

REFLEXIONS ON THE DEVELOPMENT OF STATES UNDER THE PERSPECTIVE OF FOREIGN INVESTMENTS

REFLEXÕES SOBRE O DESENVOLVIMENTO
DOS ESTADOS SOB A PERSPECTIVA DA CAPTAÇÃO
DE INVESTIMENTOS ESTRANGEIROS

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ABSTRACT

The phenomenon of globalization and market expansion, accentuated by the propagation of neoliberal ideals, made it possible for the economic agents to transpose state borders with great ease, implying a great challenge to the governance of states, considering that the traditional concept of sovereignty was not sufficient to regulate the relations that took place at the transnational level. The fluency and voltuosity of the commercial activities enabled the extraordinary growth of the activities of the so-called transnational companies, whose economic potential became decisive for the actions of the States, which began to compete with each other, with the formalization of international agreements and with the flexibilization of internal rules, in order to become attractive ground for foreign investment. Thus, through the deductive method, the study will analyze the consequences of deregulation, in order to conclude that the investments made will not always have an impact on the development of States.

Keywords: Development. Deregulation. Globalization. Foreign investments. Sovereignty.

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RESUMO

O fenômeno da globalização e expansão dos mercados, acentuado a partir da propagação de ideais neoliberais, possibilitou que a atuação dos agentes econômicos transpusesse fronteiras estatais com enorme facilidade, o que implicou num grande desafio à governança dos Estados, tendo em vista que o conceito tradicional de soberania se mostrou insuficiente a regulamentar as relações que ocorriam em nível transnacional. A fluência e vultuosidade das atividades comerciais viabilizou o extraordinário crescimento das chamadas empresas transnacionais, cujo potencial econômico se tornou determinante para a atuação dos Estados, que passaram a competir entre si, com a formalização de acordos internacionais e com a flexibilização de normas internas, a fim de se tornar solo atrativo para investimentos estrangeiros. Assim, por intermédio do método dedutivo, o estudo analisará as consequências provocadas pela desregulamentação, de modo a concluir que, para repercutir em desenvolvimento dos Estados, a intervenção estatal nas atividades de mercado por meio do Direito é a grande chave para promover ações econômicas que revertam em bem-estar social.

Palavras-chave: Desenