionalidade [...] segue inalterada, de modo que os mesmos argumentos que existiam para o questionamento da MP 2.158 [...] são igualmente aplicáveis ao artigo 77 da Lei 12.973"[40].

A novidade trazida pelo artigo 78 da Lei 12.973/14 foi a possibilidade de consolidação, até o ano-calendário de 2022, das parcelas de que trata o art. 77 na determinação do lucro real e da base de cálculo da CSLL da controladora no Brasil. Ou seja, essa possibilidade permite que os lucros auferidos pelas controladas diretas e indiretas possam sofrer a dedução de eventuais prejuízos da controladora brasileira e vice-versa. A consolidação, entretanto, não será possível para as pessoas jurídicas investidas que se encontrem em, pelo menos, uma das seguintes situações, segundo os incisos do artigo 78 e 84:

> I - estejam situadas em país com o qual o Brasil não mantenha tratado ou ato com cláusula específica para troca de informações para fins tributários;
>
> II - estejam localizadas em país ou dependência com tributação favorecida, ou sejam beneficiárias de regime fiscal privilegiado, ou estejam submetidas a regime de subtributação - aquele que tributa os lucros da pessoa jurídica domiciliada no exterior a alíquota nominal inferior a 20%;
>
> III - sejam controladas, direta ou indiretamente, por pessoa jurídica submetida a tratamento tributário previsto no inciso II do caput; ou
>
> IV - tenham renda ativa própria inferior a 80% (oitenta por cento) da renda total, consideradas como aquela obtida diretamente pela pessoa jurídica mediante a exploração de atividade econômica própria, excluídas as receitas decorrentes de: a) royalties; b) juros; c) dividendos; d) participações societárias; e) aluguéis; f) ganhos de capital, salvo na alienação de participações societárias ou ativos de caráter permanente adquiridos há mais de 2 anos; g) aplicações financeiras; e h) intermediação financeira.

No caso de não haver consolidação, o artigo 79 determina que a parcela do ajuste do valor do investimento em controlada, direta ou indireta, domiciliada no exterior equivalente aos lucros ou prejuízos por ela auferidos deverá ser considerada de forma individualizada na determinação do lucro real e da base de cálculo da CSLL da pessoa jurídica controladora domiciliada no Brasil, devendo ser adicionada ao lucro líquido relativo ao balanço de 31 de dezembro do ano-calendário em que os lucros tenham sido apurados pela empresa domiciliada no exterior, se positiva; e poderá ser compensada com lucros futuros da mesma pessoa jurídica no exterior que lhes deu origem, se negativa.

Ressalta-se que os critérios estipulados pelo artigo 78 não são para definir os critérios de tributação das controladas diretas e indiretas, mas sim a possibilidade da consolidação — limitada no tempo — dos lucros ou prejuízos destas com lucros e prejuízos da controladora brasileira. Ou seja, mais uma vez, o Brasil não seguiu os parâmetros internacionais das regras CFC que estipulam critérios como estes para fins de definição de

36 ROCHA, Sergio André. *Tributação dos Lucros Auferidos no Exterior*: Lei n. 12.973/14. São Paulo: Dialética, 2014. p. 90-91.

37 Art. 77 § 1º A parcela do ajuste de que trata o caput compreende apenas os lucros auferidos no período, não alcançando as demais parcelas que influenciaram o patrimônio líquido da controlada, direta ou indireta, domiciliada no exterior.

38 ROCHA, Sergio André. *Tributação dos Lucros Auferidos no Exterior*: Lei n. 12.973/14. São Paulo: Dialética, 2014. p. 90-91.

39 XAVIER, Alberto. A Lei nº 12. 973, de 13 de maio de 2014, em Matéria de Lucros no Exterior: Objetivos e Características Essenciais. In: ROCHA, Valdir de Oliveira (Coord.). *Grandes Questões Atuais do Direito Tributário*. São Paulo: Dialética, 2014. v. 18. p. 15.

40 ROCHA, Sergio André. *Tributação de Lucros Auferidos por Controladas e Coligadas no Exterior*. 2. ed. São Paulo: Quartier Latin, 2016.

tributação da controlada estrangeira. A regra geral permanece, repita-se, de tributação integral e automática dos lucros da pessoa jurídica localizada no exterior, independentemente da sua distribuição efetiva, sem qualquer critério diferenciador.

Ainda, conforme alerta Alberto Xavier[41], essa norma, criada pelo art. 78, trata de "transposição cega de 'conceitos' inspirados nos trabalhos da OCDE, contendo catálogo de práticas potencialmente abusivas para uma finalidade (a consolidação dos prejuízos) onde não têm lugar". Isto porque, segundo o autor, quando as legislações internacionais submetem à tributação automática os lucros das sociedades investidas que derivam de rendas passivas, o fazem pelo maior risco de diferimento que esses rendimentos apresentam. Porém, uma regra que não permite a consolidação dos prejuízos advindos desse tipo de rendimento não o faz pelo mesmo motivo, pois aqui não haveria a situação abusiva (diferimento) que se encontra naquela.

Uma outra questão levantada por muitos autores é que a Lei 12.973/14 teria permitido a tributação de controladas indiretas como se diretas fossem (a chamada tributação *per saltum*), de forma a eliminar a consolidação vertical, e proibiu a consolidação horizontal, na controladora brasileira, dos lucros e prejuízos das controladas diretas e indiretas[42]. Segundo Xavier, a adoção do sistema da tributação automática dos lucros faz com que, em vez de tratarmos as sociedades do grupo como entidades dotadas de personalidade jurídica própria e independentes entre si, passamos a tratá-las como se fossem um ente único, como se fossem filiais (i.e., estabelecimentos permanentes). Consequentemente, ao oferecer esse tratamento, os lucros são imputados, diretamente, à controladora brasileira e não mais à controlada direta estrangeira, ignorando o fato de que esses lucros deveriam, em tese, ser imputados na sociedade que os auferiu (ou seja, a controlada direta) e, após, serem consolidados na controladora. Logo, segundo o autor, o objeto da tributação previsto na citada lei não é o lucro da empresa controladora brasileira na medida de sua participação na controlada estrangeira, mas sim os lucros da própria controlada estrangeira[43].

Com isto, podemos perceber que a regra instituída pela Lei nº 12.973/14 criou uma regra mais dura que a antigamente adotada pela Medida Provisória 2.158/2001, pois agora pretende-se tributar a renda antes mesmo de saber se de fato houve um acrescimento patrimonial. Nesse sentido, argumenta Alberto Xavier que se trata de criação de novo fato gerador, uma vez que "não faz nenhum sentido falar-se em acréscimo patrimonial se apenas são considerados os elementos ativos, os lucros, e desconsiderados total ou parcialmente, os passivos, os prejuízos, como sucede se a consolidação é vedada"[44].

Tributação das coligadas

Diferentemente do tratamento dado às controladas, a lei 12.973/14 abandonou a sistemática do art. 74 da Medida Provisória 2.158/2011 para as coligadas (julgada inconstitucional pelo STF, conforme vimos). Assim, a nova lei passou a tributar os lucros das coligadas apenas quando houver a disponibilização efetiva dos lucros, conforme redação do art. 81, transcrito abaixo:

> Art. 81. Os lucros auferidos por intermédio de coligada domiciliada no exterior serão computados na determinação do lucro real e da base de cálculo da CSLL no balanço levantado no dia 31 de dezembro do ano-calendário em que tiverem sido disponibilizados para a pessoa jurídica domiciliada no Brasil [...].

Entretanto, a parte final do artigo 81 e seus incisos estipulam condições relativas à investida que devem cumulativamente ser cumpridas para que a tributação ocorra somente no momento da disponibilização:

> I - não esteja sujeita a regime de subtributação - previsto no inciso III do caput do art. 84 - (aquele que tributa os lucros da pessoa jurídica domiciliada no exterior a alíquota nominal inferior a 20%)
>
> II - não esteja localizada em país ou dependência com tributação favorecida, ou não seja beneficiária de regime fiscal privilegiado, de que tratam os arts. 24 e 24-A da Lei nº 9.430, de 27 de dezembro de 1996;
>
> III - não seja controlada, direta ou indiretamente,

41 XAVIER, Alberto. A Lei nº 12. 973, de 13 de maio de 2014, em Matéria de Lucros no Exterior: Objetivos e Características Essenciais. In: ROCHA, Valdir de Oliveira (Coord.). *Grandes Questões Atuais do Direito Tributário*. São Paulo: Dialética, 2014. v. 18. p. 21.

42 XAVIER, Alberto. A Lei nº 12. 973, de 13 de maio de 2014, em Matéria de Lucros no Exterior: Objetivos e Características Essenciais. In: ROCHA, Valdir de Oliveira (Coord.). *Grandes Questões Atuais do Direito Tributário*. São Paulo: Dialética, 2014. v. 18. p. 13.

43 XAVIER, Alberto. A Lei nº 12. 973, de 13 de maio de 2014, em Matéria de Lucros no Exterior: Objetivos e Características Essenciais. In: ROCHA, Valdir de Oliveira (Coord.). *Grandes Questões Atuais do Direito Tributário*. São Paulo: Dialética, 2014. v. 18. p. 14.

44 XAVIER, Alberto. A Lei nº 12. 973, de 13 de maio de 2014, em Matéria de Lucros no Exterior: Objetivos e Características Essenciais. In: ROCHA, Valdir de Oliveira (Coord.). *Grandes Questões Atuais do Direito Tributário*. São Paulo: Dialética, 2014. v. 18. p. 16.

> por pessoa jurídica submetida a tratamento tributário previsto no inciso I.

Aqui, novamente, a Lei estipula critérios envolvendo a localização da coligada em país de baixa tributação ou tributação favorecida. Entretanto, assim como a regulação das controladas, tais critérios não servem para determinar a incidência ou não da tributação brasileira, mas somente para permitir que a tributação ocorra no momento da disponibilização e não com a mera apuração dos lucros pela coligada. Ou seja, mais uma vez, tais critérios não são utilizados tais como as regras CFC internacionais — para determinar a incidência dos tributos do país — mas apenas para permitir o diferimento da tributação até o momento da disponibilização dos lucros.

O § 3º do artigo 81 estabelece que os lucros auferidos por intermédio de coligada domiciliada no exterior que não atenda aos requisitos estabelecidos serão tributados na forma do art. 82[45]:

> Art. 82. Na hipótese em que se verifique o descumprimento de pelo menos uma das condições previstas no caput do art. 81, o resultado na coligada domiciliada no exterior equivalente aos lucros ou prejuízos por ela apurados deverá ser computado na determinação do lucro real e na base de cálculo da CSLL da pessoa jurídica investidora domiciliada no Brasil, nas seguintes formas:
>
> I - se positivo, deverá ser adicionado ao lucro líquido relativo ao balanço de 31 de dezembro do ano-calendário em que os lucros tenham sido apurados pela empresa domiciliada no exterior; e
>
> II - se negativo, poderá ser compensado com lucros futuros da mesma pessoa jurídica no exterior que lhes deu origem, desde que os estoques de prejuízos sejam informados na forma e prazo estabelecidos pela Secretaria da Receita Federal do Brasil - RFB.

Da leitura deste artigo, pode-se concluir que, caso a coligada esteja sujeita a um regime de subtributação (alíquota nominal do imposto de renda inferior a 20%) ou esteja localizada em país com tributação favorecida ou regime fiscal privilegiado, a regra de tributação no Brasil passa a ser a mesma aplicável às controladas — no momento da apuração do lucro da investida, independentemente da disponibilização destes à coligada brasileira. Ou seja, os critérios de submissão a regime mais favorável e localização da coligada servem somente para definir o momento da tributação — se quando da disponibilização ou apuração do lucro — e não para definir a tributação em si, tal como ocorre com as legislações CFC. Portanto, também quanto às coligadas, o regime brasileiro não está de acordo com os padrões internacionais de tributação de coligadas e controladas no exterior.

Em conclusão, as novas regras trazidas pela Lei 12.973/14, em matéria de sociedades controladas e coligadas no exterior, continua a adotar "um sistema que se afasta totalmente do tipo CFC, por não ter caráter excepcional nem finalidade antielisiva, uma vez que concebe como regra geral a tributação da totalidade do lucro das controladas e coligadas no exterior, independentemente da natureza dos rendimentos que o integram e do nível de tributação a que se sujeitam no país de seu domicílio"[46].

4. Conclusão: existe no Brasil uma norma CFC?

Conforme visto, existem dois critérios utilizados nas legislações para aplicação das regras CFC adotadas no mundo: um no qual a regra determina a sua aplicabilidade quando a sociedade controlada ou coligada estiver localizada em paraíso fiscal ou país de baixa tributação; e outro em que a norma CFC é aplicável de acordo com os tipos de rendimentos, geralmente passivos, auferidos pela sociedade controlada ou coligada estrangeira. Os países analisados adotaram uma dessas regras ou as duas em conjunto.

Diante desses dois critérios utilizados pelos países para tributar as coligadas e controladas no exterior, parece-nos seguro afirmar que o Brasil jamais possuiu uma verdadeira regra CFC. A sistemática introduzida pela Lei nº 12.973/14, tanto aquela aplicável para controladas quanto para coligadas, não pode ser considerada uma regra CFC propriamente dita. Isto porque, primeiramente, a lei não limita o escopo de sua aplicação a sociedades investidas localizadas em paraísos fiscais, de baixa tributação ou regime fiscal privilegiado. Assim, parece que o propósito dessa lei não é evitar operações

45 O Art. 82-A, incluído pela Lei nº 13.259, de 2016, ainda dispõe que "opcionalmente, a pessoa jurídica domiciliada no Brasil poderá oferecer à tributação os lucros auferidos por intermédio de suas coligadas no exterior na forma prevista no art. 82, independentemente do descumprimento das condições previstas no caput do art. 81".

46 XAVIER, Alberto. *Direito Tributário Internacional do Brasil.* 8. ed. Rio de Janeiro: Forense, 2015. p. 494.

abusivas por meio de situações proporcionadas pelas regras de diferimento do tributo. Quando menciona a localização privilegiada da empresa investida não é para fins de determinação da inidência da tributação brasileira, mas somente para desconsiderar a consolidação — no caso das controladas, ou para não permitir o pagamento quando da disponibilidade dos lucros — no caso das coligadas.

Igualmente, também, pode-se concluir que a lei 12.973/14 não adota o segundo critério utilizado no modelo CFC, que possui como base, para sua aplicação, o recebimento de rendas passivas pela sociedade investida no exterior. Isto porque, conforme se viu, a Lei 12.973/14 em momento algum limita a sua aplicação para a situação em que as investidas estrangeiras recebam rendimentos passivos, mas simplesmente determina a sua aplicação irrestrita sempre que houver a apuração de lucros por sociedades estrangeiras. Mais uma vez, quando a legislação brasileira faz referência a rendas passivas é somente para excluir a possibilidade da consolidação de resultados pela controlada, não como um critério para determinar a tributação dos lucros da investida no Brasil.

Com isto, conclui-se que o Brasil jamais dispôs de uma norma com os padrões adotados por outros países, nem mesmo com o advento da Lei 12.973/14. A principal diferença é que as regras brasileiras tributam os rendimentos decorrentes da participação na investida sempre que esta apurar lucro, independentemente de qualquer critério; enquanto o modelo internacional das regras CFC tributam esses rendimentos somente se verificados certos critérios — como localização em país de tributação favorecida ou rendas passivas. Assim, a nova legislação brasileira referente à tributação dos lucros auferidos por sociedades investidas no exterior trazida pela Lei 12.973;14, por não ter alterado esta tributação automática de todos os lucros recebidos pela controlada ou coligada, não consiste, portanto, em uma *CFC legislation*.

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Anexo – Tabela Comparativa de Regras CFC

País	Grau de Participação	Localização da Controlada	Tipos de Renda (Renda Passiva)
África do Sul	O contribuinte residente na África do Sul deve deter, direta ou indiretamente, mais de 50% dos direitos de participação, ou mais de 50% dos direitos de voto, da entidade estrangeira. Para os fins das regras CFC, "direito de participação" é definido como o direito de participar em todos ou em parte dos benefícios dos direitos (exceto direito de voto) atribuídos a uma ação da entidade estrangeira. Se nenhuma entidade possuir tais direitos ou se tais direitos não forem possíveis de serem determinados, o direito de exercer o direito de voto qualifica-se como direito de participação.	Não regula.	Não regula.
Alemanha	O contribuinte residente na Alemanha deve deter mais de 50% de uma companhia estrangeira (este patamar é reduzido para 1%, ou menos, se a companhia estrangeira atuar no ramo de certas transações financeiras).	A renda passiva da controlada estrangeira deve estar sujeita à tributação a uma alíquota inferior a 25%.	Renda passiva. A legislação alemã oferece uma lista de rendas consideradas ativas. Assim, toda renda que não estiver inclusa nessa lista é considerada renda passiva.
Argentina	Não regula	Lista de jurisdições não cooperativas	Renda passiva que corresponda a no mínimo 50% da renda da subsidiária. São consideradas rendas passivas os dividendos, juros, royalties, aluguel de propriedade real e ganhos de venda de ações, participações e debêntures, assim como advindas de transações de derivativos e instrumentos financeiros.
Austrália	5 ou menos residentes australianos devem possuir 50% ou mais da companhia ou uma entidade australiana deve possuir no mínimo 40% ou 5 ou menos entidades australianas devem controlar efetivamente a companhia.	Regras aplicáveis variam se país está ou não na lista de países.	Renda passiva (se menos de 95% da receita for ativa, submete-se a teste de renda ativa).

Canadá	A lei aplica-se a "afiliadas controladas". Segundo a lei, uma "afiliada estrangeira" é considerada uma empresa na qual o residente canadense possui, pelo menos, 10% do capital em conjunto com pessoas relacionadas, com pelo menos 1% do capital sendo de titularidade do próprio residente canadense. Uma "afiliada controlada" é uma empresa afiliada estrangeira controlada pelo residente canadense ou uma combinação do residente canadense e outras pessoas.	Não regula.	Renda passiva ou "considerada passiva".
China	A empresa deve ser "controlada" por empresas residentes na China, ou conjuntamente por empresas e indivíduos residentes na China. O termo "controlada" é definido pela lei como 2 possíveis situações: (i) quando a empresa ou o indivíduo residentes na China possuem, direta ou indiretamente, 10% ou mais do capital votante e conjuntamente possuem mais de 50% do capital total da empresa estrangeira; (ii) se esses parâmetros percentuais não forem atingidos, uma disposição de controle substancial se aplicará, i.e., se o residente chinês exercer controle substancial sob a empresa estrangeira no que diz respeito aos aspectos financeiros, negociais, de titularidade das ações, de compras e vendas etc.	Quando a controlada estiver localizada em um país (ou região) onde a alíquota de tributação é "obviamente inferior" à alíquota estabelecida pela lei chinesa. O termo "obviamente inferior" é definido como uma alíquota, na jurisdição estrangeira, que é inferior a 50% da alíquota chinesa (i.e., uma alíquota de menos de 12.5%).	Não regula.
Coreia	O contribuinte residente da Coréia deve deter, direta ou indiretamente, 10% ou mais de participação em uma entidade estrangeira.	A entidade estrangeira deve estar localizada em um país de baixa tributação, i.e., a alíquota efetiva do IRPJ, referente aos três anos mais recentes, deve ser de 15% ou menos.	Não regula.

Dinamarca	Uma companhia dinamarquesa ou um estabelecimento permanente na Dinamarca de uma empresa estrangeira estão sujeitas à tributação da renda total da subsidiária ou estabelecimento permanente de uma companhia dinamarquesa se (i) a subsidiária é controlada, direta ou indiretamente, por uma companhia residente da Dinamarca; (ii) a "renda CFC" da subsidiária constituir mais de 50% da renda tributável da subsidiária; e (iii) os ativos financeiros da subsidiária, na média, constituem mais de 10% do total de seus ativos no exercício financeiro.	Não regula. Subsidiárias em todas as jurisdições, inclusive na Dinamarca, estão sujeitas à aplicação da CFC rule.	Renda passiva. A lei define "renda CFC" como as seguintes situações: (i) dividendos passíveis de tributação, de acordo com a lei dinamarquesa; (ii) resultados líquidos de juros tributáveis; (iii) benefício líquido advindo de recebíveis, dívidas e instrumentos financeiros; (iv) ganhos de capital líquidos advindos de ações passíveis de tributação, de acordo com a lei dinamarquesa; (v) royalties e ganhos de capital líquidos advindos de ativos intangíveis; (vi) renda tributável advinda de arrendamentos financeiros; (vii) renda tributável advinda de seguros, atividades bancárias e outras atividades financeiras as quais nenhuma isenção CFC tenha sido concedida de acordo com as isenções aplicáveis às instituições financeiras; e (viii) ganhos e perdas tributáveis advindos da eliminação de quotas e créditos de CO2.
Egito	A empresa residente no Egito deve possuir mais de 10% da controlada residente no exterior.	Regras CFC são aplicáveis se a renda da CFC não está sujeita à tributação ou está isenta de tributação no seu país de residência ou está sujeita à tributação a uma alíquota 75% menor do que a alíquota do IRPJ no Egito.	Renda passiva. Regra CFC é aplicável se mais de 70% da renda da controlada advir de dividendos, juros, *royalties*, taxas de administração ou pagamentos de aluguéis.
Espanha	Para os fins das regras CFC, uma entidade será considerada uma CFC se (i) for uma entidade não residente na Espanha (entretanto, as regras não são aplicáveis à países-membros da União Europeia se o contribuinte demonstrar que a CFC possui razões econômicas válidas e exercer ativamente atividades comerciais); (ii) o contribuinte espanhol, individual ou juntamente a entidades relacionadas, deter participação direta ou indireta de 50% ou mais no capital, lucro ou direitos de voto; e (iii) o imposto sobre a renda pago pela entidade estrangeira for menor que 75% do imposto conforme calculado de acordo com a lei espanhola.	Regras CFC são aplicáveis se o imposto sobre a renda pago pela entidade estrangeira for menor que 75% do imposto conforme calculado de acordo com as regras tributárias espanholas.	Renda passiva (dividendos, ganhos de capital de propriedades e participações, empréstimos de capital, seguros e atividades financeiras, entre outras).

Estados Unidos	Para os fins das regras CFC, CFCs são definidas como empresas estrangeiras que possuem acionistas americanos (i.e., entidades americanas cada uma detendo, direta, indireta ou construtivamente pelo menos 10% do direito de voto da entidade estrangeira) que conjuntamente detenham mais de 50% do direito de voto ou do valor das ações em circulação.	De modo geral, as regras se aplicam para qualquer país. Entretanto, regras mais duras são aplicáveis a certos países sujeitos ao "embargo" americano, selecionados por razões de política internacional e não por razões tributárias.	Renda passiva (dividendos, juros, alugueis, royalties, ganhos de capital, renda de certas transações entre partes relacionadas, renda de certos serviços prestados fora do país da CFC para ou através de partes relacionadas e certas rendas relacionadas ao petróleo), renda proveniente de certas operações de seguro, rendas relacionadas a certos países sujeitos ao embargo americano, renda proveniente de operações que possuam cooperação ou participação destinadas ao boicote de Israel e renda proveniente de pagamentos ilegais feitos a um governo federal ou agente.
Estônia	A empresa residente na Estônia será tributada pela renda da controlada estrangeira mesmo se a controlada não tenha distribuído lucros a controlada for controlada pelo residente na Estônia, sendo controle compreendido como possuindo pelo menos 50% do total capital da empresa estrangeira. Por outro lado, a regra também será aplicável se o indivíduo residente na Estônia possuir direta ou conjuntamente com outros indivíduos pelo menos 10% das ações da controlada estrangeira.	A empresa residente na Estônia será tributada pela renda da controlada estrangeira mesmo se a controlada não tenha distribuído lucros se a controlada estrangeira estiver localizada em um paraíso fiscal, i.e., um Estado que não tribute os lucros auferidos ou distribuídos por uma pessoa jurídica ou onde a tributação for menor que um terço do imposto de renda que o residente na Estônia está sujeito a pagar. Tendo em vista que a alíquota do imposto de renda na Estônia é de 20%, qualquer alíquota inferior a 7% seria considerada como paraíso fiscal.	Não regula.

Finlândia	A entidade estrangeira deve ser controlada por uma empresa residente na Finlândia que possua responsabilidade tributária ilimitada no que diz respeito ao imposto de renda finlandês. Controle é caracterizado pelas seguintes características, que deverão ser cumpridas para haver aplicabilidade da regra CFC: (i) um ou mais residentes finlandeses devem deter conjuntamente, direta ou indiretamente, pelo menos 50% do capital ou dos direitos de voto da entidade estrangeira, ou que sejam titulares de pelo menos 50% dos lucros da entidade estrangeira; (ii) o acionista finlandês deve deter, direta ou indiretamente, pelo menos 25% do capital da controlada ou, se na capacidade de beneficiário, deverá deter pelo menos 25% dos lucros da entidade.	A entidade estrangeira deve estar sujeita à tributação em seu país de residência em um montante 3/5 menor do que a tributação finlandesa correspondente. Assim, considerando-se que a alíquota do IRPJ na Finlândia é de 20% (em 2015), a alíquota mínima no país de residência deve ser de 12% sobre a renda da entidade estrangeira, calculado de acordo com o GAAP finlandês e a lei tributária.	Não regula.
França	A empresa sujeita à tributação na França deve deter, direta ou indiretamente, 50% das ações, direitos de voto ou direitos financeiros da entidade estrangeira ou do estabelecimento permanente. De modo a evitar abusos, a legislação, também, determina a redução do patamar de participação para 5% para cada acionista francês, direto ou indireto, onde mais de 50% das ações da entidade estrangeira forem de titularidade de outras entidades francesas ou entidades que são consideradas designadas do acionista francês.	A entidade estrangeira deve estar localizada em um país de tributação favorecida, ou seja, onde a alíquota efetiva seja pelo menos 50% menor do que a alíquota na França (atualmente 33.33%).	Não regula.
Grécia	O contribuinte residente na Grécia deve deter, individual ou conjuntamente com outra entidade/indivíduo, direta ou indiretamente, mais de 50% do capital, ações ou direitos de voto da entidade estrangeira ou deverá deter direito de receber mais de 50% do lucro da entidade estrangeira.	A entidade estrangeira deve ser residente de um país constante da lista negra da Grécia (publicada anualmente pelo Ministério da Fazenda) ou de um país não membro da União Europeia que possua regime de tributação favorecida, i.e., que possua alíquota inferior a 13% (ou cujo valor seja 50% menor do que a alíquota grega de 26%).	Mais de 30% da renda da entidade estrangeira deve derivar de rendimentos passivos (como dividendos, juros, royalties, ganhos de capital e renda de propriedades, seguros, serviços bancários e outras atividades financeiras) e pelo menos 50% do lucro relevante da entidade estrangeira deve derivar de transações com o contribuinte residente na Grécia ou suas partes relacionadas.

Hungria	O residente na Hungria deve deter, direta ou indiretamente, 10% das ações da entidade estrangeira ou a maior parte da sua renda deve derivar da Hungria.	A entidade estrangeira deve ser residente de um país onde a alíquota seja inferior a 10% (no caso de perdas, a alíquota doméstica deverá atingir 10%). A Hungria possui uma lista branca de países que não são considerados países de tributação favorecida para os fins das regras CFC (i.e., países-membros da União Europeia e da OCDE e países que possuam tratado para evitar a bitributação firmado com a Hungria). Porém, somente se a entidade estrangeira possuir uma presença comercial real no referido país.	Rendas passivas (dividendos recebidos, ganhos de capital, ganhos de capital, entre outras).
Islândia	O contribuinte residente na Islândia deve possuir ou controlar, direta ou indiretamente, pelo menos 50% da companhia, fundo ou instituição estrangeira ou o contribuinte residente na Islândia deve se beneficiar, direta ou indiretamente, da companhia.	A companhia estrangeira deve residir em um país com regime de tributação favorecida, entendido como um país no qual a alíquota do IPRJ é inferior a 2/3 da alíquota da Islândia (atualmente 20%). Assim, um país considerado como possuidor de regime de tributação favorecida seria aquele com alíquota inferior a 13.3%.	Não regula.
Indonésia	O contribuinte residente na indonésia deve deter pelo menos 50% do capital registrado da companhia estrangeira, individual ou juntamente a outros contribuintes residentes da Indonésia. As regras CFC somente se aplicam a companhias estrangeiras não cotadas.	Não regula. A Indonésia não possui uma lista branca ou negra de países.	Não regula.
Israel	O contribuinte residente em Israel deve deter, direta ou indiretamente, mais de 50% de um dos meios de controle da companhia, ou mais de 40% dos meios de controle devem ser detidos pelo residente em Israel que, juntamente a suas partes relacionadas, detém mais de 50% de um ou mais dos meios de controle da companhia estrangeira.	A companhia estrangeira deve ser residente em um país onde a alíquota do IRPJ é inferior a 15%. Israel não possui uma lista branca ou negra de países.	Renda passiva (dividendos, juros, alugueis, royalties, ganho de capital).

Itália	O contribuinte residente na Itália deve controlar, direta ou indiretamente, mais de 50% da entidade não residente. As regras CFC também se aplicam a "partes relacionadas", isto é, entidades em que o contribuinte italiano detenha, direta ou indiretamente, direito aos lucros que excedam 20% (10% no caso de companhias cotadas.	A controlada deve estar localizada em um país listado como sendo adepto de um regime de baixa tributação, assim entendido como um país onde o nível de tributação é inferior a 50% da alíquota utilizada na Itália.	As regras CFC também são aplicáveis quando a controlada estrangeira possuir mais de 50% da renda da controlada estrangeira for composta de renda passiva (derivada da administração ou investimentos em títulos, participações ou outros instrumentos financeiros disposição ou exploração de intangíveis relacionados a direitos industriais, artísticos ou literários ou serviços prestados a entidades do mesmo grupo).
Japão	A entidade estrangeira deve ser mais de 50% controlada, direta ou indiretamente, por acionistas japoneses. A entidade é considerada "controlada" por acionistas japoneses quando estes detêm, direta ou indiretamente, mais de 50% das ações em circulação, das ações com direito a voto ou dos direitos a dividendos.	Para que as regras sejam aplicáveis, o país de residência da controlada deve não tributar a renda ou possuir uma alíquota inferior a 20%.	Não regula. Entretanto, se a controlada satisfizer os requerimentos necessários para qualificar-se para isenção, somente certos rendimentos passivos (e.g., dividendos, juros, royalties e ganhos de capital) estão sujeitos às regras CFC.
Lituânia	O contribuinte residente na Lituânia deve deter, direta ou indiretamente, mais de 50% das ações da controlada; ou deve deter, em conjunto com entidades relacionadas, mais de 50% das ações da entidade controlada e a entidade controladora deve deter no mínimo 10% das ações da controlada; ou deve exercer o controle sob a entidade controlada no último dia do exercício.	A controlada deve estar localizada em locais onde haja alguma espécie de tributação favorecida. Isto é, se a controlada está localizada em um país da "lista branca" mas que esteja constituída em uma forma específica de negócio que tenha regime tributário favorecido; ou, se a controlada não estiver localizada em um país da "lista branca" ou "lista negra", as regras são aplicáveis se a controlada estiver constituída de maneira que esteja sujeita a uma alíquota de imposta de renda que seja 75% menor que a alíquota nacional. Independente da forma empresarial, se estiver localizada em um país listado na lista negra (baixa tributação)	Tributação da renda positiva que não inclui renda ativa, recebida da controladora da Lituânia e tratada como não dedutível para fins fiscais e dividendos calculados passíveis de distribuição, mas que não foram pagos para a controladora.

México	Uma companhia estrangeira é presumidamente controlada pelo residente mexicano se essa estiver sujeita à tratamento fiscal preferencial ou se a companhia residente no México exercer o controle efetivo da entidade estrangeira. O controle efetivo sob uma entidade é mensurado pela participação efetiva diária da controladora sobre as atividades da controlada, i.e., poder de controlar a administração da controlada a ponto de decidir sobre a distribuição de renda, lucro ou dividendos.	A controlada deve estar localizada em um país onde não haja tributação ou aonde a tributação sobre a renda seja 75% menor que a alíquota mexicana (que atualmente é de 30%, assim o mínimo é de 22,5%).	A regra é aplicável quando a renda passiva (incluindo dividendos, juros, royalties e ganhos de capital) representa mais de 20% da renda da controlada estrangeira.
Noruega	O contribuinte residente na Noruega deve possuir ou controlar, direta ou indiretamente, pelo menos 50% das ações da entidade estrangeira. Via de regra, o contribuinte o limite de 50% deve ser atingido tanto no início quanto no final do exercício; porém, se um contribuinte possuir ou controlar no mínimo 60% da entidade estrangeira no final do exercício, as regras CFC também lhes são aplicáveis independentemente do controle que exercia no início do exercício.	A entidade estrangeira deve estar sujeita a uma alíquota sob o imposto de renda que seja menor que dois terços da alíquota norueguesa que seria aplicável caso a companhia fosse norueguesa. A Noruega possui uma "lista negra" que inclui todos os países que possuem tributação favorecida para os fins das regras CFC. Além disso, se a entidade estrangeira estiver localizada em um país da "lista branca", mas possuir renda passiva como sua fonte de renda principal (e tal renda seja isenta de tributação no país em questão), a entidade será considerada como residente de um país de tributação favorecida para os fins das regras CFC.	Não regula.
Nova Zelândia	O contribuinte residente na Nova Zelândia deve possuir participação de 10% ou mais na CFC. Uma entidade é considerada uma CFC se um grupo de 5 ou menos residentes da Nova Zelândia possua poder de controle sobre a companhia de 50% ou mais, ou quando uma entidade individual residente da Nova Zelândia possua poder de controle sobre a companhia de 40% ou mais ou se um grupo de 5 ou mais entidades da Nova Zelândia exerçam o controle efetivo sobre a entidade estrangeira.	Não regula.	Renda passiva (dividendos, juros, alugueis e royalties), mas há inúmeras exceções. Não se aplica se CFC tiver menos de 5% de renda passiva.

Peru	Para que uma entidade estrangeira seja considerada uma CFC, essa deve possuir personalidade jurídica distinta de seus sócios, associados ou qualquer outra entidade participante, e deve ser controlada por um contribuinte residente no Peru. Para tanto, o contribuinte residente deve possuir, individual ou conjuntamente com outras residentes a ele relacionados, participação direta ou indireta de mais de 50% do capital social, resultados econômicos ou direito de voto da companhia.	A entidade estrangeira deve ser constituída ou estar localizada em um país de tributação favorecida ou em um país em que sua renda passiva não esteja sujeita à tributação sobre a renda ou que esteja sujeita à tributação a uma alíquota que seja 75% menor do que a alíquota que seria aplicável caso a entidade estivesse localizada no Peru. O país possui uma lista de jurisdições de baixa tributação.	Renda passiva (entre outras, dividendos, juros, royalties, ganhos de capital e aluguel de propriedade imóvel). Entretanto, dividendos pagos por uma CFC a outra CFC não são considerados renda passiva.
Portugal	O contribuinte residente em Portugal deve possuir uma participação significativa em uma entidade que esteja sujeita a um regime de tributação mais favorável. Isto é, o residente deve deter, direta ou indiretamente, 25% ou mais do capital, direito de voto ou direito sobre os proventos ou sobre os ativos da empresa estrangeira; ou o residente deve deter 10% ou mais do capital, direito de voto, direito sobre os proventos ou sobre os ativos da empresa estrangeira onde mais de 50% do capital social ou dos direitos relevantes da entidade sejam pertencentes (direta ou indiretamente) a acionistas residentes em Portugal.	Uma entidade estrangeira é considerada como sujeita a um regime de tributação favorecida se (i) a renda de tal companhia não estiver sujeita à tributação em seu país de residência que seja similar ou análoga ao imposto sobre a renda de pessoas jurídicas em Portugal; ou (ii) o imposto efetivamente pago pela companhia for igual a ou menor que 60% do que a companhia teria pago se fosse residente em Portugal; ou (iii) a companhia seja residente em um país que esteja incluído na "lista negra" de Portugal.	Não regula. Entretanto, não se aplica a regra se pelo menos 75% dos lucros são derivados da agricultura ou atividades industriais e comerciais dirigidas ao mercado local e suas atividades principais não sejam bancárias, financeiras, que envolvam seguros relacionados a bens ou pessoas situadas fora do país de origem, atividades de holdings ou leasing de bens.

Reino Unido	O contribuinte residente no Reino Unido deve controlar a entidade estrangeira. Uma entidade é considerada como sendo "controlada" por outra se os acionistas residentes no Reino Unido são capazes de conduzir os negócios da sociedade de acordo com os seus interesses (existem, porém, regras específicas referentes à *joint-ventures* e legislação específica visando prevenir a evasão de forma a evitar a comportamentos destinados a contornar a regra do controle). Além disso, se nenhuma das isenções forem a aplicáveis, a regra será aplicável aos residentes que detiverem, individual ou juntamente a partes relacionadas, pelo menos 25% de participação na entidade estrangeira.	O Reino Unido aplica "*entity-level exemptions*" para determinar se entidades estrangeiras localizadas em países específicos serão tributadas ou não de acordo com as regras CFC. De modo geral, CFCs residentes em territórios que tenham imposto local ou possuam alíquota maior do que 75% do imposto de renda aplicável no Reino Unido estão isentas das regras CFC, mas existem inúmeras regras específicas aplicáveis.	O Reino Unido aplica o "*gateway test*" para determinar se certas fontes de renda foram artificialmente desviadas do Reino Unido. Se sim, elas passarão a ser tributadas de acordo com as regras CFC, a menos que a entidade esteja sujeita a outro tipo de isenção.
Suécia	Estipula que se aplica a regra à empresa sueca que possui um interesse em certas entidades legais estrangeiras e determina os limites de participação.	Regras CFC são aplicáveis se a entidade estrangeira não estiver sujeita à tributação ou se estiver sujeita à tributação a uma alíquota inferior a 12.1%. A Suécia possui uma "lista branca" que inclui relevantes países dos 5 continentes (África, América, Ásia, Europa e Oceania) (porém não todos). Assim, acionistas de uma CFC localizada em algum dos países da lista branca estão isentos às regras CFC. Entretanto, certos tipos de renda poderão estar sujeitas às regras CFC mesmo que uma CFC esteja localizada em um país da lista branca.	Não regula, mas renda de "atividades econômicas genuínas" são excluídas das regras CFC.
Turquia	O contribuinte residente na Turquia deve deter, direta ou indiretamente, pelo menos 50% do capital social, dividendos ou poder de voto de uma entidade estrangeira e o faturamento bruto anual dessa deve exceder o equivalente a TRY 100.000.	A CFC deve estar sujeita a uma alíquota menor do que 10% em seu país de residência.	25% ou mais da renda bruta da CFC deve consistir em renda passiva (como dividendos, juros, alugueis, licenças, venda de títulos que estão fora do escopo comercial, agrícola e da renda pessoal).

Uruguai	O Uruguai não possui regras CFC que sejam aplicáveis a pessoas jurídicas. Porém, regras específicas são aplicáveis a indivíduos que detenham, direta ou indiretamente, participação em uma entidade estrangeira que receba renda passiva.	A entidade estrangeria deve estar sujeita a uma alíquota menor do que 12%. Nesse sentido, a renda passiva é atribuível à entidade residente no Uruguai, mas somente para o propósito de determinar os dividendos tributáveis atribuíveis a um acionista individual (pessoa física) residente no Uruguai. Por outro lado, quando um indivíduo residente no Uruguai detiver participação em uma entidade estrangeira que esteja sujeita a uma alíquota menor do que 12%, a renda passiva é atribuída diretamente ao indivíduo residente no Uruguai para fins das regras CFC.	Renda passiva (incluindo as rendas derivadas de aplicações, empréstimos ou investimentos e créditos de qualquer natureza).
Venezuela	A legislação se aplica quando o contribuinte venezuelano investir direta ou indiretamente ou por meio de intermediários em filiais, companhias, bens móveis e imóveis, ações, contas bancárias ou investimentos ou ainda quando participar em uma entidade com ou sem personalidade legal, trust, associação, fundos de investimento ou outra entidade associada ou existente em jurisdições de baixa tributação.	O contribuinte residente na Venezuela deve deter participação em uma entidade estrangeira constituída ou localizada em um país de tributação favorecida, isto é, um país em que a renda é tributada a uma alíquota inferior à 20%. O país possui uma lista de jurisdições de baixa tributação.	O contribuinte está isento da regra CFC se sua renda é derivada de rendimentos empresariais e pelo menos 50% do ativo da companhia são ativos fixos utilizados para exercer as atividades comerciais da empresa. Entretanto, tal isenção não é aplicável se mais de 20% da renda total proveniente do investimento localizado em um país de tributação favorecida resultar de dividendos, juros, royalties ou ganhos de capital oriundos da venda de bens móveis ou imóveis.

Fonte: Elaboração Própria. DELLOITE. Guide to Controlled Foreign Company Regimes, 2014. Disponível em: https://www2.deloitte.com/al/en/pages/tax/articles/guide-to-controlled-foreign-company-regimes.html.

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O retorno de bens culturais
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O retorno de bens culturais*

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Resumo

O presente artigo analisa a possível existência de obrigação jurídica internacional dos Estados de atender aos pedidos de devolução de bens culturais para seus países de origem. Esses pedidos de retorno de bens culturais, que foram retirados no final do século XIX, intensificaram-se nos últimos 30 anos. Algum desses bens culturais retornaram, recentemente, para o seu respectivo país de origem, dentre eles as joias de Troia e peças arqueológicas do Machu Picchu. No entanto, outros bens continuam em museus fora de seu país de origem, apesar de diversos apelos para o seu retorno, este é o caso dos mármores do Partenon. Por meio de um estudo de casos e normas internacionais, procura-se analisar os argumentos contrários e a favor do retorno desses artefatos, além da solução dada pelo direito internacional para atender tais demandas. Especial atenção será dada ao caso do canhão "El Cristiano", envolvendo Brasil e Paraguai. Em conclusão, não foi encontrada uma obrigação jurídica internacional para o retorno desses bens retirados antes de 1970, no entanto, observa-se uma prática cada vez mais recorrente de devolução em boa-fé do patrimônio cultural para o seu país de origem.

Palavras-chave: Retorno de bens culturais. Proteção do patrimônio cultural. Direito internacional. UNESCO. Canhão El Cristiano.

Abstract

The present paper analyses the potential existence of a legal international obligation of States to fulfil requests of restitution of cultural property to their respective country of origin. Requests for the return of cultural property taken from the territory of States in the late 19th century have intensified over the last 30 years. A number of those cultural artefacts, such as the Troy gold and the Machu Picchu artefacts have recently been returned to their respective countries of origin. Other cultural property, as in the case of the Parthenon Marble, has stayed at a museum outside its country of origin, despite several calls for its return. In this sense, this paper outlines the reasons and tries to identify an international obligation behind such returns. Special attention will be given to the request made by Paraguay to Brazil concerning the return of the 'El Cristiano' cannon, a piece of artillery taken from Paraguay by the Brazilian armed forces in the war of 1864-1870, and its implications on international and Brazilian national law. In conclusion, no international legal obligation to return cultural property displaced before

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1970 was found, however a practice to return those artefacts in good faith can be observed.

Keywords: Return of cultural property. Protection of cultural heritage. International Law. UNESCO. 'El Cristiano' cannon.

1. Introdução

No dia 1° de março de 2010, 140° aniversário do fim da Guerra do Paraguai contra Argentina, Brasil e Uruguai, o então vice-presidente paraguaio Federico Franco, em visita ao Brasil, pediu que fosse devolvida uma das relíquias paraguaias tomadas pelo exército brasileiro no conflito: "El Cristiano", um canhão de 12 toneladas, que se encontra exposto no Museu Histórico Nacional no Rio de Janeiro.[1]

Pedidos de retorno de bens culturais como o do Paraguai, são frequentes e envolvem países de todas as regiões do mundo.[2] Em regra, dizem respeito aos bens culturais, que têm grande significado para um ou mais povos, por ajudar a explicar e representar seu passado.[3]

O presente artigo tem como objetivo averiguar a existência de uma possível obrigação jurídica dos Estados em atender tais pedidos de retorno de bens culturais. Para tanto, serão analisados alguns casos reputados emblemáticos, em razão da complexidade das negociações e das discussões teóricas que são suscitadas: (1) o pedido de retorno dos Mármores do Partenon; (2) a demanda de retorno realizado pelo Peru sobre artefatos de Machu Picchu que se encontravam na Universidade de Yale; (3) o pedido de retorno, feito pela Turquia, de vinte e quatro peças de ouro, datadas de 2.500 a.C., ao Museu de Arqueologia e Antropologia da Universidade da Pensilvânia *(Penn Museum)*; por fim, analisaremos o caso do canhão El Cristiano.

2. Convenção de Haia de 1954 para a Proteção de Bens Culturais em Caso de Conflito Armado e seus protocolos

A Convenção de Haia de 1954 consiste na primeira convenção a tratar de forma ampla a proteção de bens culturais durante um conflito armado. Essa convenção foi realizada no contexto pós-segunda guerra mundial. Nesse conflito, vários bens culturais foram retirados dos países de origem, causando perdas não só para o patrimônio cultural desses países como também para o patrimônio cultural da humanidade. Assim foi observada a necessidade de se fazer uma convenção que protegesse tais bens.

Os Países Baixos, nesse sentido, submeteram à UNESCO um projeto para a elaboração de uma Convenção para a proteção de bens culturais em caso de conflito armado.[4] O projeto foi acolhido pela organização que, em seguida, emitiu uma resolução, de maneira a realizar uma Conferência para sua elaboração.

Essa Conferência tinha como objetivo elaborar uma

1 RODRIGUES, José Eduardo Ramos. O caso da devolução do canhão "El Cristiano" ao Paraguai. **Revista Magister de Direito Ambiental e Urbanístico**. Porto Alegre, v. 6, n. 31, ago. 2010. p. 82.

2 ALBERGE, Dalya. Turkey turns to human rights law to reclaim British Museum sculptures. **The Guardian.** 8 dez. 2012. Disponível em: http://www.guardian.co.uk/culture/2012/dec/08/turkey-british-museum-sculptures-rights Acesso em: 13 jul. 2013; CHAWKINS, S. Native American skulls repatriated to California from England. **Los Angeles Times**. 20 mai. 2012. Disponível em: http://articles.latimes.com/2012/may/20/local/la-me-adv-skulls-20120520 Acesso em: 13 jul. 2013; DAY, M. We want our masterpiece back – Italians petition France to return Mona Lisa to Florence. **Independent.** 8 dez. 2012. Disponível em: http://www.independent.co.uk/news/world/europe/we-want-our-masterpiece-back--italians-petition-france-to-return-mona-lisa-to-florence-8117931.html Acesso em: 13 jul. 2013; FARAGO, J. Turkey's restitution dispute with the Met challenges the 'universal museum'. **Guardian.** 7 out. 2012. Disponível em: http://www.guardian.co.uk/commentisfree/2012/oct/07/turkey-restitution-dispute-met Acesso em: 13 jul. 2013; FELCH, J. Turkey asks U.S. museums for return of antiquities. **Los Angeles Times.** 30 mai. 2012. Disponível em: http://articles.latimes.com/2012/mar/30/entertainment/la-et-turkey-antiquities-20120331 Acesso em: 13 jul. 2013; GRAHAM-HARRISON, E. Treasures returned to Afghan museum. **Guardian.** 5 ago. 2013. Disponível em: http://www.guardian.co.uk/world/2012/aug/05/artefacts-returned-afghan-museum Acesso em: 13 jul. 2013; KANTOURIS, C. Greece wins Swiss court ruling over ancient coin. **The Washington Times.** 12 jan. 2012. Disponível em: http://www.washingtontimes.com/news/2012/jan/12/greece-wins-swiss-court-ruling-over-ancient-coin/ Acesso em: 13 jul. 2013; SOWOLE, T. Amid hope of restitution, Nigeria hosts foreign museums. **The Guardian (Nigeria).** 15 fev. 2013. Disponível em: http://www.ngrguardiannews.com/index.php?option=com_content&view=article&id=113411:amid-hope-of-restitution-nigeria-hosts-foreign-museums-&catid=74:arts&Itemid=683 Acesso em: 13 jul. 2013.

3 EAGEN, S. Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws That Support International Action. **Pace International Law Review**, White Plains. Vol. 13, abr. 2001. Disponível em: http://digitalcommons.pace.edu/pilr/vol13/iss2/7 Acesso em: 13 out. 2013, p. 407.

4 SCHINDLER, D. TOMAN, J. **The Laws of Armed Conflicts**, Martinus Nihjoff Publisher,1988, p.783-784.

Convenção que "protege[sse] a beleza do passado para, em caso de guerra, [essa possa ser] conservada para o [usufruto] nosso e de nossos antecedentes."[5] A Convenção obriga os Estados, nesse sentido, a "respeitar e salvaguardar" os bens culturais.

A Convenção define bens culturais como:

> bens, móveis ou imóveis, que tenham uma grande importância para o patrimônio cultural dos povos, tais como os monumentos de arquitetura, de arte, ou de história, religiosos ou seculares, os lugares que oferecem interesse arqueológico, os grupos de edificações que, em vista do seu conjunto, apresentem um elevado interesse histórico ou artístico, as obras de arte, manuscritos, livros e outros objetos de interesse histórico artístico ou arqueológico.[6]

Ademais, a Convenção inclui os museus, bibliotecas e outros locais que armazenem os bens definidos anteriormente.[7] De acordo com professor John Merryman, essa definição põe em evidência o caráter internacional do patrimônio cultural. Esse caráter se evidencia pela ligação do bem em questão com a história da humanidade.[8] Nesse sentido, é importante que todos os países possuam um papel ativo na proteção dos bens culturais.

Em seu artigo 4°, a convenção dispõe que os Estados-partes devem proibir, prevenir e coibir todo ato de roubo, pilhagem, vandalismo e de desvio de bens culturais, assim como impedir a requisição dos bens culturais móveis situados no território de outro país.

Tal convenção foi utilizada inúmeras vezes para condenar diversos atos de pilhagem. Nos termos do Estatuto de Roma do Tribunal Penal Internacional, para ser caracterizado crime de pilhagem, são necessários os seguintes elementos: a aquisição de uma propriedade, com o intuito de privar o proprietário de seu uso, para fins pessoais ou privados, sem a autorização da pessoa legalmente legitimada para dispor do bem e o ato deve ser praticado em um contexto de conflito armado.[9]

Essa prática é condenada desde 1907 pela Convenção de Haia (IV) sobre leis e costumes da guerra terrestre, em seu artigo 47.[10] Essa convenção foi utilizada como base para a condenação de Rosenberg, Goering e Heydrich no Tribunal de Nuremberg, por crime de guerra, em razão de pilhagem cometida na Polônia e Eslovênia.[11] O Tribunal Penal Internacional, para a Ex-Iugoslávia, indiciou e condenou vários indivíduos por esses atos, ampliando, consideravelmente, o conceito desse crime.[12]

Concebeu-se o 1° Protocolo Adicional da Convenção de Haia de 1954, que dispõe, em seu artigo 1°, que as partes da convenção que ocupem território durante um conflito armado devem impedir a exportação de bens culturais.[13] Dispõe o artigo 3° da Convenção, que, caso haja a exportação, os Estados que aderiram à con-

5 UNESCO. Actes de la Conférence convoquée par l'Organisation des Nations Unies pour l'éducation, la science et la culture, tenu à la Haye du 21 avril au 14 mai 1954, p.98. Disponível em: www.unesco.org. Acesso em: 03 jul. 2017.

6 BRASIL. Decreto nº 44.851 de 11 de novembro de 1958. Promulga a Convenção e Protocolo para a Proteção de Bens Culturais em caso de conflito armado, Haia, 1954, artigo 1°.

7 BRASIL. Decreto nº 44.851 de 11 de novembro de 1958. Promulga a Convenção e Protocolo para a Proteção de Bens Culturais em caso de conflito armado, Haia, 1954, artigo 1°.

8 MERRYMAN, John Henry. 1986. Two ways of thinking cultural property. **The American Journal of International Law**, vol. 80, n. 4, oct., 1986, pp. 831-853, p. 831-2.

9 TRIBUNAL PENAL INTERNACIONAL. *Elements of Crimes for the ICC, Pillage as a war crime (ICC Statute, Article 8(2)(b)(xvi) and (e)(v)).* Acesso em: 13 jul. 2013. Disponível em: http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/elements%20of%20crimes.aspx.

10 ICRC. *Regulations concerning the Laws and Customs of War on Land.* The Hague, 18 Oct 1907. Disponível em: http://www.icrc.org/ihl.nsf/full/195 Acesso em: 12 jan. 2013.

11 O'KEEFE, Roger. Protection of Cultural Property under International Criminal Law. **Melbourne Journal of International Law**. vol 11, n.2, 2010, pp. 139-392, p. 221; *DECLARATION de la société des américanistes concernant le pillage archéologique et le trafic illicite des biens culturels*. **Journal de la Société des Américanistes**. v. 63, n. 63, 1974, p. 310.

12 TRIBUNAL PENAL INTERNACIONAL PARA A ANTIGA IUGOSLAVIA. Judgement in the Case the Prosecutor v. Dario Kordić and Mario Čerkez, Câmara de Julgamento I, Processo No. IT-95-14/2, 26 de fevereiro de 2001 TRIBUNAL PENAL INTERNACIONAL PARA A ANTIGA IUGOSLAVIA. Judgement in the Case the Prosecutor v. Hadžihasanović & Kubura, Câmara de Julgamento I, Processo No. ICTY-01-47, 15 de março de 2006; TRIBUNAL PENAL INTERNACIONAL PARA A ANTIGA IUGOSLAVIA. Judgement in the Case the Prosecutor v. Miodrag Jokić, Câmara de Julgamento I, Processo No. IT-01-42/1, 18 de março de 2004; TRIBUNAL PENAL INTERNACIONAL PARA A ANTIGA IUGOSLAVIA. Judgement in the Case the Prosecutor v. Pavle Strugar, Câmara de Julgamento II, Processo No. IT-01-42, 31 de janeiro de 2005; TRIBUNAL PENAL INTERNACIONAL PARA A ANTIGA IUGOSLAVIA. Judgement in the Case the Prosecutor v. Radoslav Brđanin, Câmara de Julgamento II, Processo No.IT-99-36, 1° de setembro de 2004; TRIBUNAL PENAL INTERNACIONAL PARA A ANTIGA IUGOSLAVIA. Judgement in the Case the Prosecutor v. Zoran Kupreškić, Câmara de Julgamento I, Processo No. ICTY-95-16, 14 de janeiro de 2000.

13 BRASIL. Decreto nº 44.851 de 11 de novembro de 1958. Promulga a Convenção e Protocolo para a Proteção de Bens Culturais em caso de conflito armado, Haia, 1954, Protocolo Adicional, artigo 1°.

venção devem devolver o artefato.[14]

A Convenção de Haia de 1954 ainda foi atualizada, em 1999, pelo seu segundo protocolo. Tal protocolo adequou as regras de proteção do patrimônio cultural em caso de conflito armado às evoluções do direito internacional humanitário trazidas pelos Protocolos Adicionais de 1977 às Convenções de Genebra de 1949 e à jurisprudência do Tribunal Penal Internacional para a Ex-Iugoslávia.[15]

O Brasil ratificou essa convenção e seu protocolo em 1958. No entanto, de acordo com o artigo 28 da Convenção de Viena sobre o Direito dos Tratados, um tratado (ou, no caso, a Convenção) em regra não retroage, salvo se ele dispuser de forma diversa.[16] A Convenção de Haia de 1954 é silente quanto à retroatividade, portanto sua aplicação somente se daria em casos que ocorreram após a sua entrada em vigor. Contudo, a maioria dos bens que são objetos de pedidos de retorno foi retirada do território do país anteriormente à elaboração da Convenção e, sendo assim, ela não pode ser aplicada enquanto fonte convencional.

3. Convenção da UNESCO relativa às medidas a adotar para proibir e impedir a importação, a exportação e a transferência ilícitas da propriedade de bens culturais de 1970 e seu Comitê

A Convenção da UNESCO relativa às medidas a adotar para proibir e impedir a importação, a exportação e a transferência ilícitas da propriedade de bens culturais, de 1970, foi concebida dezesseis anos após a adoção da Convenção de Haia sobre a Proteção de Bens Culturais em Evento de Conflito Armado de 1954, para enfrentar o crescente tráfico ilícito de bens culturais. A ideia de uma convenção para impedir o tráfico ilícito de bens culturais foi cogitada, inicialmente, no âmbito da Liga das Nações,[17] a partir do texto elaborado pelo Gabinete Internacional de Museus. Anteriormente, a proteção de bens culturais era somente mencionada em manuais e declarações, como o Lieber Code[18] e a Declaração de Bruxelas,[19] e tratados bastante amplos como as Convenções de Haia de 1899 e 1907.[20] Contudo, alguns Estados estavam relutantes em adotar um tratado sobre tráfico ilícito de bens culturais que não fazia distinção entre os bens culturais públicos e privados.[21] Durante as modificações pedidas pela organização e pelos Estados, a Segunda Guerra Mundial teve início e o projeto foi interrompido.[22] Somente em 1964 UNESCO recomeçou os esforços para adoção de um tratado sobre a matéria e estabeleceu uma comissão de peritos para esse fim.[23] Foram necessários mais 6 anos para que a convenção fosse adotada.

Sua definição de patrimônio cultural difere daquela apresentada na convenção anterior na medida em que o aspecto mais evidente da Convenção da UNESCO seria o patrimônio de um povo, trazendo um caráter nacionalista para a proteção dos bens.[24]

Essa convenção dispõe que os Estados-Partes de-

14 BRASIL. Decreto nº 44.851 de 11 de novembro de 1958. Promulga a Convenção e Protocolo para a Proteção de Bens Culturais em caso de conflito armado, Haia, 1954, Protocolo Adicional, artigo 3.

15 HENCKAERTS, Jean-Marie. New rules for the protection of cultural property in armed conflict. **International Review of the Red Cross**, No. 835, 1999.

16 BRASIL. Decreto Nº 7.030, de 14 de dezembro de 2009. Promulga a Convenção de Viena sobre o Direito dos Tratados, concluída em 23 de maio de 1969, com reserva aos Artigos 25 e 66, Artigo 28.

17 O'KEEFE, P.J., PROTT, L.V. **Cultural heritage conventions and other instruments: A compendium**. Builth Wells, United Kingdom: Institute Of Art And Law, 2011, p. 64.

18 Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863. In: SCHINDLER, D; TOMAN, J. **The Laws of Armed Conflicts**, Martinus Nihjoff Publisher, 1988, pp.3-23

19 Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874 in SCHINDLER, D; TOMAN, J. **The Laws of Armed Conflicts**, Martinus Nihjoff Publisher, 1988, pp.22-34

20 ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS. Convention (II) with Respect to the Laws and Customs of War on Land (Hague, II) (29 Jul 1899) Disponível em:https://www.opcw.org/chemical-weapons-convention/related-international-agreements/chemical-warfare-and-chemical-weapons/hague-convention-of-1899/ Acessado em: 05 jul. 2017; ICRC. Regulations concerning the Laws and Customs of War on Land. The Hague, 18 Oct 1907. Disponível em: http://www.icrc.org/ihl.nsf/full/195 Acesso em: 12 jan. 2013.

21 O'KEEFE, P.J., PROTT, L.V. **Cultural heritage conventions and other instruments: A compendium**. Builth Wells, United Kingdom: Institute Of Art And Law, 2011, p. 64.

22 O'KEEFE, P.J., PROTT, L.V. **Cultural heritage conventions and other instruments: A compendium**. Builth Wells, United Kingdom: Institute Of Art And Law, 2011, p. 64.

23 O'KEEFE, P.J., PROTT, L.V. **Cultural heritage conventions and other instruments: A compendium**. Builth Wells, United Kingdom: Institute Of Art And Law, 2011, p. 64.

24 MERRYMAN, John Henry. 1986. Two ways of thinking cultural property. **The American Journal of International Law**, vol. 80, n. 4, oct., 1986, pp. 831-853, p. 832-3.

vem combater a exportação e importação ilícita.[25] e considerar ilícitas a exportação e a transferência forçadas da propriedade de bens culturais resultantes direta ou indiretamente da ocupação de um país por uma potência estrangeira.[26] Temos ainda a obrigação dos Estados de "tomarem as medidas apropriadas, mediante solicitação do Estado de origem Parte da Convenção, para recuperar e restituir quaisquer bens culturais roubados e importados após a entrada em vigor da presente Convenção",[27] que deve ser acompanhada de compensação aos compradores de boa-fé. No entanto, tal disposição não é vista como uma obrigação de restituir os bens retirados ilicitamente, mas tão somente de realizar negociações bilaterais.[28]

Ademais, a Convenção estipulou a criação do Comitê Intergovernamental para promover o retorno de bens culturais para o país de origem ou sua restituição em caso de apropriação ilegal. O Comitê foi criado em 1978 e é composto por 22 representantes eleitos pela Conferência Geral da UNESCO, possuindo como objetivo a luta contra a pilhagem e o tráfico de bens culturais.[29] Funciona como um órgão consultivo, fornecendo um quadro de discussões, a fim de facilitar as negociações bilaterais para promover a devolução de bens culturais. O Comitê, no entanto, não emite resoluções vinculativas, dependendo, inteiramente, da boa vontade dos Estados.[30] Ainda assim, já ajudou diversos países a reaverem bens culturais ilegalmente apropriados.

O primeiro caso bem-sucedido levado ao Comitê foi em 1983 entre a Itália e o Equador, no qual a primeira devolveu 12.000 artefatos Pré-colombianos depois de sete anos de negociações.[31] Em 1988, os Estados Unidos da América devolveram à Tailândia um lintel Phra Nara[32] Esse caso foi resolvido por meio de mediação e a atuação do Comitê foi essencial.[33] Um ano depois, a Alemanha devolveu à Turquia 7.000 artefatos cuneiformes de Bogazköy.[34] Em maio de 2010, o museu Barbier--Mueller, localizado em Genebra, devolveu a máscara Makondé à República Unida da Tanzânia, que reclamava o artefato desde 2006.[35] Em 2011, na 16ª sessão do Comitê, redigiu-se uma recomendação sobre o caso da Sphinx de Boğazköy, escavada no sitio de Boğazköy, na Turquia, desaparecida durante a Segunda Guerra Mundial e que se encontrava no museu de Pergame em Berlim. Desde 1987, o Comitê Intergovernamental tentava mediar um acordo entre os dois países e, em maio de 2011, anunciou-se um acordo no qual a Alemanha devolveria a Sphinx à Turquia.[36]

25 BRASIL. Decreto nº 72.312, de 13 de maio de 1973. Promulga a Convenção sobre as Medidas a serem Adotadas para Proibir e impedir a Importação, Exportação e Transportação e Transferência de Propriedade Ilícitas dos Bens Culturais, artigo 12.

26 BRASIL. Decreto nº 72.312, de 13 de maio de 1973. Promulga a Convenção sobre as Medidas a serem Adotadas para Proibir e impedir a Importação, Exportação e Transportação e Transferência de Propriedade Ilícitas dos Bens Culturais, artigo 11.

27 BRASIL. Decreto nº 72.312, de 13 de maio de 1973. Promulga a Convenção sobre as Medidas a serem Adotadas para Proibir e impedir a Importação, Exportação e Transportação e Transferência de Propriedade Ilícitas dos Bens Culturais, artigo 7(b)(ii).

28 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p.1882; REPPAS II, Michael J. The Deflowering of the Parthenon: A Legal and Moral Analysis on the "Elgin Marbles" must be Returned to Greece. **Fordham Intell. Prop. Media & Ent. Law Journal**, v. 9, 1999, pp. 911-980, p. 960; McINTOSH, Molly L. Exploring Machu Picchu: an Analysis of the legal and ethical issues surrounding the repatriation of cultural property. **Duke Journal Comparative and International Law**. v. 19, 2006, pp.199-221, p. 215; SHENG, Gao. International Protection of Cultural Property: some preliminary issues and the role of international conventions. **Singapore Year Book of International Law and Contributors**, v. 12, 2008, pp. 57-79, p. 63-67; GOY, Raymond. Le régime international de l'importation, de l'exportation et du transfert de propriété des biens culturels. **Annuaire français de droit international**, v. 16, 1970, pp. 605-624, p. 610.

29 UNESCO. Comité Intergovernamental para a Promoção do retorno dos Bens Culturais ao seu país de origem ou a sua restituição em caso de apropriação ilegal. Disponível em: http://www.unesco.pt/antigo/Comitesprogramas.htm#retbensc Acesso em: 22 out. 2013.

30 UNESCO. Estatuto do Comité Intergovernamental para a Promoção do retorno dos Bens Culturais ao seu país de origem ou a sua restituição em caso de apropriação ilegal. Disponível em: unesdoc.unesco.org/images/0014/001459/145960e.pdf Acesso: 21 dez. 2012.

31 UNESCO. Cas de retour et de restitution sous les auspices du Comité intergouvernemental. Disponível em: http://www.unesco.org/new/fr/culture/themes/restitution-of-cultural-property/committes-successful-restitutions/ Acesso em: 29 jun. 2013.

32 Ordenamento do Phanom Rung, construção em um cone de um vulcão extinto entre os séculos XI e XII, durante o império Khmer. Disponivel em: http://www.visite-mekong.com/thailand/jewels/phanom_rung.htm Acesso em: 29 jun. 2013.

33 UNESCO. Cas de retour et de restitution sous les auspices du Comité intergouvernemental. Disponível em: http://www.unesco.org/new/fr/culture/themes/restitution-of-cultural-property/committes-successful-restitutions/ Acesso em: 29 jun. 2013.

34 Sitio de escavação da capital do antigo Império dos Hittite, que compreendia a Turquia, Síria e Líbano, no II milênio a.C. Ver CHECHI, Alessandro; BANDLER, Anne Laure; RENOLD, Marc-André. Case Boğazköy Sphinx – Turkey and Germany. **Platform ArThemis**. Disponível em: http://unige.ch/art-adr Acesso em: 21 out. 2012.

35 UNESCO. Restitution du Masque Makondé. Mai. 2010. Disponível em: http://www.unesco.org/new/fr/culture/themes/restitution-of-cultural-property/committes-successful-restitutions/restitution-of-the-makonde-mask/#c219612 Acesso em: 29 jun. 2013.

36 UNESCO. Accord bilatéral obtenu sur le Sphinx de Bogazkoy.

4. Os Mármores do Partenon

A mais notória demanda de retorno de bens culturais da atualidade é o dos Mármores do Partenon. Em 1983, a Grécia pediu o retorno de um conjunto de obras de mármores, que ornamentavam o Parthenon. Elas foram levadas em 1801 para o Reino Unido por Lorde Elgin[37] e se encontram, hoje, no acervo do *British Museum*.

Um primeiro aspecto a ser analisado é a legalidade da retirada dos bens. Tomas Bruce, Sétimo *Earl of Elgin*, foi nomeado embaixador do Reino Unido em Constantinopla, num momento em que a ajuda britânica era essencial para o Império Otomano devido à ameaça de invasão do exército francês pelo rio Nilo.[38] Tendo em vista essas circunstâncias especiais, o embaixador recebeu inúmeros privilégios.[39] Nesse contexto, o Lorde pediu ao governo otomano autorização para:

> (i) entrar livremente na *Citadel* e desenhar e modelar com gesso os Templos Antigos que ali se encontravam; (ii) construir andaimes e escavar livremente para descobrir como eram as antigas fundações; e (iii) liberdade para pegar qualquer escultura que não interferisse no trabalho ou nas paredes da *Citadel*.[40] (Tradução nossa.)

Com base num documento denominado *firman*, Lorde Elgin retirou inúmeras esculturas em mármore que decoravam Partenon.[41] No entanto, surgem, a partir da interpretação desse documento, dois problemas: 1) a legitimidade do *firman* e 2) as diversas traduções feitas que levam as diferentes percepções do texto. Devemos ressaltar que o *firman* é uma ordem, um decreto, uma licença ou uma carta do governo otomano a um de seus oficiais, que possuía o intuito de ordenar, sugerir ou pedir que um favor fosse concedido a uma pessoa.[42]

No que tange ao primeiro problema, há dúvidas se o Império Otomano teria legitimidade para dispor da propriedade grega. A ocupação otomana, em território grego, teve início em 1204.[43] Para Oppenheim, até o século XIX, vigorava, no direito internacional, a regra de que a potência ocupadora poderia se apropriar de todos os bens do país ocupado, independentemente de sua natureza.[44] Portanto, o documento seria legítimo.[45] No entanto, Reppas II argumenta que, como o Partenon é um templo religioso, a jurisdição não seria dos otomanos, mas sim das autoridades religiosas da Igreja Ortodoxa, que se encarregavam de sua manutenção.[46]

Em relação à jurisdição das autoridades religiosas, o argumento é suscitado no caso da *Igreja Grega Ortodoxa Autocephalous v. Goldberg & Feldman Fine Arts, Inc*. A Igreja, localizada no Chipre, processou a empresa Goldberg & Feldman Fine Arts, Inc, em 1988, nos Estados Unidos, pela volta dos mosaicos da Igreja Panagia Kanakaria que foram retirados do Chipre sob a autorização do exército turco em 1970 e que se encontrava no poder da empresa.[47] Não obstante a alegação da ré de que a compra dos mármores foi realizada de boa-fé, a Corte de Apelações do 7º Circuito dos Estados Unidos determinou a devolução dos artefatos, entendendo que foram retirados ilegalmente do Chipre, visto que a autorização

Disponível em: http://www.unesco.org/new/fr/culture/themes/restitution-of-cultural-property/committes-successful-restitutions/bilateral-agreement-on-the-bogazkoy-sphinx/#c219670 Acesso em: 29 jun. 2013.

37 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1882.

38 REPPAS II, Michael J. The Deflowering of the Parthenon: A Legal and Moral Analysis on the "Elgin Marbles" must be Returned to Greece. **Fordham Intell. Prop. Media & Ent. Law Journal**, v. 9, 1999, pp. 911-980, p. 920.

39 REPPAS II, Michael J. The Deflowering of the Parthenon: A Legal and Moral Analysis on the "Elgin Marbles" must be Returned to Greece. **Fordham Intell. Prop. Media & Ent. Law Journal**, v. 9, 1999, pp. 911-980, p. 920.

40 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1898. A versão italiana da carta encontra-se disponível em: http://www.britishmuseum.org/explore/highlights/highlight_image.aspx?image=firman_2.jpg&retpage=25929 Acesso em: 29 jun. 2013.

41 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1898.

42 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1898.

43 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1897.

44 OPPENHIEM, Lassa Francis Lawrence, LLD. **International Law: a treatise**, v. 2, 7 ed. Londres: Logmans, Green and Co LTDS, 1952, p. 397.

45 OPPENHIEM, Lassa Francis Lawrence, LLD. **International Law: a treatise**, v. 2, 7 ed. Londres: Logmans, Green and Co LTDS, 1952, p. 397; O'CONNELL, Daniel. **The Law of State Succession**. Londres: Cambridge, 1956, p. 226-7.

46 REPPAS II, Michael J. The Deflowering of the Parthenon: A Legal and Moral Analysis on the "Elgin Marbles" must be Returned to Greece. **Fordham Intell. Prop. Media & Ent. Law Journal**, v. 9, 1999, pp. 911-980, p. 948.

47 ESTADOS UNIDOS DA AMERICA. AUTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS and The Republic of Cyprus, Plaintiffs-Appellees, v. GOLDBERG AND FELDMAN FINE ARTS, INC., and Peg Goldberg, Defendants-Appellants. 17 F.2d 278 (1990). No. 89-2809. **United States Court of Appeals, Seventh Circuit**. Disponível em: http://scholar.google.com/scholar_case?case=16390919692097194145&q=1954+hague+convention+cultural+property&hl=en&as_sdt=2006#[19] Acesso em: 20 dez. 2013.

do exército turco não possuía legitimidade.[48] Como no caso em tela, as autoridades turcas ocupavam o local no qual os artefatos se encontravam. No entanto, a Corte decidiu que as autoridades turcas não possuíam prerrogativa para dispor dos artefatos religiosos.

Daniel O'Connell ressalta que a legislação do Estado deve ser tomada como base para definir a transferência da propriedade no caso de absorção ou ocupação por outro Estado. Assim, as propriedades religiosas ou as instituições de caridade de propriedade de entes privados não podem ser modificadas pelo país ocupante. Contudo, isto não impede que elas possam ser expropriadas por ato subsequente, respeitando os direitos adquiridos.[49]

A segunda dificuldade que pode ser observada se relaciona com a tradução do documento de autorização *firman*. Lorde Elgin, no momento da venda dos Mármores ao *British Museum*, apresentou a tradução italiana ao Parlamento Inglês.[50] Essa tradução foi feita por Antonio Dane, tradutor e diplomata, com a finalidade de esclarecer quais eram os limites a serem respeitados pela expedição.[51] O original encontrava-se em Constantinopla e perdeu-se ao longo dos anos.[52] Alguns autores argumentam que a versão italiana induz ao erro.[53] Isso porque, ao tratar da autorização para retirar peças do Partenon, dispunha que o Lorde Elgin poderia pegar *qualche pezzi di pietra con iscrizione e figure*.[54] O problema reside no *qualche*, que pode ser traduzido para o inglês tanto como *any* (qualquer), quanto por *some* (alguns).[55] No Relatório do Comitê Especial da Câmara dos Comuns sobre a Coleção do *Earl Elgin* dos Mármores Esculpidos, que autorizou a compra da coleção pelo governo britânico, o documento *firman* foi traduzido de tal maneira que proibiu que as autoridades locais impedissem o Lorde de retirar as peças.[56]

No entanto, o pedido grego de retorno de bens culturais não abordou a possível ilegalidade do documento, mas teve como base os quatro argumentos seguintes: (1) os Mármores pertencem ao conjunto arquitetônico do Partenon, que se encontra na Grécia; (2) os Mármores serão expostos de modo que o conjunto arquitetônico se situe no campo de visão do visitante; (3) são uma parte integrante e inseparável do conjunto e um símbolo da civilização grega em seu apogeu e seu retorno restauraria sua integralidade e a coesão do conjunto e; (4) o *British Museum* tem uma obrigação para com o patrimônio cultural mundial de restaurar seu símbolo.; e;[57]

Percebemos que toda a argumentação, seja pela volta ou manutenção das peças, tem como base a concepção nacionalista ou internacionalista da proteção de bens culturais.

Os gregos argumentam que os Mármores devem voltar para a Grécia, pois eles são gregos.[58] Essa é a base da concepção nacionalista: o patrimônio cultural possui tal título, pois faz parte da identidade cultural de um povo, sendo um conceito estreitamente ligado à ideia de

48 ESTADOS UNIDOS DA AMERICA. AUTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS and The Republic of Cyprus, Plaintiffs-Appellees, v. GOLDBERG AND FELDMAN FINE ARTS, INC., and Peg Goldberg, Defendants-Appellants. 17 F.2d 278 (1990). No. 89-2809. **United States Court of Appeals, Seventh Circuit**. Disponível em: http://scholar.google.com/scholar_case?case=16390919692097194145&q=1954+hague+convention+cultural+property&hl=en&as_sdt=2006#[19] Acesso em: 20 dez. 2013.

49 O'CONNELL, Daniel. **The Law of State Succession**. Londres: Cambridge, 1956, p. 227.

50 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1895-1902.

51 WILLIAMS, Dyfri. 2009. Lord Elgin's Firman. **Journal of the History of Collection**. Oxford: Oxford University Press, 2009.

52 MERRYMAN, John Henry. Thinking about the Elgin O governo britânico contra-argumentou que a retirada dos Mármores estava de acordo com o direito internacional vigente à época; a retirada dos Mármores constituiria em um precedente para a retirada de grandes aquisições dos museus, impedindo que eles cumprissem sua função de disponibilizar uma educação em arte e cultura; a manutenção dos Mármores no museu durante 150 anos preveniu que fossem danificados pelo alto índice de poluição em Atenas; e;os Mármores tornaram-se parte do patrimônio cultural do *British Museum*, devido a sua presença no Reino Unido por mais de um século.Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1895-1902.

53 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1895-1902; GREENFIELD, J. **The Return of Cultural Treasures**. 3. ed. Nova Iorque: Cambridge University Press, 2007, p. 55.

54 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1895-1902; GREENFIELD, J. **The Return of Cultural Treasures**. 3. ed. Nova Iorque: Cambridge University Press, 2007, p. 55.

55 **WEBSTER'S New Twentieth Century Dictionary**. 2. ed. World Publishing Company, 1977.

56 CÂMARA DOS COMUNS DO REINO UNIDO. **Report from the Select Committee of the House of Commons on the Earl of Elgin's collection of sculptured marbles**. Disponível em: http://books.google.com.br/books/about/Report_from_the_Select_Committee_of_the.html?id=NwUFAAAAYAAJ&redir_esc=y Acesso em: 13 jul. 2013.

57 REPPAS II, Michael J. The Deflowering of the Parthenon: A Legal and Moral Analysis on the "Elgin Marbles" must be Returned to Greece. **Fordham Intell. Prop. Media & Ent. Law Journal**, v. 9, 1999, pp. 911-980, p. 934.

58 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1911-6.

cultura. Muitos Estados, para ressaltar tal aspecto, definem o patrimônio cultural como propriedade estatal.[59] É o que acontece no Brasil. Segundo a Lei de Tombamento, os bens culturais tombados estão sob a tutela do Estado.[60]

A concepção internacionalista, no entanto, tem como base o fato de tais artefatos serem muitas vezes chamados de patrimônio cultural *da humanidade,* pertencendo, assim, à humanidade como um todo e não somente a um país.[61] Logo, o Estado que teria prioridade em hospedar os bens culturais seria aquele que oferecesse uma maior preservação, integridade e distribuição e não necessariamente o país de origem.[62]

Para Merryman, o primeiro critério a ser observado deve ser o da preservação, pois, se os artefatos fossem destruídos, a humanidade seria privada de uma importante parte de seu patrimônio cultural. No caso dos Mármores do Partenon, os ingleses asseveram que, devido à grande poluição do ar na cidade de Atenas, se os Mármores ali ficassem teriam sofrido grandes desgastes como os sofridos pela própria estrutura do Partenon.[63] Os gregos, no entanto, alegaram que não se pode dizer com certeza que os Mármores seriam afetados e ainda que a viagem de navio que proporcionou a levada dos Mármores ao Reino Unido danificou as pedras devido à alta umidade.[64] Além disso, alegou-se que, durante procedimento de preservação dos Mármores no *British Museum*, os Mármores teriam sido lavados com uma substância imprópria que retirou sua cor original.[65]

O segundo aspecto a ser observado seria o da integralidade dos artefatos, isto é, deve-se levar em conta a unidade da obra. Os Mármores decoravam o Partenon, portanto sua devolução ao local de origem completaria o templo. Porém, os ingleses afirmaram que, mesmo se os Mármores voltassem para a Grécia eles não seriam recolocados no Partenon, mas sim em um museu na cidade de Atenas.[66] Os gregos, por outro lado, alegaram que os Mármores seriam expostos de modo que o visitante pudesse observar, também, a estrutura do Partenon, dando uma visão completa do conjunto.[67]

O último aspecto a ser analisado seria o da distribuição, isto é, onde os Mármores ficariam à disposição de mais pessoas. O *British Museum* recebe milhares de visitantes por ano, e o turismo no Reino Unido é maior do que na Grécia (o Reino Unido recebe cerca de 25 milhões[68] de turistas por ano enquanto a Grécia recebe somente 17 milhões).[69] Assim, a possibilidade de ser visto por mais pessoas em Londres foi um argumento que favoreceu a permanência dos Mármores no Reino Unido.[70] Contudo, poder-se-ia argumentar que, em razão de estar de posse de obras de diversas épocas e diferentes culturas, é que o museu é mais visitado. Caso tais obras fossem alocadas alhures, possivelmente, haveria um incremento na visitação turística no local onde se situassem as obras.

Além disso, a Assembleia Parlamentar do Conselho da Europa aprovou uma resolução que distingue o retorno de bens culturais dentro e fora da Europa,[71] na medida em que "o patrimônio histórico europeu pertence a todos os europeus e [pediu aos governos] que assegurem que a diversidade desse patrimônio continue de fácil acesso em cada país." (Tradução nossa).[72] No entanto, a Assembleia não produz resoluções cogentes, sendo estas, somente, de caráter recomendatório. Além

59 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1911-6.

60 BRASIL. Decreto-Lei n° 25, de 30 nov. 1937. Organiza a proteção do patrimônio histórico e artístico nacional.

61 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1916-21.

62 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1916-21.

63 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1916-21.

64 REPPAS II, Michael J. The Deflowering of the Parthenon: A Legal and Moral Analysis on the "Elgin Marbles" must be Returned to Greece. **Fordham Intell. Prop. Media & Ent. Law Journal**, v. 9, 1999, pp. 911-980, p. 935-41.

65 REPPAS II, Michael J. The Deflowering of the Parthenon: A Legal and Moral Analysis on the "Elgin Marbles" must be Returned to Greece. **Fordham Intell. Prop. Media & Ent. Law Journal**, v. 9, 1999, pp. 911-980, p. 935-41.

66 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1907.

67 REPPAS II, Michael J. The Deflowering of the Parthenon: A Legal and Moral Analysis on the "Elgin Marbles" must be Returned to Greece. **Fordham Intell. Prop. Media & Ent. Law Journal**, v. 9, 1999, pp. 911-980, p. 942.

68 Inbound Turism Facts. Disponível em:www.visitbritain.org Acessado em 08 jan. 2013.

69 Visit Greece. Disponível em:www.visitgreece.gr Acessado em 08 jan. 2013.

70 MERRYMAN, John Henry. Thinking about the Elgin Marbles. **Michigan Law Review**, v. 83, 1985, pp. 1880-1923, p. 1922.

71 HUMBERT-DROZ-SWEZEY. L'Europe de la culture ou des cultures? **Communication et langages**, v.119, 1999 pp.76-90, p. 76.

72 CHASLE, Raymon. Report and resolutions on the cultural cooperation between ACP States and the European Economic Community. Disponível em:http://aei.pitt.edu/33260/1/A81.pdf Acessado em: 24 mai. 2015.

disso, a diferença entre retorno e devolução de bens culturais é discutida, também, pela Assembleia Parlamentar, na qual afirma que somente a devolução, que se concretiza quando a retirada do bem é ilegal, seria obrigatória, sendo o retorno facultativo ao Estado.[73] Deve-se ressaltar que o Parlamento Europeu aprovou a Diretiva 2014/60 que estabelece "os bens culturais que tenham saído ilicitamente do território de um Estado-Membro devem ser restituídos segundo os trâmites e nas condições previstas na presente diretiva",[74] mas restringe a obrigação em seu artigo 14 "para apenas a bens culturais que tenham saído ilicitamente do território de um Estado-Membro a partir de 1 de janeiro de 1993, inclusive",[75] não sendo, assim aplicável ao caso. Nota-se que essa Diretiva foi incorporada por diversos países europeus,[76] contudo, seu limite temporal impede uma ampla aplicação.

Não obstante os esforços da Grécia em repatriar os Mármores do Partenon, eles permanecem expostos no museu britânico.

5. República do Peru v. Universidade de Yale

Outro caso emblemático é o pedido do Peru de retorno dos artefatos do Machu Pichu que se encontravam na Universidade de Yale. Em 1911, Hiram Bingham, professor de Yale, redescobriu a cidade de Machu Picchu.[77] Em 1912 e 1915, o professor, em uma expedição financiada pela Universidade de Yale e a Sociedade *National Geographic*, levou aos Estados Unidos diversos artefatos incas que hoje fazem parte da exposição do *Yale's Peabody Museum*.[78]

O governo peruano fez dois pedidos formais para o retorno das obras nos dias 22 de novembro de 1918 e 26 de outubro de 1920. Tais pedidos foram direcionados a Sociedade *National Geographic*.[79] Após uma carta de Hiram Bingham, na qual o pesquisador enfatizava que os artefatos não pertenciam à Universidade de Yale, tampouco à Sociedade *National Geographic*, mas ao governo do Peru,[80] foram devolvidos, em 1921, alguns dos artefatos retirados.[81]

Em 2001, o governo peruano fez um novo pedido para a Sociedade e para a Universidade de Yale.[82] Enquanto a primeira foi favorável ao retorno, a segunda negou o retorno. Em 2010, o diálogo entre a Universidade e o governo peruano se intensificou, mas nenhum acordo foi realizado.[83]

Em dezembro de 2008, o governo peruano processou a Universidade de Yale no Distrito de Columbia, Estados Unidos da América. Tendo em vista a decisão do tribunal de Columbia de que não era competente para apreciar a lide, o caso foi enviado, em julho de 2009, para o estado de Connecticut, onde se encontra a Universidade de Yale.[84] A República do Peru acusou a universidade de: fraude; conspiração em conjunto com o arqueólogo Hiram Bingham com o intuito de iludir o governo do Peru sobre a volta

73 GREENFIELD, J. **The Return of Cultural Treasures**. 3. ed. Nova Iorque: Cambridge University Press, 2007, p. 67.

74 PARLAMENTO EUROPEU. **Diretiva 2014/60/UE** do Parlamento Europeu e do Conselho, de 15 de maio de 2014, relativa à restituição de bens culturais que tenham saído ilicitamente do território de um Estado-Membro e que altera o Regulamento (UE) n. ° 1024/2012, artigo 3.

75 PARLAMENTO EUROPEU. **Diretiva 2014/60/UE** do Parlamento Europeu e do Conselho, de 15 de maio de 2014, relativa à restituição de bens culturais que tenham saído ilicitamente do território de um Estado-Membro e que altera o Regulamento (UE) n. ° 1024/2012, artigo 14.

76 Em dois anos a diretiva foi transposta em 19 países. Ver GORKA, Marciej. Directive 2014/60/EU: A New Legal Framework for Ensuring the Return of Cultural Objects within the European Union. Santander Art & Culture Law Review, v. 2, 2016, pp. 27-34, p. 32.

77 KLARÉN, P. **Nación y sociedad en la historia del Peru**. Lima: Instituto de Estudios Peruanos, 2008, p. 305.

78 McINTOSH, Molly L. Exploring Machu Picchu: an Analysis of the legal and ethical issues surrounding the repatriation of cultural property. **Duke Journal Comparative and International Law**. v. 19, 2006, pp.199-221, p. 201.

79 McINTOSH, Molly L. Exploring Machu Picchu: an Analysis of the legal and ethical issues surrounding the repatriation of cultural property. **Duke Journal Comparative and International Law**. v. 19, 2006, pp.199-221, p. 201.

80 BINGHAM Urged Yale to Return Machu Picchu Relics to Peru. **Latin American Herald Tribune**. Disponível em http://www.laht.com/article.asp?CategoryId=14095&ArticleId=331337 Acesso em 04 jun. 2013.

81 McINTOSH, Molly L. Exploring Machu Picchu: an Analysis of the legal and ethical issues surrounding the repatriation of cultural property. **Duke Journal Comparative and International Law**. v. 19, 2006, pp.199-221, p. 202.

82 McINTOSH, Molly L. Exploring Machu Picchu: an Analysis of the legal and ethical issues surrounding the repatriation of cultural property. **Duke Journal Comparative and International Law**. v. 19, 2006, pp.199-221, p. 203.

83 YALE. Statement from Yale University Regarding Machu Picchu Archaeological Materials. **Yale News.** 21 nov. 2010. Disponível em: http://news.yale.edu/2010/11/21/statement-yale-university-regarding-machu-picchu-archaeological-materials Acesso em: 04 jun. 2013.

84 ESTADOS UNIDOS DA AMÉRICA. Republic of Peru v. Yale University, No. 1:08-CV-02109, Original Complaint, 5 dez. 2008. Disponível em: http://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2008cv02109/134251/21/ Acesso em: 17 jan. 2013.

dos bens acusação que foi retirada em fevereiro de 2010[85] — exportação ilegal de bens culturais; retenção ilegal desses artefatos e enriquecimento ilícito.[86] O governo pretendia receber os artefatos e os lucros oriundos da exposição ocorrida no museu da universidade.[87]

O primeiro problema que deve ser analisado é o de propriedade. O Estado alegou, com base nos decretos peruanos de 1911, 1912 e 1916, promulgados para regulamentar a expedição de Bingham, que os artefatos são peruanos. O primeiro decreto dispõe que todos os monumentos incas são propriedade peruana e que somente réplicas eram autorizadas a sair do país.[88] O segundo versa sobre as escavações realizadas pela expedição, que reservava ao governo peruano o direito de pedir o retorno de artefatos e réplicas.[89] E o terceiro, também tendo como objeto a expedição, previa que os artefatos considerados propriedade nacional deveriam ser objeto de retorno em um prazo de 18 meses.[90] Contudo, como a legislação de Connecticut possuía prazo de prescrição de 15 anos, foi arquivada a demanda.[91]

Em fevereiro de 2011, com a intervenção do Senador Cristopher Dodd, Yale e o Estado do Peru assinaram um *Memorandum of Understanding*. Nesse acordo, o Estado peruano e a Universidade de Yale se comprometeram a criar um centro na Universidade Peruana *Universidad Nacional de San Antonio Abad del Cusco*, situada em Cusco, cidade mais próxima de Macchu Picchu, que iria expor os artefatos em questão.[92] Em troca dos artefatos, outros seriam emprestados para uma exposição no *Yale Peabody Museum of Natural History*.[93] Além disso, tanto o governo peruano quanto a Universidade de Yale se comprometeram a conjuntamente: realizar conferências sobre a cultura inca; criar um *website* para o novo Museu e proporcionar intercâmbio entre os estudantes das duas entidades. Além de tudo, a Universidade de Yale se comprometeu também a auxiliar na arrecadação de fundos para o Museu peruano.[94]

6. Convenção do UNIDROIT sobre bens culturais roubados ou ilicitamente exportados de 1995

Em 1995, grandes inovações foram trazidas pela Convenção do UNIDROIT sobre Bens Culturais Roubados ou Ilicitamente Exportados. Em 1983, a UNESCO destacou a necessidade de realizar uma revisão da Convenção de 1970 para sanar lacunas identificadas em várias leis nacionais. A necessidade de harmonização das legislações nacionais relativas à prevenção do tráfico ilícito era evidente, tendo em vista que a Convenção de 1970 necessitava de incorporação em ordenamentos internos ou adoção de acordos bilaterais para ter efetividade.[95] Assim, a pluralidade de leis e acordos dificultava o acompanhamento da *compliance* da Convenção. Contudo, entendeu-se que, devido ao grande número de Estados Partes à Convenção de 1970, seria mais efetiva a adoção de uma nova convenção. Nesse sentido, UNIDROIT, o Instituto Internacional para a Unificação do Direito Privado, seguindo um pedido da UNESCO, elaborou e aprovou um novo tratado para complementar a Convenção de 1970, que estabeleceu um corpo mínimo de normas de direito privado. [96]

85 ESTADOS UNIDOS DA AMÉRICA. Republic of Peru v. Yale University, No. 1:08-CV-02109, Original Complaint, 5 dez. 2008. Disponível em: http://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2008cv02109/134251/21/ Acesso em: 17 jan. 2013.

86 ESTADOS UNIDOS DA AMÉRICA. Republic of Peru v. Yale University, No. 1:08-CV-02109, Original Complaint, 5 dez. 2008. Disponível em: http://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2008cv02109/134251/21/ Acesso em: 17 jan. 2013.

87 ESTADOS UNIDOS DA AMÉRICA. Republic of Peru v. Yale University, No. 1:08-CV-02109, Original Complaint, 5 dez. 2008. Disponível em: http://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2008cv02109/134251/21/ Acesso em: 17 jan. 2013.

88 PERU. Decreto de 2 Set. 1911.

89 PERU. Decreto de 31 Out. 1912.

90 PERU. Decreto de 14 jan. 1916.

91 CHECHI, Alessandro; AUFSEESER, Liora; RENOLD, Marc-André. Case Machu Picchu Collection – Peru and Yale University. **Platform ArThemis**. Disponível em: http://unige.ch/art-adr Acesso em: 21 out. 2012.

92 McINTOSH, Molly L. Exploring Machu Picchu: an Analysis of the legal and ethical issues surrounding the repatriation of cultural property. **Duke Journal Comparative and International Law**. v. 19, 2006, pp. 199-221, p. 215; YALE. Memorandum of Understanding Regarding the UNSAAC-Yale University International Center for the Study of Machu Picchu and Inca Culture Online: Disponível em:

93 TAYLOR, K. Yale and Peru Sign Accord on Machu Picchu Artifacts. **New York Times**. 11 fev. 2011. Disponível em: http://artsbeat.blogs.nytimes.com/2011/02/11/yale-and-peru-sign-accord-on-machu-picchu-artifacts/ Acesso em: 10 jan. 2013.

94 YALE. Memorandum of Understanding Regarding the UNSAAC-Yale University International Center for the Study of Machu Picchu and Inca Culture Online: Disponível em:

95 PROTT, L.V. **Commentary on the Unidroit convention on stolen and illegally exported cultural objects 1995**. United Kingdom: Institute of Art & Law, 1997.

96 PROTT, L.V. **Commentary on the Unidroit convention on**

Apesar de seus conceitos vagos, essa convenção representa um grande progresso na proteção de bens culturais.[97] Um dos avanços consta em seu artigo 3°, inciso 1, que estabelece "o princípio geral da restituição dos bens culturais roubados".[98]

Outro importante avanço dessa convenção encontra-se no artigo 3°, inciso 3. Um dos grandes problemas do retorno de bens culturais é a ocorrência da prescrição para requerê-la. Em muitos dos casos de demanda de retorno, o artefato reclamado encontra-se em outro Estado há mais de 100 anos. O caso *Certain Phosphate Lands in Nauru (Nauru v. Austrália)* perante a Corte Internacional de Justiça, lida com a questão da reabilitação das terras de fosfato em Nauru depois de sua independência. No caso supracitado, a Austrália alegou que Nauru teria perdido o direito de reclamar perante a Corte o direito sobre a reabilitação de terras minadas pela Austrália em Nauru, pois a vindicação não foi realizada em tempo razoável. A Corte reconheceu que ainda que o tratado que contempla o direito pleiteado não estabeleça um tempo para se reclamá-lo perante uma Corte, a demora na submissão de um pedido para que esse direito seja cumprido pode tornar a demanda inadmissível.[99] Contudo, a Corte entendeu que a prescrição em direito internacional não tem tempo preestabelecido e deve ser analisada casuisticamente.[100] No caso, entendeu-se que não ocorreu a prescrição.[101] Também os comentários ao Projeto da Comissão de Direito Internacional das Nações Unidas sobre Responsabilidade Internacional dos Estados endossam a noção de análise casuística da prescrição, ao afirmar que "uma reclamação não será inadmissível por prescrição, a menos que as circunstâncias sejam tais que o Estado lesado seja considerado como tendo desistido do direito pleiteado ou o Estado demandado esteja seriamente em desvantagem".[102]

Podemos perceber os problemas que o lapso de tempo pode causar ao analisar um dos argumentos que o Reino Unido utiliza para justificar a manutenção dos Mármores do Partenon no *British Museum*.

Para lidar com esse problema, a Convenção propõe "qualquer solicitação de restituição deve ser apresentada dentro de um prazo de três anos a partir do momento em que o solicitante toma conhecimento do lugar onde se encontra o bem cultural e da identidade do possuidor, e, em qualquer caso, dentro de um prazo de cinquenta anos a partir do momento do furto.[103]

> A Convenção, ainda, estipula que, em caso de bens pertencentes a monumentos ou escavações arqueológicas identificadas ou coleções públicas, o prazo de 50 anos não pode ser aplicado. A convenção, no entanto, entrou em vigor em 1998 e não é retroativa, não podendo, assim, ser utilizada nos casos mencionados.

7. As joias da Turquia

O Museu de Arqueologia e Antropologia da Universidade da Pensilvânia *(Penn Museum*), na Filadélfia devolveu à Turquia, no dia 1° de setembro de 2012, vinte e quatro peças de ouro, datadas de 2.500 a.C., retiradas ilegalmente durante os primeiros trabalhos de escavação no sítio arqueológico da antiga Troia.[104] Em 1874, o alemão Heinrich Schliemann foi autorizado a escavar nesse sítio identificado como a Troia de Homero. Após a concessão do *firman* com a autorização da escavação pelo Império Otomano, Schliemann retirou do país tais joias, ato não autorizado pelo documento.[105]

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stolen and illegally exported cultural objects 1995. United Kingdom: Institute of Art & Law, 1997, p. 26-7.

97 SECRETARIADO DA UNIDROIT, Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report. Disponível em: http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-explanatoryreport-e.pdf Acesso em: 18 jan. 2013.

98 BRASIL. Decreto n.º 3.166, de 14 de Setembro de 1999, Promulga a Convenção da UNIDROIT sobre Bens Culturais Furtados ou Ilicitamente Exportados, concluída em Roma, em 24 de junho de 1995.

99 CORTE INTERNACIONAL DE JUSTIÇA. Certain Phosphate Lands in Nauru (Nauru v. Austrália). Julgamento de 1992, para. 31.

100 CORTE INTERNACIONAL DE JUSTIÇA. Certain Phosphate Lands in Nauru (Nauru v. Austrália). Julgamento de 1992, para. 32.

101 CORTE INTERNACIONAL DE JUSTIÇA. Certain Phosphate Lands in Nauru (Nauru v. Austrália). Julgamento de 1992, para. 34.

102 CDI, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries **Yearbook of the International Law Commission**, 2001, vol. II, Part Two, p. 123. Disponível em: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf Acessado em: 05 jul. 2017

103 CORTE INTERNACIONAL DE JUSTIÇA. Caso sobre algumas terras de Fosfato em Nauru (Nauru v. Austrália). Julgamento de 1992, para. 32.

104 VELIOGLU, Ece; BANDLE, Anne Laure; RENOLD, Marc-André. "Case Troy Gold – Turkey and the University of Pennsylvania Museum of Archaeology and Anthropology," **Platform ArThemis** Disponível em:https://plone.unige.ch/art-adr/cases-affaires/troy-gold-2013-turkey-and-the-university-of-pennsylvania-museum-of-archaeology-and-anthropology Acessado em: 07 jul. 2017.

105 UNIVERSITY OF PENNSYLVANIA. Penn Museum Strengthens Partnership with Turkey, Agrees to Indefinite Term Loan of "Troy Gold". Disponível em: http://www.penn.museum/information/press-room/press-releases-research/771-penn-museum-strengthens-partnership-with-turkey,-agrees-to-indefinite-term-loan-of-troy-gold Acesso em: 14 jan. 2013.

O Museu comprou tais peças de um negociante de artes em 1966, não obstante sua origem duvidosa. Durante a avaliação de tais artefatos, o local de origem não foi definido, devido ao seu estilo bastante comum na Ásia e em Aegean de 2500 a.C. No entanto, foram encontradas similaridades às joias escavadas no sítio de Troia (Turquia), *Poliochni on* (Grécia) e *Ur* (Irã).[106] A compra dos artefatos culminou em várias discussões dentro da comunidade do museu dando origem, em 1° de abril de 1970, à Declaração da Pensilvânia, na qual a universidade expôs uma nova política de compra de artefatos. Nesse documento, emitido pela universidade, ela se comprometeu a comprar apenas artefatos que tinham sua origem licitamente comprovada para tentar diminuir as exportações ilícitas de bens culturais, inspirando outras instituições a praticar a mesma política. Foi, ainda, ressaltada a necessidade de uma convenção eficaz que regulasse a exportação de bens culturais para que sítios arqueológicos em todo o mundo fossem preservados. O então diretor do *Penn Museum* declarou que "cada vez mais tesouros desse tipo perderão seu valor histórico, se a escavação e contrabando ilegal de antiguidade não acabarem."[107] A Declaração da Pensilvânia foi seguida pela Convenção da UNESCO.

Em 2009 uma nova avaliação foi realizada e foram encontradas, nas peças, partículas consistentes com o solo do sítio de Troia.[108] No final de 2011, o Ministério da Cultura da Turquia contatou o *Penn Museum* visando ao possível retorno desses bens.[109] Várias discussões entre o Museu e o governo turco seguiram, resultando no empréstimo por tempo indefinido ao Museu da Turquia em Ancara.[110]

Como nos casos apresentados anteriormente, o retorno foi possível por meio de um acordo entre o Museu de Arqueologia e Antropologia da Universidade da Pensilvânia com o Ministério da Cultura e Turismo da Turquia. Foi firmado o empréstimo por tempo indefinido à Turquia das joias; o Ministério da Cultura e do Turismo da Turquia se comprometeu a emprestar uma coleção relacionada aos artefatos escavados da tumba do Rei Midas nos sítios de *Gordion* e *Lydia* na Turquia; o governo turco concedeu um maior suporte às escavações realizadas pela Universidade no sítio de *Gordion* e prometeu o fortalecimento da cooperação entre a Universidade e o governo turco.[111]

8. Canhão El Cristiano

A Guerra do Paraguai foi um dos conflitos mais marcantes da história da América Latina. Iniciou-se em 11 de novembro de 1864 com o confisco, no Paraguai, do navio brasileiro "Marquês de Olinda" que transportava o então presidente da província do Mato Grosso. Rapidamente, o conflito se alastrou com a invasão paraguaia das províncias do Mato Grosso e Rio Grande do Sul. A apreensão do canhão "El Cristiano" foi o resultado da tomada, pelo exército brasileiro, da fortaleza de Humaitá em 1868. Esse canhão foi construído com o metal de sinos de várias igrejas paraguaias, recebendo, assim, por causa de sua origem religiosa, uma placa com os dizeres "La Religión al Estado".[112]

Pode-se argumentar que o canhão era patrimônio histórico na medida em que representava os sinos das igrejas paraguaias. No entanto, o direito humanitário vigente na época autorizava a destruição ou apreensão de objetos militares em contexto de guerra, mesmo se esses constituíssem em bens culturais.[113] A proibição da pilhagem é

106 UNIVERSITY OF PENNSYLVANIA. Penn Museum Strengthens Partnership with Turkey, Agrees to Indefinite Term Loan of "Troy Gold". Disponível em: http://www.penn.museum/information/press-room/press-releases-research/771-penn-museum-strengthens-partnership-with-turkey,-agrees-to-indefinite-term-loan-of-troy-gold Acesso em: 14 jan. 2013.

107 BASS, G. F. "A Hoard of Trojan and Sumerian Jewelry" **American Journal of Archaeology** v.. 74, n. 4, oct., 1970, pp. 335-341, p. 341.

108 UNIVERSITY OF PENNSYLVANIA. Penn Museum Strengthens Partnership with Turkey, Agrees to Indefinite Term Loan of "Troy Gold". Disponível em: http://www.penn.museum/information/press-room/press-releases-research/771-penn-museum-strengthens-partnership-with-turkey,-agrees-to-indefinite-term-loan-of-troy-gold Acesso em: 14 jan. 2013.

109 UNIVERSITY OF PENNSYLVANIA. Penn Museum Strengthens Partnership with Turkey, Agrees to Indefinite Term Loan of "Troy Gold". Disponível em: http://www.penn.museum/information/press-room/press-releases-research/771-penn-museum-strengthens-partnership-with-turkey,-agrees-to-indefinite-term-loan-of-troy-gold Acesso em: 14 jan. 2013.

110 VELIOGLU, Ece; BANDLE, Anne Laure; RENOLD, Marc-André. "Case Troy Gold – Turkey and the University of Pennsylvania Museum of Archaeology and Anthropology," **Platform ArThemis** Disponível em:https://plone.unige.ch/art-adr/cases-affaires/troy-gold-2013-turkey-and-the-university-of-pennsylvania-museum-of-archaeology-and-anthropology Acessado em: 07 jul. 2017.

111 UNIVERSITY OF PENNSYLVANIA. Penn Museum Strengthens Partnership with Turkey, Agrees to Indefinite Term Loan of "Troy Gold". Disponível em: http://www.penn.museum/information/press-room/press-releases-research/771-penn-museum-strengthens-partnership-with-turkey,-agrees-to-indefinite-term-loan-of-troy-gold Acesso em: 14 jan. 2013.

112 DUMANS, A. Museu Histórico Nacional através dos seus 19 anos de existência. **Anais do Museu Histórico Nacional**, v.1. Rio de Janeiro: Imprensa Nacional, 1940, p. 215.

113 **Regra 38.** As partes num conflito devem respeitar os bens culturais:

considerada norma consuetudinária[114] e está contemplada em diversos manuais anteriores ao século XX.[115] O primeiro documento jurídico a proibir, formalmente, a prática de pilhagem foi a Convenção de Haia de 1899 das leis e costumes da guerra terrestre, que estabelece, em seu artigo 28, "a pilhagem de uma cidade ou local, mesmo que tomadas por agressão, é proibida",[116] esse dispositivo foi reafirmado na Convenção de Haia de 1907 das leis e costumes da guerra terrestre.[117] De acordo com L. Oppenheim, "movable pubilc enemy property can certainly be appropriated by a beligerent provided that it may directly or indirectly be useful for militar operations".[118]

Hoje, somente é autorizada tal destruição caso haja uma necessidade militar imperativa.[119] Isto pois, com a adoção da Convenção de Haia de 1954, toda destruição do patrimônio cultural só é autorizada em caso de necessidade militar imperativa.[120] Essa regra foi reafirmada no Segundo Protocolo à Convenção de Haia.[121]

A arte ou bens que possuem grande valor cultural a um povo não devem ser usados em ações militares.[122] A definição dos artefatos que gozariam da proteção costumeira e dos tratados acima citados está explicitada no 1° artigo da Convenção da UNESCO de 1970.[123] Entre o rol apresentado, encontramos "bens relacionados com a história, inclusive a história da ciência e da tecnologia, com a história militar e social, com a vida dos grandes estadistas, pensadores, cientistas e artistas nacionais e com os acontecimentos de importância nacional".[124] Dentre esses, podemos incluir o canhão do Paraguai.

No entanto, Oppenheim argumenta que o metal de uma estátua não pode ser fundido para utilização militar se tal estátua tiver um valor grande para a sociedade, tendo sido essa prática considerada crime de guerra no Tribunal de Nuremberg.[125] Portanto, a violação do princípio citado foi causada pelo próprio Paraguai e após a transformação dos sinos em canhões, esses se tornaram um objetivo militar, definido pelo Comitê Internacional da Cruz Vermelha como:

> **Regra 8**. No que diz respeito aos bens, os objetivos militares limitam-se àqueles bens que pela sua natureza, localização, finalidade ou utilização contribuam eficazmente para a ação militar e cuja destruição total ou parcial, captura ou neutralização ofereça, dependendo das circunstâncias do caso, uma vantagem militar precisa.[126]

Além disso, a restituição é reparação por um ato ilegal.[127] Ora, o próprio Paraguai transformou os sinos em

A. nas operações militares ter-se-á especial cuidado em não danificar os edifícios dedicados a fins religiosos ou de caridade, ao ensino, às artes ou ciências, bem como monumentos históricos, a não ser que se trate de objectivos (*sic*) militares.

B. não serão atacados os bens que tenham grande importância para o patrimônio cultural dos povos, salvo em caso de necessidade militar imperiosa.

HENCKAERTS, J-M; DOSWALD-BECK, L. **Customary Internacional Law**, v. 2. Cambrigde: Cambridge University Press, 2010.

114 ICRC. Rule 52 Pillage**.** Disponível em:https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule52 Acessado em: 6 jul. 2017.

115 Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863. In: SCHINDLER, D; TOMAN, J. **The Laws of Armed Conflicts**, Martinus Nihjoff Publisher, 1988, pp.3-23, artigo 44; Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874 in SCHINDLER, D; TOMAN, J. **The Laws of Armed Conflicts**, Martinus Nihjoff Publisher, 1988, pp.22-34, artigo 18 e artigo 39; The Laws of War on Land. Oxford, 9 September 1880 In SCHINDLER, D; TOMAN, J. **The Laws of Armed Conflicts**, Martinus Nihjoff Publisher, 1988, pp.36-48, artigo 32.

116 ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS. Convention (II) with Respect to the Laws and Customs of War on Land (Hague, II) (29 Jul 1899) Disponível em:https://www.opcw.org/chemical-weapons-convention/related-international-agreements/chemical-warfare-and-chemical-weapons/hague-convention-of-1899/ Acessado em: 05 jul. 2017.

117 ICRC. Regulations concerning the Laws and Customs of War on Land. The Hague, 18 Oct 1907. Disponível em: http://www.icrc.org/ihl.nsf/full/195 Acesso em: 12 jan. 2013.

118 OPPENHEIM, Lassa Francis Lawrence, LLD. **International Law: a treatise**, v. 2. Londres: Logmans, Green and Co LTDS, 1906, p. 139.

119 HENCKAERTS, J-M; DOSWALD-BECK, L. **Customary Internacional Law**, v. 2. Cambrigde: Cambridge University Press, 2010.

120 BRASIL. Decreto nº 44.851 de 11 de novembro de 1958. Promulga a Convenção e Protocolo para a Proteção de Bens Culturais em caso de conflito armado, Haia, 1954, artigo 4.

121 BRASIL. Decreto nº 5.760, de 24 de abril de 2006. Promulga o Segundo Protocolo relativo à Convenção da Haia de 1954 para a Proteção de Bens Culturais em Caso de Conflito Armado, celebrado na Haia, em 26 de março de 1999, artigo 6.

122 OPPENHIEM, Lassa Francis Lawrence, LLD. **International Law: a treatise**, v. 2, 7 ed. Londres: Logmans, Green and Co LTDS, 1952, p. 395.

123 PATERSON, R. Draft Report on National Controls over the Export of Cultural Material. Disponível em: http://www.ila-hq.org/en/committees/index.cfm/cid/13 Acesso em 27 jun. 2013.

124 BRASIL. Decreto nº 72.312, de 13 de maio de 1973. Promulga a Convenção sobre as Medidas a serem Adotadas para Proibir e impedir a Importação, Exportação e Transportação e Transferência de Propriedade Ilícitas dos Bens Culturais, artigo 1°.

125 OPPENHEIM, Lassa Francis Lawrence, LLD. **International Law: a treatise**, v. 2, 7 ed. Londres: Logmans, Green and Co LTDS, 1952, p. 404.

126 HENCKAERTS, J-M; DOSWALD-BECK, L. **Customary Internacional Law**, v. 2. Cambrigde: Cambridge University Press, 2010.

127 Cf. Projeto da Comissão de Direito Internacional das Nações Unidas sobre Responsabilidade Internacional dos Estados *in* SALIBA, Aziz Tuffi. **Legislação de Direito Internacional**. 12a ed. São

canhão, objeto militar por excelência e, assim, uma vez que o Brasil não cometeu ato ilegal, não pode o Paraguai pedir a restituição.

O vice-presidente paraguaio Federico Franco alegou que a cicatrização paraguaia das feridas decorrentes de tal conflito depende da devolução do artefato ao seu local de origem.[128] Devemos salientar a importância de tal conflito para os paraguaios. Ao final do conflito, o país estava fragilizado, habitado somente por mulheres e crianças. O historiador Carlos Guilherme Mota descreve tal guerra como "um trauma, uma chacina em larga escala, uma hecatombe demográfica, um genocídio, inclusive no final, com o que restou do exército paraguaio cheio de crianças, um cataclismo que desequilibrou o Império.".[129]

Todavia, a intenção manifestada pelo então presidente Luiz Inácio Lula da Silva para que o Brasil devolvesse o canhão encontrou alguns óbices na legislação brasileira. Encontra-se na doutrina o entendimento de que a Constituição Federal tem como função primordial a proteção dos direitos fundamentais, separados em cinco modalidades[130] e, dentre elas, é incluído o direito à proteção do patrimônio histórico e cultural[131] que protege não somente a coisa em si, mas seu valor simbólico para a identidade de uma nação ou mesmo da humanidade como um todo. Assim, em seu artigo 23, a Constituição dispõe que:

> [...] são da competência comum da União, dos Estados, do Distrito Federal e dos Municípios:
>
> [...]
>
> III – proteger os documentos, as obras e outros bens de valor histórico, artístico e cultural, os monumentos, as paisagens naturais notáveis e os sítios arqueológicos;
>
> IV – impedir a evasão, a destruição e a descaracterização de obras de arte e de outros bens de valor histórico, artístico ou cultural.[132]

No entanto, o dispositivo que melhor protege o patrimônio histórico e cultural brasileiro é, sem dúvida, a Lei do Tombamento.[133] Nessa é vedada a saída do país de todo bem tombado. José Eduardo Ramos Rodrigues descreve o tombamento como: "um ato administrativo pelo qual o Poder Público declara o valor cultural de coisas móveis e imóveis, inscrevendo-as no respectivo Livro do Tombo, sujeitando-as a um regime especial que impõe limitações ao exercício da propriedade, com a finalidade de preservá-las".[134] O canhão foi tombado em 1998 pelo Instituto do Patrimônio e Artístico Nacional juntamente ao acervo do Museu Histórico Nacional. Nesse sentido, a retirada do canhão do Museu e seu envio para o Paraguai seria ilegal conforme a lei brasileira.

Uma possível solução é o destombamento. Ele é autorizado pelo ordenamento brasileiro caso atenda a "motivos de interesse público", como o disposto no Decreto-Lei n.25 de 30 de novembro de 1937 e deve ser executado pelo Presidente da República de ofício ou em grau de recurso.[135] Tal dispositivo, no entanto, tem sua constitucionalidade questionada por diversos doutrinadores.

Segundo José Eduardo Ramos Rodrigues, não seria legítimo um ato individual do Presidente, sem a necessidade de consultar o povo, para cancelar uma proteção que tem como objeto um bem de todos. O autor propõe que, devido à importância do bem para uma comunidade ou para o povo brasileiro como um todo, o ato que cancele a proteção deveria ser executado somente mediante ação civil pública ou ação popular.[136] Ademais,

Paulo: Rideel, 2017, pp. 361, artigo 31.

128 "[O] meu país nunca vai cicatrizar a ferida da epopéia de 1865 a 1870 se o Brasil não devolver o arquivo militar que injusta e injustificadamente retém hoje, como também retém o canhão Cristão, que devem retornar ao Paraguai para que se inicie a cicatrização do povo paraguaio" Discurso de Vice-Presidente Paraguaio no 140° Aniversário do fim da Guerra do Paraguai. RODRIGUES, José Eduardo Ramos. O caso da devolução do canhão "El Cristiano" ao Paraguai. **Revista Magister de Direito Ambiental e Urbanístico**. Porto Alegre, v. 6, n. 31, ago. 2010, p. 82.

129 MOTA, Carlos Guilherme. História de um silêncio: a guerra contra o Paraguai (1864-1870) 130 anos depois. **Revista Brasileira de Estudos Avançados,** São Paulo: v. 9, n. 24, mai./ago. 1995.

130 GOMES, E. X. O patrimônio como direito fundamental. *In* **Patrimônio Cultural.** Coleção Ministério Público e Direitos Fundamentais. Belo Horizonte: Editora Del Rey, 2013.

131 MIRANDA, Marcos Paulo de Souza. **Tutela do Patrimônio Cultural Brasileiro: doutrina – jurisprudência – legislação.** Belo Horizonte: Del Rey, 2006, p. 16-17.

132 BRASIL. Constituição da República Federativa do Brasil (1988), 5 out. 1988, artigo 23.

133 BRASIL. Decreto-Lei n° 25, de 30 nov. 1937. Organiza a proteção do patrimônio histórico e artístico nacional.

134 RODRIGUES, José Eduardo Ramos. Meio ambiente cultural: tombamento, Ação civil pública. In: MILARÉ, Edis (Coord.) **Ação Civil Pública: Lei 7.347/1985 – 15 anos.** 2a ed. São Paulo: RT, 2002, p. 313.

135 BRASIL. Decreto-Lei nº 3.866, de 29 de novembro de 1941, dispõe sobre o tombamento de bens no Serviço do Patrimônio Histórico e Artístico Nacional, artigo único.

136 RODRIGUES, José Eduardo Ramos. O caso da devolução do canhão "El Cristiano" ao Paraguai. **Revista Magister de Direito Ambiental e Urbanístico**. Porto Alegre, v. 6, n. 31, ago. 2010, p. 82.

Marcos Paulo de Souza Miranda[137] afirma que tal dispositivo não foi recepcionado pela atual Constituição, por não figurar entre as prerrogativas do Presidente da República, em seu artigo 84. No entanto, esse artigo discorre somente sobre suas competências privativas.[138] Miranda ainda afirma que tal ato seria possível somente se executado mediante a expedição de uma lei.[139] Essa dinâmica é prevista na Constituição Estadual do Espírito Santo.[140]

> O autor, ainda, argumenta que, como o ato de tombamento pode resultar em benefícios em favor do proprietário, o cancelamento unilateral é inadmissível, pois nega aos interessados o direito ao contraditório e à ampla defesa.[141] Apesar de questionado, tal dispositivo foi usado inúmeras vezes.[142]

De fato, a autorização presidencial para a retirada do *status* de um bem que teoricamente tem importância para todo o país não condiz com a função da proteção concedida que deve, entre outras coisas, proteger tal bem dos abusos do poder executivo. Assim, para legitimamente ser retirada a proteção do canhão, é necessário o pedido de destombamento, o qual poderia ser encaminhado ao Congresso Nacional, órgão representante do povo.

Sobre a ilegalidade da retirada do canhão "El Cristiano" do território paraguaio, como já exposto, tal ato não violou nenhuma norma de direito internacional vigente à época, e não podem ser aplicadas, nesse contexto, a Convenção de Haia sobre a proteção de bens culturais em evento de conflito armado de 1954, a Convenção da UNESCO relativa às medidas a adotar para proibir e impedir a importação, a exportação e a transferência ilícitas da propriedade de bens culturais de 1970 e a Convenção do UNIDROIT sobre bens culturais roubados ou ilicitamente exportados de 1995.

Não obstante as críticas de diversos historiadores e juristas, o Ministério da Cultura sugeriu que "a devolução está sendo reconsiderada, para que o canhão faça parte de 'ações de cooperação de interesse para os dois países', como a criação de um museu".[143]

9. Considerações finais

A proteção de bens culturais é objeto de discussão em diferentes conferências internacionais, desde 1907, com a Convenção de Haia (IV) sobre leis e costumes da guerra terrestre. Contudo, somente em 1970 foi adotada a primeira Convenção sobre o tráfico ilícito de bens culturais que proibiu a importação, exportação e transferência ilícita de bens culturais protegidos. Essa convenção foi atualizada em 1995 pela Convenção da UNIDROIT, que estabeleceu normas de direito internacional privado com vistas a coibir o tráfico ilícito. Observa-se que, para que haja restituição nas hipóteses contempladas por essas convenções, é necessária a comprovação da retirada ilícita do bem.

No entanto, os pedidos de retorno de bens culturais lidam, em grande parte, com objetos retirados de seu país de origem antes de 1970, o que impede a aplicação dessas Convenções. Nos casos estudados, percebemos que o retorno de bens culturais, quando inaplicáveis as Convenções internacionais, sujeitam-se à discricionariedade dos Estados que receberam tais bens. Há países que discordam da ilegalidade da retirada do bem e negam seu retorno, como se constata no caso dos Mármores do Partenon, que opõe o Reino Unido e a Grécia,

137 MIRANDA, Marcos Paulo de Souza. **Tutela do Patrimônio Cultural Brasileiro: doutrina – jurisprudência – legislação.** Belo Horizonte: Del Rey, 2006, p. 129.

138 BRASIL. Constituição da República Federativa do Brasil (1988), 5 out. 1988, artigo 84.

139 MIRANDA, Marcos Paulo de Souza. **Tutela do Patrimônio Cultural Brasileiro: doutrina – jurisprudência – legislação.** Belo Horizonte: Del Rey, 2006, p. 130.

140 "Artigo 182, § 1º Os bens culturais sob proteção do Estado somente poderão ser alterados ou suprimidos através de lei, vedada qualquer utilização que comprometa a integridade dos atributos que justifiquem sua proteção." ESPIRITO SANTO, Constituição de 1989. Emenda 61/09. Disponível: http://www.al.es.gov.br/appdata/anexos_internet/downloads/c_est.pdf Acesso em 20 de mai. de 2017.

141 MIRANDA, Marcos Paulo de Souza. **Tutela do Patrimônio Cultural Brasileiro: doutrina – jurisprudência – legislação.** Belo Horizonte: Del Rey, 2006, p. 131.

142 O destombamento da igreja de São Pedro dos Clérigos e a igreja do Calvário para a abertura da Av. Presidente Vargas, em 1942, no Rio de Janeiro; o cancelamento do tombamento do Pico do Itabirito, em Minas Gerais. *in* MIRANDA, Marcos Paulo de Souza. **Tutela do Patrimônio Cultural Brasileiro: doutrina – jurisprudência – legislação.** Belo Horizonte: Del Rey, 2006, p.131. JUNQUEIRA, Thais Lanna. O PICO DA DISCÓRDIA: Conflitos na patrimonialização de um conjunto paisagístico em Itabirito na década de 1960. **Anais do 4º Colóquio Ibero-Americano Paisagem Cultural, Patrimônio E Projeto.** Disponível em:<http://www.forumpatrimonio.com.br/paisagem2016/artigos/pdf/53.pdf> Acesso em 20 de mai. de 2017.

143 FLECK, I. A honra por um canhão. **Folha de São Paulo**. 18 abr. 2013. Disponível em: http://www1.folha.uol.com.br/fsp/mundo/104452-a-honra-por-um-canhao.shtml Acesso: 04 jul. 2013.

enquanto outros concordam com a restituição dos artefatos pleiteados, por meio de empréstimo e por tempo indeterminado, como se verificou no casos das joias de Troia e dos tesouros de Machu Picchu.

Como não se constatou ilegalidade na retirada do canhão "El Cristiano" durante a Guerra do Paraguai e inexistindo obrigação internacional de devolvê-lo, a decisão sobre seu eventual retorno ao Paraguai cabe ao Brasil. Observam-se, contudo, óbices impostos pela legislação brasileira para o retorno de um bem tombado devido ao Decreto n° 25 de 1935. Apesar de não existir uma obrigação internacional ou nacional de restituição desse bem, verifica-se, a partir dos casos estudados, uma crescente prática de devolução desses bens.

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Direitos culturais e Nações Unidas: uma análise a partir da Declaração Sobre a eliminação de Todas as Formas de Intolerância e Discriminação Baseadas na Religião ou na Crença

Cultural rights and United Nations: analysis of the Declaration on the elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

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Leilane Serratine Grubba**

Márcio Ricardo Staffen***

Resumo

A pesquisa científica tem por objeto a problemática do universalismo e do culturalismo no âmbito dos direitos humanos. Desenvolvida pelo método de tentativa e erro, proposto por Karl Popper, a pesquisa apresenta como problema inicial saber se a universalidade dos direitos humanos é um contraponto homogeneizador e imperialista aos diversos localismos culturais, sugestão essa proposta pela pensamento de Herrera Flores. A partir do mencionado problema, apresentou-se como hipótese que o universalismo busca apenas a garantia de um mínimo de dignidade a todos os seres humanos, de maneira genérica e abstrata. Por esse motivo, o universalismo não se contrapõe aos diversos localismos culturais, mas apresenta-se como uma tentativa de abrigá-los. O artigo estrutura-se em três seções, cada uma correspondendo a um objetivo específico da pesquisa. A primeira seção analisará o problema de pesquisa, ponderando sobre a argumentação culturalista de Herrera Flores. A segunda seção analisará a hipótese apresentada, especificamente a Declaração sobre a eliminação de todas as formas de intolerância e discriminação baseadas na religião ou na crença, das Nações Unidas. Por fim, a terceira seção realizará um balanço de refutação, para concluir se a hipótese deve ser refutada ou é, ao menos provisoriamente, corroborada.

Palavras-chave: Direitos Humanos; Universalismo; Direitos Culturais; Imperialismo-cultural; Religião.

Abstract

The study presented aims to address the issue of universalism and culturalism in the field of human rights. Developed by trial and error method, proposed by Karl Popper, the research investigates whether the universality of human rights is a homogenizer and imperialist counterpoint to

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the various cultural localism, as said by Herrera Flores. From the problem was presented as hypothesis that universalism seeks only to guarantee a minimum of dignity to all human beings, in a general and abstract manner. For this reason, universalism is not opposed to the various cultural localism, but is presented as an attempt to hold them. The article is divided into three sections, each corresponding to a specific objective of the research. The first section will examine the problem of research, pondering the culturalist argument. The second section will examine the hypothesis presented, specifically the Declaration on the Elimination of All Forms of Intolerance and Discrimination based on religion or belief, the United Nations. Finally, the third section will carry out an assessment of refutation, to complete the hypothesis must be refuted or is, at least provisionally, confirmed.

Keywords: Human Rights, Universalism, Cultural Rights, Cultural-Imperialism, Religion.

1. Introdução

As lutas humanas pelo acesso aos bens materiais e imateriais necessários para se alcançar uma vida digna, nos diferentes espaços geográficos e históricos, foram reconhecidas de maneira distinta, jurídica ou politicamente, por meio de direitos com estruturas específicas.

O que se entende modernamente por direitos humanos advém de uma construção política e jurídica, cujo início da produção remonta ao século XV e, principalmente, ao século XVII. À época do iluminismo, não existiam propriamente direitos humanos, válidos para todos de maneira universal, mas apenas direitos de âmbito local ou nacional, pensados para alguns humanos de maneira específica, como foi o caso dos direitos do homem, integrantes da Declaração Francesa de Direitos do Homem e do Cidadão, de 1789[1].

A categoria dos direitos humanos, apesar da influência dos séculos XV a XVII, de maneira concreta, surgiu somente com a criação da Organização das Nações Unidas, em 1945, logo após a Segunda Guerra Mundial[2]. As Nações Unidas originaram-se do comprometimento prévio de cinquenta e um países para com a paz, a segurança, o desenvolvimento de relações amistosas entre as diversas nações, a promoção do progresso social, além de melhores padrões de vida e direitos humanos.

A Carta das Nações Unidas (1945), documento que formalmente lhe originou no plano jurídico e político, contém o principal motivo de seu surgimento, que é histórico e humanitário. Com o fim da Segunda Grande Guerra Mundial, o motivo foi a determinação dos povos em preservar as gerações vindouras do flagelo das guerras. Mais do que isso, o motivo foi a determinação dos Estados-parte em afirmar a fé nos direitos humanos fundamentais, na dignidade e no valor da pessoa humana, na igualdade de direitos de homens e mulheres, na igualdade de direitos de nações pequenas e grandes, e estabelecer condições sobre as quais a justiça e o respeito às obrigações decorrentes de tratados e de outras fontes do direito internacional possam ser mantidos. Logo após o seu surgimento, em dezembro de 1948, as Nações Unidas adotaram, sob a forma de Resolução, a Declaração Universal dos Direitos Humanos (1948). A Declaração preceituou os direitos inerentes a todo e qualquer ser humano, entendidos como direitos universais. Em seu texto jurídico, foram preceituados direitos civis, políticos, sociais, econômicos, culturais, dentre outros direitos.

Sequencialmente à Declaração de 1948, a Organização das Nações Unidas proclamou outros instrumentos internacionais que aprofundaram os direitos anunciados em 1948, bem como criaram outros direitos antes não previstos. Todos os direitos, desde o surgimento das Nações Unidas, foram proclamados como direitos inerentes da dignidade humana e universais.

Dentre os instrumentos internacionais proclamados, é possível mencionar alguns, quais sejam: (a) a Convenção sobre Refugiados, de 1951; (b) o Pacto Internacional de Direitos Civis e Políticos, de 1966; (c) o Pacto Internacional de Direitos Sociais, Econômicos e Culturais, de 1966; (d) o Tratado de não-proliferação de armas nu-

1 A Declaração de Direitos do Homem e do Cidadão não foi pensada para ser universal ou universalizada, pois se tratava de um instrumento jurídico que buscou garantir *os direitos naturais, inalienáveis e sagrados do homem*, incluindo-se como destinatários na formulação de direitos tão somente os homens proprietários franceses. Para saber mais, consultar a Declaração de 1789 no seguinte endereço eletrônico: <http://pfdc.pgr.mpf.mp.br/atuacao-e-conteudos-de-apoio/legislacao/direitos-humanos/declar_dir_homem_cidadao.pdf>.

2 Sobre o surgimento e história das Nações Unidas, é possível consultar o sitio eletrônico da ONU no Brasil: <http://www.onu.org.br/conheca-a-onu/a-historia-da-organizacao/>. Acesso em 03/12/2013. Também é possível consultar o sitio eletrônico internacional das Nações Unidas: <http://www.un.org/en/aboutun/history/index.shtml>. Acesso: 3 dez. 2013.

cleares, de 1968, (e) a Convenção Internacional sobre a eliminação de todas as formas de discriminação racial, de 1969; (f) a Convenção sobre a eliminação de todas as formas de discriminação contra mulheres, de 1979; (g) a Declaração sobre a eliminação de todas as formas de intolerância e discriminação baseadas em religião ou crença, de 1981; e (h) a Declaração contra todas as formas de tortura e tratamentos ou punições cruéis, inumanos e degradantes, de 1984.

Apesar da universalidade ou do universalismo presente nos direitos humanos proclamados pelas Nações Unidas, desde o seu surgimento, proliferaram discursos de cunho culturalista (discursos relativistas, localistas ou de direitos culturais), os quais questionam essa possível ou necessária universalidade dos direitos humanos, considerando, em resumo, que o universalismo é uma tentativa cultural-ocidental de imposição imperialista de uma única forma de se estar no mundo com dignidade. Assim, em suas variadas vertentes de pensamento, os culturalistas reclamam que os direitos humanos não são, nem de fato, nem de direito, universais. Um dos pensadores que levanta essa modalidade de afirmação é Herrera Flores.

Diante disso, a pesquisa científica realizada, consubstanciada no texto apresentado por meio de artigo científico, tem por objeto a problemática do universalismo e culturalismo dos direitos humanos. Não se tem por objeto o questionamento do fundamento dos direitos humanos universais, das Nações Unidas, tampouco o questionamento de serem, esses direitos humanos, de fato ou juridicamente universais, ou seja, válidos e eficazes[3] universalmente para todos os povos e culturas.

A pesquisa desenvolve-se por meio do método popperiano de tentativa e erro. O problema de pesquisa, entendido como **P1** (problema inicial)[4] a partir de uma leitura popperiana, pode ser descrito da seguinte maneira: parece que os direitos humanos, propostos pelas Nações Unidas, por serem pretensamente universais (ou universalistas), são imperialistas e, por isso, incompatíveis com modos culturalmente diversos de se buscar uma vida digna, motivo pelo qual cada povo e cultura deveria juridicizar seus próprios direitos culturais. O problema reside em saber se, de fato, a universalidade dos direitos humanos é um contraponto homogeneizador e imperialista[5] aos diversos localismos culturais.

A hipótese ou teoria explicativa (**TE**) ao **P1,** seguindo o método proposto por Popper, é que o universalismo dos direitos humanos, apesar de ser uma tentativa de homogeneização, busca apenas garantir um mínimo de dignidade a todos os seres humanos, de maneira genérica e abstrata. Por esse motivo, possibilita, no âmbito do universalismo[6], a diversidade cultural e manifestações culturais. Não parece que o universalismo, ao menos no caso da Declaração de 1981, referente å liberdade de religião, se contrapõe aos diversos localismos culturais, mas apresenta-se como uma tentativa de abrigá-los.

Diante do problema de pesquisa, o artigo se estrutura em três partes ou seções, cada uma das quais se identifica, metodologicamente, a um objetivo de pesquisa. A primeira seção, referente ao primeiro objetivo, analisará especificamente o problema da pesquisa (**P1**), dedicando-se à análise da argumentação culturalista dos direitos humanos no que tange ao universalismo e sua tentativa de imposição cultural-ocidental de um único modo de se estar no mundo. A segunda seção, referente ao segundo objetivo, analisará a teoria explicativa (**TE**) oferecida e a experiência empírica (**EE**), realizada primordialmente no âmbito do pensamento lógico. A seção dedica-se à análise específica da Declaração sobre a eliminação de todas as formas de intolerância e discri-

3 Não será realizada uma pesquisa empírica para averiguar o grau de eficácia dos direitos humanos nos diferentes contextos regionais ou culturais.

4 A pesquisa utiliza-se do método popperiano, sistematizado por Popper no esquema P^1 - TE – EE – P^2, no qual P^1 é o *problema inicial,* TE é a *teoria explicativa*, EE é a *experiência empírica* e P^2 é um novo problema, derivado dos resultados da experiência. Esse esquema pode ser encontrado no livro *O conhecimento e o problema corpo-mente*, de Popper (2002, p. 22-35), além de poder ser encontrado em outras de suas obras.

5 Atualmente, o termo imperialismo serve para designar o sistema de relações políticas, econômicas, militares e culturais que aparece de maneira concreta nas sociedades coloniais ou dependentes, onde existe a violência decorrente do sistema capitalista (LENIN, 2000). Imperialismo também se refere à teoria do imperialismo cultural, desenvolvida por alguns pensadores latino-americanos que retomaram as proposições da Escola de Frankfurt, para denunciar a forma como as potencias impuseram condutas e valores nas demais sociedades periféricas, por meio da universalização de uma cultura dominante (MARION YOUNG, 1990, p. 86-113). É possível afirmar, ademais, que atualmente ambos os termos, colonialismo e imperialismo, são utilizados de maneira intercambiável, sendo que uma forma de os distinguir é espacial e não temporalmente. Nesse sentido, entende-se o imperialismo como o fenômeno que se origina na metrópole, para a dominação, podendo funcionar sem colônias formais. Já o colonialismo é o resultado ocorrido nas próprias colônias (HARDT; NEGRI, 2000).

6 Segundo Diniz (2012, p. 202), a "Globalizaçåo e fragmentação, universalismo e relativismo såo eventos que, embora pareçam excludentes, em realidade, são complementares".

minação baseadas na religião ou na crença, das Nações Unidas.

A escolha metodológica pela Declaração de 1981, para servir de análise da teoria explicativa, deve-se a um motivo principal: além do recorte necessário da pesquisa, opta-se pela análise de uma Declaração que, a *priori*, se relaciona ao tema religião, tema esse vinculado a visão cultural e não universalista. Não parece existir uma única religião ou crença, presente ou possível, nas sociedades atuais. Dessa forma, a análise da Declaração de 1981 já apresenta um grande indício da possibilidade de refutação da teoria explicativa oferecida. A pesquisa busca saber se, apesar do forte indício, é possível afirmar que o universalismo dos direitos humanos é, de fato, uma tentativa de imposição imperialista-cultural.

Por fim, a terceira seção, correspondente ao terceiro objetivo, será dedicada a um balanço de refutação, a fim de analisar se, ao menos provisoriamente, a teoria explicativa pode ser teoricamente corroborada. A seção busca analisar se o conteúdo da Declaração de 1981, por se relacionar primordialmente a um tema de cunho cultural, possibilita a corroborar a tese culturalista de ser, os direitos humanos, um produto cultural ocidental imperialista. Feito o devido e necessário recorte metodológico da pesquisa apresentada neste texto, passa-se à análise do problema (**P1**).

2. Problema de pesquisa (P^1): o universalismo parece ser um imperialismo-cultural

O processo jurídico-político de formação das Nações Unidas, em 1945, consagrou a categoria dos direitos humanos, entendidos como textos jurídicos internacionais que buscam garantir, de maneira universal, dignidade ao ser humano. Apesar de, modernamente, cento e noventa e três países[7] serem membros das Nações Unidas, o universalismo dos direitos é questionado por diversos discursos de cunho culturalista (anti-universalistas).

Os discursos culturalistas, em resumo, afirmam a existência e validade de concepções localistas culturais com relação aos direitos, isto é, concepções que postulam a sua própria visão do que deveriam ser direitos humanos, de acordo com as necessidades concretas de cada população e cultura. Esses discursos e práticas questionam o universalismo dos textos jurídicos oriundos das Nações Unidas.

Diante desses questionamentos surgiu a necessidade de problematizar, cientificamente, o universalismo dos direitos humanos. Por meio do método popperiano, descrito na introdução, a pesquisa examina se os direitos humanos, propostos pelas Nações Unidas, por serem pretensamente universais (universalistas), são incompatíveis com os demais modos de se estar no mundo e de se buscar uma vida digna, motivo pelo qual cada povo e cultura deveria juridicizar seus próprios direitos culturais. O problema reside em saber se a universalidade dos direitos humanos é um contraponto homogeneizador e imperialista aos diversos localismos culturais. Diante disso, esta seção dedica-se à análise do problema de pesquisa e irá verificar o teor do discurso culturalista, especialmente a crítica oferecida por Joaquín Herrera Flores.

O discurso culturalista, defende Marx (2000, p. 30-40), no geral, parte da premissa de que a noção de direitos universais significa a universalização de valores culturais eminentemente ocidentais, principalmente considerando o eixo Europa-Estados Unidos. Assim, o universalismo dos direitos humanos, observa Said (1996), passa a ser considerado como um culturalismo de corte ocidental hegemônico. Isto faz com que os direitos humanos sejam justificáveis em razão de uma universalidade forjada no contexto de pensamento iluminista ocidental. (ARRUDA JUNIOR; GONÇALVES, 2004, p. 36).

Se o fundamento universalista dos direitos humanos é um valor ocidental, objeto Santos (2010), então os direitos humanos universais devem operar como um localismo globalizado, ou seja, uma forma de globalização de 'vai de cima para baixo', configurando-se num instrumento de 'choque de civilizações'.

Mais do que isso, afirma-se que a extensão atual dos direitos humanos universais decorre do próprio acordo da Declaração Universal de 1948, que optou por, jurídica e politicamente, elevar alguns bens a um maior conteúdo axiológico e a serem aceitos por diversas culturas e formas de vida. Esses bens parecem se configurar numa pauta de justiça formal e pretender deter maior conteúdo valorativo, normativa, ética e filosoficamente.

7 A lista dos países é divulgada pelas Nações Unidas no seguinte endereço eletrônico: <http://www.un.org/en/members/index.shtml>. Acesso em: 3 dez. 2013.

(SÁNCHEZ RUBIO, 2010).

Criticado em razão de se configurar como um centro de poder e soberania, o universalismo deveria reconhecer o pluralismo de valores e a multipolar ordem mundial, advoga Dias (2015, p. 68-79), na qual coexistem unidades regionais com valores e culturas próprias, além de diferentes compreensões do que deveriam ser os direitos humanos, como bem admoesta Mouffe (2003).

Em resumo, a crítica culturalista (relativista ou anti--universalista[8]) afirma:

> Partido sempre de um ponto de vista particular, que envolve a comunidade, a doutrina relativista concebe uma série de críticas à concepção universalista dos direitos humanos, por exemplo, que a noção de direitos humanos contrapõe-se à noção de deveres proclamados por muitos povos; o conceito de direito humanos leva em consideração uma visão antropocêntrica do mundo, que não é compartilhada por todas as culturas; o caráter ocidental da visão dos direitos humanos, que pretende ser geral e imperialista; a falta de adesão formal por parte de muitos Estados aos tratados de direitos humanos ou a falta de políticas comprometidas com tais direitos, o que seria indicativo da impossibilidade do universalismo. (GUERRA, 2013, p. 296).

Herrera Flores (2009b, 177-179) afirma que o direito não pode ser considerado superior ao cultural (como no caso do universalismo), mas que também a própria cultura, garantidora da diferença, não pode ser superior ao direito. Com relação à crítica ao universalismo, o pensador afirma que esse deixa de se pautar pelos reais contextos nos quais o ser humano se situa, impondo uma teoria e prática (jurídica e política) enquanto ponto de referência para a interpretação das demais formas culturais de vida.

Partindo de uma concepção abstrata, o universalismo-absolutista[9] enclausura-se na racionalidade formal e reduz os direitos humanos ao componente jurídico, postulando a coerência interna do sistema normativo e a possibilidade de validade universal. O pensador supramencionado denominou essa problemática do universalismo dos direitos humanos como 'falácia ideológica ou normativista', para significar, além da naturalização dos fenômenos, uma ideologia revestida de lógica e racionalidade para a conservação do sistema hegemônico--universalista. Segundo ele, quando o sistema apresenta o *dever-ser* do direito como se fosse um *é*, ele naturaliza as propostas normativas e ideológicas, para apresenta-las como lógicas e racionais. Diante disso, esclarece, Herrera Flores (2009b, p. 177-179), torna-se possível apresentar uma ideologia sob a forma universal para qualquer contexto histórico e espacial, bem como para qualquer ser humano.

Esse universalismo dos direitos humanos, segundo Herrera Flores (2009b, p. 38), decorre da seguinte ideia iluminista: somente a universalidade conduz à razão. Diante disso, ou os direitos humanos são universais ou não são direitos humanos. Para o pensador, além de retoricamente circular, a afirmação da racionalidade atrelada à universalidade, desde o seu início, com o conteúdo das liberdades e propriedades privadas, beneficiava tão somente ao particularismo ocidental.

Criticar o universalismo dos direitos humanos enquanto produtos culturais[10] ocidentais hegemônicos e/ou imperialistas, para Herrera Flores (2009b, p. 40), significa uma denúncia ao pensamento individualista que marca as modernas sociedades ocidentais, bem como uma denúncia aos essencialismos e naturalismos oriundos dessa mesma sociedade. Além disso, significa pensar uma nova prática não etnocêntrica ou eurocêntrica, preocupada com a vida digna do ser humano nos diversos espaços concretos.

Contrário ao universalismo-imperialista, Herrera Flores (2007, p. 14) afirma a necessidade do realismo--relativista, que reconheça a realidade do mundo para além do pensamento e a inexistência de um critério absoluto e transcendental a partir do qual se faça juízo das reações humanas diante do mundo. Enquanto o realismo pressupõe a afirmação da exterioridade do mundo e dos contextos, o relativismo reconhece a pluralidade de interpretações possíveis e intervenções múltiplas e diferenciadas, de acordo com os entornos de relações que conformam as realidades. Esse modelo de pensa-

8 Falcão (2014, p. 405) afirma a existência de uma crítica relativista radical que nega qualquer legitimidade "ao processo de globalização, em todas as suas vertentes, incluindo a dos direitos humanos dentro do mesmo processo e rechaçando o seu universalismo". Em sua tese, contudo, afirma a existência de uma possível lógica universalista que respeite as diferenças culturais.

9 Segundo Herrera Flores (2007, p. 58), o absolutismo constitui-se em uma pretensão intelectual que impõe um procedimento ou uma verdade final que fundamenta universalmente toda a prática individual e social. Uma prática que, ao se autovalidar enquanto medida e se considerar absolutamente válida, apresenta-se como se fosse o natural e o racional.

10 "Todo produto cultural (novelas, filmes, teorias, direitos humanos...) é o resultado de uma '*reação*' diante do entorno de relações que mantemos com os outros, com nós mesmos e com a natureza". (HERRERA FLORES, 2009b. p. 208).

mento permite, para o mencionado pensador, reconhecer a pluralidade de propostas e reações culturais, considerando que todas podem ser tão legítimas quanto a universalista.

Para Herrera Flores (2007, p. 58), assumir uma postura realista-relativista-relacional significa assumir uma postura teórica que se baseia em práticas sociais relacionais: tudo deve ser entendido em relação com o contexto que o institui. O relevante é construir uma cultura dos direitos que acolha a universalidade das garantias e o respeito ao diferentes, a partir de uma visão complexa e contextualizada.

Por uma visão complexa, o autor acredita na possibilidade de chegar a uma síntese universal das diferentes opções ante os direitos, mas não aceita considerar o universal como ponto de partida, por ele denominado '*universalismo a priori*'. O universalismo, para Herrera Flores, deve ser '*a posteriori*', também chamado de 'universalismo chegada ou de confluência', que deve ocorrer após um processo de diálogo, para um entrecruzamento de propostas. Isso significa postular um universalismo que se descubra no transcorrer da convivência interpessoal e intercultural. A partir dessa caracterização, o autor entende ser necessário abandonar as abstrações, como a universalista, para se assumir o dever que impõe o valor da liberdade: a construção de uma ordem social justa (artigo 28, da Declaração de 1948), que permita e garanta a todos lutar por suas reivindicações. (HERRERA FLORES, 2009a, p. 170).

Por meio de uma crítica realizada ao universalismo abstrata, Herrera Flores (2009a, p. 84) propõe a adoção de uma concepção integral dos direitos, que supere a dicotomia entre direitos individuais, sociais, econômicos, culturais. Essa concepção integral deve incluir três tipos de direitos: (a) à integridade corporal; (b) à satisfação das necessidades; e (c) de reconhecimento à diferença.

Diante da análise realizada, é possível afirmar um problema de pesquisa prévio: o discurso culturalista, em geral, entende que o universalismo dos direitos humanos é um contraponto homogeneizador e imperialista aos diversos localismos culturais (à manifestação da diferença cultural). Nesse sentido, deve-se questionar que o universalismo, por meio dos direitos humanos, é incompatível com os demais modos de se estar no mundo e de se buscar uma vida digna.

3. Teoria explicativa: a Declaração de 1981 é universal por conter e permitir os diversos culturalismos

A Organização das Nações Unidas[11], fundada em 1945, apresentou como propósito de surgimento a promoção do progresso social, o desenvolvimento da paz e segurança no mundo, além de melhores padrões de vida e direitos humanos. A Carta das Nações Unidas, documento que lhe originou, jurídica e politicamente, foi elaborada pelos representantes dos cinquenta países presentes à Conferência sobre Organização Internacional. Em 2016, as Nações Unidas contam com a adesão de cento e noventa e três países.

Em 1948, a Nações Unidas adotaram a Declaração Universal dos Direitos Humanos, tratado jurídico-político que preceituou os direitos inerentes a todo e qualquer ser humano, universalmente, como forma de garantir um mínimo de dignidade a todos. Após a Declaração Universal, outros importantes instrumentos legais foram adotados, como a Declaração sobre a eliminação de todas as formas de intolerância e discriminação baseadas na religião ou na crença, em 25 de novembro de 1981 (A/RES/36/55).

A mencionada Declaração de 1981 é objeto desta seção, que tem por objetivo analisar a hipótese (**TE**) oferecida ao problema de pesquisa. Esta seção dedica-se à análise específica da Declaração sobre a eliminação de todas as formas de intolerância e discriminação baseadas na religião ou na crença, das Nações Unidas, a fim de averiguar, sequencialmente, se a hipótese oferecida pode ser corroborada, ou seja, que o universalismo dos direitos humanos, ao menos do caso representativo da Declaração de 1981, apesar de ser uma tentativa de homogeneização, busca apenas garantir um mínimo de dignidade a todos os seres humanos, de maneira genérica e abstrata.

Se a hipótese puder ser corroborada, significa um grande indício (não indutivo) de que o universalismo não se contrapõe aos diversos culturalismos e manifestações culturais, mas apresenta-se como uma tentativa

11 Sobre o surgimento e história das Nações Unidas, é possível consultar o sitio eletrônico da ONU no Brasil: <http://www.onu.org.br/conheca-a-onu/a-historia-da-organizacao/>. Acesso em: 3 dez. 2013. Também é possível consultar o sitio eletrônico internacional das Nações Unidas: <http://www.un.org/en/aboutun/history/index.shtml>. Acesso em: 3 dez. 2013.

de abrigá-los. Diante disso, passa-se à análise da hipótese oferecida à pesquisa.

A Declaração sobre a eliminação de todas as formas de intolerância e discriminação baseadas na religião ou na crença, de 1981, dispõe que a religião e a crença, para qualquer pessoa que as professe, devem ser entendidas como um dos elementos fundamentais na sua concepção de vida. Dessa forma, a liberdade de religião e de crença, segundo o discurso das Nações Unidas, deve ser plenamente respeitada e garantida, universalmente.

Com a Declaração de 1981, as Nações Unidas resolveram adotar todas as medidas necessárias para combater o avanço da eliminação da intolerância em todas as suas formas e manifestações, além da prevenção e combate à discriminação no que concerne à religião ou à crença. Isso porque, segundo o próprio discurso das Nações Unidas, a liberdade de religião e de crença contribuem para o avanço do objetivo de paz mundial, justiça social, criação de laços amistosos entre as pessoas e eliminação de ideologias e práticas colonialistas e de discriminação racial.

Promulgada com o objetivo de proteção de toda e qualquer liberdade de religião e de crença, a Declaração universalista opta pela abertura cultural, isto é, busca proteger as diversas manifestações culturais no que tange ao aspecto do sagrado. Diante disso, o texto da Declaração inicia-se com a consideração de que um dos princípios básicos da Carta das Nações Unidas é o da dignidade e igualdade inerentes, que existem como qualidades naturais e permanentes, a todos os seres humanos, e que todos os Estados-membros se comprometeram a agir, em conjunto ou separadamente, em cooperação com a Organização, para promover e estimular o respeito universal e a observância dos direitos humanos e liberdades fundamentais para todos, sem distinção de raça, sexo, língua ou religião.

O texto da Declaração de 1981 também afirmou que a Declaração Universal dos Direitos Humanos (1948) e os demais convênios de direitos humanos proclamam os princípios da não discriminação, da igualdade perante a lei e o direito à liberdade de pensamento, de consciência, de religião e de crença.

Sequencialmente, as Nações Unidas afirmaram, na Declaração de 1981, que o desrespeito e a violação aos direitos humanos e liberdades fundamentais, em particular o direito à liberdade de pensamento, consciência, religião ou qualquer crença, ocasionaram, direta ou indiretamente, guerras e grandes sofrimentos à humanidade, especialmente quando o desrespeito e a violação supramencionados servem como meio à interferência estrangeira nos assuntos internos de outros Estados e acendem o ódio entre povos e Nações.

Diante disso, parece surgir a necessidade de proteção universal à religião ou crença como categoria abstrata, isto é, de proteção aos diversos localismos culturais, no que tange à escolha de religião ou crença e, mais ainda, de respeito entre diversas culturas e religiões ou crenças.

Nesse sentido é possível visualizar a hipótese (**TE**) oferecida ao problema de pesquisa: existem grandes indícios de que o universalismo busca abarcar os localismos culturais e proteger o direito à diferença, inclusive o respeito aos direitos humanos (liberdade de religião e crença individual ou coletiva), quando há uma tentativa de imposição culturalista no que concerne à escolha de religião ou crença. Assim é que a Declaração de 1981 entende que a liberdade de religião e de crença deve ser totalmente respeitada e garantida.

Conforme será analisado, a Declaração de 1981 é universalista somente no que diz respeito à obrigação internacional de respeito à diferença e liberdade de escolha, mas não no que se refere à obrigação de adoção de uma determinada religião ou crença. Ela é universalista porque, ao prezar pelo respeito e liberdade, proíbe a imposição cultural de religião e crença, bem como proíbe a discriminação em decorrência da liberdade de religião ou crença.

Além disso, é importante, segundo as Nações Unidas, promover o entendimento, a tolerância e o respeito nas questões relacionadas à liberdade de religião e de crença, além de assegurar a inadmissibilidade do uso da religião ou de convicções com fins incompatíveis com a Carta das Nações Unidas, outros instrumentos pertinentes das Nações Unidas e com os propósitos e princípios da Declaração de 1981, ou seja, para fins de imposição cultural, para fins discriminatórios, para fins bélicos, dentre outros.

Conforme o texto expresso da Declaração de 1981, entendeu-se que a liberdade de religião e de crença deve contribuir para a consecução dos objetivos da paz mundial, da justiça social, da amizade entre os povos e da eliminação das ideologias ou práticas do colonialismo e da discriminação racial. O motivo do objetivo mencionado reside do fato de que a Declaração seguiu na esteira da adoção de várias convenções, sob a égide das Nações

Unidas e de agências especializadas, para a eliminação de várias formas de discriminação e em razão da preocupação nutrida com as manifestações de intolerância e pela existência de discriminação em razão da religião ou crença que ainda existem em algumas partes do mundo.

Diante disso, as Nações Unidas resolveram adotar todas as medidas necessárias para a rápida eliminação da intolerância em todas as suas formas e manifestações e prevenir e combater a discriminação em razão da religião ou crença, proclamando o texto jurídico-político ora analisado.

Diante da análise preliminar efetuada, passa-se ao texto expresso da Declaração de 1981. Em seu artigo primeiro, o texto dispõe que todos devem ter o direito à liberdade de pensamento, consciência e religião. Esse direito deve incluir a liberdade de ter a religião ou qualquer crença, inclusive se não ter religião ou crença, bem como a liberdade de, individualmente ou em comunidade, em público ou privado, manifestar a religião ou crença em adoração, observância, prática ou ensino.

O texto também dispõe que, contra práticas individuais ou culturais, ninguém pode ser submetido a medidas coercitivas que possam restringir sua liberdade de ter uma religião ou crença de escolha própria. Contudo, a liberdade de manifestar (não de possuir) a própria religião ou crença estará sujeita apenas às limitações previstas em lei, quando necessárias para a proteção da segurança pública, a ordem, a saúde ou a moral pública, ou os direitos e liberdades fundamentais dos outros, conforme o disposto no artigo primeiro.

Preceituou o artigo segundo que ninguém pode ser sujeito à discriminação por um Estado, instituição, grupo de pessoas ou pessoa, em razão de religião ou outras crenças. Para os efeitos da Declaração, a expressão 'intolerância e discriminação baseadas na religião ou crença' significa qualquer distinção, exclusão, restrição ou preferência baseada na religião ou crença e que tenha por objetivo ou efeito a abolição ou o fim do reconhecimento, gozo ou exercício de direitos humanos e liberdades fundamentais em igualdade de condições.

A Declaração afirmou, no seu artigo terceiro, que a discriminação entre seres humanos, em razão da religião ou da crença, constitui uma afronta à dignidade humana e uma negação dos princípios da Carta das Nações Unidas, o que deve ser condenado como uma violação dos direitos humanos e das liberdades fundamentais proclamados na Declaração Universal dos Direitos Humanos, e como um obstáculo para as relações amistosas e pacíficas entre as nações.

No artigo quarto, afirmou-se que todos os Estados devem adotar medidas efetivas para prevenir e eliminar a discriminação em razão da religião ou crença, em reconhecimento ao exercício e gozo dos direitos humanos e liberdades fundamentais em todas as dimensões da vida civil, econômica, política e cultural.

Na redação do artigo quinto, se entendeu que os pais ou responsáveis legais da criança têm o direito de organizar a vida no seio familiar, conforme a sua religião ou crença, levando em consideração a educação moral em que acreditem deva ser educada a criança. As crianças, por sua vez, têm o direito de ter acesso à educação, em matéria de religião ou crença, de acordo com os desejos de seus pais ou tutores legais, não podendo ser obrigadas a receber quaisquer instruções em uma religião ou crença contra a vontade de seus pais ou responsáveis legais.

Em se tratando de uma criança que não está sob os cuidados de seus pais ou responsáveis legais, deverão ser tomados em consideração seus desejos expressos ou outra prova de seus desejos em matéria de religião ou crença, visto que o princípio orientador deve ser o do melhor interesse da criança. Finalmente, conforme dispõe o quinto artigo, a prática da religião ou das convicções em que uma criança é educada não deve ser prejudicial para a sua saúde física ou mental ou ao seu pleno desenvolvimento.

De acordo com o artigo sexo e, sem prejuízo do disposto no artigo primeiro, o direito à liberdade de pensamento, consciência, religião ou crença deve incluir, entre outras, as seguintes liberdades:

> a) adorar ou manter conexão com a religião ou crença e estabelecer e manter lugares para essas finalidades;
>
> b) estabelecer e manter instituições de caridade ou humanitárias;
>
> c) fazer, inquirir e utilizar em quantidade suficiente os artigos e materiais necessários para os ritos e costumes de uma religião ou crença;
>
> d) escrever, publicar e disseminar publicações relevante nestas áreas;
>
> e) ensinar uma religião ou crença em local adequado para esse fim;
>
> f) solicitar e receber contribuições voluntárias financeiras e outras de pessoas e instituições;

GRUBBA, Leilane Serratine; STAFFEN, Márcio Ricardo. Direitos culturais e Nações Unidas: uma análise a partir da Declaração Sobre a eliminação de Todas as Formas de Intolerância e Discriminação Baseadas na Religião ou na Crença. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 510-523

h) capacitar, nomear, eleger ou designar por sucessão de líderes apropriados, exigidar pelas requisitos e normas de qualquer religião ou crença;

i) observar dias de dencanso para celebrar feriados e cerimônias de acordo com os preceitos de uma religião ou crença; e,

j) estabelecer e manter comunicação com indivíduos e comunidades em questões de religião e crença em nível nacional e internacional.

Os direitos e liberdades estabelecidos, segundo o artigo sétimo, serão concedidos nas legislações nacionais, de maneira que todos possam ser capazes de valer-se dos direitos e liberdades na prática. Além disso, conforme se extrai da redação do artigo oitavo, a respeito da interpretação da Declaração, nenhuma disposição pode ser interpretada no sentido de restringir ou derrogar algum dos direitos definidos na Declaração Universal dos Direitos Humanos e nos Pactos Internacionais sobre Direitos Humanos.

A análise da Declaração de 1981, objeto desta seção, parece oferecer uma boa indicação de que o universalismo dos direitos humanos não é um contraponto aos diversos culturalismos, mas uma tentativa de fazer com que os culturalismos possam ser efetivamente válidos, sem quaisquer modalidades de imperialismos culturais ou bélicos, além de discriminações.

Diante do argumento supramencionado, também há uma boa indicação da corroboração da hipótese que afirma não ser, o universalismo, uma tentativa de imperialismo cultural, mas, pelo contrário, a tentativa de barrar possíveis imperialismos culturais, para que os direitos humanos, localismos culturais e preferencias pessoas possam ser respeitados.

4. Síntese compreensiva: teses e antíteses

O surgimento das Nações Unidas, em nível de Organização Internacional, significou um avanço político e jurídico na defesa da vida humana em dignidade. Os tratados de direitos humanos, proclamados como universais, buscaram garantir um mínimo de dignidade ao ser humano, de maneira abstrata, bem como direitos específicos para grupos entendidos como necessitários, em razão de desigualdades sociais e jurídicas ainda latentes, como as mulheres, as crianças, os deficientes, os idosos, etc. A partir das Nações Unidas, todos os direitos foram enunciados como inerentes da dignidade humana e universais.

Contudo, em pouco tempo do surgimento das Nações Unidas, começaram a proliferar discursos antagônicos ao pressuposto universalista, entendidos como discursos de cunho culturalista (relativistas, localistas ou de direitos culturais). Esses discursos questionam a premissa universalista, considerando que a tentativa de universalização dos direitos, de maneira *a priori*, é incompatível como os demais modos de vida cultural não-ocidentais e não-capitalistas.

Diante dos reclamos anti-universalistas, a pesquisa consubstanciada neste artigo apresentou como problemática inicial (**P**$_1$), o seguinte questionamento: são, os direitos humanos universais, incompatíveis com os demais modos de se estar no mundo e de se buscar uma vida digna? O problema reside em saber se, de fato, a universalidade dos direitos humanos é um contraponto homogeneizador e imperialista aos diversos localismos culturais.

A análise do discurso culturalista, realizado na primeira seção do artigo, permitiu a compreensão de algumas premissas da crítica anti-essencialista, são elas:

a) a noção de direitos universais significa a universalização de valores culturais eminentemente ocidentais (culturalismo ocidental);

b) sendo o fundamento universalista dos direitos humanos um valor ocidental, então os direitos humanos devem operar como um localismo globalizado, ou seja, uma forma de globalização de 'vai de cima para baixo' (imperialista); e

c) em razão do imperialismo cultural, o universalismo não permite a existência e validade de concepções localistas de direitos, de acordo com as necessidades concretas de cada cultura e população.

Por sua vez, apresentou-se, ao problema de pesquisa, a hipótese (**TE**) de que o universalismo dos direitos humanos, apesar de ser uma tentativa de homogeneização, busca apenas garantir um mínimo de dignidade a todos os seres humanos, de maneira genérica e abstrata. Por esse motivo, possibilita, no âmbito do universalismo, a diversidade cultural e manifestações culturais. A fim de realizar a análise da problemática e hipótese, optou-se pelo exame da Declaração sobre a eliminação de todas as formas de intolerância e discriminação baseadas na religião ou na crença, de 1981.

A escolha metodológica pela Declaração de 1981, sobre religião e crença, deve-se a um motivo principal: além do recorte necessário da pesquisa, a Declaração se relaciona ao tema religião, tema esse vinculado à visão cultural e não universalista. Não parece existir uma única religião ou crença, presente ou possível, nas sociedades atuais. Dessa forma, a análise da Declaração de 1981 já apresenta um grande indício da possibilidade de refutação da teoria explicativa oferecida e da corroboração da crítica culturalista ao universalismo. A pesquisa busca saber se, apesar do forte indício, é possível afirmar que o universalismo dos direitos humanos é, de fato, uma tentativa de imposição imperialista-cultural.

Contudo, apesar dos fortes indícios de refutação da teoria explicativa, a análise do texto jurídico da Declaração de 1981 parece conduzir à conclusão oposta, qual seja: a Declaração de 1981 apresenta fortes indícios de que o universalismo busca abarcar os localismos culturais e proteger o direito à diferença, inclusive o respeito aos direitos humanos (liberdade de religião e crença individual ou coletiva), quando há uma tentativa de imposição culturalista no que concerne à escolha de religião ou crença.

A opção por afirmar que 'existem fortes indícios', ao invés de se assegurar que a análise da Declaração conduz à conclusão de que o universalismo busca abarcar os localismos, deve-se a uma opção metodológico-científica. Se se afirmasse que a análise de uma única Declaração conduz à conclusão mencionada, operar-se-ia no âmbito de uma indução mal concebida sobre o universalismo e demais textos jurídicos não analisados. A cientificidade da pesquisa ora realizada não pode permitir uma conclusão indutivista-geral.

Dessa forma, em razão de ser, a Declaração, um texto que *a priori* refutaria a hipótese, conforme os motivos já mencionados, e, pelo contrário, ela parece ter permitido a corroboração provisória da hipótese, então ela apresenta fortes indícios sobre os demais textos jurídicos das Nações Unidas a respeito do universalismo. Em resumo, a análise da Declaração de 1981 permite supor a existência de fortes indícios quanto ao fato de não ser, o universalismo, uma tentativa de imposição imperialista do culturalismo ocidental, mas a tentativa de proteção de um mínimo de dignidade, liberdade e direito à diferença.

Feita a necessária explicação, passa-se à análise final das premissas presentes na Declaração de 1981, que parecem corroborar a hipótese de pesquisa:

a) respeito e garantia à liberdade de religião, crença, pensamento e consciência, inclusive a liberdade de não ter religião ou crença, assim como a liberdade de, individualmente ou em comunidade, em público ou em privado, manifestar a religião ou crença em adoração, observância, prática ou ensino;

b) combate ao avanço da eliminação da intolerância e discriminação no que concerne à liberdade de religião e crença; e

c) impossibilidade de haver medidas coercitivas que restrinjam a liberdade de ter ou de não ter uma religião ou crença, salvo no caso das limitações previstas em lei, quando elas não detenham caráter discriminatório e imperialistas.

A análise das premissas presentes na Declaração de 1981 parece refutar a tese culturalista (a) de que a noção de direitos universais significa a universalização de valores culturais ocidentais. Ao menos no caso específico da religião e crença, a Declaração, de cunho universalista, preocupou-se em garantir a qualquer pessoa, pertencente a qualquer Estado e cultura, a liberdade de escolher sua própria religião e crença, sem imposições, restrições ou discriminações.

Parece também refutada a tese (b) que afirma que o universalismo opera como um localismo globalizado imperialista, bem como a tese (c) que dispõe a impossibilidade de manifestações localistas culturais no ambito do universalismo. Isso porque o universalismo da garantia da liberdade de religião e crença, apesar de condenar práticas coercitivas culturais de imposição religiosa, busca tão somente possibilitar que todos os seres humanos, invididual, comunitária ou culturalmente, possam ter a liberdade de escolha. Assim, o universalismo, especificamente representado na Declaração, traduz-se na tentativa de abarcar e possibilitar as diferenças culturais.

Herrera Flores, crítico do universalismo dos direitos, afirma a necessidade de se pensar a prática não etnocêntrica ou eurocêntrica, preocupada com a vida digna do humano nos diversos espaços concretos (localismos e escolhas culturais). Além disso, ele entende ser necessária a construção de uma cultura dos direitos que acolha a universalidade das garantias e o respeito ao diferentes, por meio da adoção de uma concepção integral que inclua ao menos três direitos básicos humanos: (a) à integridade corporal; (b) à satisfação das necessidades; e (c) de reconhecimento à diferença.

De acordo com o pensamento de Herrera Flores, parece que o universalismo presente na Declaração de

GRUBBA, Leilane Serratine; STAFFEN, Márcio Ricardo. Direitos culturais e Nações Unidas: uma análise a partir da Declaração Sobre a eliminação de Todas as Formas de Intolerância e Discriminação Baseadas na Religião ou na Crença. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 510-523

1981 é exatamente àquele proposto pelo autor: um universalismo que reconhece o pluralismo de valores na ordem mundial e que busque garanti-los, por meio de medidas jurídicas e políticas. Um universalismo não etnocêntrico ou eurocêntrico, que está preocupado com a garantia do reconhecimento à diferença (liberdade de religião e crença), com a garantia da satisfação das necessidades religiosas e de crenças, bem como preocupado com a integridade corporal (condenando as práticas imperialistas, impositivas e coercitivas de escolha de religião ou crença).

As críticas analisadas, de caráter anti-universalistas, que afirmam que o universalismo é uma imposição ocidental cultural imperialista, parecem refutadas. Isso porque se depreende da pesquisa, contra-indutivamente, que pelo menos um universalismo não pode ser considerado imperialista – o universalismo presente na Declaração de 1981.

O universalismo presente na Declaração de 1981 parece possibilitar e garantir um mínimo de dignidade a todos, abarcando os diversos localismos culturais. Disso resulta, sem qualquer tentativa de inferência indutiva geral, que existem fortes indícios de que o universalismo onusiano, que compartilha das mesmas premissas do universalismo da Declaração de 1981, não seja uma forma de imperialismo ocidental, mas uma forma de garantir a diferença e, ao mesmo tempo, a dignidade de todo o ser humano.

5. Considerações finais

A pesquisa realizada, sobre o universalismo dos direitos humanos, desenvolveu-se conforme o pensamento e estrutura científica popperianos. Tendo por objeto de estudo o universalismo e o culturalismo, o artigo não buscou questionar o fundamento, validade ou efetividade dos direitos humanos.

O problema de pesquisa (**P1**) foi descrito da seguinte maneira: parece que os direitos humanos, propostos pelas Nações Unidas, por serem pretensamente universais são incompatíveis com os demais modos de se estar no mundo e de se buscar uma vida digna, motivo pelo qual cada povo e cultura deveria juridicizar seus próprios direitos culturais. Ao problema, foi oferecida a seguinte hipótese (**TE**): o universalismo dos direitos humanos, apesar de ser uma tentativa de homogeneização, busca apenas garantir um mínimo de dignidade a todos os seres humanos, possibilitando a diversidade cultural e manifestações culturais. Não parece que o universalismo, ao menos no caso da Declaração de 1981, se contrapõe aos localismos culturais, mas apresenta-se como uma tentativa de abrigá-los.

De acordo com o problema e hipótese, o artigo se estruturou em três seções, cada uma das quais se identificando, metodologicamente, a um objetivo de pesquisa. A primeira seção, analisou especificamente o problema da pesquisa, dedicando-se ao exame da argumentação culturalista dos direitos humanos no que tange ao universalismo e sua tentativa de imposição cultural-ocidental de um único modo de se estar no mundo.

Percebendo os direitos humanos como um culturalismo de corte ocidental, os anti-universalistas (discurso culturalista) afirmam que o universalismo é uma tentativa de imperialismo cultural ocidental, que não possibilita a existência e validade de concepções localistas de direitos (direitos culturais), que possam atuar de acordo com as necessidades concretas de cada cultura e população.

Sequencialmente, a segunda seção analisou a teoria explicativa. A seção dedicou-se à apreciação específica da Declaração sobre a eliminação de todas as formas de intolerância e discriminação baseadas na religião ou na crença, das Nações Unidas. Metodologicamente, optou-se pela Declaração de 1981, dentre os vários tratados das Nações Unidas, principalmente em virtude de ser um texto jurídico que se relaciona ao tema religião, vinculado a visão cultural e não universalista. Se não existe, no mundo, uma única religião ou crença, então existem fortes indícios da possibilidade de refutação da teoria explicativa oferecida. A pesquisa busca saber se, apesar do forte indício, é possível afirmar que o universalismo é, de fato, uma tentativa de imperialismo cultural.

Por fim, a terceira seção dedicou-se a um balanço de refutação, a fim de analisar se, ao menos provisoriamente, a teoria explicativa pode ser teoricamente corroborada. Do exame realizado, conclui-se que, apesar dos fortes indícios de refutação da teoria explicativa, a análise do texto jurídico da Declaração de 1981 conduziu à conclusão oposta, qual seja: a Declaração de 1981 apresenta fortes indícios de que o universalismo busca abarcar os localismos culturais e proteger o direito à diferença, inclusive o respeito aos direitos humano, quando há qualquer tentativa de imposição culturalista no

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Os reflexos da proteção internacional da propriedade intelectual para o desenvolvimento interno: uma análise sobre o sistema patentário brasileiro e a transferência de tecnologia

The effects of the international protection of the intellectual property for inside development: an analysis of the Brazilian patent system and the technology transfer

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Resumo

A pesquisa se propôs ao estudo sobre a proteção internacional da Propriedade Intelectual, buscando averiguar em que medida ela impacta no desenvolvimento interno, sobretudo no sistema patentário brasileiro. Para tanto, o trabalho foi dividido em dois momentos, destinando-se o primeiro à realização de um apanhado evolutivo sobre os instrumentos internacionais de proteção, quais sejam a Convenção de Paris e o Acordo TRIPS, compreendendo a problemática envolvendo a transferência de tecnologia. No segundo momento, dedicou-se à análise do sistema patentário brasileiro enquanto propulsor do desenvolvimento interno. Utilizando-se do método de abordagem dedutivo e do método e procedimento histórico, acompanhados da pesquisa bibliográfica e documental, foi possível observar que o sistema internacional de proteção trouxe fortes reflexos para o desenvolvimento interno em virtude das decisões políticas adotadas pelo Brasil, ao aderir ao Acordo TRIPS sem estar efetivamente preparado para isso.

Palavras-chave: Propriedade Intelectual. proteção internacional. Desenvolvimento interno. sistema patentário.

Abstract

The research one proposed to study about international protection of Intellectual Property, searching to investigate how it impacts on the inside development, especially in the Brazilian patent system. Therefore, the work was divided into two stages, one designating the first to realization of a evolutionary bunched about international instruments of protection, which are the Paris Convention and the TRIPS Agreement, understanding the problematic about technology transfer. In the second moment, one dedicated to analysis about Brazilian patent system as a propelling of the inside

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development. One using the deductive method and of the historical method, as well as bibliographical and documentary research, it was possible to observe that the international protection system brought strong effects for the inside development due to political decisions adopted by Brazil, to adhere to Agreement TRIPS without being effectively prepared for this.

KeyWords: Intellectual property. International protection. Inside development. Patent system.

1. Introdução

Os estudos sobre a Propriedade Intelectual vêm adquirindo importância crescente nas últimas décadas. Seja com relação aos Direitos Autorais, ou à Propriedade Industrial, são inumeráveis as questões que têm gerado debate e até mesmo questionamento, como a proteção de softwares e o domínio público, no primeiro caso, ou quanto às particularidades envolvendo as modalidades de propriedade industrial, especialmente quando relacionadas ao Desenvolvimento.

Independentemente do enfoque que se pretenda dar à pesquisa, o estudo sobre o Sistema Internacional de Proteção da Propriedade Intelectual sempre se faz presente, por ser fundante da própria ordem interna que disciplina a matéria. Foi a partir dos instrumentos normativos internacionais que se convencionou os parâmetros mínimos a serem adotados na construção do ordenamento jurídico interno, além de trazerem formas de gerenciamento e transferência de tecnologia entre países.A maneira como o Sistema Internacional foi consolidado gera intensos debates, sobretudo no que diz respeito à transferência de tecnologia de países desenvolvidos para os menos desenvolvidos. A rigidez das previsões internacionais teria impactado especialmente no sistema patentário dos países com um grau inferior de desenvolvimento, tornando-os reféns do monopólio exercidos pelas grandes corporações e multinacionais.

Diante dessa perspectiva, o presente trabalho tem por escopo traçar uma reflexão justamente sobre os impactos da proteção internacional da Propriedade Intelectual no desenvolvimento interno, buscando abordar essa problemática envolvendo a transferência de tecnologia, bem como averiguar como resta sedimentado o sistema patentário brasileiro e de que maneira isso pode influenciar no grau de desenvolvimento interno do país.

Para tanto, adota-se o método de abordagem dedutivo, uma vez que a reflexão parte da análise das normatizações existentes, tanto em nível internacional como interno, para investigar mais a fundo os seus reflexos para o desenvolvimento nacional. Não obstante, utiliza-se do método de procedimento histórico, uma vez que se faz um panorama geral não apenas da evolução normativa em âmbito internacional, mas também das condições em que os instrumentos foram sendo firmados. Como técnica de pesquisa, adota-se a pesquisa bibliográfica e a análise documental, com enfoque para instrumentos como a Convenção de Paris e o Acordo TRIPS.

2. A proteção internacional da propriedade intelectual e a problemática envolvendo a transferência de tecnologia entre países desenvolvidos e em desenvolvimento

As criações advindas do intelecto humano tendem a ganhar o mundo assim que saem do campo das ideias e passam a se materializar. Por esse motivo, demandam um enfrentamento não apenas na ordem jurídica interna, mas também em âmbito global. É nesse cenário que a tutela da Propriedade Intelectual ganha importância, desempenhando, conforme ressalta Marinho[1], um importante papel na construção dos pilares do direito internacional, já que os direitos por ela tutelados necessitam de uma abrangência para além das fronteiras.

Esse "reconhecimento da importância da proteção internacional traz consigo a necessidade de celebração de convenções internacionais capazes de coordenar as leis internas dos Estados"[2]. Mas a construção do Sistema Internacional de proteção da Propriedade Intelectual se deu a passos lentos, considerada a dificuldade de se encontrar um consenso entre as pretensões dos países envolvidos. Com efeito, o contraste entre as configurações dos países desenvolvidos em relação aos que ainda se encontravam em estágio de desenvolvimento dava ensejo a fortes embates no decorrer das tratativas internacionais.

1 VARELLA, Marcelo Dias; PLATIAU, Ana Flávia Barros; SCHLEICHER, Rafael T. Desenvolvimento Tecnológico, Pesquisa Pública e Propriedade Intelectual: Análise da Miríade de Normas Internacionais. In: **Propriedade Intelectual e Desenvolvimento.** Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 306.

2 BASSO, Maristela. **O Direito Internacional da Propriedade Intelectual.** Porto Alegre: Livraria do Advogado, 2000, p. 22.

Após realizar um estudo sobre o contexto internacional da Propriedade Intelectual, Varella[3] identifica a existência de três distintas modalidades de países, classificação esta que adota a produção de tecnologia e o interesse pelos direitos de propriedade intelectual como critérios comparativos. De acordo com as suas observações, na primeira modalidade estariam os tecnologicamente excluídos, que são importadores de tecnologia e detentores de muito poucas, ou até mesmo nenhuma patente de invenção, representando a maior parte dos países. A segunda modalidade seria composta por alguns países desenvolvidos e regiões de países em desenvolvimento, sendo conhecidos como adaptadores de tecnologia. Já no terceiro grupo estariam alguns poucos países que dominam a produção mundial de tecnologia e de patentes, como é o caso dos Estados Unidos, da Alemanha, do Japão, do Reino Unido, dentre outros. Estes, sozinhos, recebem cerca de 93% de todos os benefícios econômicos advindos do sistema de propriedade intelectual.

Essa classificação está intimamente relacionada ao nível de desenvolvimento de cada país e até mesmo aos diferentes índices observados em distintas regiões de um mesmo país. Conforme bem observa Correa, "países diferentes são afetados diferentemente pelos direitos de propriedade intelectual."[4] Tal premissa se mostra fundamental na compreensão sobre a maneira como a proteção internacional da propriedade intelectual impactou de forma mais ou menos favorável em cada Estado nação, assim como as influências exercidas por cada Estado na consolidação desse sistema protetivo.O trabalho de harmonização legislativa entre os diversos países teve início com as Uniões de Paris e de Berna, em 1883 e 1884, respectivamente, sendo mais tarde revigorado pela Organização Mundial da Propriedade Intelectual – OMPI, em 1967 e finalmente consolidado pelo Acordo TRIPS, em 1994.[5]

Enquanto a Convenção de Paris veio regular o ramo da Propriedade Industrial, a Convenção de Berna passou a disciplinar os Direitos de Autor. Nas palavras de Maristela Basso, graças à essas duas Convenções, "estabeleceu-se o princípio da proteção mínima, aceito pelos Estados Unionistas, abaixo do qual nenhuma legislação poderia ficar. [...] O que as Uniões de Paris e de Berna não conseguiram ficou a cargo da OMPI e tem sido revigorado pelo TRIPS."[6]

No que tange à proteção específica da Propriedade Industrial, a Convenção de Paris foi o primeiro tratado de cunho universal a cuidar do tema, tendo o Brasil como um dos primeiros a ratifica-lo, ao lado de alguns países desenvolvidos. Desde então, setores foram sendo incluídos ou excluídos da proteção conforme o interesse estratégico de cada país.[7]

Ainda sobre a Convenção de Paris, esclarece Barbosa[8] que quando a mesma foi negociada houve a prevalência do entendimento no sentido de que não caberia a padronização das normas substantivas, relativas a marcas e patentes nas várias legislações nacionais, optando-se por estabelecer um mecanismo de compatibilização entre as normas, permitindo a diversidade nacional.

A previsão quanto à desnecessária padronização de normas representou um ponto extremamente favorável para a adesão dos mais variados países do mundo, que poderiam resguardar sua soberania interna para disciplinar a matéria da maneira que melhor lhes aprouvesse. O Brasil aderiu à Convenção de Paris em 1992, por meio do Decreto nº 635.[9]

Essa prerrogativa, contudo, foi deixada de lado quando do firmamento do Acordo TRIPS. Conforme observa Denis Barbosa[10], "o ambiente depois do TRIPS não é mais o da Convenção de Paris, com seu respeito à diversidade nacional". Essa primeira consideração sobre o acordo revela uma da tensões que marcaram a sua celebração.A tensão que antecedeu o firmamento do acordo TRIPS teve início em meados de 1986, quando, por insistência dos Estados Unidos e de mais alguns países desenvolvidos, as discussões sobre os direitos de propriedade intelectual foram levados para serem tratados no Gatt – Acordo Geral de Tarifas e Comércio, oportunidade em que o tema foi vinculado ao comércio internacional. Durante a última rodada de tratativas, que

3 VARELLA, Marcelo Dias**. Propriedade Intelectual e Desenvolvimento**. São Paulo: Lex, 2005, p. 03

4 *Ibidem*., p. 50.

5 BASSO, Maristela. *Op. Cit*., p. 22.

6 VARELLA, Marcelo Dias. *Op. Cit*., p. 177.

7 VARELLA, Marcelo Dias**. Propriedade Intelectual e Desenvolvimento.** São Paulo: Lex, 2005, p. 177.

8 BARBOSA, Denis Borges. Trips e a Experiência Brasileira. In: **Propriedade Intelectual e Desenvolvimento.** Marcelo Dias Varella (Org.). São Paulo: Lex, 2005. Pp. 135.

9 BRASIL. Presidência da República. Decreto nº 635, de 21 de agosto de 1992. Promulga a Convenção de Paris para a Proteção da Propriedade Industrial, revista em Estocolmo a 14 de julho de 1967. Disponível em: < http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/D0635.htm> Acesso em: 20 mar. 2017.

10 BARBOSA, Denis Borges. *Op. Cit*., p. 168.

ocorreu Uruguai, se encerrando em 1994 com a criação da OMC – Organização Mundial do Comércio, foi criado um anexo ao acordo constitutivo dessa organização, que veio a ser conhecido como TRIPS - Acordo Relacionado aos Direitos de Propriedade Intelectual[11]

A consolidação da Organização Mundial do Comércio foi impulsionada pela aceleração do movimento de globalização e pela intensificação do comércio internacional e o interesse dos países desenvolvidos em salvaguardar suas indústrias e comércio.[12] Em virtude disso, considerando que o Acordo TRIPS foi criado no seio da OMC, inequívoca se mostra a sua atenção voltada para o comércio internacional, o que justifica a conversão dos bens intelectuais em verdadeiras mercadorias. Conforme esclarece Benetti[13], com o propósito de sustentar a observância das normas e assegurar a fluidez do comércio entre os Estados-membros, a OMC criou um sistema de solução de controvérsias, onde qualquer Estado membro pode encaminhar seu conflito à OMC quando se verificar que foram infringidos os direitos decorrentes dos acordos.

Esse foi um dos aspectos mais relevantes para que os assuntos envolvendo direitos da propriedade intelectual fossem introduzidos na OMC. Com efeito, diante da instituição desse sistema de resolução de controvérsias tornou-se possível controlar a efetiva implementação desses direitos bem como das demais diretrizes trazidas pelo Acordo TRIPS no ordenamento interno dos países-membros.O Acordo TRIPS, desde as suas tratativas iniciais, foi alvo de fortes críticas, as quais ainda se fazem presentes no momento atual. O Brasil foi um dos principais atores negociadores durante as discussões internacionais da rodada Uruguai do Gatt. Liderando os países do terceiro mundo, o Brasil se posicionou contra a formação de um quadro rígido de normas sobre propriedade intelectual.[14]

Os Estados Unidos, por sua vez, pressionavam o país internamente, para a adoção de uma norma ampla e nos fóruns internacionais. Chegou-se inclusive a impor sanções comerciais contra o Brasil, em 1988, de aproximadamente 1,8 bilhões de dólares em 1995, caso a lei não fosse finalmente aprovada no Congresso Nacional.[15]

Sobre esse mesmo aspecto, destaca Roland[16], que foi a partir do marco da Eco 92, ocorrida no Rio de Janeiro, que a pressão americana para que o Brasil viesse a se filiar ao sistema multilateral de regulamentação da propriedade intelectual se intensificou, vindo a ser finalmente consubstanciada no Acordo TRIPS. Tal fato, ainda de acordo com o autor, revela o caráter eminentemente estratégico dos mecanismos de apropriação e privatização do conhecimento, que são tidos como promotores do desenvolvimento e da hegemonia econômica.Dentre as principais características do Acordo TRIPS está a extensão da obrigatoriedade da concessão de direitos sobre Propriedade Intelectual para praticamente todos os campos do conhecimento.[17] Com efeito, o acordo prevê um conjunto mínimo de setores para os quais é obrigatório ter direitos de propriedade intelectual. Logo, ao ratificá-lo, os países foram obrigados a criar normas internas no mesmo sentido, o que proporcionou um efeito de universalização das convenções internacionais, que até então eram ratificadas por alguns poucos países desenvolvidos apenas.[18]

A inserção da Propriedade Intelectual, em sentido amplo, na Ordem Econômica global, por meio do Acordo TRIPS, colocou em evidência uma questão fundamental, que diz respeito à transferência de tecnologia.

11 BENETTI, Daniela Vanila Nakalski. Proteção Às Patentes de Medicamentos e Comércio Internacional. In: **Propriedade Intelectual e Desenvolvimento**. Welber Barral e Luiz Otávio Pimentel (Orgs.). Florianópolis: Fundação Boiteux, 2006, p. 343-344.

12 GRANGEIRO, Alexandre; TEIXEIRA, Paulo Roberto. Repercussões do Acordo de Propriedade Intelectual no acesso a medicamentos. In: **Propriedade Intelectual:** tensões entre o capital e a sociedade. VILLARES, Fábio (Org.) São Paulo: Paz e Terra, 2007, p. 115.

13 BENETTI, Daniela Vanila Nakalski. Proteção Às Patentes de Medicamentos e Comércio Internacional. In: **Propriedade Intelectual e Desenvolvimento.** Welber Barral e Luiz Otávio Pimentel (Orgs.). Florianópolis: Fundação Boiteux, 2006. Pp. 345.

14 VARELLA, Marcelo Dias; PLATIAU, Ana Flávia Barros; SCHLEICHER, Rafael T. Desenvolvimento Tecnológico, Pesquisa Pública e Propriedade Intelectual: Análise da Miríade de Normas Internacionais. In: **Propriedade Intelectual e Desenvolvimento**. Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 338.

15 *Ibidem*.

16 ROLAND, Manoela Carneiro. O debate sobre o Desenvolvimento sob a perspectiva estratégica da Propriedade Intelectual e da sua regulamentação internacional. In: Patrícia Aurélia Del Nero (Coord.) **Propriedade Intelectual e Transferência de Tecnologia**. Belo Horizonte: Fórum, 2011, p. 42.

17 GRANGEIRO, Alexandre; TEIXEIRA, Paulo Roberto. Repercussões do Acordo de Propriedade Intelectual no acesso a medicamentos. In: **Propriedade Intelectual:** tensões entre o capital e a sociedade. VILLARES, Fábio (Org.) São Paulo: Paz e Terra, 2007, pp. 116.

18 VARELLA, Marcelo Dias. Políticas Públicas para Propriedade Intelectual no Brasil. In: **Propriedade Intelectual e Desenvolvimento.** Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 178.

Para Fontes[19], o estudo sobre a transferência de tecnologia deve partir de um ângulo intervencionista, "dado o seu caráter de promotora do desenvolvimento econômico e parâmetro regulador da transmissão da boa técnica e da propriedade intelectual."

Mas antes de se compreender a transferência, imprescindível se mostra a compreensão sobre o conceito de tecnologia. Nesse sentido, de acordo com as explicações de Assafim[20], adotando-se uma concepção ampla, pode-se definir a tecnologia como o conjunto de conhecimentos científicos cuja adequada utilização pode ser fonte de utilidade ou de benefícios para a Humanidade. Por outro lado, de maneira mais restrita, pode-se conceituar a tecnologia como o conjunto de conhecimentos e informações próprio de uma obra, que pode ser utilizado de forma sistemática para o desenho, desenvolvimento e fabricação de produtos ou a prestação de serviços.Já quando se remete à transferência da tecnologia, segundo Corrêa[21], adotando-se um sentido amplo, é possível compreendê-la como um negócio jurídico pelo qual uma das partes obriga-se a transmitir determinados conhecimentos aplicáveis a um processo produtivo, sendo remunerada pela outra parte. Contudo, adverte o autor que, para que haja real transferência de tecnologia é fundamental a assimilação dos conhecimentos pelo receptor.Ademais, o artigo sétimo do Acordo TRIPS, que trata dos objetivos a serem buscados por meio do mesmo, assim refere:

> A proteção e a aplicação de normas de proteção dos direitos de propriedade intelectual devem contribuir para a promoção da inovação tecnológica e para a transferência e difusão de tecnologia, em benefício mútuo de produtores e usuários de conhecimento tecnológico e de uma forma conducente ao bem-estar social econômico e a um equilíbrio entre direitos e obrigações.[22]

Como se depreende, o Acordo em questão elencou expressamente dentre os seus objetivos a transferência e a difusão de tecnologia, o que deve ser perseguido sem que se deixe de lado a finalidade maior do bem estar social econômico. Contudo, há quem entenda que os objetivos declarados no bojo do Acordo TRIPS "serviram apenas de ferramenta hipócrita de negociação, tendo sido absolutamente negligenciados."[23]

Um tema bastante pertinente e que também se insere nesse debate diz respeito à questão do acesso a medicamentos e o desenvolvimento interno em termos de saúde e bem-estar da população nacional. Problemática que sempre se mostrou transparente diz respeito à dificuldade de acesso à saúde considerados os altos custos dos medicamentos, cujas fórmulas são patenteadas por potentes multinacionais que monopolizam os proventos do conhecimento fármaco-científico.

Atentando para esse problema, que traz consequências negativas para a grande maioria dos países no campo global, é que se buscou uma flexibilização do Acordo TRIPS. Foi por meio da Declaração de Doha, firmada em novembro de 2001, que o combate a epidemias e doenças que afetam os países pobres foi tornado uma preocupação global, a partir do que se previu a possibilidade da concessão de licenciamentos compulsórios, para casos de emergência ou urgência nacional.[24]

Prevendo as dificuldades enfrentadas pelos países que se encontram em um estágio de desenvolvimento ainda precoce, a Declaração de Doha reforçou o compromisso de os países desenvolvidos oferecerem incentivos às suas empresas e instituições, com o propósito de promover a transferência de tecnologia para os países menos desenvolvidos. Ainda, previu uma série de flexibilizações a serem aplicadas ao Acordo TRIPS, como a prevalência da liberdade de cada membro para conceder licenças compulsórias, determinando as razões pelas quais elas serão concedidas, bem como as hipóteses que considera como sendo de emergência ou urgência nacional.

Tais flexibilizações repercutem incisivamente na transferência de tecnologia, na medida em que, diante da premissa básica sobre a qual se ancora a ideia de transferência, qual seja, a assimilação pelo receptor, o

19 FONTES, André R. C. Perfis de Transferência de Tecnologia. In: Propriedade Intelectual e Transferência de Tecnologia. Patrícia Aurélia Del Nero (Org.) Belo Horizonte: Fórum, 2011.

20 ASSAFIM, João Marcelo de Lima. A Transferência de Tecnologia no Brasil (aspectos conceituais e concorrenciais da Propriedade Industrial). Rio de Janeiro: Lumen Juris, 2013, p. 14.

21 CORRÊA, Daniel Rocha. **Contratos de Transferência de Tecnologia.** Belo Horizonte: Movimento editorial da Faculdade de Direito da UFMG, 2005, p. 96.

22 BRASIL. Presidência da República. Decreto nº. 1.355, de 30 de dezembro de 1994. Disponível em: < http://www.planalto.gov.br/ccivil_03/decreto/antigos/d1355.htm> Acesso em: 20 mai. 2017.

23 SILVA, Tatianna Mello Pereira da. Acordo TRIPS: one-size-fits-all? In: **Revista de Direito Internacional**, v. 10, n. 1, Brasília, 2013, p. 68. Disponível em: < file:///C:/Users/Note%20Michele/Downloads/1987-11447-1-PB.pdf> Acesso em: 03 jul. 2017.

24 MERCER, Henrique da Silva. Patente de Medicamentos conforme o TRIPS: O caso da Gripe Aviária. In: **Propriedade Intelectual e Desenvolvimento**. Welber Barral e Luiz Otávio Pimentel (Orgs.). Florianópolis: Fundação Boiteux, 2006, p. 363

instrumento da licença compulsória muitas vezes não se mostra suficiente. Isso ocorre quando o país não detém capacidade tecnológica para desenvolver por conta própria aquele objeto que sofreu a quebra da patente. Refletindo sobre essa problemática, Suguieda[25] esclarece que, para se tratar de transferência de tecnologia, é fundamental que haja capacitação tecnológica nacional. Com efeito, por meio da Declaração de Doha, houve o reconhecimento formal de que os membros da OMC com nenhuma ou insuficiente capacitação no setor farmacêutico poderiam enfrentar dificuldades para fazer uso efetivo do licenciamento compulsório nos termos do Acordo TRIPS. Para o autor, essa dificuldade antecede qualquer problema de segurança jurídica do instituto legal da licença compulsória ou decorrente das regras dos mercados imperfeitos que porventura possam impedir ou limitar a participação de terceiros.Como bem observa Rocha[26], não restam dúvidas "de que a transferência de tecnologia gera desenvolvimento econômico para o país receptor, mesmo que esse desenvolvimento refira-se apenas ao lucro gerado pelo aumento ou melhora na produção." Contudo, é preciso examinar novas abordagens para a transferência de tecnologia dos países ricos para os pobres, já que esta foi apontada por muitos tratados e declarações internacionais como um dos objetivos do sistema internacional. Falta, ao longo do processo, um maio acompanhamento operacional.[27]

Ademais, é preciso um esforço local de cada país, no delineamento de estratégias que se voltem para os problemas e para as potencialidades de desenvolvimento local.

A partir dessa perspectiva, se passará a analisar a maneira como o Brasil optou por estruturar internamente os Direitos de Propriedade Intelectual, atentando-se para o Sistema Patentário vigente e a maneira como isso impacta no seu nível de desenvolvimento.

3. Reflexões sobre o desenvolvimento interno a partir do sistema patentário brasileiro

Partindo de uma análise classificatória dos países integrantes da ordem mundial no que tange ao seu nível de desenvolvimento e dedicando maior atenção à realidade desenvolvimentista do Brasil, é possível identificar o destaque que ele representa no investimento em determinados setores, como o da biotecnologia. Essa observação é feita por Varella, que ainda atenta para o caráter tímido da atuação do Brasil, na medida em que produz menos de 2% das inovações mundiais:

> O Brasil tem capacidade para adaptar tecnologias e reproduzi-las a custos mais baixos no território nacional. Especialmente para esse grupo de poucos países a propriedade intelectual tem uma função muito importante. Ela vai limitar ou estimular o ritmo de desenvolvimento tecnológico do país, em função de políticas favoráveis e diferenciadas em favor de setores estratégicos da indústria nacional, para que se consiga alavancar esse desenvolvimento.[28]

Como se depreende, o Brasil se enquadra no grupo dos países adaptadores de tecnologias. Enquanto dotado da capacidade de adaptar tecnologias já existentes, pode ter um futuro ainda mais promissor no que tange ao seu nível de desenvolvimento econômico caso saiba se utilizar das ferramentas disponibilizadas pela Propriedade Intelectual.

Analisando uma pesquisa realizada por Varella, é possível verificar que a produção de tecnologia se concentra nos países do Norte, resultando na priorização da ciência e tecnologia entre os principais investimentos públicos e privados nesses países. A título ilustrativo, o autor compara o Brasil aos Estados Unidos, referindo que, enquanto estes investiam no final do século passado uma média de 2,8% do PIB em pesquisa científica, o Brasil investia 0,8% apenas.[29]

Nesse mesmo sentido, evidencia Albuquerque[30] que o Brasil faz parte de um conjunto de países que não possuem um sistema de inovação completo (ou madu-

25 SUGUIEDA, Márcio Heidi. O Tênue Equilíbrio da Propriedade Intelectual no Brasil. In: **Propriedade Intelectual e Transferência de Tecnologia.** Patrícia Aurélia Del Nero (Coord.). Belo Horizonte: Fórum, 2011, p. 68-69

26 CORRÊA, Daniel Rocha. **Contratos de Transferência de Tecnologia.** Belo Horizonte: Movimento editorial da Faculdade de Direito da UFMG, 2005, p. 161.

27 SACHS, Jeffrey. O divisor global de Inovação. In: **Propriedade Intelectual e Desenvolvimento**. Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 32-33.

28 VARELLA, Marcelo Dias. **Propriedade Intelectual e Desenvolvimento**. São Paulo: Lex, 2005, p. 04.

29 *Ibidem*, p. 173.

30 ALBUQUERQUE, Eduardo da Motta e. Propriedade Intelectual e estratégias para o desenvolvimento. In: **Propriedade Intelectual:** tensões entre o capital e a sociedade. VILLARES, Fábio (Org.) São Paulo: Paz e Terra, 2007, p. 142.

ro), da mesma forma que a Índia, a África do Sul e o México, sendo de extrema urgência que comece a investir decididamente na construção desse sistema.

Essa realidade enfrentada pelo Brasil está intimamente relacionada à forma como aderiu ao acordo TRIPS. Sobre esse aspecto, revela Denis Barbosa[31] que "o legislador brasileiro acabou cedendo à pressão unilateral americana, sem aproveitar-se dos ganhos de razoabilidade que vieram com o TRIPS." Analisando os dispositivos previstos no acordo, mais precisamente, contemplando as suas disposições transitórias, é possível observar que restou resguardada a prerrogativa aos países em desenvolvimento de postergar a vigência do acordo pelo prazo de quatro anos[32], tendo o Brasil optado deliberadamente por não fazê-lo.

Com efeito, a "padronização das legislações nacionais decorrentes da adesão ao tratado TRIPS deixa de levar em conta as diferenças relevantes entre países em via de desenvolvimento (PVD) e os países de desenvolvimento avançado."[33] Enquanto alguns países tenham se preocupado em aproveitar o período transitório concedido pelo acordo para fortalecer-se internamente, o Brasil prontamente procedeu à uniformização da sua legislação nacional.

Em razão disso, infere-se que os impactos do Acordo TRIPS no Brasil refletem "não o equilíbrio, mas a prevalência irrefreada da tese do predomínio dos interesses dos proprietários, mesmo a despeito do mercado e do comércio", desencadeando o recrudescimento radical do sistema de propriedade.[34]

Conforme pontua Varella[35], os direitos de propriedade intelectual foram associados ao estímulo da inovação tecnológica, sendo que, com a intensificação do processo de globalização, ganham importância ainda mais estratégica. Partindo desse enfoque, a atribuição de direitos de propriedade intelectual pode significar o estímulo à inovação tecnológica da indústria local, como pode significar também apenas o aumento do domínio do mercado nacional por uma empresa estrangeira.

Ao refletir sobre o modelo padronizado de proteção da Propriedade Intelectual, em artigo publicado na Revista de Direito Internacional, Silva[36] atenta para o fato de que a Propriedade Intelectual consiste em um dos meios para a consecução de um fim a ser levado em consideração dentro de uma estratégia maior de promoção do desenvolvimento econômico e do bem-estar social mundial.

Nesse sentido, a Propriedade Intelectual pode ser adotada como uma importante ferramenta para a promoção do desenvolvimento interno. Contudo, cada Estado nacional deve "saber quando reforçar ou não os direitos de propriedade intelectual sobre determinados setores, resguardando seus interesses", sob pena de ficar refém das grandes multinacionais.[37]

Embora o Brasil invista pouco, está entre os países em desenvolvimento que mais investe em ciência e tecnologia. O fato de ser dotado de capacidade para adaptar tecnologia de acordo com os recursos que possui em seu próprio território demonstra um certo otimismo para se pensar em uma estratégia que promova de maneira mais efetiva o seu desenvolvimento interno.[38]

Ocorre que, ao aderir ao Acordo TRIPS de maneira automática, sem se valer do período transitório, o Brasil pecou na elaboração de estratégias que lhe permitiriam alcançar uma maior qualidade no desenvolvimento, optando por já lançar sua nova Lei de Propriedade Industrial, de nº. 9.279, de 1996, em estrita consonância àquele acordo. Assim, conforme acentua Grangeiro[39], "na elaboração da Lei de Patentes o Brasil deixou de

31 BARBOSA, Denis Borges. Trips e a Experiência Brasileira. In: **Propriedade Intelectual e Desenvolvimento.** Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 152.

32 BRASIL. Presidência da República. Decreto nº. 1.355, de 30 de dezembro de 1994. Disponível em: < http://www.planalto.gov.br/ccivil_03/decreto/antigos/d1355.htm> Acesso em: 20 mai. 2017.

33 GONTIJO, Cícero. **As transformações do sistema de Patentes, da Convenção de Paris ao Acordo Trips.** A posição brasileira. Fundação Heinrich Böll. 2005. Disponível em: < http://paje.fe.usp.br/~mbarbosa/dpi/gontijo1.pdf > Acesso em: 20 mar. 2017, p. 12.

34 BARBOSA, Denis Borges. Trips e a Experiência Brasileira. In: **Propriedade Intelectual e Desenvolvimento**. Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 148-149.

35 VARELLA, Marcelo Dias. Políticas Públicas para Propriedade Intelectual BARBOSA, Denis Borges. Trips e a Experiência Brasileira. In: **Propriedade Intelectual e Desenvolvimento.** Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 148-149.*Ibidem*, p. 178.

36 SILVA, Tatianna Mello Pereira da. Acordo TRIPS: one-size-fits-all?. In: **Revista de Direito Internacional**, v. 10, n. 1, Brasília, 2013, p. 69. Disponível em: < file:///C:/Users/Note%20Michele/Downloads/1987-11447-1-PB.pdf> Acesso em: 03 jul. 2017.

37 VARELLA, Marcelo Dias. **Propriedade Intelectual e Desenvolvimento,** São Paulo: Lex, 2005, p. 03

38 *Ibidem*, p. 13

39 GRANGEIRO, Alexandre; TEIXEIRA, Paulo Roberto. Repercussões do Acordo de Propriedade Intelectual no acesso a medicamentos. In: **Propriedade Intelectual**: tensões entre o capital e a sociedade. VILLARES, Fábio (Org.) São Paulo: Paz e Terra, 2007, p. 130

SEGALA, Michele M.; GREGORI, Isabel Christine S. De. Os reflexos da proteção internacional da propriedade intelectual para o desenvolvimento interno: uma análise sobre o sistema patentário brasileiro e a transferência de tecnologia. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 524-535

incorporar diversas salvaguardas, assim como, na atualidade, utiliza os mecanismos de proteção previstos na sua própria lei de forma tímida."

Consistente em um dos ramos da Propriedade Intelectual, a Propriedade Industrial pode ser compreendida como um promissor instrumento de desenvolvimento, merecendo particular atenção o instituto das patentes. Atentando para a construção teórica realizada por Correa[40], tem-se que o sistema de patentes carrega consigo a intenção original de recompensar o espírito inventivo, incentivando, com isso, o progresso técnico.

O instituto das patentes persegue o ideal de impulsionar o progresso técnico-industrial, fomentando a realização e a divulgação de invenções. Estas, por sua vez, de acordo com a conceituação trazida por Assafim[41], consistem em regras para a ação humana e são o resultado de um processo criador, pressupondo a apresentação de um problema e a determinação dos meios para solucioná-lo.

Conceituando o mesmo instituto, Macedo e Pinheiro[42] esclarecem que a patente consiste em uma das propriedades industriais e envolve conhecimentos não triviais de base técnica, científica e legal. Em sua origem, surgiu como uma política de cunho desenvolvimentista para incentivar os artesãos a criar novos processos e mercadorias e a produzi-las localmente, sendo o inventor a peça principal da lógica da concessão do monopólio em troca do benefício da revelação do conhecimento.

A partir dessa perspectiva, a patente pode ser encarada como um incentivo concedido pelo Estado para que novas invenções sejam criadas. Ocorre que, na prática vivenciada pelo mundo globalizado, não se consegue mais vislumbrar tal incentivo. Considerando que os titulares das patentes passam a ser as grandes corporações, o instituto acaba sendo encarado restritivamente como uma ferramenta de monopólio, mediante a predominância das regras de mercado sobre o interesse social desenvolvimentista.

Sob esse mesmo enfoque, discorre Assafim[43] que as patentes de invenções têm a função primordial de servir de instrumento de tecnologia. Não obstante, nos países subdesenvolvidos ou em desenvolvimento, existe uma espécie de desconfiança frente às patentes de invenções como portadoras de tecnologias. Com frequência, imagina-se que as mesmas somente servem às empresas dos países industrializados para que explorem, em regime de monopólio, nos países menos desenvolvidos as invenções, sem que seja transmitida a tecnologia correspondente.O titular de uma patente recebe, por um período de 20 anos, o direito exclusivo de

> fabricar, utilizar, pôr à venda, vender ou importar o produto ou processo produtivo patenteado. Em contrapartida, o titular deve divulgar como chegou a determinado produto, de forma a ensinar ao público o processo tecnológico que o levou a al invenção. [...] Trata-se de uma poderosa ferramenta em favor da transferência de tecnologia, mas que presume alguns requisitos, como capacidade de adaptação da tecnologia pelos países, o que pressupõe nível importante de desenvolvimento tecnológico, o que poucos países em desenvolvimento detêm;"[44]

A grande maioria dos teóricos são defensores da criação de um sistema de patentes para os Estados, pois sem ele não haveria desenvolvimento científico e tecnológico, principalmente na era da globalização, onde o aspecto comercial está realçado em todos os âmbitos do cotidiano social."[45]

Pertinente se faz a reflexão sobre a tradição brasileira quanto ao uso de patentes, que já é de longa data, o que se depreende até mesmo pela ativa participação do país nos tratados e acordos internacionais pertinentes ao tema. Sobre esse aspecto, explica Gontijo[46] que a lei de patentes, de 28 de agosto de 1830, previa a concessão de patentes apenas a nacionais, sendo que aos estrangeiros interessados em explorar localmente suas invenções

40 CORREA, Carlos M. Aperfeiçoando a Eficiência Econômica e a Equidade pela Criação de Leis de Propriedade Intelectual. In: **Propriedade Intelectual e Desenvolvimento**. Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 51-52.

41 ASSAFIM, João Marcelo de Lima. **A Transferência de Tecnologia no Brasil** (aspectos conceituais e concorrenciais da Propriedade Industrial). Rio de Janeiro: Lumen Juris, 2013, p. 19.

42 MACEDO, Maria Fernanda Gonçalves; PINHEIRO, Eloan dos Santos. O impacto das Patentes Farmacêuticas em Países em Desenvolvimento e as Perspectivas para o Brasil. In: **Propriedade Intelectual e Desenvolvimento.** Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 282.

43 ASSAFIM, João Marcelo de Lima. *Op Cit.,* p. 20.

44 VARELLA, Marcelo Dias. Políticas Públicas para Propriedade Intelectual no Brasil. In: **Propriedade Intelectual e Desenvolvimento**. Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 188.

45 BENETTI, Daniela Vanila Nakalski. Proteção Às Patentes de Medicamentos e Comércio Internacional. In: **Propriedade Intelectual e Desenvolvimento.** Welber Barral e Luiz Otávio Pimentel (Orgs.). Florianópolis: Fundação Boiteux, 2006, p. 346.

46 GONTIJO, Cícero. As transformações do sistema de Patentes, da Convenção de Paris ao Acordo Trips. A posição brasileira. Fundação Heinrich Böll. 2005. Disponível em: < http://paje.fe.usp.br/~mbarbosa/dpi/gontijo1.pdf > Acesso em: 20 mar. 2017, p. 17.

era concedido um subsídio (muito diferente do monopólio). Além disso, a lei previa a caducidade, nos casos em que houvesse a ausência de exploração local após dois anos da concessão.

Atualmente, o sistema patentário brasileiro segue os ditames previstos na Lei nº. 9.610/98, que regula todas as modalidades de Propriedade Industrial. A patente é concedida pelo governo, por intermédio do Instituto Nacional de Propriedade Industrial (INPI), oportunidade em que são atribuídos ao solicitante o direito de propriedade sobre o seu objeto e o direito de impedir terceiros de usá-la sem seu consentimento, prerrogativas que se estendem pelo prazo de vinte anos contados a partir da solicitação do privilégio.[47]

Conforme esclarece Marinho[48], o INPI se trata de uma autarquia federal autossuficiente, que independe de repasses do governo, sendo responsável por executar as normas que regulam a propriedade industrial, tendo em vista sua função social, econômica, jurídica e técnica, o que retrata a importância da sua atuação na condução do sistema brasileiro de patentes. Contudo, entende-se que a sua estrutura não se mostra compatível com a importância que o sistema representa, o que se depreende em razão da demora na análise dos pedidos, diante da falta de profissionais destinados a essa função.As dificuldades enfrentadas pelo INPI, sobretudo no tocante à mão-de-obra, repercutem negativamente no sistema patentário. De acordo com o entendimento de Benetti[49],é a partir da proteção do conhecimento científico e tecnológico e da sua transformação em inovação que se alcança o desenvolvimento socioeconômico do país. Em razão disso, a Propriedade Intelectual e, sobretudo, a Propriedade Industrial, é vista como um elemento essencial para o desenvolvimento interno.

Por outro lado, defendendo uma posição não tão otimista, Suguieda[50] alerta que quando se está a tratar de países em desenvolvimento, é interessante desmistificar argumentações que almejam incutir a ideia de que a proteção em si da propriedade intelectual é fator que promove a inovação tecnológica ou a atração de investimentos. Para o autor, trata-se de um fator a ser considerado, mas não pode ser visto em sentido absoluto.De acordo com a perspectiva trazida por Varella[51], a gestão da concessão de patentes possui uma face técnica, que é representada pelo cumprimento dos acordos internacionais, atendendo ao mínimo previsto pelo TRIPS e pelos outros tratados em vigor no Brasil, e outra política, que está fundamentada no cumprimento da função social da propriedade, representada pela escolha dos formuladores de políticas públicas sobre quais setores estimular por meio da concessão de patentes e quais setores estimular por meio da não-concessão de direitos de propriedade intelectual.Se a conjuntura dessas duas faces da concessão de patentes se der de maneira equilibrada, entende-se pela possibilidade de se pensar o sistema patentário enquanto propulsor do desenvolvimento nacional.

Como bem observa Correa[52] ,

> o reconhecimento dos direitos de propriedade intelectual fundamenta-se essencialmente na suposição de que, na falta de incentivos, os investimentos pra criar novo conhecimento ficarão abaixo do nível ótimo. Os criadores de políticas enfrentam o difícil dilema de sacrificar o bem-estar de hoje em vista de benefícios futuros. As abordagens desse dilema precisam considerar o contexto em que ocorre o processo de inovação e difusão de conhecimento.

Nesse sentido, fundamental se apresenta a promoção de incentivo por parte do Estado, para que novas pesquisas sejam desenvolvidas e revertam em desenvolvimento econômico e social para a comunidade local, ao invés de limitar-se ao cumprimento das normas de caráter internacional, tornando-se mero fornecedor de matéria prima para que as grandes multinacionais adquiram maior monopólio global.Conforme propõe Remiche[53], a construção de um sistema das patentes equi-

47 MACEDO, Maria Fernanda Gonçalves; PINHEIRO, Eloan dos Santos. O impacto das Patentes Farmacêuticas em Países em Desenvolvimento e as Perspectivas para o Brasil. In: **Propriedade Intelectual e Desenvolvimento**. Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 282.

48 MARINHO, Maria Edelvacy Pinto Marinho. Política de Patentes em Biotecnologia: posicionamento Brasileiro. In: **Propriedade Intelectual e Desenvolvimento.** Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 317.

49 BENETTI, Daniela Vanila Nakalski. *Op. Cit.*, p. 43.

50 SUGUIEDA, Márcio Heidi. O Tênue Equilíbrio da Propriedade Intelectual no Brasil. In: **Propriedade Intelectual e Transferência de Tecnologia**. Patrícia Aurélia Del Nero (Coord.). Belo Horizonte: Fórum, 2011, p. 65.

51 VARELLA, Marcelo Dias. Políticas Públicas para Propriedade Intelectual no Brasil. In: **Propriedade Intelectual e Desenvolvimento.** Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 189

52 CORREA, Carlos M. Aperfeiçoando a Eficiência Econômica e a Equidade pela Criação de Leis de Propriedade Intelectual. In: **Propriedade Intelectual e Desenvolvimento**. Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 72.

53 REMICHE, Bernard. Revolução Tecnológica, Globalização e Direito das Patentes. In: **Propriedade Intelectual e Desenvolvimento**. Marcelo Dias Varella (Org.). São Paulo: Lex, 2005, p. 128.

librando os diferentes interesses, internacionais e locais, deverá ser uma solução política, ou seja, resultar de uma vontade coletiva e, claro, preparada com estudos interdisciplinares.

Dentro dessa mesma perspectiva, já alertou Barbosa[54] para o fato de que a Carta Magna previu uma finalidade específica para a propriedade industrial, qual seja, o desenvolvimento tecnológico, social e econômico do País, não da humanidade, não dos países em geral. Nesse sentido, imprescindível se mostra a adoção de uma gestão dos direitos de propriedade industrial mais voltada para as demandas econômicas e sociais do país.

4. Considerações finais

O artigo proporcionou uma reflexão sobre a maneira como o Sistema Internacional de proteção da Propriedade Intelectual foi sendo construído e as diferentes formas como impactou nos países desenvolvidos e naqueles que ainda se encontravam em estágio de desenvolvimento. Além disso, evidenciou a forte disputa de interesses que sempre esteve por trás do firmamento dos acordos mais importantes envolvendo a matéria.

A posição de superioridade e de poder exercida pelos países desenvolvidos no cenário internacional foi o suficiente para inserir o ramo da Propriedade Intelectual no sistema de comércio internacional. Como resultado disso, o Acordo TRIPS surgiu com um enfoque totalmente diferenciado do trazido pela sua antecessora Convenção de Paris. Enquanto esta última detinha um tom conciliatório, respeitando os interesses e a autonomia dos países, o outro, ainda que se dizendo respeitar a autonomia dos Estados partes, acabou por amarrá-los a um sistema rígido de proteção.Como visto, a proteção internacional da Propriedade Intelectual trouxe sensíveis impactos para a formação dos sistemas patentários, refletindo, por sua vez, no desenvolvimento de alguns países. No caso do Brasil, ao abrir mão do prazo de transição possibilitado pelo próprio TRIPS, incorporando suas diretrizes à sua legislação interna de maneira quase que automática, acabou abrindo mão também de desenvolver-se localmente.Diante das reflexões realizadas, foi possível observar que o sistema de patentes possui um viés técnico e outro político, sendo que a observância às normas internacionais, embora indispensáveis, compõem apenas o primeiro viés, restando ainda o aspecto político. Este, diz respeito à autonomia que o país detém, sendo capaz de traçar estratégias que incentivem, no plano interno, a realização de novas pesquisas e a criação de novas tecnologias, o que, por sua vez, poderá contribuir de maneira mais efetiva para o desenvolvimento nacional.

Logo, como consideração conclusiva, tem-se que o sistema internacional de proteção da Propriedade Intelectual impactou de maneira direta no desenvolvimento interno, que, se não fosse por uma decisão política adotada pelo Brasil ao aderir ao Acordo TRIPS sem a devida maturidade, poderia hoje ter índices muito mais satisfativos, seja do ponto de vista econômico, social e até mesmo tecnológico.

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54 BARBOSA, Denis Borges. Trips e a Experiência Brasileira. In: **Propriedade Intelectual e Desenvolvimento.** Marcelo Dias Varella (Org.). São Paulo: Lex, 2005. p. 144

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O caso hipotético da morte do embaixador francês na Espanha: duas espécies de ius gentium em Francisco de Vitoria

The fictional case of the French ambassador's murder in Spain: two kinds of ius gentium in Francisco de Vitoria

Rafael Zelesco Barretto

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O caso hipotético da morte do embaixador francês na Espanha: duas espécies de *ius gentium* em Francisco de Vitoria*

The fictional case of the French ambassador's murder in Spain: two kinds of *ius gentium* in Francisco de Vitoria

Rafael Zelesco Barretto**

Resumo

O artigo expõe uma parte pouco comentada do pensamento de Francisco de Vitoria, a quem se costuma atribuir papel importante no desenvolvimento da ciência do Direito Internacional. Em seus comentários à *Suma Teológica* de Tomás de Aquino, Vitoria propôs um caso hipotético para ilustrar a obrigatoriedade do direito das gentes. Narrou o suposto assassinato do embaixador francês na Espanha, afirmando que tal conduta seria injusta por violar o *ius gentium*. Tal reprovabilidade foi justificada em dois níveis, que Vitoria relacionou a duas espécies de direito das gentes. O primeiro destes seria geral e decorreria de um consentimento virtual de todo o universo, enquanto que o segundo seria específico e resultaria do acordo entre algumas nações. A distinção é feita de passagem e o mestre salmantino não a desenvolve. Nas páginas a seguir, argumenta-se que a dualidade no direito das gentes é uma marca distintiva do pensamento vitoriano. Assim, expõem-se outras passagens da obra do dominicano nas quais a distinção mencionada reaparece perante casos concretos. Para efeitos de comparação, o artigo também descreve e responde a interpretações diferentes, feitas por outros estudiosos de Vitoria. Conclui-se que a dualidade no *ius gentium* contribui para aproximá-lo do direito natural, indicando-lhe uma finalidade e controlando os excessos do voluntarismo estatal.

Palavras chave: Direito das gentes. Segunda Escolástica. Direito natural.

Abstract

This paper presents a less commented part of the teachings of Francisco de Vitoria, to whom it is nowadays usual to attribute a major role in the development of international law theory. In his commentaries on Thomas Aquinas' Summa Theologica, Vitoria draws on a hypothetical case in order to explain the obligatory nature of ius gentium. He told a fictional story about the murder of the French ambassador to Spain, claiming such an act would be unjust since it violated ius gentium. Vitoria then elaborates on the reproachable character of that homicide, by means of a twofold reasoning, related to two different kinds of ius gentium. The first is general

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and established by a virtual consent of the whole universe, while the second is more specific and roots in agreement between some nations only. This distinction is drawn incidentally and without further developments. This essay argues that the dual character of ius gentium is a distinctive feature of Vitoria's thought. In this sense, other passages of the dominican's work show this differentiation while handling concrete situations. Further, the article draws a comparison and provides answers to different positions of other experts on Vitoria. The conclusion is that duality in Vitoria's law of nations brings it nearer to natural law, gives ius gentium a finality and controls the excesses of state voluntarism.

Keywords: Ius gentium. Second Scholasticism. Natural law.

1. Introdução

Este artigo examina a noção de *ius gentium* nos comentários de Francisco de Vitoria à questão 57 ("O Direito") da *Secunda Secundae* da Suma Teológica. Trata-se de salientar um aspecto que parece ser pouco comentado entre os estudiosos do pensamento vitoriano, qual seja, a divisão que o mestre salmantino opera dentro do conceito de direito das gentes, ali distinguindo uma espécie oriunda de um pacto público e outra provinda de um acerto privado. A menção a este caráter dual do direito das gentes é breve e um tanto confusa. O problema é discutido pelo teólogo através de um exemplo fictício – a morte do enviado francês mencionada no título deste artigo – que, contudo, não cumpre exatamente sua finalidade, em parte devido ao hábito escolástico de exagerar na exposição de argumentos favoráveis. Deve ser dito também que Vitoria não retoma esta tese explicitamente nas suas famosas *Relectiones* sobre os índios e o direito da guerra. Contudo, este trabalho buscará evidenciar que a distinção apontada é fundamental para compreender a natureza do *ius gentium* vitoriano, bem como suas controversas relações com o *ius naturale* e o *ius civile*. Em última análise, argumentar-se-á que uma das causas – se não a principal – da vitalidade da doutrina de Francisco de Vitoria está na delicada relação que ele estabelece, desenvolvendo o pensamento de Tomás de Aquino, entre as duas espécies de direito das gentes.

Para tanto, seguir-se-á esta ordem: a próxima seção trará uma breve síntese da lição vitoriana sobre o artigo 3º da *quaestio* 57 do Tratado sobre a Justiça de Santo Tomás, destacando-se as dúvidas sobre a essência, natural ou positiva, do *ius gentium*, sobre sua obrigatoriedade e sobre os atores que estarão eventualmente vinculados ao mesmo. O capítulo seguinte estará centrado na hipótese do assassinato do embaixador francês na Espanha, perante a qual se intentará pôr em evidência a bipartição do direito das gentes feita por Vitoria. Sucessivamente, alguns esquemas interpretativos rivais serão passados em revista. Outro tópico buscará comprovar a tese aqui defendida cotejando diversas passagens das obras do dominicano burgalês. Por fim, espera-se concluir esclarecendo qual o lugar do direito das gentes no pensamento jurídico de Francisco de Vitoria, bem como reavaliando seu aporte ao debate atual sobre o direito internacional.

2. Síntese da doutrina vitoriana do direito das gentes

Seguindo o roteiro traçado pelo Aquinate, Francisco de Vitoria se depara com o direito das gentes ao estudar a divisão do direito. Dois posicionamentos tradicionais se opunham desde a Idade Média, o primeiro sustentando uma divisão dual[1], o outro advogando pela tripartição[2]. O direito das gentes constituía o pomo da discórdia, pois as duas correntes concordavam em re-

1 Sua origem mais visível estava no jurisconsulto Gaio: "Todos os povos que são regidos por leis e costumes usam um direito que, em parte, lhes é próprio e, em parte, é comum a todos os homens, pois o direito que cada povo promulga para si mesmo esse lhe é próprio e se chama *direito civil*, direito inerente à própria cidade, mas o direito que a razão natural constituiu entre todos os homens e entre todos os povos que o observam, chama-se *direito das gentes*, como se disséssemos o direito que todos os povos usam. Assim, também, o povo romano usa de um direito que, em parte, lhe é próprio e, em parte, comum a todos os homens." GAIUS. **Institutas do Jurisconsulto Gaio**. Tradução de J. Cretella Jr. e Agnes Cretella. São Paulo: Revista dos Tribunais, 2004, 1,1. Também Aristóteles poderia ser incluído aqui, por não mencionar um *ius gentium*. ARISTÓTELES, Ética a Nicômaco. Tradução de António de Castro Caeiro. São Paulo: Atlas, 2009, 1134b.

2 Com base no jurisconsulto Ulpiano: "O direito privado é tripartido: foi, pois, selecionado ou de preceitos naturais, ou civis, ou das gentes." AA.VV. **Digesto de Justiniano. *Liber Primus*. Introdução ao Direito Romano**. Tradução de Hélcio Maciel França Madeira. 3ª ed. São Paulo: Revista dos Tribunais. Osasco: UNIFIEO, 2002, D.1.1.1.2. Também: "O direito das gentes é aquele do qual os povos humanos se utilizam. O que permite facilmente entender que ele se distancia do natural, porque este é comum a todos os animais e aquele é comum somente aos homens entre si." Idem, D.1.1.1.4

lação à existência dos direitos natural e civil. É bom ter em mente que não se tratava de uma discussão sobre a divisão didática dos ramos do direito, como quando se discute hoje se o direito do trabalho ou o direito internacional privado integram o direito público ou privado. O *quid* referia-se à determinação das fontes do direito, isto é, a qual tipo de raciocínio se deveria recorrer para conhecer o que seria justo em cada circunstância[3].

Mantendo-se na tradição cristã que remontava a Santo Isidoro de Sevilha, Tomás de Aquino segue Ulpiano na tripartição, embora divirja do romano em relação à definição de direito natural, por só admitir aplicá-lo de modo impróprio e por extensão aos animais irracionais[4]. Contudo, a questão era mais complicada do que parecia, pois os conceitos de direito natural e direito civil opunham-se diretamente em alguns aspectos, *tertium non datur*. A pergunta sobre a origem do direito deixa isto bem claro: existe o justo que procede da vontade humana, e existe aquele que não. No primeiro caso, tem-se o direito civil, humano ou positivo[5], no segundo, ingressa-se no direito natural. E quanto ao direito das gentes? Deverá por força inserir-se em alguma destas opções. O mesmo problema teórico se apresenta ao discutir a obrigatoriedade do direito: esta pode residir na adequação à natureza do homem ou em um mandato instituído por uma autoridade. Difícil conceber uma opção fora destas, que fosse reservada ao *ius gentium*.

Assim, o problema do enquadramento do direito dos povos era comum aos partidários das duas correntes. Aqueles que advogavam por duas espécies básicas de direito precisavam assimilar o *ius gentium* a algum dos outros tipos. E os que propunham sua autonomia deviam, não obstante, decidir-se a aproximá-lo do *ius civile* ou do *naturale* na resposta às questões fundamentais expostas acima.

É sabido que Santo Tomás vacila perante este problema, concedendo neste passo e no Tratado sobre a Lei[6] respostas que, embora mantenham uma coerência de fundo[7], efetivamente divergem na ênfase dada a um ou outro direito em sua ligação com o *ius gentium*[8].

Francisco de Vitoria mantém a divisão tripartite. Notando a dificuldade enfrentada pelo Doutor Angélico, reserva seu comentário sobre o problema exclusivamente para o Tratado sobre a Justiça, evitando cair em contradição. Na questão 57, principia distinguindo, na esteira do autor da Suma, o direito das gentes do direito natural: este compreende aquilo que é adequado a outrem em razão da igualdade, como por exemplo a devolução de um empréstimo. Caso a quantia tomada não seja restituída, o devedor estará assumindo uma posição superior ao credor, pois beneficiou-se com o prejuízo do outro. A devolução é de direito natural por uma exigência básica de igualdade – ou, como formula Vitoria, "por si mesmo diz igualdade e justiça"[9]. Já o direito das gentes refere-se àquilo que é adequado ao outro a partir de um critério distinto da mera exigência de igualdade. Trata-se de um direito mais sofisticado: a proporcionalidade da conduta será medida por algum outro parâmetro valioso. Vitoria usa o mesmo exemplo que Santo Tomás: o caráter privado da propriedade não é uma consequência da simples igualdade entre os homens. Na verdade, sua legitimidade decorre de uma avaliação adicional. Se os bens não estivessem repartidos, seguir-se-iam intermináveis disputas pela posse. Logo, em atenção à paz e concórdia entre os homens (critério adicional), que possibilita manter a igualdade básica entre todos (primeiro critério da justiça), a instituição da propriedade privada deve reputar-se justa. Trata-se de uma exigência do *ius gentium*.

Separado o direito dos povos do *ius naturale*, é preciso resguardar-se para não tombar no extremo oposto. Surge aí a tormentosa questão sobre a natureza do *ius gentium*. O fato de não identificar-se plenamente com o direito natural já basta para adscrevê-lo ao *ius positivum*?

3 VILLEY, Michel. **A formação do pensamento jurídico moderno**. São Paulo: Martins Fontes, 2005, pags. 47-65.

4 Ao conceituar lei natural, o Aquinate faz referência às inclinações que o homem possui em comum com os demais animais (AQUINO, Santo Tomás de. **Suma de Teología**, vol. 2, 2ª ed. Madri: BAC, 1989, I-II q. 94 a.2, onde cita Ulpiano). Porém sua intenção não parece ser a de incluir os animais entre os sujeitos do direito natural, como fica claro ao tratar da licitude de matar os demais seres vivos quando isto for necessário para o homem (AQUINO, Santo Tomás de. **Suma de Teología**, vol. 3. Madri: BAC, 1990, II-II q. 64 a.1 *ad* 2).

5 Frequentemente empregados como sinônimos, sem embargo das conotações bastante diferentes que adquirirão posteriormente.

6 AQUINO, Santo Tomás de. **Suma de Teología**, vol. 2, 2ª ed. Madri: BAC, 1989, I-II q.95 a.4.

7 HERRERA, Daniel Alejandro. Ius gentium: ¿derecho natural o positivo? *In*: IDOYA ZORROZA, María (org.). **Proyecciones sistemáticas e históricas de la teoría suareciana de la ley**. Col. "Cuadernos de pensamento español", nº 37. Pamplona: Universidad de Navarra, 2009, pag. 49.

8 Comentando a I-II q. 95 a.4, Francisco de Vitoria nota que "na II-II q. 57 [...] [Tomás] diz o contrário do que fala neste artigo". VITORIA, Francisco de. **La ley**. Tradução de Luis Frayle Delgado. 2ª ed. Madri: Tecnos, 2009, pag. 36.

9 VITORIA, Francisco de. **La justicia**. Tradução e introdução de Luis Frayle Delgado. Madri: Tecnos, 2003, pag. 23.

Vitoria continua com Santo Tomás: o direito das gentes assemelha-se mais ao direito civil que ao natural. Ele reconhece que muitos, especialmente entre os juristas, preferiam aproximar o direito das gentes do direito natural, em deferência aos romanos da época tardia, cujo *ius gentium* era fortemente influenciado pelo estoicismo. Contudo, não se deixa seduzir: após manifestar um certo enfado com a persistência desta discussão – "*digo en primer lugar que la discusión es más bien acerca del nombre que de la realidad, pues interesa poco decir una u outra cosa*"[10] – afirma claramente que o direito das gentes deve ser incluído no direito positivo:

> *Decimos, pues, con Santo Tomás, que el derecho natural es un bien por sí mismo, sin orden alguno a otro. En cambio, el derecho de gentes no es un bien de suyo, esto es, se dice que el derecho de gentes no tiene en sí equidad por su propia naturaleza, sino que está sancionado por un consenso de los hombres. Y así respondo a la cuestión principal con esta conclusión: que el derecho de gentes más bien debe ponerse dentro del derecho positivo, que del natural.*[11]

Como se vê, o motivo principal para a decisão de Vitoria pelo direito positivo é o consenso dos homens que está por trás do *ius gentium*. Uma vez que este é produto do consentimento dos vários povos e nações[12], obedece à racionalidade do direito civil, e não tanto aos ditames pré-voluntários do *ius naturale*.

Situando o direito das gentes no direito positivo, o teólogo burgalês se vê diante de um novo problema: a lei positiva obriga somente aqueles que a ela aderiram. Em uma conferência anterior (*Relectio de Potestate Civili*), ele havia formulado uma teoria da translação, pela qual o poder civil, provindo de Deus, era trasladado à comunidade humana, que em seguida, por razões de conveniência e prudência, o atribuía a um soberano[13]. Ora, se o poder residia, então, na comunidade humana como um todo, e se o poder do governante se devia unicamente ao consentimento da comunidade (ainda que tal consentimento fosse dado uma vez apenas e já considerado suficiente inclusive para as gerações seguintes), como justificar a obrigatoriedade do *ius gentium*, se este direito não fora especificamente promulgado por nenhum soberano investido do poder civil por seus súditos? Em outras palavras, como diz Vitoria, "*si el derecho de gentes fuera de derecho positivo, como se ha dicho, y no de derecho natural, el problema estaría en si el violar el derecho de gentes es pecado*". Fazendo uma adaptação ao século presente, quando o dominicano diz "pecado", pode-se entender "ilícito grave". Vitoria prossegue com seu questionamento: Ainda admitindo-se que alguns povos consentiram com o direito das gentes, como justificar sua obrigatoriedade para aqueles que deliberada e constantemente se mantém longe dele?

Portanto, a primeira resposta de Vitoria – o direito das gentes é direito positivo – levanta uma nova questão. Se o *ius positivum* está baseado no consentimento da república, como justificar a obrigatoriedade do direito das gentes, em especial naqueles casos em que toda a república obra conscientemente de modo contrário aos preceitos deste direito dos povos?

3. A duplicidade do *ius gentium* em Vitoria

Fiel ao método escolástico, Francisco de Vitoria responde a estas dúvidas com uma distinção: o direito das gentes é duplo, analogamente à duplicidade do direito positivo. Com efeito, ao tratar deste, na lição anterior, o regente de Prima dizia que correspondia ao que era justo por determinação tanto de uma lei quanto de um pacto privado. Acrescentava que a lei também podia ser considerada um pacto público, e assim todo o direito positivo tinha origem no consenso humano[14]. Ora, da mesma forma que o direito positivo possuía origem dupla, em pacto público ou privado, também o *ius gentium* exibiria tal complexidade: "*hemos sostenido que es doble el derecho de gentes, lo mismo que es doble el derecho positivo, como hemos dicho antes*"[15].

O mestre salmantino prossegue explicitando o paralelismo, pois o direito dos povos também poderia ter sua origem em um pacto público ou um privado. Inten-

10 VITORIA, Francisco de. **La justicia**. Tradução e introdução de Luis Frayle Delgado. Madri: Tecnos, 2003, pag. 25.

11 VITORIA, Francisco de. **La justicia**. Tradução e introdução de Luis Frayle Delgado. Madri: Tecnos, 2003, pag. 26.

12 Neste trabalho, os conceitos de "povo", "nação", "república" e "Estado" serão utilizados indistintamente, entendendo-se que não há sentido, para os fins buscados aqui, em aplicar-lhes as distinções que a ciência política desenvolveu nos séculos posteriores a Francisco de Vitoria. Seu sentido será o de "comunidade autônoma" ou "perfeita", no dizer do mestre salmantino.

13 VITORIA, Francisco de. **Relectio de Potestate Civili. Estudios sobre su Filosofía Política**. Edición crítica de Jesús Cordero Pando. Col. "Corpus Hispanorum de Pace", segunda série, vol. 15. Madri: CSIC, 2008, pags. 21-27.

14 VITORIA, Francisco de. **La justicia**. Tradução e introdução de Luis Frayle Delgado. Madri: Tecnos, 2003, pag. 14.

15 VITORIA, Francisco de. **La justicia**. Tradução e introdução de Luis Frayle Delgado. Madri: Tecnos, 2003, pag. 27.

ta esclarecer a questão com o exemplo do embaixador francês:

> *Supongamos, por ejemplo, que nosotros tengamos guerra con los franceses y los franceses envíen un embajador, al que los españoles dan muerte contra el derecho de gentes. ¿Por qué y cómo sabéis vosotros que no (nosotros) hayamos admitido aquel derecho de gentes y que hayamos pecado matando al enemigo?*[16]

A questão é bastante gráfica: sob qual fundamento uma nação poderia exigir que algum preceito do direito das gentes fosse respeitado por outra parte? Caso os espanhóis executassem o legado francês, como provar que os ibéricos haviam violado uma norma de direito? Estes últimos não poderiam alegar que não haviam admitido tal costume e que, portanto, não se encontravam vinculados ao mesmo? Em última análise: qual o motivo para afirmar que os diferentes povos e nações estariam obrigados pelo *ius gentium*?

Vitoria explica que o direito das gentes pode originar-se de um consenso comum ou de um acordo particular. No caso da imunidade dos enviados diplomáticos, esta é observada em toda parte por força do *ius gentium* público, que vigora entre todas as nações e é universalmente respeitado. Não se trata de justificar a vigência desta norma pelo mero fato de ser um costume universal. É precisamente o contrário: a manutenção de embaixadas e do relacionamento interestatal daí decorrente é um importante fator na prevenção das guerras. Para que possam conviver, os povos necessitam um convívio civilizado, e os legados têm a importante função de possibilitar a conversação e a troca de opiniões entre os países. Tais funcionários não poderiam exercer bem seu papel, porém, caso não fossem invioláveis na república perante a qual representassem seu governo. Daí dizer-se que a proteção aos embaixadores decorre do direito das gentes público – primeiro *ius gentium* vitoriano.

Ocorre que nem todas as normas do direito das gentes possuem valor universal. O teólogo burgalês propõe a questão:

> *El problema está en si es pecado violar el derecho de gentes que aún no ha sido sancionado para algunos; es decir, la duda está al hablar del derecho de gentes no escrito, o también del escrito que no obliga a todos los hombres del mundo, como está claro tratándose de la muerte de los embajadores, que va contra el derecho de gentes. No todos están obligados a observar el derecho de gentes, puesto que no es natural.*[17]

O assunto se complica: há um direito das gentes que não vincula todas as pessoas ou povos, por não ter sido sancionado para todos. Em outras palavras, a universalidade não é característica essencial do *ius gentium*, podendo estar ou não presente, sem que isto altere a natureza e a juridicidade de tais normas. Surge aqui o segundo direito das gentes vitoriano, oriundo de um consentimento restrito a algumas nações.

O exemplo dos embaixadores retorna aqui, e o mestre salmantino parece enredar-se na discussão. Ele não acabara de dizer que a imunidade diplomática era exigência do *ius gentium* universal?

Na verdade, é bom lembrar aqui do hábito escolástico de, perante alguma discussão acadêmica, empilhar argumentos em prol e contra cada posição, esmerando-se particularmente, sem dúvida, em justificar o próprio pensamento. Frequentemente, e como se pode ver na estrutura de diversas conferências de Vitoria[18], tal acúmulo de razões a favor tornava-se exagerado, pesado e repetitivo. *In casu*, parece ser isso mesmo que o teólogo fez. O exemplo da morte do embaixador francês não foi proposto como um caso hipotético a ser ordenado em uma das duas espécies de direito das gentes. Ao contrário, foi mencionado para resolver uma questão mais ampla, já enunciada acima: se o direito das gentes (enquanto gênero) é positivo, e se não está vinculado a nenhuma comunidade em particular, de onde vem sua obrigatoriedade? Para responder a esta pergunta, Vitoria selecionou um exemplo de atualidade em sua época e procurou mostrar que o *ius gentium* fornecia uma resposta clara ao problema, bem como razões suficientes para que esta fosse seguida pelos países interessados. Passou então, "escolasticamente", a buscar argumentos de todo tipo no sentido da cogência do *ius gentium*. A primeira destas razões foi, como visto, o consentimen-

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16 VITORIA, Francisco de. **La justicia**. Tradução e introdução de Luis Frayle Delgado. Madri: Tecnos, 2003, pag. 27. Nota do tradutor da versão espanhola, aqui em tradução livre: "No texto original existem duas versões latinas, *non* (não) e *nos* (nós). A última nos parece mais conveniente ao contexto." A respeito, pode-se dizer que, no contexto da citação, a diferença é pouco relevante, uma vez que o cerne da questão está exatamente em saber se "*aquel derecho de gentes*" obrigava ou não os espanhóis. Portanto, é indiferente que a dúvida seja acerca de se os espanhóis admitiram aquele costume, ou de se não o admitiram.

17 VITORIA, Francisco de. **La justicia**. Tradução e introdução de Luis Frayle Delgado. Madri: Tecnos, 2003, pag. 27.

18 Na *Relectio de Indis*, por exemplo, o primeiro título legítimo pelo qual os espanhóis poderiam ocupar a América é justificado por nada menos que catorze razões sequencialmente ordenadas. Ver VITORIA, Francisco de. **Relectio de Indis. Carta Magna de los Indios**. Trad. C. Baciero, org. Luciano Pereña. Col. "Corpus Hispanorum de Pace". Madri: CSIC, 1989.

to universal. Em paralelo a tal argumento, menciona também o *ius gentium* particular: caso se prefira acreditar que a inviolabilidade dos legados não valha perante o mundo inteiro, ainda assim ela produziria efeitos perante Espanha e França, pois ambas concluíram acordos particulares a respeito:

> *En segundo lugar digo que obrar contra el derecho de gentes y violarlo es ilícito, porque de suyo lleva consigo una injusticia que se infiere, y cierta desigualdad. Porque si los franceses consideran inmunes a nuestros embajadores, es necesario que lo mismo consideremos nosotros a los suyos.*[19]

Além de violar o consenso universal, a eventual morte do embaixador geraria também uma desigualdade concreta na relação bilateral entre Espanha e França. Uma das partes teria se esforçado para garantir a imunidade do diplomata, enquanto que o outro lado abusou da boa-fé de seu vizinho e do próprio enviado para executá-lo, colocando-se em posição mais vantajosa (sujeita a menos restrições) que a primeira.

Existe, portanto, um segundo direito das gentes, referente a pactos entre nações particulares. Tais pactos não necessitam ser escritos: o costume também cria vínculos jurídicos[20]. Da mesma forma que ocorre entre os indivíduos, a relação entre as repúblicas deve pautar-se na igualdade para ser justa. A quebra de um pacto acordado, ainda que somente entre dois soberanos, destrói tal igualdade e é, desta forma, injusta, violando o direito das gentes entre estas nações.

Esta divisão do fundamento do direito das gentes encaixa-se na natureza do mesmo *ius gentium*, como definida por Vitoria. O primeiro tipo, oriundo de um grande consenso geral, aproxima-se bastante do direito natural, ainda que não se identifique com este. Recorde-se sempre que o direito natural independe do consenso humano, enquanto que o direito das gentes, mesmo nesta primeira acepção, é um fruto do acordo entre as vontades das pessoas ou nações. Porém, no caso do pacto internacional público, Vitoria supõe razoavelmente que um tal acerto só seria alcançado pelos diferentes povos nos casos em que realmente se faça necessário. Isto é, o direito das gentes geral abrange aquelas coisas que são praticamente indispensáveis à convivência humana:

> *El derecho de gentes es necesario para la conservación del derecho natural. Pero no es absolutamente necesario, sino casi necesario, porque mal se puede salvaguardar el derecho natural sin el derecho de gentes; pues el derecho natural se observaria con gran dificultad si no existiese el derecho de gentes.*[21]

Na perspectiva tomista que também é a de Vitoria, o direito natural corresponde ao justo por natureza. Isto é, àquilo que, por uma exigência direta da igualdade entre os seres humanos, será devido ao outro em cada relação entre duas ou mais pessoas envolvendo coisas. Por definição, o direito natural não é suscetível de codificação, uma vez que o "justo" mudará de acordo com as circunstâncias concretas de cada relacionamento humano. Santo Tomás evocava um exemplo expressivo quanto a isto, na figura do proprietário de uma arma que, após emprestá-la, se tornasse louco ou inimigo da cidade. Neste caso, é evidente que o direito natural, que antes mandava devolver o objeto, agora impedirá fazê-lo. Aristóteles expressa a mesma ideia ao diferenciar "retaliação" de "retribuição" na Ética a Nicômaco: a retaliação consiste na simples repetição de um ato injusto pela vítima contra o ofensor. Já a retribuição corrige a injustiça através de uma proporção[22].

Ou seja, pode ser bastante difícil dizer com precisão o que é o justo natural perante algum caso concreto conflituoso. É por isso que se faz necessário o direito positivo: trata-se de uma concretização do direito natural adequada a certas condições mutáveis de tempo e espaço, onde intervém a vontade humana. Segundo Francisco de Vitoria, "*se llama positivo porque procede de al-*

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19 VITORIA, Francisco de. **La justicia**. Tradução e introdução de Luis Frayle Delgado. Madri: Tecnos, 2003, pag. 28.

20 Em sentido contrário, Haggenmacher defende que o direito das gentes escrito corresponde às regras que foram consagradas pela legislação estatal, enquanto que o não escrito se referiria às outras normas do *ius gentium*, que não teriam recebido (ainda) guarida do ordenamento jurídico nacional: HAGGENMACHER, Peter. La place de Francisco de Vitoria parmi les fondateurs du droit international. *In*: TRUYOL SERRA, Antonio *et al.* **Actualité de la pensée juridique de Francisco de Vitoria**. Bruxelas: Bruylant, 1988, pag. 64. Acredita-se que este dualismo (como o chama Haggenmacher) não se coaduna com o pensamento vitoriano, pois este não faz referência em nenhum momento a leis internas e menciona, na segunda parte da solução ao exemplo do assassinato do embaixador francês, uma desigualdade entre duas nações, Espanha e França. Parece claro que tal desigualdade não se baseia em legislações nacionais diferentes, e sim em que ambas haviam consentido em manter certo comportamento recíproco, que teria sido alterado bruscamente em seguida. Na *De Iure Belli*, Vitoria menciona que o direito das gentes sobre proibição de matar prisioneiros cristãos, ainda que culpados pela agressão injusta, foi estabelecido pelo costume e deve ser mantido. (VITORIA, Francisco de. **Relectio de Iure Belli o Paz Dinámica**. Org. Luciano Pereña. Col. "Corpus Hispanorum de Pacis", vol. 6. Madri: CSIC, 1981, pag. 185)

21 VITORIA, Francisco de. **La justicia**. Tradução e introdução de Luis Frayle Delgado. Madri: Tecnos, 2003, pag. 29.

22 ARISTÓTELES, Ética a Nicômaco. Tradução de António de Castro Caeiro. São Paulo: Atlas, 2009, pags. 112-115. Livro V, 1132b-1133b.

BARRETTO, Rafael Zelesco. O caso hipotético da morte do embaixador francês na Espanha: duas espécies de ius gentium em Francisco de Vitoria. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 536-564

gún consenso [...] *el* [*derecho*] *que depende de la voluntad o el beneplácito de los hombres se denomina positivo*"[23]. Porém, como já visto, há uma etapa intermediária entre o direito natural e o positivo: o *ius gentium* no sentido primário descrito acima por Vitoria é a primeira e mais ampla concretização do direito natural. Será composto pelas exigências mais gerais que correspondem ao modo de vida das comunidades humanas.

Vale destacar que, na tradição jusnaturalista clássica integrada por este dominicano, direito natural e direito positivo não formam dois sistemas jurídicos prontos e acabados, como se se tratasse dos ordenamentos legais de dois países ou de duas "províncias" da ciência jurídica contemporânea, tais como direito contratual, consumeirista, da responsabilidade civil etc. Na verdade, são duas fontes de um único ordenamento ou sistema jurídico, que é em parte natural e em parte positivo[24]. Esta concepção dos dois direitos permite compreender como o teólogo burgalês pôde manter seu *ius gentium* em posição intermediária: se *ius naturale* e *ius civile* são fontes, e não agrupamentos de preceitos, não haverá contradição em que ambos irriguem o direito das gentes.

Não se olvide que, para Vitoria, como para todo o pensamento escolástico e aristotélico clássico, o homem possui uma natureza comum, compartilhada por todos os integrantes da espécie. Dentre os traços característicos do ser humano, encontra-se a sociabilidade, que o impele a buscar a companhia dos outros e, em última análise, a viver em sociedade e formar esferas particulares de convivência – no tempo de Vitoria, as "repúblicas". Admitindo estes postulados, compreende-se que as várias comunidades humanas espalhadas pelo mundo serão destinatárias de algumas poucas exigências básicas de justiça que serão comuns, por mais que o contexto histórico, geográfico etc. possa variar. Estas exigências básicas compõem o *ius gentium* vitoriano em seu primeiro sentido.

A lição sobre o artigo 3º da *quaestio* 57 fornece alguns exemplos deste direito das nações: a propriedade privada, as regras básicas sobre início e fim das guerras, a inviolabilidade dos embaixadores, a redução dos prisioneiros de guerra à escravidão. São todos padrões de conduta que ele observa tanto na sociedade em que vive (Espanha), quanto na comunidade onde esta se inseria (que pode ter o nome de Cristandade, Sacro Império Romano-Germânico, Europa etc.), quanto entre os povos vizinhos com os quais se mantinham relações (muçulmanos[25]). Nenhuma destas exigências é de direito natural, isto é, uma necessidade imediata decorrente da natureza do homem. Mas sem elas, argumenta o regente de Prima, seria quase impossível manter a igualdade entre as pessoas[26]. São, portanto, normas jurídicas que devem ser respeitadas. Decorrem da vontade humana de um modo sutil e indireto: é verdade que os povos do mundo não escolheram explicitamente tais regras. O "consenso do orbe" se deu através da consagração destas normas essenciais pelo uso, sendo certo que se trata de preceitos quase necessários à vida em sociedade. O *ius gentium* vitoriano no sentido primário possui, então, uma dupla raiz: nasce do consentimento geral – isto é, do que é observado entre todas as nações – sempre que tal costume esteja concretizando alguma norma de direito natural. Ao contrário deste último, o direito dos povos não é necessário. Mas representa um modo de aplicar o direito natural à realidade das sociedades humanas. Caso não houvesse o direito das gentes, ainda assim o direito natural poderia teoricamente continuar vigente. Na prática, contudo, a falta da orientação específica do *ius gentium* faria com que os homens encontrassem numerosas dificuldades à hora de descobrir e aplicar o *ius naturale* aos casos litigiosos.

Neste sentido, Juan Cruz Cruz define o direito das gentes de Francisco de Vitoria como um direito complementar, exigível em função de sua conveniência, para que o direito natural seja preservado. O direito das gentes é necessário, embora não absolutamente, devido à realidade antropológica pós-pecado original, o qual fragilizou o interior humano, transtornando suas paixões e tornando mais difícil, quase impossível, encontrar o jus-

23 VITORIA, Francisco de. **La justicia**. Tradução e introdução de Luis Frayle Delgado. Madri: Tecnos, 2003, pags. 14-15.

24 HERRERA, Daniel A. *Op. cit.*, pag. 56. Também Michel Villey considera direito natural e lei positiva como fontes do direito, sendo que ambos deverão ser aplicados de modo harmônico, orientado pela experiência e pela realidade na busca do que é justo em cada caso concreto. VILLEY, Michel. **Filosofia do Direito**. São Paulo: Martins Fontes, 2003. Ver especialmente Tomo II, Título Terceiro, Capítulo 3, art. I: pags. 431-440.

25 Aqui ele ainda não menciona os índios americanos, embora a *Relectio de Indis*, proferida alguns anos depois, venha a ser uma aplicação prática desta doutrina do *ius gentium* aos nativos do Novo Mundo.

26 O caso específico da escravização dos prisioneiros de guerra, hoje claramente expulso do *ius gentium*, será discutido mais adiante. Por ora, basta ressaltar que tal direito pode sofrer alterações decorrentes de mudanças decisivas na relação dos indivíduos e das repúblicas.

to natural em um caso concreto, no qual vontade e razão estarão muito influenciadas pelos afetos sensíveis[27]. Desta maneira, o direito das gentes, como um direito "normal", consagrado pelo uso generalizado, auxilia as pessoas a obedecerem às exigências básicas do direito natural.

É um direito no qual a vontade humana intervém, não através do livre-arbítrio individual (direito civil ou positivo), mas por duas grandes escolhas históricas, feitas por milhares de indivíduos ao longo dos séculos: a determinação do modo de vida que as diferentes sociedades terão em comum e o padrão de condutas básicas adequadas a este modo de vida.

Como se vê, este *ius gentium* lembra um pouco a proporcionalidade aristotélica: seu conteúdo variará de acordo com as condições gerais da convivência humana. Assim sendo, dentro do próprio conteúdo do *ius gentium* não se exige uma uniformidade estrita. Modos de vida muito diferentes entre si podem levar a alterações no *ius gentium*. Vitoria repara nisso, ao mencionar o *ius gentium* que ainda não foi sancionado para todos os povos. No exemplo do embaixador francês, a pergunta "¿Por qué y cómo sabéis vosotros que nosotros hayamos admitido aquel derecho de gentes y que hayamos pecado matando al enemigo?"[28] refere-se a esta mutabilidade interna no direito dos povos: os conterrâneos de Vitoria só poderiam ser responsabilizados juridicamente pela morte do embaixador francês caso estivessem obrigados pela correspondente norma de direito das gentes. Dado que "*no todos están obligados a observar el derecho de gentes*", é preciso provar que os ibéricos estão entre os povos vinculados por esta regra específica. Para isso, será necessário de início examinar se o preceito em questão compõe o *ius gentium* primário ou secundário. No primeiro caso, o problema estará resolvido: todos estão vinculados por estas normas de direito das gentes. Já na segunda hipótese, seria preciso outra análise para identificar se o povo em questão concordou – por palavras ou por atos – com aquela norma de *ius gentium*, que estará baseada no consentimento. Como visto, Vitoria considera que a inviolabilidade dos legados faz parte do primeiro *ius gentium*. Porém, para fins acadêmicos e *ad argumentandum*, indica como a questão se resolveria se tal regra estivesse no *ius gentium* secundário ou particular. Daí a menção à desigualdade que surgiria entre espanhóis e franceses caso o embaixador fosse desrespeitado.

Note-se que o *ius gentium* particular difere do direito civil na medida em que aquele se refere aos indivíduos enquanto reunidos em comunidades e na medida em que mantêm relações com outros agrupamentos semelhantes. Neste sentido, é um direito distinto do *ius civile* por ter âmbito de aplicação diverso. Como Vitoria é fiel à tradição organicista do pensamento aristotélico-tomista, ele tende a valorizar mais a comunidade que o indivíduo[29], refletindo em uma primazia do direito das gentes – obrigação que incumbe aos cidadãos devido a sua organização em república – sobre o direito civil – obrigação decorrente da simples relação entre cidadãos[30].

Alguns anos mais tarde, ao proferir a célebre conferência "*De Indis*", Vitoria afirmará que o direito das gentes leva em conta o consentimento da maior parte do orbe, ainda que a menor parte se oponha[31]. Parece

27 CRUZ CRUZ, Juan: La soportable fragilidad de la ley natural: consignación transitiva del ius gentium en Vitoria. *In*: CRUZ CRUZ, Juan: **Ley y dominio en Francisco de Vitoria**. Pamplona: EUNSA, 2008, pags. 24 e seguintes.

28 VITORIA, *op.cit.*, pag. 27.

29 Por exemplo: "*Todo lo que el hombre es, no sólo en cuanto a sus bienes de fortuna, sino también a los de su naturaleza, constituye un bien de la república.* [...] *a todo hombre le incumbe la obligación de sacrificarse por la república, y la república puede exponerle para la conservación de si misma, incluso si constase que va a morir; con ello no comete ninguna injusticia, de igual modo que un miembro del cuerpo puede sacrificarse por la salud del todo.* [...] *La república podrá sacrificar a un hombre, como se hace con un miembro, en favor de la salvación de toda la república. Ésta puede exponer la vida de un inocente por su salvación, si ello es necesario.*" VITORIA, Francisco de. Comentários à Secunda Secundae da Suma Teológica de Santo Tomás de Aquino, q. 125, a.4. *Apud* VITORIA, Francisco de. **Relectio de Potestate Civili. Estudios sobre su filosofia política**. Edição crítica de Jesús Cordero Pando. Madri: CSIC, 2008, pag. 97. Embora "*aunque el cuerpo natural y el místico tengan mucho en común, no lo tienen todo, sino que difieren en algunas cosas. Una parte natural existe precisamente en razón del todo en el cuerpo; pero en la Iglesia cada hombre existe para Dios y para sí mismo, y su bien privado no se ordena al bien del todo*". VITORIA, Francisco de. Relectio Secunda de Potestate Ecclesiae. *Apud* VITORIA, Francisco de. **Relectio de Potestate Civili. Estudios sobre su filosofia política**. Edição crítica de Jesús Cordero Pando. Madri: CSIC, 2008, pag. 97.

30 "*Toda la república puede ser licitamente castigada a causa del pecado del rey. Así, si el rey emprendiese una guerra injusta contra cualquier príncipe, aquél que sufrió la agresión puede alzarse con el botín y ejercer los demás derechos de guerra sobre los súbditos del rey, incluso aunque todos sean inocentes. Este corolario se prueba porque, dado que el rey es instituido por la república, si éste llevase a cabo con insolencia algo indigno, eso se imputa a la república.*" VITORIA, Francisco de. **Relectio de Potestate Civili. Estudios sobre su filosofia política**. Edição crítica de Jesús Cordero Pando. Madri: CSIC, 2008, pag. 43.

31 "*Obsérvese que si el derecho de gentes tiene en buena parte su origen en el derecho natural, claramente tiene fuerza para conceder derechos y crear obligaciones. Y en el supuesto de que no siempre tenga su origen en el derecho natural, sí parece que se tienen en cuenta el consentimiento de la mayor parte del orbe, sobre todo cuando se trata del bien común de todos. Porque si desde los primeros tiem-*

residir aqui uma contradição no pensamento do mestre salmantino: afinal, o direito das gentes obriga ou não os recalcitrantes? A resposta dependerá de qual *ius gentium* estiver em questão. Tratando-se do *ius gentium* oriundo de um pacto público, isto é, do consentimento de todas as nações, um país que se opusesse ao direito das gentes estaria operando contra o bem comum, tanto de sua república quanto dos vizinhos. Quando se tratar, por outro lado, de um *ius gentium* "ainda não sancionado" para um dos lados, isto significa que a norma não corresponde ao modo de vida daquele povo, tampouco ao contexto no qual este se insere. Em outras palavras, aquela república não consentiu com tal preceito. Neste caso, abre-se uma possibilidade de derrogação da norma, pois tratar-se-á do *ius gentium* particular.

Concluindo esta seção, pode-se sintetizar a divisão vitoriana nos seguintes termos: o direito das gentes não se insere definitivamente no direito natural ou no positivo. Contudo, sua dependência da vontade humana (embora não do livre-arbítrio individual) e sua historicidade (embora só dependa das características mais comuns das sociedades e idiossincrasias culturais específicas não o derroguem) o situam mais próximo ao direito positivo que ao natural.

No interior do *ius gentium*, encontra-se nova divisão, referente ao modo de produção de normas e aos sujeitos aos quais estas se dirigem. Em um primeiro sentido, o direito das gentes é produto de um virtual pacto público que abrange todas as nações "do orbe". Neste sentido, obrigará todos os povos independentemente de suas características culturais ou do conhecimento que possuam do *ius gentium*, eis que existem traços da natureza do ser humano que se repetem universalmente, como a tendência constante à sociabilidade e à vida em sociedade. No segundo sentido, o direito das gentes é produto de um pacto particular entre nações específicas. Tal pacto pode dar-se de modo expresso ou pela via consuetudinária. Caso não se esteja diante de um tratado, este segundo tipo de *ius gentium* será proporcional às características essenciais da coletividade na qual os povos específicos se inserem.

É possível, por fim, que o segundo tipo de *ius gentium* altere o primeiro, desde que isto não cause uma violação ao direito natural. Em outras palavras, que o direito natural seja concretizado de forma mais específica por um grupo restrito de nações do que pelos postulados gerais do primeiro direito das gentes.

Francisco de Vitoria talvez mereça alguma crítica por não ter sido mais sistemático no tratamento desta questão. Afinal, esperar-se-ia do "pai do direito internacional" um estudo mais percuciente acerca da passagem onde Santo Tomás define o direito das gentes. Além disto, é um fato que a divisão do *ius gentium* aqui descrita só aparece de modo razoavelmente explícito na resolução do caso do embaixador francês. O restante da obra internacionalista de Vitoria não menciona tal distinção.

O que se pode dizer a respeito é que, como já percebido por Peter Haggenmacher[32], Francisco de Vitoria não imaginava estar criando algo novo quando lecionava sobre o *ius gentium*, embora acabasse por conferir-lhe importantes nuances de própria lavra. Ele se percebia como seguindo na mesma linha de pensamento que, dos juristas romanos e passando por Santo Isidoro de Sevilha, inspirara as precisas (no direito, nem sempre) definições de Santo Tomás de Aquino. Ao explicar o direito das gentes, o teólogo burgalês tinha por missão tomar elementos da rica tradição sobre o tema e aplicá-los a um problema novo e concreto. Neste sentido, ainda que a bipartição no *ius gentium* não fosse explicitamente enunciada pelas fontes de Vitoria, este possivelmente teria encontrado alguma correspondência nas páginas da Suma Teológica a respeito. Quando trata por sua vez do tema, não é tão explícito sobre esta divisão do *ius gentium*, quiçá para manter-se fiel à letra de Santo Tomás. Mas, confrontado pelas questões que ele mesmo se propõe na discussão do texto, acaba por admitir a existência das duas subespécies – postulado coerente com sua concepção de direito e de direito das gentes, como visto[33].

pos de la creación del mundo y de su reconstrucción después del diluvio la mayoría de los hombres estableció que los embajadores en todas partes fueran inviolables, que los mares fueran comunes, que los prisioneros de guerra fueran esclavos, y que asimismo convenía que los extranjeros no fueran expulsados, ciertamente esto tendría fuerza de ley, aun con la oposición de los demás." VITORIA, Francisco de. **Relectio de Indis. Carta Magna de los Indios**. Trad. C. Baciero, org. Luciano Pereña. Col. "Corpus Hispanorum de Pace". Madri: CSIC, 1989, pag. 102 (Grifo em sublinhado acrescentado.)

32 HAGGENMACHER, *op. cit.*, pags. 58-63.

33 Em interessante estudo sobre os sentidos real e atribuído aos Tratados de Paz de Westfália (1648), Luiz Magno Pinto Bastos Junior afirma que a relevância destes instrumentos para a história política está em seu caráter dúplice: eram tanto acordos entre potências equiparadas entre si quanto leis internas do Sacro Império Romano-Germânico. Pensa-se que esta dualidade, que configurou um "sistema multinivelado" no interior do Império, reflete tacitamente a bipartição vitoriana, sendo que as garantias religiosas e institucionais para os súditos do Imperador alemão se enquadram no sentido primário do *ius gentium* identificado por Vitoria, eis que seriam uma exigência geral dos povos (aqui, da Cristandade). BASTOS JUN-

4. Outras interpretações do *ius gentium* vitoriano

A tese aqui defendida, da existência de duas espécies de *ius gentium* em Francisco de Vitoria, está longe, ao que parece, de ser majoritária entre os estudiosos do teólogo dominicano. Nesta seção serão mostradas algumas interpretações diferentes do direito das gentes proposto pelo salmantino, com especial atenção a eventuais menções sobre os dois tipos de *ius gentium* mencionados por Vitoria no comentário à II-II q. 57 a.3.

Em artigo publicado neste periódico[34], Paulo Emílio de Macedo narra a evolução na recepção e valoração do labor vitoriano ao longo dos séculos, esmerando-se em evidenciar os anacronismos que foram ajuntados, pelos intérpretes, à obra original do mestre salmantino. Acerca da natureza do *ius gentium*, Macedo entende que esta não era, para Vitoria, questão premente. A ambivalência no trânsito entre direito das gentes público e privado dever-se-ia, para ele, às características do pensamento vitoriano, que estaria apenas derivando o velho conceito romano, de um *ius gentium* cuja validade e aplicação se cingiam ao interior do Império Romano e ao poder do pretor, para a realidade pós-Descobrimento, de um mundo multirreligioso, porém submetido à jurisdição cristã. Segundo Macedo, quando Vitoria fala em "todo o orbe", está pensando na *Respublica Christiana*. A proximidade com o direito natural também seria um paralelismo com o típico raciocínio romano, porém sem grande aplicabilidade prática. O direito das gentes de Francisco de Vitoria seria um direito supranacional, porém intra-Cristandade[35].

A contribuição deste internacionalista é relevante por buscar situar Vitoria em seu tempo. É imprescindível ter em mente, como ele insiste, que o mundo visto pelo dominicano diferia substancialmente daquele contemplado por seus intérpretes hodiernos. Conceitos como "humanidade" e "orbe" terrestre muito provavelmente evocariam, na mente do palestrante e de seus ouvintes, imagens familiares, relativas ao convívio dos vários príncipes cristãos, mediado por valores religiosos fundamentais e comuns.

Muito embora se conceda que tal era, ao que parece, a perspectiva de Vitoria, mantém-se que o fundamento de seu *ius gentium* encontra-se detalhado em seu Comentário ao Tratado da Justiça, e que independe da jurisdição cristã. O esquema acima descrito não necessita da chancela religiosa para ser aplicado. E, com efeito, como se verá nos exemplos colacionados mais abaixo, o regente de *Prima* emprega seu *ius gentium*, tanto o primário quanto o secundário, a realidades totalmente alheias à Cristandade, como os costumes dos índios e dos nativos africanos.

Discorda-se de Paulo Emílio de Macedo, então, quando indica que o dominicano espanhol não teria ultrapassado, em sua concepção do direito das gentes, a perspectiva romana[36]. Parece, antes, que o segundo aspecto do direito dos povos, aquele dependente do consentimento de nações que estivessem em contato, revela uma ideia incipiente de igualdade entre os diversos povos do mundo, que seria insuportável a um jurista da antiga *Roma caput mundi*.

Juan Cruz Cruz[37] entende o direito das gentes em perspectiva muito próxima da que foi abordada aqui, como a conclusão de um raciocínio em que o direito natural figura como a premissa maior e as fragilidades humanas causadas pelo pecado original formam a premissa menor. Suas proposições são, pois, condicionais ou hipotéticas, não absolutas, embora sejam universais. Trata-se de uma modulação das normas do direito natural causada pelas diversas circunstâncias que podem incidir na vida humana, acrescidas do latente perigo da discórdia entre os homens causada pela desordem instaurada em seu interior após o pecado.

Acerca da divisão estabelecida por Vitoria entre direito das gentes público e particular, Cruz se reporta à distinção feita pelo salmantino no artigo anterior da mesma *quaestio*, no qual analisava a relação entre direito natural e positivo. Ali, o teólogo afirmava que

> *en otro sentido justo es lo que es igual por la determinación de una ley o por un pacto privado, y no por su propia naturaleza; como, por ejemplo, cuánto hay que pagar por un caballo o una*

IOR, Luiz Magno Pinto. Rever ou romper com Vestfália? Por uma releitura da efetiva contribuição dos acordos de paz de 1648 à construção do modelo vestfaliano de Estados. **Revista de Direito Internacional**, Brasília, v. 14, n. 1, 2017, pags. 357-376, esp. pag. 363. Disponível em: < https://www.publicacoesacademicas.uniceub.br/rdi/article/view/4397 >. Acesso em: 10.07.2017.

34 MACEDO, Paulo Emílio Borges de. O mito de Francisco de Vitoria: defensor dos direitos dos índios ou patriota espanhol? **Revista de Direito Internacional**, Brasília, v. 9, n. 1, jan./jun. 2012. Disponível em: < https://www.publicacoesacademicas.uniceub.br/rdi/article/view/1602/1591 >. Acesso em: 10.07.2017.

35 Idem, pag. 9.

36 Idem, pag. 11.

37 CRUZ CRUZ, *op. cit.*

casa, y por el trabajo de un día, etc., no es algo determinado por su propia naturaleza sino por un pacto. Y en este sentido pongamos la segunda conclusión: lo justo en este sentido se denomina derecho positivo e humano. Y lo justo así entendido unas veces consta por un pacto humano privado, otras por un pacto público, y esto se llama ley.[38]

Segundo Cruz, a divisão no seio do direito das gentes ocorreria de forma análoga. Haveria um *ius gentium* público, oriundo de um pacto comum feito pelos representantes dos diversos povos ou nações, e um *ius gentium* privado, que provém de um consentimento privado e de pactos feitos por indivíduos particulares[39]. O primeiro é exemplificado por ele com o instituto das embaixadas, aproveitando a lição vitoriana. Em relação ao *ius gentium* privado, Cruz não o desenvolve, tal como Vitoria deixou de fazer. Contudo, analisa diversos exemplos concretos de direito das gentes, dentre os quais é possível enxergar o *ius gentium privatum* defendido por ele na instituição da propriedade privada e na solenidade do matrimônio[40]. São figuras cujo uso comum se deu a partir da ação de particulares, ao contrário do envio e recepção dos legados diplomáticos.

Esta concepção da bipartição vitoriana do direito das gentes é compartilhada por Peter Haggenmacher[41] e Mariano Fazio[42], que acentuam o caráter contratual do direito que será instituído pelo pacto público e sua positividade. Diferem de Cruz ao considerar que o direito das gentes vitoriano, ao menos nesta parte dos Comentários, é predominantemente positivo[43].

Trata-se de um entendimento um pouco diferente do que foi exposto até aqui. A principal distinção está em que, para Cruz, Haggenmacher e Fazio, o critério de separação usado por Vitoria seria a identidade do criador do *ius gentium*, que pode ser a comunidade, agindo por seus representantes (*ius gentium* público), ou as pessoas individuais, atuando em nome próprio (*ius gentium* privado). Enquanto que nas páginas precedentes o critério era outro: o grau de abrangência da norma, que podia ser geral (*ius gentium* primário ou público) ou restrito (*ius gentium* secundário ou particular). É por isso que, para estes autores, a distinção entre estes dois tipos de direito das gentes é tida como secundária: a identidade do legislador pouco importa, se o *ius gentium* produzirá sempre os mesmos efeitos.

O raciocínio de Cruz tem o mérito de deixar claro que o direito das gentes se forma também pela soma de diversas condutas individuais autônomas. É certo que a propriedade privada, o caráter solene do matrimônio e alguns outros institutos decorreram de seu uso constante por parte dos indivíduos de diversas nações por um longo período de tempo. Então, faz certo sentido afirmar que o propósito de Vitoria com a distinção foi o mesmo que no momento em que dividiu o *ius civile*: falar sobre duas possíveis origens do direito estudado.

Por outro lado, o esquema proposto por Cruz, Haggenmacher e Fazio traz um inconveniente: não dá explicação suficiente para eventuais derrogações do *ius gentium*, cuja admissibilidade Vitoria reconhece expressamente. Com efeito, o direito das gentes originado em um pacto público e o que deve sua existência a um acordo entre particulares não parecem diferir substancialmente quanto a sua obrigatoriedade: os exemplos da propriedade privada e da celebração do matrimônio são citados por Cruz (seguindo Vitoria) ao lado das figuras do tratado de paz e da inviolabilidade dos embaixadores. O fato de estes últimos ordenarem-se ao *ius gentium* público e os primeiros, ao privado, não modifica em nada seu caráter vinculante.

Além disso, bem examinado o contexto da afirmação vitoriana sobre a bipartição do *ius gentium*, não parece que ele tivesse em vista a distinção enxergada pelos três estudiosos mencionados[44]. Tanto é que o dominicano retoma, na sequência, o exemplo do embaixador francês, explicando que a eventual morte deste causaria

38 VITORIA, Francisco de. **La justicia**. Tradução e introdução de Luis Frayle Delgado. Madri: Tecnos, 2003, pag. 14.

39 CRUZ CRUZ, *op. cit.*, pag. 18.

40 Idem, pag. 23.

41 HAGGENMACHER, *op. cit.*, pags. 40-41.

42 FAZIO FERNANDEZ, Mariano. **Francisco de Vitoria: cristianismo y modernidad**. Buenos Aires: Ciudad Argentina, 1998, pag. 87.

43 Mariano Fazio acrescenta que Vitoria modificará sua perspectiva posteriormente, nas duas *Relectiones de Indis*, passando a incluir o direito das gentes no direito natural.

44 "*... hemos sostenido que es doble el derecho de gentes, lo mismo que es doble el derecho positivo, como hemos dicho antes, en el artículo segundo. Uno es positivo por un pacto privado y un consenso, y otro por un pacto público. Así decimos del derecho de gentes, que uno ha sido hecho por el consentimiento común de todas las gentes y naciones, y en este sentido, los embajadores son admitidos por derecho de gentes, y son inviolables en todas las naciones; pues así considerado el derecho de gentes se acerca tanto al derecho natural que el derecho natural no puede observarse sin el derecho de gentes. La paz es de derecho natural; si surgen guerras, es necesaria la misión de los embajadores para conseguir la paz. Dicho de otro modo, si los embajadores no fuesen admitidos por derecho de gentes, no podrían apaciguar las guerras.* [...] *De donde se deduce que siempre es ilícito violar el derecho de gentes, porque va contra el consenso común. En segundo lugar digo que obrar contra el derecho de gentes y violarlo es ilícito, porque de suyo lleva consigo una injusticia que se infiere, y cierta desigualdad.*" VITORIA, *op. cit.*, pag. 28.

um desequilíbrio na justiça da relação entre espanhóis e franceses. Não fala em pactos privados entre indivíduos particulares, mas em um padrão de conduta estabelecido entre duas nações, pelo qual uma destas adquiriu o direito de esperar que a outra vá respeitá-lo[45]. Como, na frase seguinte, Vitoria muda de assunto, a interpretação mais fiel à transcrição de sua aula parece ser que, com direito das gentes particular, ele se referia a acordos (escritos ou não) que envolvessem somente algumas das nações do orbe.

Outra ideia a respeito é a de Luiz Henrique Cascelli de Azevedo, que desenvolveu sua tese de doutorado sobre o autor em epígrafe[46], onde procura traçar uma evolução do pensamento de Vitoria sobre a natureza do *ius gentium*. Sua hipótese é que nos Comentários à Suma Teológica, este se encontraria próximo ao direito positivo. Contudo, na *Relectio de Potestate Civili*, já caminharia para mais perto do direito natural. E, por fim, nas *Relectiones* sobre os índios, Vitoria teria[47] identificado o direito das gentes com o direito natural[48]. Em relação à alegada etapa de transição, o trecho da conferência sobre o poder civil em que Azevedo se apoia é bastante conhecido:

> *De todo lo dicho se desprende el siguiente corolario: el Derecho de Gentes no sólo tiene fuerza por el pacto o acuerdo entre los hombres, sino que tiene fuerza de ley. En efecto, el orbe todo, que en cierto modo constituye una única república, tiene el poder de promulgar leyes justas y convenientes para todos, cuales son las del Derecho de Gentes. De donde se sigue que pecan mortalmente quienes violan el derecho de gentes, ya sea en la paz o en la guerra, en los asuntos más graves, como es el no respetar a los legados. No le es lícito a um reino particular no querer atenerse al Derecho de Gentes, ya que ha sido promulgado por la autoridad del orbe entero.*[49]

A partir desta passagem, Azevedo enfatiza que as violações ao direito das gentes não seriam permitidas por Vitoria, eis que aquele haveria sido estabelecido pela autoridade de todo o orbe, que agiria quase como uma grande república[50]. O autor também lembra que, para o mestre dominicano, a abolição do direito das gentes pelo consenso de todos os povos seria uma impossibilidade prática. Por fim, afirma que, em Vitoria, o direito das gentes se mistura com o direito natural.

Acerca do exemplo do embaixador francês, o estudioso brasileiro pensa que reforça sua hipótese de uma transição do pensamento vitoriano na consideração do *ius gentium* sucessivamente como positivo ou natural. Para ele, os dois motivos alegados pelo regente de Prima para respeitar a inviolabilidade do enviado de Paris referem-se ao direito natural. Tanto uma disposição dada por autoridade comum do orbe quanto uma certa desigualdade na relação entre dois povos significariam o mesmo: *ius gentium* e *ius naturale* possuem o mesmo fundamento de obrigatoriedade[51]. Apesar de transcrever o trecho do Comentário sobre a Suma Teológica em que Vitoria faz a distinção entre pacto público e privado na raiz do *ius gentium*, Azevedo não lhe confere maior significado.

O trecho da *De Potestate Civili* acima citado parece eloquente quanto à ordenação do direito das gentes no direito natural. Com efeito, a possibilidade de qualquer *opt-out* do *ius gentium* está explicitamente negada, pois este seria fruto da autoridade legislativa de todo o orbe, no qual toda e qualquer nação recalcitrante estará inserida, e para com quem terá obrigações relativas ao bem comum universal. Logo, se este direito se dirige a todas as nações indistintamente e sem consideração pela autoridade particular de uma ou outra república e da vontade de seus membros, parece que se trata de um direito pré-voluntário. Seria um direito natural, ou ao menos algo que se lhe aproxima essencialmente. Perderia o sentido, então, a divisão exposta neste trabalho entre direito das gentes público ou particular, dado que todo ele seria universal e cogente. O fato de Vitoria repetir a alusão à inviolabilidade dos embaixadores reforçaria a ideia de que esta se fundamenta unicamente em um *ius gentium* universal.

Contudo, tal afirmação será matizada caso se tome em conta o desenvolvimento da conferência na qual

45 "*Porque si los franceses consideran inmunes a nuestros embajadores, es necesario que lo mismo consideremos nosotros a los suyos. De donde si, por ejemplo, los embajadores son enviados por una de las partes para restablecer la paz y no son maltratados, si los envía la otra parte y son maltratados, se sigue que hay una desigualdad y una injusticia.*" Idem, ibidem.

46 AZEVEDO, Luiz Henrique Cascelli de: ***Ius Gentium* em Francisco de Vitoria: a fundamentação dos Direitos Humanos e do Direito Internacional na tradição tomista**. Porto Alegre: Sergio Antonio Fabris, 2008.

47 Idem, pags. 147-150.

48 É a mesma opinião de Paulo Emílio V. B. de Macedo, que deixa em aberto outra possibilidade: a de que o dominicano não se preocupava com o direito das gentes nem com seu fundamento. A diferença entre os dois momentos decorreria, nesta segunda hipótese, de sua relativa indiferença pelo conceito. Ver: MACEDO, op. cit., pag. 9.

49 VITORIA, Francisco de. **Relectio de Potestate Civili. Estudios sobre su Filosofía Política**. Edição crítica de Jesús Cordero Pando. Col. "Corpus Hispanorum de Pace", segunda série, vol. 15. Madri: CSIC, 2008, pag. 63.

50 AZEVEDO, *op. cit.*, pag. 150.

51 Idem, pags. 147-149.

o parágrafo se insere[52]. É preciso notar que Francisco de Vitoria não estava tratando especificamente do *ius gentium* nesta ocasião. Na verdade, ele examinava uma questão clássica na história da filosofia política: se o rei estaria obrigado pela lei instituída por si mesmo. Pronuncia-se pela afirmativa, aduzindo duas razões: seria injusto para com os demais cidadãos se o rei, que também é parte da república, não assumisse sua parte na carga dos deveres públicos. Além disso, por ser parte da república, o soberano estaria subordinado a esta e, portanto, à legislação correspondente, ainda que produzida pelo próprio monarca[53]. Desta subordinação do rei à lei, fundamentada na condição de membro da comunidade nacional, Vitoria extrai, como corolário, o princípio de que o *ius gentium* possui força de lei. Tal propriedade não lhe advém de um pacto entre os homens, mas da vinculação de todos os reinos e nações às regras expedidas pelo orbe, que é o todo do qual fazem parte. Do mesmo modo que o rei, também a república se subordina à lei.

Mas o mestre salmantino não se aprofunda neste tema, do qual poderia retirar diversas conclusões interessantes acerca dos limites do poder civil e de seu exercício para além das fronteiras da república[54]. Ele se contenta em enunciar o corolário e passa, em seguida, a outro tema. Imediatamente após proferir a lapidar frase acerca da obrigatoriedade do *ius gentium* para todo e qualquer reino, Vitoria começa a explicar a relação entre a razão que originou a lei e a vigência desta, tema em que não menciona o direito das gentes. Pode-se inferir que o mestre salmantino chegou a esta conclusão de modo incidental, mencionando-a para conferir mais interesse a sua conferência e possivelmente como nota mental para o tratamento do tema no futuro[55]. Deste modo, o raciocínio estabelecido no parágrafo é incompleto e não representa uma posição definitiva de Vitoria a respeito do *ius gentium*. Quando diz que não é lícito a nenhum reino recusar o direito das gentes, isto pode ser entendido como referindo-se ao estabelecido por um pacto público. O fato de ele não mencionar nenhuma outra maneira de derrogação do *ius gentium* não significa que não possa haver nenhuma em seu pensamento. Talvez não tenha visto necessidade de adentrar a fundo na matéria, obedecendo também a uma promessa feita no início da conferência, de referir-se somente ao que fosse imprescindível para sua investigação acerca da república, "*con las menos palabras posibles*"[56].

Considere-se ainda que Vitoria menciona, na aludida passagem, que a força do direito das gentes não é retirada somente do pacto entre os homens – reconhecendo implicitamente que o consentimento também é fonte do *ius gentium*. O fato de ele referir-se a um pacto entre homens, e não entre nações, deve-se novamente ao contexto: na frase seguinte, conclui que violar o direito das gentes é um pecado grave. Ora, só os homens, mas não

52 J.C. Pando elaborou um ilustrativo esquema da *De Potestate Civili*, no qual se pode ver que o parágrafo do *ius gentium* se situa na terceira grande "conclusão" da palestra: a obrigatoriedade das leis civis. Ver VITORIA, *op. cit.*, pag. 310.

53 Este raciocínio vitoriano aplica a chamada teoria da translação do poder civil, da qual foi um grande exponente. Segundo esta teoria, o poder civil provinha de Deus e era delegado pelo Criador aos homens, que instituíam uma autoridade concreta para poder viver em sociedade de acordo com sua natureza sociável. Para conveniência dos homens e de acordo com a lei natural, cada sociedade instituía alguma forma de governo, que passava a deter a autoridade sobre todos. Mas o poder, isto é, a força ordenadora da sociedade, permanecia com os cidadãos tomados em conjunto, em virtude da necessidade da comunidade. VITORIA, *op. cit.*, pags. 21-37, em especial pags. 26-27: "La causa material, en la que ciertamente por derecho natural y divino reside este poder, es la misma república*, a la que compete gobernarse y administrarse a sí misma, y dirigir al bien común todos sus poderes. Se prueba porque, si por derecho divino y natural existe algún poder de governar la república, y al margen del común derecho positivo y el sufragio humano, no existe mayor razón para que semejante poder se sitúe en uno con preferencia a otro, resulta ineludible que la propia comunidad se baste a sí misma y tenga este poder.* [...] *Además, puesto que el cuerpo usa cada miembro para el provecho y utilidad del todo, de modo tal que, si necesario fuera para la integridad del todo, los miembros privados se expongan al peligro y perezcan, no existe razón alguna por la que la república no goce de similar poder, mediante el cual esté capacitada para regir y obligar a sus ciudadanos – como miembros suyos – en vistas a la utilidad y conveniencia del bien público.*" (No original, o trecho sublinhado se encontra grifado em itálico). Ver também URDANOZ, Teófilo. Sobre la potestad civil – Introducción. *In*: VITORIA, Francisco de: **Obras de Francisco de Vitoria. Relecciones teológicas**. Ed. Teófilo Urdanoz. Madri: Biblioteca de Autores Cristianos, 1960, pags. 115-140; e CORDERO PANDO, Jesús. El poder en la república: sus formas y funciones según Francisco de Vitoria. *In*: VITORIA, Francisco de. **Relectio de Potestate Civili. Estudios sobre su Filosofía Política**. Edição crítica de Jesús Cordero Pando. Col. "Corpus Hispanorum de Pace", segunda série, vol. 15. Madri: CSIC, 2008, pags. 397-434.

54 Como é sabido, as duas *relectiones De Indis* aplicarão este sentido do *ius gentium* à situação concreta do relacionamento entre espanhóis e índios por ocasião da conquista da América.

55 Em sentido contrário, Cordero Pando entende que a menção ao direito das gentes seria um ponto central deste discurso de Vitoria, que teria conduzido sua argumentação sobre a obrigatoriedade das leis civis propositalmente a este campo, demonstrando-o como uma consequência necessária e bem fundamentada. CORDERO PANDO, *op. cit.*, pag. 481. Já Haggenmacher confessa que a conclusão extraída por Vitoria é "*un peu inattendue*" e acrescenta que o propósito do dominicano aqui seria o de afirmar a qualidade jurídica do direito das gentes. HAGGENMACHER, *op. cit.*, pag. 42.

56 VITORIA, Francisco de. **Relectio de Potestate Civili. Estudios sobre su Filosofía Política**. Edição crítica de Jesús Cordero Pando. Col. "Corpus Hispanorum de Pace", segunda série, vol. 15. Madri: CSIC, 2008, pag. 9.

BARRETTO, Rafael Zelesco. O caso hipotético da morte do embaixador francês na Espanha: duas espécies de ius gentium em Francisco de Vitoria. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 536-564

os povos, podem pecar.

Visto desta maneira, o fragmento citado parece não se opor à interpretação defendida nestas páginas, de uma divisão entre um *ius gentium* de caráter público, mais próximo do direito natural, e um de natureza particular, afeto principalmente ao direito positivo[57].

Além disto, a interpretação de Azevedo parece chocar-se com o método seguido pelo teólogo burgalês na exposição desta palestra: sempre que aborda um tema que julga importante, Vitoria anuncia qual a questão a ser discutida, aduzindo razões favoráveis e contrárias a seu ponto de vista. Ele também recorre rotineiramente ao expediente de enumerar as conclusões que irão estruturando o raciocínio seguido em toda a *Relectio*. E, demonstrando haver preparado diligentemente a dissertação, não retorna uma vez sequer ao que já foi exposto: seu pensamento progride linearmente e de forma organizada ao longo dos minutos da conferência. Ora, o corolário acerca da obrigatoriedade do *ius gentium* é apresentado como "*el siguiente corolario*" que se desprende do que foi dito antes. O palestrante não lhe dá um número e não o enuncia como ponto de partida para uma série de argumentos a favor e contrários. Logo a seguir, o abandona e não retorna ao mesmo, que também não possui nenhum papel relevante na fundamentação das grandes conclusões da *Relectio*. Portanto, o *ius gentium* aqui é somente um convidado de segunda categoria, e a passagem que trata do mesmo não pode ser tomada como representativa do pensamento completo do dominicano sobre o tema na ocasião.

Contra a tese da evolução do pensamento vitoriano sobre a natureza do *ius gentium* estão também as datas conhecidas de suas aulas e palestras: Francisco de Vitoria explicou a *Secunda Secundae* da Suma Teológica durante os anos letivos de 1526-1529 e 1534-1537[58]. A *De Potestate Civili* data de 1528[59], isto é, foi proferida durante o primeiro curso vitoriano, mais precisamente no momento em que as aulas versavam sobre a virtude da justiça. Contudo, a maior parte dos manuscritos das lições vitorianas (inclusive os que serviram de base às edições consultadas no presente estudo) datam do segundo ciclo de aulas, sendo certo que a parte relativa à justiça foi ministrada em fins de 1535[60]. Portanto, a conferência sobre o poder civil não pode ser considerada uma etapa de transição posterior aos Comentários, pois estes reafirmam a posição original de Vitoria sete anos após a *Relectio*. Se há discordâncias entre ambos os textos, não podem ser atribuídas a uma mudança de opinião de Vitoria.

Teófilo Urdanoz esposa uma terceira opinião sobre a divisão do *ius gentium* vitoriano. Segundo ele, o mestre salmantino haveria preconizado um direito de gentes de índole natural e um positivo[61]. O primeiro referir-se-ia às normas de direito natural que incidiriam sobre as relações entre as nações, a partir de seu pertencimento ao *totus orbis* ou comunidade universal[62]. Ao lado deste, haveria um outro, positivo, complementar às normas de direito das gentes natural e incumbido do governo de todo o orbe. O legislador deste *ius gentium* positivo seria a própria comunidade mundial[63]. Tais normas poderiam revestir tanto a forma escrita quanto consuetudinária, sendo que na primeira categoria entrariam também pactos ou convênios particulares, que vinculariam apenas as nações que a eles aderissem. Mas este direito positivo das gentes iria muito além: Urdanoz é especialmente enfático acerca da possibilidade de atividade legislativa da "comunidade das nações", citando em seu apoio o já estudado trecho da *De Potestate Civili* sobre a obrigatoriedade do *ius gentium*[64]. Tratar-se-ia de um direito próprio

57 "*Est-ce à dire que la conception contractuelle développée dans le Commentaire sur la* Somme théologique *soit abandonée? Il est certain que le méchanisme thomiste des condicta publica, qui y avait justifié la force obligatoire du ius gentium, n'est plus guère apparent. Mais les deux conceptions ne sont pas pour autant incompatibles. Ramener le droit des gens à l'une de ces conventions publiques, on l'a vu, revenait implicitement à lui reconnaître une nature légale. Inversement, son aspect conventionnel n'est pas rejeté dans la Leçon sur le pouvoir civil, pas plus que ne l'est l'universalité requise pour la validité de cette loi.*" HAGGENMACHER, *op. cit.*, pag. 42. As expressões sublinhadas se encontram grifadas em itálico no original.

58 Idem, pag. 40.

59 URDANOZ, *op. cit.*, pag. 108.

60 FRAYLE DELGADO, Luis. Estudio preliminar. *In*: VITORIA, Francisco de. **La justicia**. Tradução e introdução de Luis Frayle Delgado. Madri: Tecnos, 2003, pag. XVI.

61 URDANOZ, Teófilo. Introducción a la primera relección. *In*: VITORIA, Francisco de. **Obras de Francisco de Vitoria. Relecciones teológicas**. Org. Teófilo Urdanoz. Madri: Biblioteca de Autores Cristianos, 1960, pag. 586.

62 URDANOZ, Teófilo. Síntesis teológico-jurídica de la doctrina de Vitoria. *In*: VITORIA, Francisco de. **Relectio de Indis o libertad de los indios**. Trad. L. Pereña e J.M. Perez Prendes, Org. Luciano Pereña. Col. "Corpus Hispanorum de Pace", vol. 5. Madri: CSIC, 1967, pags. CXXX-CXXXIII.

63 Idem, pag. CXXXIII.

64 Idem, pag. CXXXIV. O trecho vitoriano em questão é: "*El Derecho de Gentes no sólo tiene fuerza por el pacto o acuerdo entre los hombres, sino que tiene fuerza de ley. En efecto, el orbe todo, que en cierto modo constituye una única república, tiene el poder de promulgar leyes justas y convenientes para todos, cuales son las del Derecho de Gentes.*" VITORIA, Francisco de. **Relectio de Potestate Civili. Estudios sobre su Filosofía Política**. Edição crítica de Jesús Cordero Pando. Col. "Corpus Hispanorum

da comunidade universal que, ademais, seria regido pelo princípio da maioria, como preceituado por Vitoria na *De Indis*. Isto é, a comunidade universal teria a faculdade de ditar normas positivas obrigatórias para os distintos países[65]. Para isso, sempre segundo Urdanoz, deveria contar com instituições próprias representativas, nas quais as decisões fossem tomadas e submetidas ao escrutínio da maioria[66]. Por fim, tratando do conteúdo do direito das gentes, tanto natural quanto positivo, Urdanoz sublinha que, em Vitoria, aparece uma primeira formulação de catálogo de direitos fundamentais[67] quando o mestre salmantino debate o problema da legitimidade da colonização espanhola das Américas. Este rol de direitos básicos dos indivíduos e dos Estados surgiria como uma concretização do direito natural. Por exemplo, da concepção primordial da sociabilidade humana, o teólogo burgalês haveria extraído seu *ius comunicationis*, estribo de direitos fundamentais como o direito de ingresso em país estrangeiro e de saída do próprio, as liberdades de navegação e comércio, o direito de residência e trabalho de estrangeiros etc.[68] Seriam decorrências da parte natural do direito das gentes, que se imporiam a todas as nações do orbe – tanto que Vitoria justifica o ataque armado aos índios que eventualmente obstruam tais faculdades[69].

Esta interpretação da doutrina vitoriana do *ius gentium* por Teófilo Urdanoz possui duas grandes vantagens. Em primeiro lugar, revela a ligação que existe, dentro do direito dos povos, entre direito natural e positivo. O autor estabeleceu algumas prerrogativas fundamentais que competiriam a nações e indivíduos a partir do método vitoriano de extrair conclusões do direito natural. Mas também reconheceu que "o orbe", através de alguma espécie de consenso ou votação, poderia criar regras próprias, de cunho positivo, isto é, não necessário como reflexo do direito natural, e impô-las a todas as nações. Além disso, alguns Estados específicos poderiam criar normas que só valessem entre si, em espírito contratual. Direito das gentes natural e positivo estariam, assim, umbilicalmente ligados. A interrogação que Vitoria propunha a seus alunos quando estudavam Santo Tomás – o direito das gentes é natural ou positivo? – seria respondida pelo mestre salmantino, de acordo com Urdanoz, nos dois sentidos. O fundamento e as primeiras determinações são naturais, as derivações construídas com base nisso são positivas.

A segunda qualidade da posição de Urdanoz refere-se ao catálogo de direitos fundamentais que este autor encontra em Vitoria. Seriam exigências decorrentes do modo de vida humano. Suficientemente genéricas, para abranger as várias comunidades existentes, e específicas o bastante para conferir direitos e deveres aos

de Pace", segunda série, vol. 15. Madri: CSIC, 2008 (No original, o trecho sublinhado se encontra grifado em itálico.)

65 "*En él* [Vitoria] *se establece una clara contraposición entre un derecho internacional de tipo contractual – el de los tratados o convenciones mutuas – y el verdadero derecho positivo de leyes internacionales, emanadas de esa autoridad supranacional. Este es el que obliga a todos los Estados, pues 'ninguno puede sustraerse a su obligación'.*" URDANOZ, Teófilo. Introducción a la primera relección. *In*: VITORIA, Francisco de. **Obras de Francisco de Vitoria. Relecciones teológicas**. Ed. Teófilo Urdanoz. Madri: Biblioteca de Autores Cristianos, 1960, pag. 591. (No original, os trechos sublinhados se encontram grifados em itálico.)

66 URDANOZ, Teófilo. Síntesis teológico-jurídica de la doctrina de Vitoria. *In*: VITORIA, Francisco de. **Relectio de Indis o libertad de los indios**. Trad. L. Pereña e J.M. Perez Prendes, org. Luciano Pereña. Col. "Corpus Hispanorum de Pace", vol. 5. Madri: CSIC, 1967, pag. CXXXIV, onde também se lê: "*La puerta queda así abierta para toda futura actividad legisladora de la autoridad mundial ya organizada. Los acuerdos de este Organismo de las Naciones Unidas deberían obligar a todos porque van impuestas por la autoridad superior de la Comunidad universal, representada en la mayoría. Todavía no se ha llegado a dar tal eficacia obligatoria a un cuerpo de leyes del derecho internacional positivo, fuera de parciales convenios legislativos.*" Na introdução à *Relectio de Indis Prior*, Urdanoz esclarece que Vitoria havia "preconizado" a sociedade de nações com autoridade supranacional, mas não como uma exigência imediata do direito das gentes de sua época. Contudo, este compilador da obra vitoriana manifesta que na época presente a união das nações seria cada vez mais urgente. URDANOZ, Teófilo. Introducción a la primera relección. In: VITORIA, Francisco de. **Obras de Francisco de Vitoria. Relecciones teológicas**. Ed. Teófilo Urdanoz. Madri: Biblioteca de Autores Cristianos, 1960, pags. 584-585.

67 URDANOZ, Teófilo. Síntesis teológico-jurídica de la doctrina de Vitoria. *In*: VITORIA, Francisco de. **Relectio de Indis o libertad de los indios**. Trad. L. Pereña e J.M. Perez Prendes, org. Luciano Pereña. Col. "Corpus Hispanorum de Pace", vol. 5. Madri: CSIC, 1967, pag. XXXVII.

68 O rol completo pode ser visto em: URDANOZ, Teófilo. Introducción a la primera relección. *In*: VITORIA, Francisco de. **Obras de Francisco de Vitoria. Relecciones teológicas**. Ed. Teófilo Urdanoz. Madri: Biblioteca de Autores Cristianos, 1960, pags. 594-612.

69 "*Si los indios quisieran negar a los españoles el derecho de gentes en los puntos arriba indicados, por ejemplo, el comercio y demás derechos señalados, los españoles deben primero con razones y por la vía de la persuasión evitar el escándalo y demostrar por todos los medios que no vienen a hacerles daño, sino que quieren residir pacificamente y emigrar allá sin causarles daño alguno* [...] *Pero si tras estas pruebas los indios no quieren darse por satisfechos, sino que acuden a la violencia, los españoles pueden defenderse y tomar todas las precauciones convenientes a su seguridad, porque lícito es repeler la fuerza con la fuerza. Y no sólo esto; si no hubiera otra solución, pueden con autorización del príncipe perseguirla con la guerra y poner en juego los demás derechos de la guerra.*" VITORIA, Francisco de. **Relectio de Indis. Carta Magna de los Indios**. Trad. C. Baciero, org. Luciano Pereña. Col. "Corpus Hispanorum de Pace". Madri: CSIC, 1989, pag. 103. (O trecho sublinhado encontra-se grifado em itálico no original.)

participantes das relações internacionais. Neste sentido, é interessante a contribuição de Johannes Thumfart que denomina os dois aspectos do *ius gentium* vitoriano como *ius cogens naturale* e *ius cogens positivum*, identificando o primeiro sobretudo com o direito universal de comunicação, do qual outros direitos fundamentais se derivariam[70]. O restante do direito das gentes seria de natureza positiva, destacando-se, para este autor alemão, seu caráter democrático, eis que poderia ser modificado pela maior parte do orbe e até mesmo, em tese, abolido por um consenso universal[71]. Esta identificação do direito das gentes vitoriano com o *ius cogens* possui seus méritos, sobretudo em relação aos direitos humanos fundamentais.

É preciso frisar que estes dois estudiosos diferem em relação ao aspecto que predomina em Vitoria: Urdanoz pensa que o *ius gentium* é fundamentalmente natural, enquanto que Thumfart o enxerga como principalmente positivo. Para as necessidades do presente trabalho, contudo, importa mais a semelhança entre ambos, consistente na relação entre direito natural e positivo no *ius gentium* vitoriano e no papel decisivo que a maior parte do orbe joga no estabelecimento das normas correspondentes.

Contudo, estes posicionamentos podem ser criticados por, mais uma vez, não explicarem de modo satisfatório a possibilidade de derrogação do *ius gentium* expressamente reconhecida por Vitoria. Se a vontade da maioria é decisiva para a formação do direito dos povos, como explicar que em alguns casos uma minoria de nações possa colocar-se deliberadamente fora deste, como afirma o dominicano acerca da escravidão ou do próprio envio de diplomatas? A concepção de Urdanoz e Thumfart parece pecar por excesso de institucionalismo, ao enxergar na *communitas totius orbis* uma verdadeira potência legiferante dotada de autoridade supranacional[72]. Ainda que haja trechos das lições vitorianas que corroborem tal tese, esta se mostra inadequada perante sua clara afirmação de que algumas regras do *ius gentium* só teriam validade para as nações que o aceitassem, tal como ocorre em um pacto entre pessoas particulares. De todo modo, o tratamento dado por Vitoria ao *ius gentium*, seja nos Comentários, seja nas *Relectiones*, não autoriza afirmar que pensava em qualquer tipo de organização internacional ou comunidade universal regida pelo princípio democrático. Quando menciona o poder do *totus orbis* de conferir leis a si mesmo, não parece ter em mente uma atividade normativa no modelo dos atuais foros internacionais, muito menos inspirada nos poderes legislativos internos. Afinal, o orbe só era equiparado a uma república "de certo modo", em alguns aspectos. O dominicano certamente não enxergava na comunidade universal as mesmas características – nem em ato, nem em potência – que nas "comunidades perfeitas" por ele denominadas de repúblicas[73]. A gênese consensual do *ius gentium* consistia, como ele mesmo dizia, em um acordo virtual[74]. Portanto, prescinde-se de instituições supranacionais.

5. Algumas provas da duplicidade do *ius gentium* em Francisco de Vitoria

É possível objetar que o exemplo do homicídio do embaixador francês, que originou a presente discussão, não forneceria base suficiente para as conclusões extraídas neste estudo. Afinal, se Vitoria menciona um *ius gentium* público e um privado, é verdade que ele não se detém sobre este aspecto nem adere especificamente à interpretação exposta nestas páginas, de acordo com a qual o critério para a distinção mencionada seria a abrangência das normas do direito das gentes.

Porém, pensa-se que a separação entre *ius gentium* universal e particular está bem mais enraizada no pensamento vitoriano que a confusa passagem sobre a

70 THUMFART, Johannes. **Die Begründung der globalpolitischen Philosophie: Francisco de Vitorias Vorlesung über die Entdeckung Amerikas im ideengeschichtlichen Kontext**. Berlim: Kulturverlag Kadmos, 2012, pag. 20.

71 Idem, pags. 135-136.

72 Ainda que Thumfart, à diferença de Urdanoz, reconheça expressamente que Vitoria não tinha em mente a configuração estatal atual, ele afirma que o orbe poderia instituir democraticamente normas de direito internacional positivo, dependentes da vontade da maioria (Idem, pags. 134-138).

73 Neste sentido, Mariano Fazio e Pedro Mercado Cepeda destacam que o *totus orbis* de Vitoria possui mais relação com as dimensões social e política dos indivíduos do que com a vontade associativa dos Estados. A comunidade do orbe em Vitoria se diferenciaria da república porque se orientaria por um bem próprio, diferente do bem comum de cada sociedade. Os autores relacionam tal finalidade à dignidade humana. Seja como for, são enfáticos em afirmar que o *orbis* de Vitoria não pode ser concebido como um Estado. FAZIO, Mariano e MERCADO CEPEDA, Pedro. Las dimensiones política y jurídica del *totus orbis* en Francisco de Vitoria. *In*: CRUZ CRUZ, Juan (org.). **Ley y domínio en Francisco de Vitoria**. Pamplona: EUNSA, 2008, pags. 205-225.

74 VITORIA, Francisco de. **La justicia**. Tradução e introdução de Luis Frayle Delgado. Madri: Tecnos, 2003, pag. 29.

BARRETTO, Rafael Zelesco. O caso hipotético da morte do embaixador francês na Espanha: duas espécies de ius gentium em Francisco de Vitoria. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 536-564

má sorte do enviado francês faz crer. Concede-se que o exemplo de aula não foi dos mais felizes. Contudo, quando trata de casos concretos à luz do direito das gentes, o mestre salmantino retorna ao raciocínio que foi aqui descrito. Esta seção traz algumas soluções vitorianas nas quais a duplicidade do *ius gentium* fica aparente.

Na lição sobre a justiça, Vitoria menciona um caso em que o direito das gentes poderia ser derrogado em parte: os povos cristãos haveriam anulado em suas relações mútuas o preceito que permitia a escravização dos que fossem capturados em guerra justa[75]. Tal assertiva já fora estabelecida pelo teólogo burgalês cerca de um ano antes, ao comentar a célebre *Quaestio de Bello* da Suma Teológica:

> *Duda catorce: ¿Los prisioneros de guerra son esclavos?*
>
> *Respuesta: En otro tiempo parecía ser esto de derecho de gentes. En efecto, en tiempo de los romanos se observaba, al parecer, la norma de que los prisioneros de guerra quedaban esclavos.*
>
> *Segunda afirmación de acuerdo con Pedro Palude: Aun en el caso de que se les haya hecho prisioneros justamente, los cristianos ahora no pueden ser reducidos a esclavitud, ni siquiera en guerra justa. La prueba está en que pueden hacer testamento así como poseer bienes propios, cosa que no está permitida a los esclavos.*
>
> *Tercera afirmación: Si se trata de otras personas – paganos y moros, por ejemplo – los prisioneros de guerra son esclavos, si la guerra con ellos es justa, se entiende; porque si no es justa, nunca se puede hacer esclavos a los prisioneros. Esta es la verdadera doctrina.*[76]

Por fim, na *Relectio de Iure Belli*, Francisco de Vitoria reforça tal proibição, considerando que os soldados cristãos poderiam pedir resgate por prisioneiros da mesma fé, mas nunca vende-los como escravos[77].

É importante ressaltar que a exceção não se baseia em um preceito de direito natural – caso em que seria obrigatória em todo e qualquer conflito – nem na superioridade moral dos cristãos. Nas três vezes em que menciona tal proibição, Vitoria sequer a valora positivamente, limitando-se a constatar que os cristãos chegaram a um acordo neste sentido, o qual haveria adquirido força obrigatória. Note-se que esta atitude passivamente descritiva não é sempre adotada pelo teólogo em suas obras, como pode ser visto na própria explicação sobre a guerra em Tomás de Aquino. Ali, imediatamente após enunciar sobriamente o costume cristão de não fazer prisioneiros nas guerras travadas no seio da Cristandade, Vitoria se interroga sobre a licitude de causar prejuízo ao inimigo sem que haja uma necessidade militar por trás. Fazendo referência a incêndios de vilas e queima de colheitas, o espanhol condena tais ações em termos fortes, chamando-as de caprichos diabólicos e fogo infernal[78]. Tal vivacidade contrasta com a aparente tranquilidade na qual Vitoria analisa a redução dos prisioneiros de guerra a escravos. Tudo isso confirma que, para ele, a melhora na situação dos capturados em combate se devia unicamente à mudança no padrão de conduta dos povos cristãos em suas guerras recíprocas. O fato de que o resultado concreto fosse mais humano não intervinha em suas considerações. Não se podiam fazer escravos dos prisioneiros de guerra cristãos por causa de uma alteração no *ius gentium*. Em contrapartida, no tocante aos não cristãos, o antigo preceito comum não fora alterado, e seguiria valendo a permissão de escravizar os cativos. O único reparo que Vitoria faz neste ponto é que a guerra deve ser justa; do contrário, a injustiça do combate inquinaria seus resultados, e não existiria motivo defensável para tolher a liberdade dos indivíduos que não haviam feito mal algum, nem por atos próprios, nem por ações de sua república[79].

75 Idem, pag. 30.

76 VITORIA, Francisco de. Quaestio de Bello. *In*: VITORIA, Francisco de. **Relectio de Iure Belli o Paz Dinámica**. Org. Luciano Pereña. Col. “Corpus Hispanorum de Pacis”, vol. 6. Madri: CSIC, 1981, pags. 238-239.

77 VITORIA, Francisco de. **Relectio de Iure Belli o Paz Dinámica**. Org. Luciano Pereña. Col. “Corpus Hispanorum de Pacis”, vol. 6. Madri: CSIC, 1981, pag. 177.

78 VITORIA, Francisco de. Quaestio de Bello. *In*: VITORIA, Francisco de. **Relectio de Iure Belli o Paz Dinámica**. Org. Luciano Pereña. Col. “Corpus Hispanorum de Pacis”, vol. 6. Madri: CSIC, 1981, pag. 239.

79 Na *De Iure Belli*, Francisco de Vitoria chega a uma conclusão semelhante em relação à permissibilidade de matar os culpados (isto é, os inimigos que agiram de modo malicioso e que não foram levados à guerra por ignorância ou por simples obediência de boa fé ao seu rei): em uma guerra contra pagãos, ou dos pagãos contra os cristãos, esta medida extrema poderia ser a única maneira de obter segurança após a vitória. Porém “*en la guerra* [*de cristianos*] *contra cristianos yo no pienso que sea lícito obrar así*”, em vista das calamidades e sofrimentos que decorreriam. A razão aqui parece ser um pouco diversa, pois o conferencista não menciona o direito das gentes ou algum acordo especial, preferindo enfatizar o dever do príncipe para com o bem comum. Contudo, parece claro que a morte de todos os inimigos é proibida nos casos em que a proximidade religiosa, social e cultural possibilitaria que a paz fosse mantida por meios menos violentos (derrogação do *ius gentium* geral por uma situação específica, que exigiria uma regra de *ius gentium* particular), ao passo que, nos embates contra povos muito diferentes, para com os quais a desconfiança recíproca seria muito grande, os modos de assegurar a paz fossem mais restritos, justificando por vezes o massacre dos perdedores culpados (regra geral do *ius gentium*, em aplicação estrita

Neste sentido deve ser interpretada a carta ao padre Bernardino de Vique sobre o comércio de escravos promovido pelos portugueses, na qual tal instituição é reconhecida sem críticas e seus beneficiários são amplamente defendidos. Na missiva, Vitoria respondia a algumas dúvidas de um seu correligionário acerca do procedimento dos lusos em relação aos africanos que eles tomavam como escravos. Aparentemente, diversos compradores (inclusive espanhóis) se viam às voltas com problemas de consciência, não por duvidar da licitude da escravidão em si, mas devido ao temor de que os portugueses houvessem escravizado aqueles indivíduos injustamente, fora do contexto habitual da guerra justa. Uma das questões propostas a Vitoria era qual a possível culpa de um comprador de escravos obtidos originalmente por um ataque injusto dos europeus[80]. A resposta do autor da *De Indis* é mais legalista do que se poderia esperar dele:

> *A la otra duda, de los que en sus tierras fueron hechos esclavos en la guerra, tampoco veo por dónde les facer grand escrúpulo, porque los portugueses no son obligados a averiguar las justicias de las guerras entre los bárbaros. Basta que éste es esclavo, sea de hecho o de derecho, y yo le compro llanamente.*[81] (Grafia original mantida.)

A aparente insensibilidade de Vitoria pode chocar o leitor deste trecho. Em outras passagens do mesmo documento, ele retoma seus habituais apelos por um tratamento humano dos escravos[82]. Na passagem acima transcrita, porém, deseja-se chamar a atenção para o respeito tributado pelo salmantino aos costumes africanos, eis que a maioria dos escravos traficados pelos lusitanos naquela época lhes eram fornecidos por outras tribos nativas, consistindo em combatentes inimigos capturados. Como já visto, Vitoria postulava que, fora da exceção vigente entre povos cristãos por causa de sua tradição específica, seria lícito escravizar os prisioneiros em uma guerra justa. À dúvida sobre a justiça das guerras que se davam entre os nativos, o regente de Prima responde que esta devia presumir-se, sempre que não houvesse maneira segura de estabelecer os fatos. Admitindo-se que os africanos pudessem guerrear justamente uns com os outros, a licitude da captura e subsequente comercialização de escravos seria a consequência lógica[83]. Este seria a outra face da proibição de fazer servos na guerra entre cristãos: coerentemente, o teólogo dominicano reconhece que os demais povos estão sujeitos ao *ius gentium* geral, sem as restrições introduzidas consuetudinariamente na Cristandade.

De todo modo, como Jesús Cordero Pando já evidenciou[84], a aceitação da escravidão por parte de Vitoria acaba sendo uma prova a mais da vitalidade de seu pensamento. Pois sua teoria do *ius gentium* se mantém íntegra ainda que se rechace o exemplo da escravidão. Com os olhos de hoje, é possível enquadrar a escravidão dos inimigos vencidos como um instituto de *ius gentium* particular (e não geral, como entendia Vitoria), que foi subsequentemente derrogado pela mudança nas condições de vida das comunidades humanas[85]. A distinção

da doutrina da guerra justa).

80 Segundo informa o pe. Miguel de Arcos, também correspondente de Vitoria e que guardou a carta ao pe. Vique fazendo algumas anotações à margem para melhor entendimento. VITORIA, Francisco de. El tráfico de esclavos realizado por los portugueses. Fragmento de una carta al padre Bernardino de Vique. *In*: VITORIA, Francisco de. **Relecciones sobre los indios y el derecho de guerra**, 3ª ed. Madri: Espasa-Calpe, 1975, pag. 24.

81 Idem, pag. 23.

82 "*In particulari de los esclavos que los portugueses traen de su India, sin duda si se tuviese por cierto que los portugueses se alzan con ellos por aquella forma y ruindad, yo no sé por dónde los pueda nadie tener por esclavos. Yo no creo que aquél sea trato, a lo menos común de los portugueses, aunque alguna vez haya acaescido; ni es verisímle que el rey de Portugal permitiese tan gran inhumanidad, ni que faltase alguno que le advirtiese dello.*" (Grafia original mantida. O trecho grifado encontrava-se em itálico no original.) Idem, pag. 22. Também: "*Mayor escrúpulo y más que escrúpulo es que ordinariamente los traen inhumanamente, no se acordando los señores que aquéllos son sus prójimos, y de lo que dice sant Pablo, que el señor y el siervo tienen otro Señor a quien el uno y el otro han de dar cuenta.*" (Grafia original mantida.) Idem, pag. 23.

83 A propósito desta passagem, Johannes Thumfart escreve que as condenações que Francisco de Vitoria expressará contra a conquista espanhola das Américas não se devem a pensamentos humanitários ou pacifistas, mas somente à má utilização da categoria do *bellum iustum*. É verdade que o estilo de Vitoria é sóbrio quando trata de questões jurídicas. Mas não se concorda com a assertiva de Thumfart de que o *ius gentium* vitoriano seria "positivista" por causa desta grande atenção à forma dos institutos jurídicos e à falta de uma condenação explícita da escravidão. Imagina-se, ao contrário, que o próprio Vitoria responderia que a correta compreensão do conteúdo do *ius gentium* seria essencial para alcançar a paz entre os povos, incluindo aí o respeito a costumes diferentes ou até mesmo (em certa medida) repugnantes. THUMFART, *op. cit.*, pags. 142-145.

84 CORDERO PANDO, *op. cit.*, pags. 479-480.

85 Também é possível interpretá-la como resultado de um grande erro de apreciação das sociedades humanas, que resultou em uma massiva violação ao direito natual, como prefere Cordero Pando. "*Así considerado, como explicitación racional, a lo largo de la historia, del derecho natural, va adquiriendo contenidos que, en algún caso, como en el aludido de la esclavitud, pueden deberse a la insuficiencia de racionalidad o al error humano, que tendrán que ir superándose con el tiempo.*" Idem, pag. 480. Embora se concorde com as razões desta argumentação, surge a dúvida sobre o grau de sua dependência das categorias de pensamento e condições sociais típicas dos últimos séculos – e a consequente invalidade de sua aplicação a contextos distintos, como o mundo atlântico do século XVI. Este debate, contudo, não possui importância para o presente estudo.

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entre os dois tipos de direito das gentes parece útil neste aspecto.

Retornando à *De Iure Belli*, é interessante continuar a estudar a lição de Francisco de Vitoria sobre o tratamento a ser dado aos prisioneiros de guerra. Já que não podem ser escravizados (na guerra entre cristãos), seria lícito matá-los? O conferencista pensa que nada se opõe em princípio a executar os "culpados" após uma guerra justa, "*guardando, sin embargo, la equidad*". Mas logo abranda esta sentença, consignando que

> *Como en la guerra hay muchas cosas establecidas por derecho de gentes, parece admitido por la costumbre que, obtenida la victoria y pasado el peligro, no se dé muerte a los prisioneros a no ser que sean prófugos. Y se ha de observar este derecho de gentes en la forma en que acostumbran a guardarlo los hombres rectos. Respecto de los que se han entregado, no he leído ni oído que exista semejante costumbre.*[86]

Como se vê, a solução mais humana que Vitoria alcança é fruto do costume bélico. A conclusão poderia facilmente correr no sentido inverso, caso os povos então conhecidos pelo teólogo cultivassem o hábito de passar os vencidos à espada. Embora certamente se preferisse uma exortação ao tratamento benévolo dos vencidos em razão de sua comum humanidade, não se deve perder de vista que o direito das gentes aqui adquire coloração nitidamente positiva e variável. Também é possível entrever o outro *ius gentium*, universal e permanente, na segunda frase do trecho copiado: ainda que certo conteúdo do direito das gentes possa alterar-se, o dever formal de respeitá-lo vale para todos.

Vitoria reconhece que o costume neste caso não é tão sólido quanto desejável, e acrescenta que, por isso,

> *en la rendición de fortalezas de ciudades los que se han entregado suelen tener cuidado de poner condiciones con las que puedan salvar la vida y ponerse a salvo, quiero decir, temerosos de que se les dé muerte si se entregan sin más y sin condición alguna. Y esto leemos que ya se ha hecho algunas veces. Por lo cual no parece inicuo que si una ciudad se entrega sin condiciones, algunos de los más culpables sean ejecutados por mandato del príncipe o del juez.*[87]

Novamente pode-se apreciar o confronto entre o *ius gentium* público e o privado. No caso, o dominicano admite que pode haver dúvidas sobre o teor exato do direito das gentes no tocante à sorte dos derrotados. Recomenda, assim, que as cidades sitiadas que desejem entregar-se pactuem com os atacantes, de modo que estes se vejam obrigados a respeitar a vida dos combatentes. Tratar-se-ia de um *ius gentium* privado, isto é, oriundo de um acordo específico entre as partes, que derrogaria o direito das gentes geral. Recorde-se que isto é permitido sempre que a derrogação não fira o direito natural. Na hipótese presente, o resultado seria a diminuição do número de mortes, o que está bem longe de contrariar as exigências do *ius naturale*.

Na época de Vitoria, quando os mestres explicavam o *ius gentium* nas Sentenças de Pedro Lombardo ou na Suma Teológica, um dos exemplos mais populares era o relativo à propriedade, que inclusive fora empregado pelo próprio Aquinate em sua exposição. Como já se viu[88], o teólogo burgalês também faz uso desta ilustração ao comentar a parte correspondente da Suma. Em outra parte, especificamente no âmbito de seu longo comentário à questão 62 sobre a restituição, Francisco de Vitoria se detém com mais precisão no clássico assunto da divisão das propriedades:

> *Si es cierto que Dios hizo todas las cosas comunes para todos, y el ser humano es dueño de todas las cosas por derecho natural, ¿cómo y de dónde procede la división de las cosas? La división de las cosas no está establecida por derecho natural.* [...] *Podemos decir que la división de las cosas se llevó a cabo a partir de un consenso virtual e interpretativo, al ocupar cada uno su lugar y dejar otros a los demás. Tal vez ocurrió así, no mediante un acuerdo formal y preciso, sino por acuerdo interpretativo, de modo que algunos comenzaron a cultivar unas tierras y los demás otras, y del uso de aquellas cosas se derivó que ése se sintiera satisfecho con las tierras que había ocupado y el otro con las otras, de forma que uno no ocupaba las tierras de su vecino.*[89]

Desta vez ele não menciona o direito das gentes, possivelmente porque já havia explicado há pouco tempo, na altura da questão 57, que a divisão das propriedades se contava entre seus institutos. O que importa agora é que, nesta passagem, Vitoria exprime, com bastante didática, o modo como pensa que o direito das gentes se formou: no caso da propriedade privada, através de uma série de convênios privados, cada qual entre poucos indivíduos, cuja generalização terminou por consagrar a norma como instituto universal de direito das

86 VITORIA, Francisco de. **Relectio de Iure Belli o Paz Dinámica**. Org. Luciano Pereña. Col. "Corpus Hispanorum de Pacis", vol. 6. Madri: CSIC, 1981, pags. 185-187.

87 Idem, pag. 187.

88 Ver seção 2 do presente estudo, *supra*.

89 VITORIA, Francisco de. Comentários à Secunda Secundae da Suma Teológica de Santo Tomás, q. 62 a.1. *In*: VITORIA, Francisco de. **Relectio de Potestate Civili. Estudios sobre su Filosofía Política**. Edição crítica de Jesús Cordero Pando. Col. "Corpus Hispanorum de Pace", segunda série, vol. 15. Madri: CSIC, 2008, pag. 155.

gentes[90]. Ora, trata-se de uma evolução do direito das gentes particular ao geral. Quando o mestre salmantino diz que não houve um acordo formal e preciso, mostra como, no início, grande parte do direito das gentes era fruto da mera convivência entre poucos indivíduos ou povos diferentes. As grandes regras gerais foram se plasmando lentamente na consciência das pessoas, à medida em que suas relações se sofisticavam. Não se deve esquecer, porém, como foi anteriormente exposto, que tal desenvolvimento só foi possível graças às poucas exigências do *ius gentium* que não se modificam, aquelas que contém um grau muito elevado de direito natural. Não houvesse este substrato de direito humano comum, os povos dificilmente se poriam de acordo, seja de modo formal, virtual ou interpretativo.

A história da instituição da propriedade privada, como contada por Vitoria, é assim um eloquente testemunho de sua divisão do direito das gentes em geral e particular, nada obstando que o segundo evolua, graças a sua aceitação universal, para a forma primária.

Passa-se agora à mais célebre das conferências vitorianas, a *Relectio de Indis Recenter Inventis* ou *De Indis Prior*, na qual examina o delicado problema da conquista espanhola da América. Vale a pena deter-se no primeiro dos títulos legítimos enunciados por Francisco de Vitoria como boas razões para a presença ibérica no Novo Mundo: o dominicano enuncia "a sociedade e comunicação natural", complementando-o com algumas teses. A primeira é que "*los españoles tienen derecho a emigrar a aquellos territorios y a permanecer allí, a condición de que no causen daño a los índios, y éstos no pueden prohibírselo*"[91]. Para provar tal proposição, amontoa nada menos que catorze argumentos, dentre os quais o seguinte: "*En undécimo lugar, ellos admiten a otros indios de cualquier parte que sean. Luego harían una injusticia no admitiendo a los cristianos.*"[92] Não é necessário, para os propósitos do presente trabalho, questionar a veracidade desta afirmação tão genérica segundo a qual os índios seriam extremamente hospitaleiros com os nativos de outras tribos. Suponha-se, como o faz Vitoria, que entre os americanos realmente houvesse tal costume de receber bem aos forasteiros. A conclusão que ele extrai é que os espanhóis não poderiam ser excluídos desta hospitalidade indígena. Note-se que aqui, ao contrário do que ocorre nas demais provas, o palestrante raciocina por indução. O fato de os índios praticarem a hospitalidade entre si demonstra que eles aceitaram um princípio geral de acolher os estrangeiros. Quando surgem os espanhóis e caso estes sejam repelidos, terão sido relegados a uma situação desigual e inferior em relação aos demais povos que há na América. Uma vez que a justiça exige a igualdade, os nativos não podem tratar os europeus de modo inferior ao que eles mesmos estabeleceram como padrão mínimo de conduta para com estrangeiros.

Notável neste raciocínio é o aparecimento e a eficácia do *ius gentium* particular. A princípio, nada parece obrigar os índios à hospitalidade. Mas depois que eles, livremente, passaram a praticá-la entre as diversas tribos, acabaram vinculados por este costume. Percebe-se mais uma aplicação do "acordo virtual ou interpretativo" que o mestre salmantino especulara como origem da propriedade privada.

A mesma construção reaparece pouco à frente, na mesma *Relectio*: "*Si entre los indios hay bienes comunes tanto a nacionales cuanto a forasteros, no es lícito a los indios prohibir a los españoles la comunicación y participación de esos bienes.*" [93]

Francisco de Vitoria podia não saber muito sobre os habitantes do Novo Mundo, mas dava grande valor a suas tradições (desde que não se opusessem ao direito natural). Caso alguma tribo permitisse algumas liberdades a membros de outras nações, os espanhóis fariam jus ao mesmo direito. Novamente, o *ius gentium* particular, oriundo dos contratos entre povos determinados, surge com grande força, obrigando os nativos a seguir as práticas que eles mesmos estabeleceram, evitando assim a injustiça de tratar um povo como inferior[94]. O

90 Ao menos na visão de Vitoria. Hoje, pelo contrário, já é bem sabido que no século XVI numerosos povos só faziam uso rudimentar da propriedade privada. Poder-se-ia talvez argumentar que alguma forma de propriedade privada, ainda que despida das formalidades encontradas na Europa, realmente seria universal.

91 VITORIA, Francisco de. **Relectio de Indis. Carta Magna de los Indios**. Trad. C. Baciero, org. Luciano Pereña. Col. "Corpus Hispanorum de Pace". Madri: CSIC, 1989., pag. 99. Em itálico no original.

92 Idem, pag. 100.

93 Idem, pag. 102.

94 É evidente que esta construção vitoriana estava afastada da realidade americana, pois os espanhóis não poderiam honestamente ser considerados como uma simples tribo entre muitas outras. Da mesma forma, ainda que se admita em tese os direitos defendidos por Vitoria, as atrocidades sofridas por alguns povos indígenas poderiam justificar que outros, cientes disso, não quisessem manter nenhum trato com os europeus. Tudo isso, porém, é irrelevante para a pesquisa aqui empreendida, até porque parece certo que o conhecimento que Vitoria possuía dos assuntos das Índias era bastante restrito. Importa antes considerar os princípios afirmados por Vitoria deixando a outros estudos, que de resto já existem, a questão de

mesmo se diga em relação à possibilidade de naturalização dos espanhóis em uma tribo indígena:

> *Es más, parece que quien quiera domiciliarse en alguna ciudad de aquellos naturales tomando, por ejemplo, esposa o por los otros medios por los que los demás extranjeros suelen adquirir la ciudadanía, no parece que pueden prohibírselo más que a otros, y por consiguiente pueden gozar de los privilegios de los ciudadanos como los demás, con tal que acepten también las cargas como los demás.*[95]

Ao contrário do que possa parecer, o regente de Prima não defendia um direito amplo e irrestrito à aquisição da cidadania local pelos "imigrantes" espanhóis, e sim a equiparação destes aos demais estrangeiros que os índios já conheciam. Ele advogava pela faculdade de seus compatriotas de beneficiar-se das mesmas regras que, em seu entendimento, vigorava entre os vários povos das Américas. Trata-se, novamente, de um postulado igualitário, pelo qual as normas livremente estabelecidas entre as tribos indígenas em seu *ius gentium* particular, poderiam beneficiar outras nações que viessem a aderir a tais acordos. Note-se a exigência de que os costumes pré-existentes fossem respeitados: os peninsulares deviam adequar-se aos critérios de naturalização já vigentes entre os nativos. O *ius gentium* geral de Vitoria obrigaria os indígenas a tratar todas as outras nações de modo igualitário, não podendo assim excluir *a priori* os ibéricos da "cidadania".

A discussão sobre este primeiro título legítimo de sociabilidade e comunicação naturais engloba as passagens mais famosas e posteriormente repetidas da conferência, que são aquelas nas quais o mestre aborda diretamente o direito das gentes. Observe-se que tal menção é feita de passagem, no contexto da demonstração de suas teses práticas sobre os variados direitos dos espanhóis nas Américas. Apesar de não se tratar de um estudo específico sobre o *ius gentium*, ao contrário do que se viu na lição sobre a *quaestio* 57 da Suma, foram as frases da *Relectio*, e não as da *Lectio*, que passaram para a história do direito internacional.

Uma destas passagens imortalizadas corresponde à primeira prova da tese inicial do título do *ius communicationis*. Como acima transcrito, Vitoria menciona que os espanhóis possuem o direito de percorrer e estabelecer-se nas terras do Novo Mundo, sempre que não causem dano aos índios. As justificativas aduzidas começam por:

> *Se prueba, en primer lugar, por el derecho de gentes, que o es derecho natural o se deriva del derecho natural (Instituciones I 2, 1): 'Se llama derecho de gentes lo que la razón natural estableció entre todas las gentes'. En efecto, en todas las naciones se considera inhumano recibir mal a los forasteros y emigrantes; y por el contrario, humano y cortés comportarse bien con los forasteiros; y no sería así, si es que obraran mal los emigrantes por viajar a naciones extranjeras.*[96]

Observe-se a vinculação estreita entre direito natural e direito das gentes nesta passagem, muito diferente da proximidade com o direito positivo que se lia nos comentários vitorianos à Suma Teológica. Porém, esta nova perspectiva não pode conduzir à conclusão de que o direito das gentes seria uma espécie de *ius naturale* de alcance irrestrito. Na verdade, a fonte do direito positivo não está totalmente ausente da definição emprestada de Gaio. Vitoria não dá resposta definitiva à interrogação sobre o lugar do direito dos povos: este é de direito natural ou derivado do mesmo.

A explicação de Vitoria pode ser entendida no sentido de uma alternativa: não sendo o momento de aprofundar na definição do *ius gentium*, ele se limita a assinalar que este possui ligação com o direito natural, e que tal ligação poderia ser mais forte ("*es derecho natural*") ou menos ("*o se deriva del derecho natural*"). A mesma lógica parece estar por trás da sequência do trecho: após estabelecer a relação entre os dois direitos, Vitoria a justifica com a citação de Gaio, que indicaria o caráter universal do *ius gentium*, e também com o costume universal de

saber se foram bem aplicados na América ou não.

95 VITORIA, *op. cit.*, pag. 103.

96 VITORIA, *op. cit.*, pag. 99. Sobre este trecho, há uma célebre polêmica a respeito da citação vitoriana do jurisconsulto Gaio nas Institutas. Onde o romano escrevera "*quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium*", Vitoria cita "*quod naturalis ratio inter omnes gentes constituit, vocatur ius gentium*" (Edições históricas de Lyon e Salamanca, reimpressas em: VITORIA, Francisco de. **Relecciones Teológicas del Maestro Fray Francisco de Vitoria**, vol. 1. Org. L.G. Alonso Getino. Madri: Imprenta de la Rafa, 1933, pags. 382-383). Discute-se o significado desta alteração de "*homines*" por "*gentes*". A posição tradicional, defendida originalmente por Ernest Nys (NYS, Ernest. Introdução. *In*: VITORIA, Francisco de. **De indis et de iure belli relectiones**. Org. Ernest Nys. Washington, D.C.: Carnegie Institution, 1917, pags. 42-43) e aceita, entre outros, por Urdanoz (*op. cit.*, pag. 568), entende que tal alteração foi proposital, pois Vitoria tencionava desenvolver um direito propriamente internacional a partir das regras romanas, que se aplicavam a relações interpessoais, trazendo os Estados para o centro do direito internacional. A tese oposta pode ser encontrada em Haggenmacher (*op. cit.*, pags. 58-60), para quem a alteração deveu-se ao hábito vitoriano de citar as passagens de memória, sem conferir a isto nenhum significado especial. Também Thumfart salienta que tal alteração não passa de uma variação insignificante do texto de Gaio, pois o *ius gentium* vitoriano não põe o Estado em primeiro plano, e sim o indivíduo (THUMFART, *op. cit.*, pag. 244).

receber bem os viajantes, de caráter mais positivo.

A duplicidade fica mais clara quando o teólogo trata de fundamentar outra proposição:

> *Si entre los indios hay bienes comunes tanto a nacionales como a forasteros, no es lícito a los indios prohibir a los españoles la comunicación y participación de esos bienes.*
>
> *[...]*
>
> *En este tema son muchos los puntos que parecen derivar del derecho de gentes. Obsérvese que si el derecho de gentes tiene en buena parte su origen en el derecho natural, claramente tiene fuerza para conceder derechos y crear obligaciones. Y en el supuesto de que no siempre tenga su origen en el derecho natural, sí parece que se tienen en cuenta el consentimiento de la mayor parte del orbe, sobre todo cuando se trata del bien común de todos. Porque si desde los primeros tiempos de la creación del mundo y de su reconstrucción después del diluvio la mayoría de los hombres estableció que los embajadores en todas partes fueran inviolables, que los mares fueran comunes, que los prisioneros de guerra fueran esclavos, y que asimísmo convenía que los extranjeros no fueran expulsados, ciertamente esto tendría fuerza de ley, aun con oposición de los demás.*[97]

Outra vez, o mestre salmantino prioriza o aspecto prático em detrimento de esclarecer definitivamente a proveniência do direito das gentes. Como se lê, ele está interessado em defender a obrigatoriedade das normas de *ius gentium*. Para desincumbir-se eficazmente desta tarefa, desenvolve estratégias de persuasão tanto para os que alinhavam o *ius gentium* ao *ius naturale* quanto para os que preferiam admiti-lo entre o direito civil. Conclui, assim, que nos dois casos, os diversos povos estarão vinculados pelo direito das gentes. A única distinção é que, quando se tratar de um direito consentido (*ius gentium* no segundo sentido, ou particular), a norma só atingirá as nações que a ela aderirem, podendo inclusive prevalecer sobre um comando de *ius gentium* primário, ou universal, em sentido contrário. Parece evidente que a menção à escravização dos prisioneiros de guerra foi feita por Vitoria pensando no contexto dos possíveis confrontos entre espanhóis e indígenas – mas ele devia estar bem consciente da existência do preceito específico do *ius gentium* que derrogara tal disposição quando a luta fosse entre cristãos.

Portanto, os dois trechos mais "teóricos" da *Relectio de Indis Prior* sobre o direito das gentes caracterizam-se por sua ambiguidade no tocante à real natureza deste último. O conferencista evita tomar partido decididamente por um dos lados, preferindo mostrar como as duas posições rivais coincidiriam em apoio de suas teses concretas (direitos subjetivos ao ingresso e permanência em outro país, direito de adquirir a cidadania estrangeira e de ser tratado como igual, direito de participar na fruição dos bens comuns etc.)[98]. Importante sublinhar que os parágrafos acima transcritos não fecham a porta à possibilidade de que o "consentimento do orbe" ocorra em pequena escala, entre poucas nações. Afinal, o direito que vale "entre todas as gentes" pode ser visto como apenas uma das duas formas possíveis de *ius gentium*.

Prosseguindo na conferência sobre os índios, encontra-se uma importante aplicação do direito das gentes particular na admissão do título do auxílio aos aliados como causa para guerra justa. Citando o exemplo dos tlaxcalas, que se uniram aos soldados de Cortez contra os astecas, Vitoria destaca que "*la defensa de los aliados y amigos es causa justa de guerra*"[99]. Neste caso, o ataque armado decorrerá de uma norma específica de direito das gentes estabelecida pela aliança entre as duas nações, que ampliará, neste ponto específico, o preceito do *ius gentium* universal segundo o qual a força somente pode ser empregada em defesa de um direito ou resposta a uma injúria recebida[100]. Note-se que a defesa dos amigos *manu militari* não se confunde com a reparação de um dano sofrido pela república. Trata-se de uma conduta cuja justificativa reside no direito alheio que foi violado. Segundo Vitoria, a guerra em legítima defesa de terceiro seria lícita em dois casos: quando o príncipe estivesse agindo para garantir a paz e a justiça no orbe[101], ou quando estivesse vinculado a algum pacto

97 VITORIA, Francisco de. **Relectio de Indis. Carta Magna de los Indios**. Trad. C. Baciero, org. Luciano Pereña. Col. "Corpus Hispanorum de Pace". Madri: CSIC, 1989, pag. 102.

98 "Quando Vitória se preocupa com o fundamento de validade [do direito das gentes], este decorre da natureza; quando ele considera a questão de somenos importância, a origem é de direito positivo." MACEDO, *op. cit.*, pag. 11. Disponível em: < https://www.publicacoesacademicas.uniceub.br/rdi/article/view/1602/1591 >. Acesso em: 10.07.2017.

99 VITORIA, *op. cit.*, pag. 110.

100 Francisco de Vitoria já se havia pronunciado a favor da guerra em defesa de aliados ao comentar a questão 40 (*De Bello*) da II-II da Suma Teológica. Ver VITORIA, Francisco de. Quaestio de Bello. *In*: VITORIA, Francisco de. **Relectio de Iure Belli o Paz Dinámica**. Org. Luciano Pereña. Col. "Corpus Hispanorum de Pacis", vol. 6. Madri: CSIC, 1981, pag. 219.

101 Por exemplo, quando um príncipe resolvesse tomar a defesa de um povo que estivesse sendo vítima de tirania e truculência por parte de seu governante. Interessante notar que Vitoria primeiro afirma este direito na teoria ("*en general, cuando los súbditos tienen derecho a luchar contra su rey, pueden los príncipes luchar a favor del pueblo. La razón está en que el pueblo es inocente y los príncipes pueden y les es lícito por derecho natural defender el orbe para que no se le haga injusticia*" Idem, pags. 219-221), para depois leva-lo à prática, ao admitir a defesa dos nativos

BARRETTO, Rafael Zelesco. O caso hipotético da morte do embaixador francês na Espanha: duas espécies de ius gentium em Francisco de Vitoria. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 536-564

que lhe impusesse a defesa de outra república que estivesse ameaçada. A diferença entre estas duas situações residiria em que, no primeiro caso, a obrigatoriedade da ação seria sensivelmente menor que no segundo. Além disso, o primeiro motivo, mais importante, restringirá o segundo, de modo que não será permitido vir em auxílio de algum aliado caso seja evidente que este não possui razão na disputa[102].

Porém, o direito das gentes particular também pode ser invalidado caso seu teor viole o direito natural. É o que se vê quando Vitoria denunciava o título ilegítimo da "eleição voluntária", alegado pelos espanhóis quando conseguiam fazer com que alguma nação índia consentisse com o domínio dos Reis Católicos. O que, à primeira vista, poderia parecer um simples pacto entre dois povos, apto a criar novas normas de direito das gentes que regulassem o convívio entre ambos, é descartado pelo mestre salmantino em virtude do vício de consentimento que encontra em tais acordos:

> *En primer lugar, no deberían intervenir el miedo y la ignorancia, que vician toda elección. Ahora bien, ambos factores intervienen en aquellas elecciones y aceptaciones; pues los indios no saben lo que hacen, y aún quizá ni entienden lo que les piden los españoles. Además se lo piden a una turba inerme y medrosa, a la que rodean con las armas en la mano.*[103]

Embora o raciocínio de Vitoria seja fácil de entender e apoiar, ele parece encontrar-se em contradição com a solução dada por ele a outro problema envolvendo coação na conclusão de um tratado. Após a batalha de Pavia (1525), o rei francês Francisco I fora capturado pelo Imperador Carlos V e conduzido a Madri, onde passara algum tempo em cativeiro. Para obter sua liberdade, precisou assinar um tratado[104], naturalmente bastante desfavorável a seu país. Assim que cruzou os Pirineus, porém, o rei gálico recusou-se a cumprir diversos pontos do pacto, argumentando que tal convenção era nula por haver sido assinada sob coação.

Em sua lição sobre a *Quaestio de Bello* de Santo Tomás, Vitoria rejeita esta razão oferecida pelo rei francês afirmando que, ainda que o tratado fosse desvantajoso e só obtido devido a seu estado de prisioneiro, o rei Francisco permanecia vinculado ao mesmo, para que a violação do pactuado não conduzisse a uma perpetuação das guerras[105].

Esta censura formulada contra o rei Francisco I faz surgir uma aparente contradição no raciocínio vitoriano. O regente de Prima não aceitara as razões do monarca para liberar-se das obrigações do tratado de Madri. Já no caso dos índios e dos conquistadores, denuncia os acordos como nulos. O que aconteceu?

Parece que o teólogo dominicano não considerou que tais situações fossem semelhantes. E, realmente, há que se tomar em conta que Francisco I e Carlos V estavam em pé de igualdade no que tange à compreensão do que faziam quando celebravam o tratado. Por mais que o soberano gálico estivesse sendo forçado por sua prisão a concordar com termos desagradáveis, ele não recebia tratamento pior do que o de outros príncipes europeus cativos na época. Ao comentar seu caso, Vitoria ainda teve o cuidado de ressaltar que o tratado "forçado" não poderia ser excessivo em suas concessões, nem aproveitar-se da desventura do soberano para ameaçar a sobrevivência da França[106]. Dentro destes amplos limites, porém, o teólogo não acredita que o rei francês poderia alegar coação contra o pacto que ele se dispusera a assinar.

Os nativos americanos, por sua vez, sequer sabiam o que estava em jogo quando ouviam os espanhóis proclamar seus "direitos" às terras e convidá-los a uma submissão pacífica. Com efeito, sabe-se que a estratégia de aproximação predileta dos castelhanos consistia em uma proclamação unilateral, o *Requerimiento*, que, após uma brevíssima síntese da religião cristã e dos poderes do Papa e do Imperador (muitas vezes lido em latim),

americanos que estivessem sofrendo injustiças reiteradas por parte de seus líderes como uma das causas para a guerra justa dos espanhóis nas Américas ("*Otro título podría ser la tiranía de los mismos caciques de los indios o sus leyes tiránicas en daño de los inocentes, el sacrificio, por ejemplo, de hombres inocentes o la matanza, otras veces, de hombres libres de culpa con el fin de comer su carne*" – VITORIA, Francisco de. **Relectio de Indis. Carta Magna de los Indios**. Trad. C. Baciero, org. Luciano Pereña. Col. "Corpus Hispanorum de Pace". Madri: CSIC, 1989, pag. 109).

102 Ao discutir a delicada situação do ducado de Milão, objeto de discórdia entre Carlos V e Francisco I, Vitoria afirma que os espanhóis poderiam auxiliar o milanês (cuja política era pró ibérica) a pedido deste caso ficasse estabelecido que ele governava o ducado com justo título. VITORIA, Francisco de. **Relectio de Iure Belli o Paz Dinámica**. Org. Luciano Pereña. Col. "Corpus Hispanorum de Pacis", vol. 6. Madri: CSIC, 1981, pag. 225.

103 VITORIA, Francisco de. **Relectio de Indis. Carta Magna de los Indios**. Trad. C. Baciero, org. Luciano Pereña. Col. "Corpus Hispanorum de Pace". Madri: CSIC, 1989, pag. 96.

104 Tratado de Madri de 1526.

105 VITORIA, Francisco de. **Relectio de Iure Belli o Paz Dinámica**. Org. Luciano Pereña. Col. "Corpus Hispanorum de Pacis", vol. 6. Madri: CSIC, 1981, pags. 259-261.

106 Idem, pag. 259.

incitava os índios a uma pronta vassalagem a tais senhores, sem que os nativos jamais os tivessem visto ou tido qualquer notícia daqueles[107].

Assim, no primeiro caso, a coação seria derivada da derrota em batalha; no segundo, da ignorância. Vitoria segue raciocínios distintos nas duas situações, os quais refletem os dois tipos de *ius gentium* estudados nestas páginas. O caso do rei Francisco é remetido ao direito das gentes particular: havendo um pacto entre duas nações, este deve ser obedecido[108]. Os acordos hispano-indígenas são analisados pelo direito das gentes geral: medo e ignorância viciam toda e qualquer eleição, nas palavras de Vitoria.

A comparação entre as duas espécies de acordos envolvendo a Espanha evidencia a duplicidade do direito das gentes na concepção do mestre salmantino. Parece certo que, para ele, o *ius gentium* particular, por operar em um ambiente mais restrito e depender do consentimento expresso dos envolvidos, é mais exigente em relação à igualdade dos participantes. Já o *ius gentium* público aplica-se sempre que mais de um povo estiver presente, não importando as diferenças de cultura ou nível tecnológico que existam entre eles.

Esta tese vitoriana não passou despercebida por seus primeiros sucessores. Domingo de Soto, por exemplo, que frequentemente substituía Vitoria em sua cátedra de Prima durante as doenças do burgalês, também se deu conta do caráter dúplice do *ius gentium*. Em seu comentário ao artigo 3º da *quaestio* 57 do Tratado da Justiça de Santo Tomás, de Soto não tem dúvidas em situar o direito das gentes como uma espécie do direito positivo, afirmando às claras aquilo que era somente insinuado em Vitoria:

> *El derecho de gentes distínguese del derecho natural y se comprende bajo el derecho positivo.*[109]

> *El derecho natural es absolutamente necesario, es decir, que no depende del humano consentimiento; mas, el derecho de gentes obliga porque parece así, es decir, porque es juzgado así por los hombres; y nunca se dividirían las posesiones de las cosas, si no consintieren los hombres, en que unos poseyeran aquéllas y otros las otras; luego, el derecho de gentes no es absolutamente natural, sino positivo.*[110]

A seguir, o confessor de Carlos V se ocupa de distinguir entre o direito das gentes necessário e aquele que pode ser "dispensado com causa"[111]. Ele exemplifica o primeiro com a divisão das coisas (embora admita, na mesma frase, que na vida religiosa possa não ocorrer tal apropriação privada). Já a servidão, alguns contratos civis e certas obrigações em tempo de guerra podem ser excepcionados havendo causa suficiente:

> *Y algunos contratos civiles, aun los que son de derecho de gentes, pueden ser dispensados. Pues es de derecho de gentes guardar la palabra a los enemigos, como conservar los legados en la guerra; no obstante, si la causa de la fe pidiese lo contrario, no se habría de guardar, pues, si esparciesen dogmas corrompidos, habrían de ser quemados. Y no habría necesidad de dispensa.*[112]

É verdade que a argumentação de Soto não é muito elaborada[113]. Contudo, importante notar que ele segue Vitoria na distinção entre um direito das gentes geral, que obriga a todos por igual, e um específico, que pode eventualmente ser derrogado em favor de uma relação justa.

Apesar de não dizê-lo com estas palavras, os exemplos que de Soto utiliza evidenciam que a dispensa do direito das gentes restrito obedeceria a uma exigência do direito natural. Isto é um pouco diferente do raciocínio vitoriano, no qual a simples falta de consentimento impediria a eficácia de normas de *ius gentium* específico ou secundário. O burgalês parece conferir maior peso à liberdade das nações de autogerir seus negócios exteriores do que seu sucessor em Salamanca. Seja como for, a divisão no seio do direito das gentes é clara em de Soto, confirmando sua existência em Vitoria[114].

107 Em um interessante estudo sobre o *Requerimiento*, Patricia Seed conclui que o mesmo reproduzia a lógica unilateral que os espanhóis haviam tomado dos contatos oficiais do Islã, quando este era a religião dominante na Península Ibérica, com os cristãos. SEED, Patricia. **Cerimônias de posse na conquista européia do Novo Mundo (1492-1640)**. São Paulo: UNESP, 1999, pags. 101-141.

108 Também a hipótese de que o vencedor exija um tratado extorsivo é abordada por Vitoria segundo a lógica do direito das gentes particular: "*Si se causase un daño gravísimo a la patria hasta el punto de desaparición, entonces no habría que cumplir la palabra dada, pues en un caso así tampoco nosotros podríamos pedir en justicia que se cumpliese la palabra dada.*" O raciocínio de reciprocidade é típico da lógica "horizontal" do direito das gentes secundário ou particular em Francisco de Vitoria. VITORIA, *op. cit.*, pag. 259.

109 DE SOTO, Domingo. **Tratado de la justicia y el derecho**, tomo II. Trad. espanhola de Jaime Torrubiano Ripoll. Madri: Editorial Reus, 1926, pag. 203.

110 Idem, pag. 205.

111 Idem, pag. 209.

112 Idem, ibidem.

113 SILVA, Paula Oliveira e; CALVÁRIO, Patrícia. A fundamentação, natural ou positiva, do direito das gentes em alguns comentários seiscentistas à Suma de Teologia de Tomás de Aquino II-IIae, q. 57, a.3. *In*: **Revista Aquinate**, nº 14 (2011), pags. 41-42.

114 Em curso ministrado na Academia de Direito Internacional de Haia sobre o fundamento do Direito Internacional em perspectiva histórica, Alfred Verdross nota que Francisco Suárez, em certa perspectiva um continuador de Vitoria nas investigações sobre o

6. Conclusão

Francisco de Vitoria concorda com Tomás de Aquino em que o direito das gentes é a primeira concretização do direito natural. Trata-se do local de manifestação inicial da vontade humana, cujo âmbito de atuação ainda é bastante restrito em comparação com as exigências obrigatórias que emanam do *ius naturale*. Na grande divisão do direito que define o jusnaturalismo clássico, entre direito natural e positivo, o *ius gentium* ocupa um plano intermediário, porém mais próximo deste último. A interferência da vontade humana é apontada por Vitoria como decisiva para afastar definitivamente o direito das gentes do justo por natureza.

Esta vontade humana, porém, pode manifestar-se de duas maneiras diferentes. Pode reconhecer a essencialidade de certas condutas diante de um cenário histórico amplo, limitando-se a externalizar e promover uma ação por considerá-la justa necessariamente. Neste caso, estar-se-á perante o *ius gentium* público ou geral, que obriga todos os povos por corresponder a traços universalmente repetidos da natureza humana. Este direito dos povos se beneficiará de uma aceitação quase universal, pois corresponde a circunstâncias genéricas que podem ser encontradas na vida de todas as nações.

A segunda maneira de a vontade operar na definição do *ius gentium* é através do livre acordo entre as nações, pelo qual direitos e obrigações mútuos são fixados e em virtude do qual, indiretamente, se contribui para a paz entre os povos. Nesta segunda situação, o arbítrio humano aparece com maior destaque, podendo escolher entre os vários possíveis pactuantes e objetos do contrato. O *ius gentium* particular faz jus a seu nome por impor deveres e atribuir direitos aos indivíduos tomados enquanto comunidade.

O que une as duas vertentes do direito das gentes é sua função de trazer paz às relações entre as comunidades, possibilitando o diálogo jurídico entre nações distintas, iguais em soberania e com leis e costumes dissonantes entre si. O *ius gentium* específico depende do genérico, pois a vontade dos contratantes não está livre para violar o direito natural. Portanto, nem tudo pode ser objeto de um tratado. Por outro lado, a exigência específica do direito natural pode ser difícil de enxergar diante de um caso concreto, tornando necessária a intervenção do *ius gentium* primário, adequado a todos os povos, para materializar o direito natural.

Formado por estes dois componentes, o *ius gentium* distingue-se do direito natural por sua dependência das circunstâncias concretas nas quais se dá a relação jurídica. O direito natural determina o que é justo considerando apenas o postulado genérico da igualdade. Já o direito das gentes também leva em conta os fatores históricos, sociais, econômicos etc. que influem na relação jurídica determinada e a concretizam.

Na verdade, a relação entre estes dois ramos do direito dos povos espelha a relação existente entre direito natural e positivo. Tal como o direito positivo é necessário para conferir aplicabilidade ao direito natural, assim também o direito das gentes consensual ou pactuado é necessário para indicar concretamente o que é devido a qual comunidade. E, da mesma maneira que o direito natural constitui um guia seguro para o direito positivo, impedindo excessos que poderiam redundar em injustiça, o direito das gentes geral representa um limite perante o qual a liberdade dos contratantes cessa.

De todo o exposto, algumas conclusões saltam à vista:

Em primeiro lugar, observou-se que a dialética “direito natural – direito positivo” não se refere somente aos primeiros fundamentos do fenômeno jurídico, mas pode ser encontrada também em outros ramos do direito. Como evidenciado por Francisco de Vitoria, o sistema do direito das gentes exibe uma parte com maior proximidade com o direito natural e outra mais próxima do direito positivo. O objeto deste estudo foi apenas o *ius gentium*, e tão somente na parte em que Vitoria o analisou, mas é possível aventar que a mesma dialética se faça presente igualmente em outros ramos do direito. Direito natural e positivo não são divisões didáticas entre as várias normas, mas espécies de fontes do direito,

direito das gentes, também menciona duas espécies deste direito, consistindo a primeira no direito que as nações observam entre si, e a segunda no direito interno comum a todas elas. Embora a descrição destas espécies divirja da vitoriana aqui estudada, é de dizer-se que a incompatibilidade não é total: o primeiro *ius gentium* de Suárez aproxima-se do segundo de Vitoria, enquanto que o outro, formado a partir de uma igualdade de condutas internas, pode muito bem ser consequência da adoção do *ius gentium* vitoriano primário. Ver: VERDROSS, Alfred. **O fundamento do direito internacional**. Revista de Direito Internacional, Brasília, v. 10, n. 2, 2013, pag. 2. Título original: Le fondement du droit international. Recueil des cours de l’Académie de Droit International, 1927, p. 325-384. Tradução de Marcelo Dias Varella (coordenador), Amábile Pierroti, Luiza Nogueira e Marlon Tomazette. Disponível em: < https://www.publicacoesacademicas.uniceub.br/rdi/article/view/2685/pdf >. Acesso em: 10.07.2017.

que indicam para onde se deve olhar na busca por regras que disciplinem uma certa disputa.

Em segundo lugar, nota-se que a distinção proposta pelo mestre salmantino de modo um tanto descuidado, enquanto buscava provar outros pontos, acabou por constituir um dos traços mais dinâmicos e permanentes de sua concepção de *ius gentium*. Com efeito, seu esquema de raciocínio pode ser aplicado sem muitas adaptações ao direito internacional público dos tempos atuais. A sociedade internacional do século XXI também se organiza separando dois tipos de direito internacional. Da mesma forma que evidenciado por Vitoria, existe o entendimento de que algumas normas internacionais são universais e obrigatórias, enquanto que outras são particulares e suscetíveis de derrogação.

O conceito contemporâneo de *ius cogens* insere-se na primeira definição. Trata-se da parte do direito internacional que é insuscetível de derrogação pelo direito positivo, devido ao fato de constituir pressuposto necessário para a manutenção do restante da ordem jurídica internacional. Embora a existência desta figura jurídica não possa ser negada, *ex vi* dos arts. 53 e 64 da Convenção de Viena sobre o Direito dos Tratados[115], a determinação de seu conteúdo está longe de ser pacífica[116]. Seja como for, a discussão deixa claro que o voluntarismo dos sujeitos do direito internacional não abrange todas as matérias. Embora alguns autores afirmem que o *ius cogens* depende da vontade dos Estados em atribuir-lhe certas normas de direito internacional[117], a verdade é que há um consenso em que somente as regras que expressem valores centrais da comunidade internacional possam receber tal qualificação.

O conceito do *ius cogens* parece corresponder ao *ius gentium* público de Francisco de Vitoria. Em ambos observa-se a generalidade, a inderrogabilidade e a essencialidade. E é importante considerar que o *ius cogens* é um instituto de vida recente, surgido no decorrer do século XX para salvaguardar os pilares do direito internacional. Isso corresponde a outra característica do *ius gentium* geral, que é a sua dependência da vontade positiva. Embora seja um direito necessário e universalmente válido, ele, diferentemente do direito natural, depende de manifestações específicas de vontade para adquirir forma. O mesmo ocorre com o direito internacional necessário: este reflete valores atemporais, como o respeito pela sacralidade da vida humana, pela propriedade, pela forma de vida dos grupos humanos etc. Na figura do *ius cogens*, tais valores universais são concretizados na linguagem específica da época contemporânea, na forma de direitos subjetivos, positivados, de aplicação fiscalizada por órgãos internacionais etc. É neste modo de expressão dos valores universais que o *ius cogens* pode dizer-se produto de um acordo entre todos os povos do mundo.

Também o outro lado do direito das gentes vitoriano, o direito particular ou específico, aproxima-se da figura hodierna do direito internacional positivo com sua ênfase na igualdade dos sujeitos e no consenso na produção das regras.

Nesta perspectiva, o grande aporte de Francisco de Vitoria é a ligação umbilical que se nota entre as duas espécies de *ius gentium*. Embora uma se vincule mais ao direito natural e a outra, ao direito positivo, é evidente

115 "Artigo 53. É nulo um tratado que, no momento de sua conclusão, conflite com uma norma imperativa de Direito Internacional geral. Para os fins da presente Convenção, uma norma imperativa de Direito Internacional geral é uma norma aceita e reconhecida pela comunidade internacional dos Estados como um todo, como norma da qual nenhuma derrogação é permitida e que só pode ser modificada por norma ulterior de Direito Internacional geral da mesma natureza." "Artigo 64. Se sobrevier uma nova norma imperativa de Direito Internacional geral, qualquer tratado existente que estiver em conflito com essa norma torna-se nulo e extingue-se." Também o Projeto de Artigos da Comissão de Direito Internacional das Nações Unidas faz referência ao *ius cogens* em seus artigos 40 e 41, que compõem o capítulo intitulado "Violações graves de obrigações decorrentes de normas imperativas de direito internacional geral".

116 Autores como Jean Combacau e Serge Sur consideram que tal conteúdo é inalcançável (COMBACAU, Jean e SUR, Serge. **Droit international public**, 7ª ed. Paris: Montchrestien, 2006, pags. 52-53). Stephan Hobe sustenta que o *ius cogens* é formado hoje pela vedação do uso da força e respeito aos direitos humanos mais básicos (HOBE, Stephan. **Einführung in das Völkerrecht**, 9ª ed. Tübingen: Francke, 2008, pag. 180), enquanto André de Carvalho Ramos acrescenta a autodeterminação dos povos (RAMOS, André de Carvalho. Comentários ao artigo 53. *In*: SALIBA, Aziz Tuffi. **Direito dos Tratados. Comentários à Convenção de Viena sobre o Direito dos Tratados (1969)**. Belo Horizonte: Arraes, 2011, pags. 458-466). Já Celso Mello inclui a Carta da ONU na categoria de norma de *ius cogens* (MELLO, Celso R.D.A. **Curso de Direito Internacional Público**, vol. I, 15ª ed. Rio de Janeiro: Renovar, 2004, pag. 217). Valério Mazzuoli propõe o costume internacional geral, os tratados multilaterais sobre temas essenciais e as normas que consagram garantias fundamentais do ser humano (MAZZUOLI, Valério de Oliveira. **Curso de Direito Internacional Público**, 5ª ed. São Paulo: Revista dos Tribunais, 2011, pag. 155).

117 SHAW, Malcolm N. **International Law**, 6ª ed. Nova York: Cambridge University Press, pags. 126-127: "*The appropriate test would thus require universal acceptance of the proposition as a legal rule by states and recognition of it as a rule of jus cogens by an overwhelming majority of states, crossing ideological and political divides. It is also clear that only rules based on custom or treaties may form the foundation of jus cogens norms.*"

que, para ele, se tratam de duas componentes do mesmo ordenamento jurídico, destinadas a produzir efeitos e indicar o justo nas mesmas relações jurídicas. Pode-se inclusive aventar que é por causa desta ligação essencial que a distinção entre o direito das gentes geral e específico não é explicitamente mencionada por Vitoria, havendo necessidade de perquirir seus textos sobre o assunto para perceber a existência desta separação, como foi feito na seção anterior deste texto.

Porém, a dualidade existe, e demonstra como o direito natural possui influência sobre o direito das gentes vitoriano. Para o mestre salmantino, o *ius naturale*, centrado na exigência básica de igualdade entre os indivíduos participantes de uma relação jurídica, constituía o fundamento e o norte do direito das gentes. Desta forma, o *ius gentium* particular ou específico, decorrente da vontade das nações expressa em acordos, não é desprovido de uma finalidade última. Embora seu conteúdo possa variar indefinidamente de acordo com as circunstâncias de tempo, espaço e interesses de seus criadores, ele se encontra umbilicalmente vinculado ao *ius gentium* geral, e deve especificar e concretizar os termos do grande acordo tácito entre as nações que constitui o direito das gentes em sentido amplo. Em outras palavras, Vitoria estabelece uma razão de ser para o direito internacional: este existe para manter a paz entre as repúblicas garantindo que cada indivíduo em seu interior receba o que lhe cabe.

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De volta à Bevilaqua: análise econômica da aplicação do art. 9º da LINDB às obrigações civis contratuais

Back to Bevilaqua: Economic Analysis of the Application of art. 9 of LINDB to Contractual Civil Obligations

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De volta à Bevilaqua: análise econômica da aplicação do art. 9º da LINDB às obrigações civis contratuais*

Back to Bevilaqua: Economic Analysis of the Application of art. 9 of LINDB to Contractual Civil Obligations

Danielle Cristina Lanius**

Ivo Teixeira Gico Jr***

Resumo

Desde 1942, o art. 9º da LINDB impõe às partes de contratos internacionais que o direito aplicável a sua relação deverá ser o do local da celebração do contrato. O presente artigo pretende demonstrar que, na linha das legislações mais modernas e do ponto de vista juseconômico, a *lex loci celebrationis* não deve ser imposta, mas sim utilizada como norma supletiva, em caso de silêncio das partes, preservando a autonomia da vontade. A imposição da *lex loci celebrationis* limita a capacidade de os agentes se organizarem e dificulta a inserção no Brasil no comércio internacional, portanto, a regra deve ser alterada.

Palavras-chave: Conflito de Leis. Obrigações Civis Contratuais. Eficiência. LINDB.

Abstract

Since 1942, Article 9 of The National Introductory Statute to Brazilian Law imposes on international contracting parties that the applicable law to their contracts should be the one of the place where the contract was signed. In accordance with most modern laws, this paper uses a law & economics approach to show that *lex loci celebrationis* should not be imposed, but used only as a supplementary rule in case the contract is silent. Parties' autonomy should be preserved. The principle *lex loci celebrationis* limits the parties' abilities to organize themselves and creates difficulties to Brazil's participation at world trade, hence, the applicable law rule should be changed.

keywords: Conflicts of Law. Contractual Obligation. Efficiency. NISB

1. Introdução

"O comercio internacional, de um lado, e, de outro, a diversidade das leis são o fundamento lógico e social deste ramo do direito". Assim, Bevi-

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laqua inaugurou sua obra "Princípios Elementares do Direito Internacional Privado"[1]. Essa introdução parece apropriada quando se relembra que, no período que antecedeu o Código Civil de 1916, a lei brasileira não era precisa no que dizia respeito a regras aplicáveis a conflitos de leis. Aplicavam-se, ainda, as Ordenações do Reino[2], mas era das normas comerciais que se extraíam as regras de Direito Internacional Privado referentes às obrigações contratuais.

O Código Comercial de 1850 trazia, em seu art. 30, uma regra que valia "para a forma e para o fundo (substância) dos atos e obrigações realizadas no Brasil por negociantes aqui residentes"[3]: a *locus regit actum*. Essa mesma regra era aplicável no que diz respeito às formalidades extrínsecas dos contratos celebrados em país estrangeiro, nos termos do §2º, do art. 3º do Regulamento 737 de 1850. Também o art. 424 do Código Comercial, ao referir-se a contestações judiciais referentes a letras de câmbio, indicava que estas seriam "decididas segundo as Leis ou usos comerciais das Praças dos países, onde estes atos forem praticados"[4]. Na opinião de Bevilaqua[5], generalizando o que dispunha esse artigo, teríamos "um princípio justo: a substancia e o efeito das obrigações serão regulados pela lei do logar onde forem contrahidas, salvo expressa convenção das partes contractantes".

Tais regras de conexão, no entanto, não eram aplicadas de forma incontroversa. Valladão[6], por exemplo, afirmava que a melhor diretriz era aquela defendida por Teixeira de Freitas, segundo a qual, quanto à substância das obrigações comerciais, deveria ser aplicada a lei do lugar da execução[7], conforme disposto no art. 4º do Regulamento 737[8].

Apesar dessas construções doutrinárias, o Brasil carecia de um corpo de regras de Direito Internacional Privado mais preciso e adequado às necessidades da época. Somente com a promulgação do Código Civil de 1916 é que foram introduzidas no ordenamento jurídico brasileiro, de forma mais sistemática, normas sobre a aplicação das leis, direito intertemporal e direito internacional privado[9]. Os 21 artigos que estruturavam a aplicação do Direito brasileiro ficaram conhecidos, originalmente, como a Introdução ao Código Civil de 1916.

O art. 13 da Introdução ao Código Civil de 1916 estabeleceu que as obrigações seriam reguladas, quanto à substância e aos seus efeitos, salvo estipulação em contrário, pela lei do lugar onde foram contraídas, excepcionando, no parágrafo único, as hipóteses em que necessariamente seriam regidas pela lei brasileira[10]. Observa-se que foi adotado o critério da lei do local da celebração (*lex loci celebrationis*), mas, em linha com as con-

1 BEVILAQUA, Clóvis. *Princípios Elementares de Direito Internacional Privado*. Campinas: Red Livros, 2002. p. 11.

2 Sobre conflito de leis nas Ordenações vide POUSADA, E. L. R. *Preservação da Tradição Jurídica Luso-Brasileira: Teixeira de Freitas e a Introdução à Consolidação das Leis Civis*. 2006. 263f. Dissertação (Mestrado) – Universidade de São Paulo, São Paulo, 2006.

3 VALLADÃO, H. *Direito Internacional Privado*: em base histórica e comparativa, positiva e doutrinária, especialmente dos Estados Americanos: parte especial. Rio de Janeiro: F. Bastos, 1978. v. 3. p. 24.

4 Esse artigo foi revogado pelo Decreto nº 2.044, de 31 de dezembro de 1908, que, em seu art. 47, estipulou que "a substância, os efeitos, a forma extrínseca e os meios de prova da obrigação cambial são regulados pela Lei do lugar onde a obrigação foi firmada", mantendo como elemento de conexão a *lex loci celebrationis*.

5 BEVILAQUA, Clóvis. *Princípios Elementares de Direito Internacional Privado*. Campinas: Red Livros, 2002. p. 267.

6 VALLADÃO, H. *Direito Internacional Privado*: em base histórica e comparativa, positiva e doutrinária, especialmente dos Estados Americanos: parte especial. Rio de Janeiro: F. Bastos, 1978. v. 3. p. 24.

7 Esse princípio viria a sofrer atenuação com a adoção, no Código Comercial português de 1888 da lei do lugar da celebração, no que diz respeito à substância e efeitos, salvo convenção em contrário (autonomia da vontade) e do lugar da realização, no que diz respeito ao modo de cumprimento. Cfr. VALLADÃO, H. *Direito Internacional Privado*: em base histórica e comparativa, positiva e doutrinária, especialmente dos Estados Americanos: parte especial. Rio de Janeiro: F. Bastos, 1978. v. 3. p. 25.

8 O art. 4º dispunha que "os contratos commerciaes, ajustados em Paiz estrangeiro mas exequíveis no Imperio, serão regulados e julgados pela Legislação Commercial do Brasil". Entendia-se, pois, a *contrario sensu*, que as obrigações exequíveis no estrangeiro seriam regidas pela lei estrangeira, "embora pudessem ser julgadas pelos tribunais brasileiros". VALLADÃO, H. *Direito Internacional Privado*: em base histórica e comparativa, positiva e doutrinária, especialmente dos Estados Americanos: parte especial. Rio de Janeiro: F. Bastos, 1978. v. 3. p. 25.

9 Nesse sentido, Araújo esclarece que "somente com a Introdução ao Código Civil de 1916, na era republicana, teve o país um conjunto de regras específicas" que, segundo ela, foram "fortemente influenciadas pela técnica europeia". Cfr. ARAÚJO, Nádia. *Direito Internacional Privado*: Teoria e Prática Brasileira. Rio de Janeiro: Renovar, 2003. p. 90.

10 As exceções eram os casos de contratos ajustados em países estrangeiros, quando exequíveis no Brasil, as obrigações contraídas entre brasileiros em país estrangeiro, os atos relativos a imóveis situados no Brasil e os atos relativos ao regime hipotecário brasileiro.

cepções econômicas[11] e políticas da época[12], foi incluída a possibilidade de que as partes pudessem escolher a lei aplicável ao contrato.

A Introdução ao Código Civil foi substituída pela Lei de Introdução do Código Civil (LICC)[13], por meio do Decreto-Lei nº 4.657, de 1942, que, em matéria de obrigações, consagrou, em seu art. 9º, o princípio da *lex loci celebrationis*.

A alteração introduzida pelo art. 9º da LICC gerou uma série de controvérsias no que diz respeito à sua interpretação. Doutrinadores como Araújo[14], Diniz[15] e Basso[16] entenderam que o legislador teria rejeitado o princípio da autonomia da vontade ao retirar a expressão "salvo estipulação em contrário". Sua utilização estaria, portanto, restrita ante o caráter imperativo da norma, admitindo-se sua aplicação apenas na hipótese de a autonomia da vontade estar prevista pela lei do país em que a obrigação se constituiu. Outros, a exemplo de Dolinger[17], não excluíram a possibilidade de aplicação do princípio da autonomia da vontade, pois advogam em favor da não obrigatoriedade da regra *locus regit actum*.

A despeito dessa discussão doutrinária, para fins deste artigo, considerar-se-á a interpretação dada pela primeira corrente, segundo a qual não há guarida para a autonomia da vontade no âmbito das obrigações internacionais, a menos que esteja prevista na lei do local da celebração.

Há que se reconhecer, no entanto, que a regra *lex loci celebrationis* não é absoluta no ordenamento jurídico brasileiro. Sua aplicação pode ser afastada "nas hipóteses de arbitragens sobre direitos obrigacionais (patrimoniais) disponíveis, conforme disposto na Lei n. 9.307/96"[18]. Ademais, com a aprovação pelo Congresso Nacional da adesão à Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias (CISG), que entrou em vigor em abril de 2014, a autonomia da vontade passa a conviver, nas hipóteses reguladas pela Convenção, com a norma da LINDB.

Ressalta-se, ainda, que diversos tratados de Direito Internacional, tais como a Convenção de Roma de 1980 (hoje superada pelos Regulamentos[19]) e a Convenção Interamericana sobre Direito Aplicável aos Contratos Internacionais, ainda não ratificada pelo Brasil, passaram a adotar a autonomia da vontade como critério de escolha da lei aplicável. Quanto maior for a adesão a esses tratados, mais frequentemente a autonomia da vontade será utilizada como regra de conexão nos contratos internacionais.[20]

Por essa razão, tanto a doutrina como o Estado brasileiro já reconheceram a necessidade de modernização das regras brasileiras de Direito Internacional Privado. Comissões de especialistas foram constituídas pelo Ministério da Justiça, projetos de lei foram encaminhados ao Congresso (como, por exemplo, o PL n. 4.905), mas, até a presente data, essas iniciativas não foram frutíferas. Nas palavras de Dolinger[21],

> [E]spera-se há anos que o Congresso aprove o projeto de Lei nº 269 do Senado, apresentado em 2004 pelo senador Pedro Simon, que cria uma nova, moderna legislação sob o título 'Lei Geral de Aplicação das Normas Jurídicas', para substituir a Lei de Introdução, estabelecendo princípios e regras

11 Ao discorrer sobre a evolução histórica dos elementos de conexão do Direito Internacional Privado, Araújo demonstra a influência de questões de caráter econômico em sua adoção pelos Estados. Cfr. ARAÚJO, Nádia. *Direito Internacional Privado*: Teoria e Prática Brasileira. Rio de Janeiro: Renovar, 2003. p. 437.

12 Amorim relaciona a redação do art. 13 da Lei de Introdução ao Código Civil, especificamente no que tange ao fato de que facultava às partes o direito de escolha da lei aplicável, com a "influência do Liberalismo ainda predominante na época da entrada em vigor do nosso Código". Cfr. AMORIM, E. C. *Direito Internacional Privado*. Rio de Janeiro: Forense, 2001. p. 156.

13 A LICC foi alterada pela Lei nº 12.376, de 2010, que lhe modificou o nome para Lei de Introdução às normas do Direito Brasileiro (LINDB), sem acrescentar qualquer outra mudança em seu conteúdo. A redação do art. 9º permanece vigente até a presente data.

14 ARAÚJO, Nádia. *Direito Internacional Privado*: Teoria e Prática Brasileira. Rio de Janeiro: Renovar, 2003. p. 323.

15 DINIZ, Maria Helena. *Lei de Introdução ao Código Civil Brasileiro Interpretada*. 13. ed. São Paulo: Saraiva, 2007.

16 BASSO, Maristela. *Curso de Direito Internacional Privado*. 2. ed. São Paulo: Atlas, 2011. p. 199.

17 DOLINGER, J. *Direito Internacional Privado*: Parte Geral. 10. ed. Rio de Janeiro: Forense, 2011. p. 521.

18 BASSO, M. *Curso de Direito Internacional Privado*. 2. ed. São Paulo: Atlas, 2011. p. 203.

19 Regulamento (CE) nº 593/2008, de 17 de junho de 2008 (Roma I) e Regulamento (CE) nº 864/2007, de 11 de julho de 2007 (Roma II).

20 Além disso, a realidade incontrastável da adoção internacional do princípio da autonomia da vontade está cristalizada no *Second Restatement*. Segundo Ruhl, mesmo nos Estados americanos que ainda adotam o *First Restatement,* a jurisprudência dos tribunais aplica amplamente o parágrafo 187 do *Second Restatement*. *Cfr.* RÜHL, G. Party Autonomy in the Private International Law of Contrats: Transatlantic Convergence and Economic Efficiency. *Comparative Research in Law & Political Economy*. Research paper n. 4, v. 3, n. 1, 2007. Disponível em: <http://digitalcommons.osgoode.yorku.ca/clpe/227>.

21 DOLINGER, J. *Direito Internacional Privado*: Parte Geral. 10. ed. Rio de Janeiro: Forense, 2011. p. 543.

conformes à legislação de praticamente todos os países. Basta dizer que a de 1942 não reconhece expressamente a liberdade dos contratantes em pactos internacionais de escolher a lei que será aplicada – a brasileira ou a estrangeira -, autonomia que é aceita por todas as legislações e convenções internacionais. Esta falha tem causado prejuízos na atuação internacional da empresa brasileira.

Dada a tendência internacional pela adoção do princípio da autonomia da vontade e as tentativas frustradas de modernização do Direito Internacional Privado brasileiro, surgem, inevitavelmente, os seguintes questionamentos: primeiro, a norma vigente, que estabelece a lei do lugar da celebração, é eficiente para reger e qualificar as obrigações contratuais? E, segundo, as mudanças legislativas poderiam ser efetuadas para melhor adequar a legislação brasileira às necessidades do comércio internacional?[22]

A resposta a essas perguntas, enunciadas em termos de eficiência, exige a utilização de instrumentos analíticos da Economia, pois o Direito não fornece ao jurista as ferramentas necessárias para investigar a eficiência das normas jurídicas. Tal opção metodológica implicará o redirecionamento de uma abordagem tradicional, com foco jurídico-político, e, portanto, mais centrada nos Estados, para uma análise econômica, centrada no indivíduo.

Essa proposta é consistente com as ideias de Lehmann que defende a emancipação do indivíduo das disputas entre Estados e a criação de uma Teoria do Conflito de Leis na qual o indivíduo esteja no cerne da análise, justamente em razão de os conflitos se iniciarem com uma disputa entre particulares e por serem estes os mais diretamente afetados pela aplicação de uma determinada lei[23].

Essa "ética consequencialista"[24], expressa no pensamento de Lehmann, ajusta-se bem à perquirição da eficiência das normas de conflito de leis. Ademais, a opção por adotar ferramentas de análise econômica requer a aceitação de algumas premissas, entre elas, o individualismo metodológico, segundo o qual "a função do Estado é restrita pelas preferências de seus cidadãos", não sendo ele "mais que o agregado das preferências individuais"[25].

Nesse contexto, é interessante examinar a regra de conflito de leis prevista no art. 9º da LINDB sob a ótica da eficiência, tendo o indivíduo como centro da análise.

2. Metodologias para aferição da eficiência

2.1. Premissas do método econômico

O método a ser aplicado se baseia em alguns postulados fundamentais que, apesar de amplamente conhecidos, precisam ser pontuados, pois a análise econômica se sustenta e, também, é limitada em razão dessas premissas.

Em primeiro lugar, parte-se da ideia de que os recursos são limitados e, portanto, "a escassez dos bens impõe à sociedade que escolha entre alternativas possíveis e excludentes"[26]. Cada escolha presume "um custo, um trade off, que é exatamente a segunda alocação factível mais interessante para o recurso, mas que foi preterida. A esse custo chamamos de custo de oportunidade"[27]. Para fazer suas escolhas, "os agentes econômicos ponderam os custos e os benefícios de cada alternativa, adotando a conduta que, dadas as suas condições e circunstâncias, lhes traz mais bem-estar", ou seja, adotam uma conduta racional maximizadora[28].

22 Segundo Gico Junior, "a abordagem juseconômica investiga as causas e as consequências das regras jurídicas e de suas organizações na tentativa de prever como cidadãos e agentes públicos se comportarão diante de uma dada regra e como alterarão seu comportamento caso essa regra seja alterada". Assim, um juseconomista normalmente se perguntaria "como os agentes efetivamente têm se comportado diante da regra atual (diagnóstico)" e "como uma mudança da regra jurídica alteraria essa estrutura de incentivos [...] na tentativa de prever como eles passariam a se comportar (prognose)". Cfr. GICO JUNIOR, Ivo T. Metodologia e Epistemologia da Análise Econômica do Direito. *Economic Analysis of Law Review*, v. 1, n. 1, p. 21, jan./jun. 2010.

23 LEHMANN, M. From Conflict of Laws to Global Justice. *Columbia University Academic Commons*, 2011. Disponível em: <http://hdl.handle.net/10022/AC:P:10223>.

24 SCHÄFER, H.; OTT, C. *The Economic Analysis of Civil Law*. Heidelberg: Springer-Verlag, 2004. p. 4.

25 SCHÄFER, H.; OTT, C. *The Economic Analysis of Civil Law*. Heidelberg: Springer-Verlag, 2004. p. 5.

26 GICO JUNIOR, Ivo T. Metodologia e Epistemologia da Análise Econômica do Direito. *Economic Analysis of Law Review*, v. 1, n. 1, p. 22, jan./jun. 2010.

27 GICO JUNIOR, Ivo T. Metodologia e Epistemologia da Análise Econômica do Direito. *Economic Analysis of Law Review*, v. 1, n. 1, p. 22, jan./jun. 2010.

28 GICO JUNIOR, Ivo T. Metodologia e Epistemologia da Análise Econômica do Direito. *Economic Analysis of Law Review*, v. 1, n. 1, p. 22, jan./jun. 2010.

Por fim, considerando-se a premissa de que os "agentes econômicos ponderam custos e benefícios na hora de decidir", "uma alteração em sua estrutura de incentivos poderá levá-los a [...] realizar outra escolha."[29]. Em resumo, a ideia central da abordagem juseconômica é que os agentes são racionais e respondem a incentivos para tentar maximizar a sua utilidade, na busca de sua felicidade. Nesse contexto, regras jurídicas diferentes levam a comportamentos sociais diferentes, por sua vez, regras jurídicas diferentes sobre conflitos de leis no espaço geram comportamentos sociais diferentes. Com esses postulados em mente, passemos à questão da eficiência.

2.2. Conceito econômico de eficiência

Embora utilizado por juristas, muitas vezes de forma atécnica[30], o conceito de eficiência não é jurídico, mas econômico. [31] No entanto, o termo eficiência pode ter mais de um significado, sendo mais correntes os conceitos de eficiência produtiva e de eficiência alocativa. A eficiência produtiva diz respeito ao aproveitamento ótimo dos recursos de produção, isto é, produzir mais (*output*) com os mesmos recursos (*input*) ou produzir o mesmo tanto com menos recursos. Isto é ser eficiente do ponto de vista produtivo.

Apesar de ser um desafio para juristas, o conceito de eficiência produtiva pouco varia entre os economistas. A ideia está, sempre, relacionada com "prover o máximo produto com os recursos e tecnologia disponível"[32] e remete, portanto, à eliminação de desperdício e à obtenção do máximo de resultado com os recursos disponíveis (produzir mais dispondo da mesma quantidade de recursos ou produzir o mesmo consumindo menos recursos).

A eficiência alocativa, por outro lado, está relacionada às finalidades a que determinados recursos estão alocados em uma determinada situação. Quando os recursos estão alocados para sua finalidade mais valiosa, se diz que há eficiência alocativa. Quando recursos que estão empregados para uma finalidade poderiam ser empregados para outra finalidade mais valiosa, diz-se que esta alocação é ineficiente e, portanto, não é alocativamente eficiente. Aqui há um julgamento em relação à alocação e uma pergunta se esta alocação reflete as preferências sociais. Assim, um mercado é eficiente, em termos alocativos, quando as empresam produzem até que o custo marginal de uma unidade produzida se iguale ao valor dado pelos consumidores àquela unidade. Conforme sintetizado por Mankiw[33], uma alocação é eficiente quando maximiza "o excedente total recebido por todos os membros da sociedade"[34]

Quando se pensa em aferição de eficiências, o principal referencial teórico é o critério de Pareto[35]. Um sistema será Pareto eficiente quando não houver nenhuma outra alternativa na qual o bem-estar de, pelo menos, uma pessoa seja maior, sem que seja reduzido o bem-estar de qualquer outra. É um estado em que não é possível melhorar a utilidade de um agente sem diminuir a utilidade de outro.

Embora seja uma construção teórica pouco suscetível a críticas de princípio, sua aplicabilidade prática é, no entanto, muito restrita, pois a objeção de um único indivíduo ou grupo é suficiente para bloquear uma decisão, ainda que esta seja a escolha mais vantajosa para todos os demais[36,37]. Além disso, duas alocações Pareto

29 GICO JUNIOR, Ivo T. Metodologia e Epistemologia da Análise Econômica do Direito. *Economic Analysis of Law Review*, v. 1, n. 1, p. 22, jan./jun. 2010.

30 É recorrente, entre os juristas, uma confusão entre conceitos de eficiência, eficácia e efetividade. Esse problema está presente, por exemplo, em Bercovici que associa eficiência ao atingimento de resultados. BERCOVICI, G. *Constituição Econômica e Desenvolvimento*: uma leitura a partir da Constituição de 1988. São Paulo: Malheiros, 2005

31 BOBBIO, N. *Teoria Geral da Política*: a filosofia política e as lições dos clássicos. Rio de Janeiro: Campus, 2000. p. 201, em sua costumeira lucidez, corrobora essa ideia ao afirmar que a eficiência é "um juízo técnico, e não moral". Também SILVA, J. A. D. *Curso de Direito Constitucional Positivo*. 16 ed. São Paulo: Malheiros, 1999. p. 651 deixa claro seu entendimento de que se trata de uma categoria econômica, e não jurídica.

32 WONNACOTT, P.; WONNACOTT, R. *Economia*. 2. ed. São Paulo: Makron Books, 1994. p. 808.

33 MANKIW, N. G. *Introdução à Economia*: Princípios de Micro e Macroeconomia. 2. ed. Rio de Janeiro: Campus, 2001. p. 153.

34 Excedente total em um mercado seria o resultado da diferença entre "o valor total atribuído pelos compradores dos bens, medido por sua disposição para pagar" e "os custos dos produtores que fornecem o bem". Cfr. MANKIW, N. G. *Introdução à Economia*: Princípios de Micro e Macroeconomia. 2. ed. Rio de Janeiro: Campus, 2001. p. 153.

35 Segundo Buchanan, o princípio desenvolvido por Pareto é o conceito de eficiência mais amplamente aceito. Cfr. BUCHANAN, A. E. *Ethics, Efficiency and the Market*. Oxford: Clarendon Press, 1985. p. 4.

36 SCHÄFER, H.; OTT, C. *The Economic Analysis of Civil Law*. Heidelberg: Springer-Verlag, 2004. p. 22.

37 Não por outra razão, a ideia análoga à eficiência de Pareto no âmbito da Política é o consenso. Cfr. BUCHANAN, A. E. *Ethics, Efficiency and the Market*. Oxford: Clarendon Press, 1985. p. 12.

eficientes não podem ser comparadas exclusivamente com base nesse princípio[38].

Para fazer frente a essas limitações práticas, e ante ao "fato de que quase nunca as condições para a superioridade de Pareto são satisfeitas na vida real"[39] (POSNER, 2007, p. 13, tradução nossa), Nicholas Kaldor e John Hicks desenvolveram o critério da compensação. Uma mudança social é Kaldor-Hicks eficiente quando alguns indivíduos auferem um acréscimo em seu bem-estar e outros são indiferentes ou sofrem um decréscimo em relação ao estado social original, mas o ganho em bem-estar do primeiro grupo após a mudança é mais que suficiente para compensar as perdas do segundo, ainda que tal compensação não ocorra. Em outras palavras, uma transação será Kaldor-Hicks eficiente se redundar em um aumento do bem-estar social total[40].

Quando, então, pode-se dizer que as transações são eficientes? Em termos de eficiência produtiva, um contrato será eficiente quando permitir às partes a obtenção do máximo de resultado com os recursos disponíveis e haverá eficiência alocativa quando "cada recurso estiver alocado para a parte que mais o valorize e cada risco para a parte que possa suportá-lo com o menor custo"[41]. Spagnolo[42], por sua vez, sintetiza a questão da seguinte forma:

> Diz-se que as decisões tomadas pelas partes de uma negociação são racionalmente controladas pelo custo-benefício marginal das trocas. Custos de transação criam um atrito na alocação eficiente dos recursos [...]. Da mesma forma, assimetrias de informação distorcem as trocas de bens, assim como as externalidades. [...] Entende-se, convencionalmente, que essas barreiras inviabilizam que se obtenha um resultado Pareto ou Kaldor Hicks eficiente, pois resultam em uma alocação inferior à utilidade ótima. Isso leva a um importante princípio normativo que surge da análise econômica do Direito Contratual; que a lei deveria ser estruturada a fim de reduzir os custos de transação de forma a encorajar as trocas e, deste modo, facilitar uma alocação eficiente de recursos.

Em conclusão, se admitirmos que a eficiência pode ser promovida pela lei, ao reduzir ou remover custos de transação, é possível analisar a regra de conflito de leis prevista no art. 9º da LINB e perquirir se ela atende às necessidades dos indivíduos ou grupos a ela submetidos, nas perspectivas dos próprios grupos.

3. Custos de transação e o art. 9º da LINDB

Para analisar a regra de conflito de leis prevista no art. 9º da LINB, nos termos propostos no item anterior, é necessário, preliminarmente, identificar quais são os objetivos do Direito Contratual e, na sequência, levantar os aspectos em que a adoção do elemento de conexão *lex loci celebrationis* promove ou restringe a eficiência.

A função social do contrato e, portanto, o fim último buscado pelo Direito Contratual é (i) gerar um nível ótimo de confiança entre as pessoas que interagem e (ii) reduzir ao máximo os custos de transação dessa interação. A confiança é criada (iii) pela garantia legal de que, uma vez realizada a promessa juridicamente protegível (contrato), o Estado garantirá que as partes cumpram com sua palavra (vedação ao comportamento divergente) e (iv) pela intervenção estatal nos casos de falha de mercado, como nas hipóteses de vício de vontade, erro e coação. Já os custos são reduzidos (v) pela previsão de regras estruturantes que facilitam a negociação e (vi) regras-padrão que se aplicarão supletivamente na hipótese de as partes não terem acordado de forma diversa[43].

Assim, do ponto de vista contratual, a eficiência da regra contida no art. 9º da LINB deve ser vista à luz da função social do contrato e, portanto, à luz da razão pela qual as pessoas realizam contratos e como organizam suas vidas e interações sociais. Se a regra de conflito de leis no âmbito das obrigações prejudicar qualquer desses objetivos ou se levar a um aumento nos custos de transação, inferior aos benefícios que eventualmente promova, estar-se-á diante de uma regra ineficiente, pois estará a minar a própria razão da existência da lei substantiva aplicável.

A eficiência da regra de conexão pode ser analisada

38 SCHÄFER, H.; OTT, C. *The Economic Analysis of Civil Law*. Heidelberg: Springer-Verlag, 2004. p. 28.

39 POSNER, R. A. *Economic Analysis of Law*. New York: Aspen Publishers, 2007. p. 13.

40 O critério envolve a possibilidade teórica do pagamento de compensação pelos ganhadores aos perdedores, embora não se exija que essa compensação seja efetivamente realizada daí também ser chamada de Pareto-Potencial.

41 Tradução livre de COOTER, R.; ULEN, T. *Law and Economics*. 3. ed. Massachusetts: Addison Wesley Longman, 2000. p. 206.

42 Tradução livre de SPAGNOLO, L. CISG *Exclusion and Legal Efficiency*. Holanda: Kluwer Law International, 2014. p. 26-27.

43 GICO JUNIOR, I. T. *A Função Social dos Contratos*. Brasília, 2017. *Mimeo*.

a partir de seus efeitos nos diversos estágios da transação: 1) negociação; 2) elaboração; 3) cumprimento e 4) litígio.

3.1. Fase de negociação (pré-contratual)

Nessa fase, é relevante analisar tanto aspectos relacionados à assimetria de informação quanto questões que favorecem ou não o fechamento do contrato. Pela redação atual da LINDB, como visto anteriormente, a regra de conexão é a lei do local da celebração. Na hipótese de o contrato ser firmado entre ausentes, o § 2º do art. 9º determina que a obrigação resultante do contrato se reputa constituída no lugar onde residir o proponente.

A vantagem da norma vigente é que, ao estabelecer regras definidas quanto à lei aplicável, reduz os custos de negociação dos contratos, que poderão ser omissos sobre a questão da escolha da lei aplicável[44]. Há situações em que a adoção da autonomia da vontade pode impedir a contratação, caso as partes não consigam chegar a um acordo no que diz respeito à lei aplicável. Além disso, as partes sabem, de antemão, qual será a lei aplicável, de forma que isso reduz a incerteza, diminuindo os riscos da transação e, portanto, favorecendo, em última análise, o comércio internacional.[45].

Ademais, as partes, cientes da regra do art. 9º, podem escolher a norma aplicável ao contrato ao definir o local de sua celebração. Embora essa escolha possa implicar custos aos contratantes (custos com deslocamento, por exemplo), ela confere a eles alguma flexibilidade na escolha da lei aplicável, o que tende a ser mais eficiente. Isso porque, em tese, as partes teriam melhores condições de escolher a lei mais adequada para regular suas relações contratuais. E, tendo em vista a possibilidade do envio de procurações, mundo afora, via internet, os custos de transação dessa opção ficariam, significativamente, reduzidos. Embora aparentemente, a norma apresente benefícios, ela, também, gera certos custos. A primeira e mais forte objeção é concernente ao fato de que nem sempre é tão simples definir qual foi o lugar da celebração[46]. Essa dificuldade toma uma dimensão muito preocupante quando relacionada ao comércio eletrônico. No contexto das contratações *on-line*, a referência geográfica do lugar da contratação está cada vez mais esvaziada, ainda mais quando se considera a massiva utilização de dispositivos móveis. Schreiber[47] sintetiza a questão ao afirmar que, "o lugar da contratação passa, com o comércio eletrônico, a ser uma espécie de abstração, uma ficção que os juristas lutam com unhas e dentes para preservar, mas que se revela cada vez mais artificiosa e irreal".[48]

Além disso, Andrade[49] ressalta que "o lugar do contrato poderá ser meramente acidental, não sendo justo que as partes se vejam jungidas permanentemente a um ordenamento jurídico com o qual jamais terão contato", caso em que a regra de conexão se mostra claramente ineficiente, pois nenhuma das partes terá qualquer ganho de bem-estar decorrente da adoção da regra.

Mais preocupante, porém, é a insegurança que a norma traz aos contratos celebrados entre ausentes. A discussão doutrinária em torno do tema, por si só, evidencia o grau de incerteza que esse dispositivo aporta às contratações internacionais. Alguns defendem que a norma, ao afirmar que a obrigação se encontra constituída no lugar onde residir o proponente, estabeleceu

44 COOTER, R.; ULEN, T. *Law and Economics*. 3. ed. Massachusetts: Addison Wesley Longman, 2000. p. 201.

45 Essa promessa de harmonia na aplicação da lei, uniformidade e segurança jurídica, apregoadas pelo método clássico, são desmistificadas por Juenger, tanto no âmbito extracontratual, como no âmbito contratual. Cfr. JUENGER, F. K. General Course on Private International Law. *Collected Courses of the Hague Academy of International Law*, Boston, v. 193, 1985. p. 190 e 191.

46 Os exemplos tradicionais que expressam essa dificuldade são, em geral, pitorescos, como a possibilidade de contratar durante um voo internacional ou em águas internacionais.

47 SCHREIBER, A. Contratos Eletrônicos e Consumo. *Revista Brasileira de Direito Civil,* v. 1, p. 101, jul./set. 2014.

48 Schreiber alerta ainda que a aplicação da regra do lugar onde residir o proponente " resultaria em constante reenvio à lei do país do fornecedor, na medida em que os sites de varejo exibem propostas permanentes ao público que o consumidor simplesmente 'aceita' mediante o pressionar de um botão do seu teclado ou mouse". Segundo ele, tais sites por vezes omitem a identidade do fornecedor e seu endereço físico de modo que "o consumidor brasileiro acabaria por se sujeitar à legislação de um país que, no ato da contratação, sequer sabe precisamente qual é, gerando uma situação de inequívoco desequilíbrio em seu desfavor". Cfr. SCHREIBER, A. Contratos Eletrônicos e Consumo. *Revista Brasileira de Direito Civil,* v. 1, p. 103, jul./set. 2014.

49 ANDRADE, A. P. *Manual de Direito Internacional Privado*. 2. ed. São Paulo: Sugestões Literárias, 1978. p. 231.

o domicílio[50] como regra de conexão[51]. Para outros, "a regra encontra-se em descompasso com o art. 435 Código Civil de 2002", ao estabelecer que o contrato se reputa celebrado no local em que tenha sido proposto e reafirma que o local da oferta é que "deve ser considerado como o local de constituição das obrigações, porque é do contrato que elas nascem"[52]. Por fim, há quem afaste o critério domiciliar e interprete o texto de forma literal, adotando o critério da residência, que seria mais flexível, considerando que muitos negócios se concretizam fora do domicílio dos contratantes [53].

Seja como for, a celeuma doutrinária demonstra, claramente, a ineficiência da norma e seu efeito deletério sobre a previsibilidade das regras, o que aumenta os custos de transação incidentes sobre a negociação. Nas palavras de Wagner[54], a insegurança jurídica "pode ser vista como uma barreira não-tarifária ao comércio" e "gera um nível inferior de atividade comercial e receitas", pois algumas das transações "não poderão ser concretizadas, ou o serão de forma ineficiente, uma vez que os indivíduos precisam atuar sob crescente incerteza".

Ainda na fase pré-contratual, é essencial avaliar os impactos da regra do art. 9º sobre as questões relacionadas a assimetria de informação. Nesse âmbito, porém, qualquer regra de conexão, incluindo a autonomia da vontade, terá potencial de gerar custos de transação, pois em uma negociação internacional é recorrente que uma, ou ambas as partes, não esteja familiarizada com o conteúdo da lei aplicável. Essa parte incorrerá em custos para obter informações se o investimento necessário for "inferior ao benefício esperado de ser informado"[55].

3.2. Fase de redação do contrato (*drafting*)

A adoção de qualquer regra de conexão (seja "vínculos mais próximos", lugar da execução, lugar da celebração ou autonomia da vontade), que seja desconhecida por, pelo menos, uma das partes, gera custos de transação no momento da elaboração do contrato. Esses custos estão associados à língua, acessibilidade da legislação e ao conhecimento da jurisprudência.

No entanto, Ruhl[56] defende que assegurar às partes a liberdade de escolher a lei aplicável seria, em princípio, eficiente em termos econômicos. Subjacente à sua análise, está a premissa de que as partes atuam como agentes racionais maximizadores e que não escolheriam determinada lei aplicável ao contrato a menos que essa escolha lhes fosse vantajosa e mais adequada às suas necessidades. Haveria, portanto, fortes razões econômicas para a adoção da autonomia da vontade que poderia ser Pareto eficiente, na hipótese de que a escolha não reduza o bem-estar de terceiros ou Kaldor-Hicks eficiente quando a escolha das partes não reduzir o bem-estar de terceiros mais do que aumentar o bem-estar dos contratantes.

Uma outra vantagem da autonomia da vontade diz respeito ao fato de que, quanto mais diversidade houver nos contratos de uma determinada empresa quanto à definição da lei aplicável, maiores serão os custos de transação. A possibilidade que as partes escolham a lei aplicável pode ser benéfica às empresas que buscam reduzir seus custos, pois a escolha recorrente de determinada lei propicia o aprendizado e pode gerar economias de escala[57]. A regra brasileira não propicia esse ganho, pois dependerá do lugar da celebração, que poderá variar de contrato para contrato.

A autonomia da vontade pode, ainda, facilitar a concretização dos contratos nas hipóteses em que as partes tenham restrições específicas a aplicação de determinada lei. Nesse caso, as partes podem escolher uma lei entendida por elas como "neutra"[58], o que poderá viabilizar a contratação.

50 Castro pontua diversas situações em que o critério do domicílio pode se mostrar extremamente problemático, por exemplo na hipótese de haver mais de um proponente com domicílios diferentes, na situação em que o proponente não tiver domicílio conhecido ou na ocorrência de obrigações sinalagmáticas em que as partes são ao mesmo tempo credoras e devedoras, e têm domicílios diferentes. Cfr. CASTRO, A. *Direito Internacional Privado*. 5. ed. Rio de Janeiro: Forense, 1999. p. 433.

51 Cfr. DINIZ, M. H. *Lei de Introdução ao Código Civil Brasileiro Interpretada*. 13. ed. São Paulo: Saraiva, 2007. p. 67-68.

52 BASSO, Maristela. *Curso de Direito Internacional Privado*. 2. ed. São Paulo: Atlas, 2011. p. 209.

53 ARAÚJO, Nádia. *Direito Internacional Privado*: Teoria e Prática Brasileira. Rio de Janeiro: Renovar, 2003. p. 317.

54 Tradução livre de WAGNER, H. *Economic Analysis of Cross-Border Legal Uncertainty*: The Exemple of the European Union. Outubro, 2004. Disponível em: <https://www.fernuni-hagen.de/hwagner/download/371-maastricht_181004_final_vers.pdf>. Acesso em: 21 set. 2016.

55 COOTER, R.; ULEN, T. *Law and Economics*. 3. ed. Massachusetts: Addison Wesley Longman, 2000. p. 209.

56 RÜHL, G. Party Autonomy in the Private International Law of Contrats: Transatlantic Convergence and Economic Efficiency. *Comparative Research in Law & Political Economy*. Research paper n. 4, v. 3, n. 1, 2007. Disponível em: <http://digitalcommons.osgoode.yorku.ca/clpe/227>.

57 SPAGNOLO, L. *CISG Exclusion and Legal Efficiency*. Holanda: Kluwer Law International, 2014. p. 102-105.

58 Nem todos os ordenamentos jurídicos permitem que se escolha uma lei que não tenha qualquer relação com as partes ou o objeto da contratação, estabelecendo limites à autonomia da vontade, como ocorre, por exemplo, no caso do *Second Restatement* americano.

LANIUS, Danielle Cristina; Jr., Ivo Teixeira Gico. De volta à Bevilaqua: análise econômica da aplicação do art. 9º da LINDB às obrigações civis contratuais. Revista de Direito Internacional, Brasília, v. 14, n. 2, 2017 p. 565-577

Apesar das suas evidentes vantagens, há que se reconhecer, em contrapartida, que a adoção do princípio da autonomia da vontade tende a levar o risco para a parte menos apta a prevê-lo ou evitá-lo.

3.3. Fase de cumprimento do contrato (*performance*)

A regra determinada no art. 9º da LINBD, conforme acima mencionado, pode levar a situações indesejáveis, nas quais a lei do local da celebração tem pouca relação com os interesses das partes. Apesar disso, no que diz respeito ao cumprimento do contrato, ela apresenta menores custos de transação do que, por exemplo, a "regra dos vínculos mais próximos". A adoção dessa regra leva a problemas na definição *ex ante* da lei aplicável, o que pode reduzir a confiança dos contratantes.

Também pode-se dizer, no entanto, que a adoção da autonomia da vontade reduz custos de transação, pois as partes tenderão a escolher uma lei com a qual tenham familiaridade. Isso favorece a execução do contrato, pois terão maior clareza de suas obrigações e direitos e terão maior previsibilidade quanto ao desfecho de eventuais litígios, reduzindo, assim, o risco legal. Em resumo, como pontua Del'Olmo[59], "a principal virtude apontada à autonomia da vontade está em atender aos reais interesses das partes envolvidas na relação, o que, muitas vezes, as conexões objetivas [...] podem não realizar".

3.4. Fase de litígio

Finalmente, na fase de litígios, tanto a regra do art. 9º da LINDB quanto a regra da autonomia da vontade têm o potencial de gerar incerteza, em especial, se a lei substancial aplicável não for a mesma da lei do foro. Os juízes, muitas vezes, resistem em aplicar a lei estrangeira e, quando o fazem, interpretam-na sob a ótica no direito pátrio.

O levantamento promovido por Ribeiro e Lupi[60] (2014) concernente à aplicação do direito material estrangeiro em contratos pelos Tribunais de Justiça brasileiros, de 2004 a 2013, reforça essa percepção. Embora em alguns casos se tenha reconhecido o direito aplicável como o direito estrangeiro, não foram encontradas decisões com "análise de dispositivos aplicados à espécie"[61]. A aplicação, segundo a pesquisa, restringia-se, em diversos casos, à "presunção de regularidade dos atos praticados no exterior" ou à "refutação da aplicação do direito doméstico". Em outros casos, a aplicação da lei estrangeira foi afastada por questões de ordem pública ou de falta de prova do direito estrangeiro[62].

Outras regras mais flexíveis, que permitem que o juiz defina discricionariamente a lei aplicável ao caso, em geral, com fundamento "nos vínculos mais estreitos", implicam riscos elevados para as partes, que só saberão, *ex post*, a lei que regerá suas obrigações.

Além disso, via de regra, os magistrados não têm disponibilidade de tempo e recursos para, primeiro, definir a lei aplicável ao contrato e, depois, ainda ter que, muitas vezes, estudar a lei para aplicá-la. Essa situação aumenta os incentivos para que o magistrado aplique a lei do foro, ainda que essa decisão possa não ser a melhor para as partes.

A adoção do princípio da autonomia da vontade, no entanto, aporta um aspecto interessante levantado por Ruhl[63]: a possibilidade de escolha da lei aplicável pelas partes incentiva a competição entre os sistemas jurídicos e preserva as vantagens regulatórias das jurisdições estrangeiras. Note-se que a adoção da autonomia da vontade não impede a existência de regra especial para consumidores, em caso de relação de consumo, tampouco impõe às partes que aceitem este ou aquele ordenamento jurídico. Ela, apenas, liberta o indivíduo para que realize a sua escolha, de acordo com suas preferências.

59 DEL'OLMO, F. S. *Curso de Direito Internacional Privado*. 8. ed. Rio de Janeiro: Forense, 2010. p. 158.

60 RIBEIRO, G. F.; LUPI, A. L. P. B. A Aplicação do Direito Material Estrangeiro em Contratos pelos Tribunais de Justiça Brasileiros: uma análise sobre dez anos de jurisprudência (2004-2013). *Revista do Programa de Pós-Graduação em Direito da UFC*, v. 34, n. 1, p. 81-107, jan./jun. 2014.

61 RIBEIRO, G. F.; LUPI, A. L. P. B. A Aplicação do Direito Material Estrangeiro em Contratos pelos Tribunais de Justiça Brasileiros: uma análise sobre dez anos de jurisprudência (2004-2013). *Revista do Programa de Pós-Graduação em Direito da UFC*, v. 34, n. 1, p. 81, jan./jun. 2014.

62 RIBEIRO, G. F.; LUPI, A. L. P. B. A Aplicação do Direito Material Estrangeiro em Contratos pelos Tribunais de Justiça Brasileiros: uma análise sobre dez anos de jurisprudência (2004-2013). *Revista do Programa de Pós-Graduação em Direito da UFC*, v. 34, n. 1, p. 104, jan./jun. 2014.

63 RÜHL, G. Party Autonomy in the Private International Law of Contrats: Transatlantic Convergence and Economic Efficiency. *Comparative Research in Law & Political Economy*. Research paper n. 4, v. 3, n. 1, 2007. Disponível em: <http://digitalcommons.osgoode.yorku.ca/clpe/227>.

4. Considerações finais

O Direito Internacional Privado brasileiro "continua regulado pelas noções clássicas do século XIX, utilizando o sistema de regras de conexão bilaterais rígidas"[64]. Há, no entanto, uma tendência internacional no sentido de se adotarem regras mais flexíveis, notadamente a autonomia da vontade.

O Brasil, apesar de não ter aprovado, até a presente data, modificações nas regras de conflito de leis que incorporem essa tendência de modernização, abriu caminho para a adoção da regra da autonomia da vontade pela aprovação dada Lei de Arbitragem e pela adesão à CISG, hipóteses nas quais a regra da autonomia da vontade passou a conviver com a norma da LINDB. Eventual decisão de modernizar as normas brasileiras de Direito Internacional Privado, no entanto, não deve descartar os relevantes aspectos pragmáticos que a análise econômica do Direito pode aportar, afinal, como visto, a legislação desempenha um papel relevante na estrutura de incentivos das partes no âmbito do comércio internacional.

Muito embora as regras clássicas de conflito de leis possam passar uma impressão de maior segurança jurídica, foi possível demonstrar que essa percepção pode ser ilusória. Na maioria das situações, a opção pela autonomia da vontade parece prevalecer em termos de custo-benefício.

Essa conclusão é consistente com as ideias de Juenger[65] para quem a aplicação do método clássico gera um custo muito superior a seus eventuais benefícios, além de não conseguir "sequer atingir seu modesto objetivo de harmonização". A autonomia das partes na definição da lei aplicável parece ser, em sua opinião, a melhor solução, porém, é limitada pelas situações em que as partes não expressaram tal definição, o que nos remeteria novamente à adoção de algum dos métodos tradicionais de solução de conflito de leis no espaço.

Da mesma forma, Ruhl[66] aponta fortes razões econômicas para a adoção da autonomia da vontade que poderá ser Pareto eficiente, na hipótese de que a escolha não reduza o bem-estar de terceiros ou Kaldor-Hicks eficiente quando a escolha das partes não reduzir o bem-estar de terceiros mais do que aumentar seu bem-estar.

A adoção da autonomia da vontade tem o potencial de, sempre que as partes tiverem acesso à informação e não houver grande assimetria de poder entre elas, gerar situações eficientes em termos econômicos. E, se a opção for Pareto-eficiente, deveria, nas palavras de Cooter e Ulen[67], ser adotada. Além disso, por definição, quando as partes forem poderosas, certamente, negociarão a escolha da lei aplicável[68]. Assim, a vedação à autonomia da vontade gera prejuízos, apenas, aos mais fracos, sendo, portanto, Pareto-ineficiente.

No entanto, dados os problemas advindos da recorrente omissão das partes em promover a escolha da lei aplicável e das dificuldades que muitas vezes terão em fazê-lo, em razão da ignorância, inexperiência ou dos custos financeiros envolvidos, parece que a melhor linha de ação é manter a regra de conexão atual, abrindo a possibilidade de as partes escolherem a lei aplicável, se assim convencionarem.

De repente, estamos de volta a 1916, sugerindo a adoção das regras já sugeridas há cem anos por Bevilaqua[69]. Para ele, a vontade era fonte geradora de obrigações e, consequentemente, deveria ser permitido às partes escolher a lei a que seriam subordinadas as obrigações contraídas livremente. Assim, a substância e o efeito das obrigações contratuais deveriam ser reguladas pela lei do lugar onde foram celebrados os atos que as originaram, salvo estipulação em contrário ou ofensa a normas de ordem pública.

Cumpre-nos, por fim, reconhecer o caráter Pareto-eficiente da proposta de Bevilaqua, pois voltar a incluir no texto do art. 9º da LINDB a expressão "salvo disposição em contrário" não traria prejuízo a ninguém, mas poderia aumentar o bem-estar de alguns sujeitos, refletindo em menores custos de transação e, consequentemente, em incentivo ao comércio exterior do Brasil.

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64 ARAÚJO, N. *Direito Internacional Privado*: Teoria e Prática Brasileira. Rio de Janeiro: Renovar, 2003. p. 90-91.

65 JUENGER, F. K. General Course on Private International Law. *Collected Courses of the Hague Academy of International Law*, Boston, v. 193, p. 190, 1985.

66 RÜHL, G. Party Autonomy in the Private International Law of Contrats: Transatlantic Convergence and Economic Efficiency. *Comparative Research in Law & Political Economy*. Research paper n. 4, v. 3, n. 1, 2007. Disponível em: <http://digitalcommons.osgoode.yorku.ca/clpe/227>.

67 COOTER, R.; ULEN, T. *Law and Economics*. 3. ed. Massachusetts: Addison Wesley Longman, 2000. p. 184.

68 SPAGNOLO, L. *CISG Exclusion and Legal Efficiency*. Holanda: Kluwer Law International, 2014. p. 140.

69 BEVILAQUA, C. *Princípios Elementares de Direito Internacional Privado*. Campinas: Red Livros, 2002. p. 259-260.

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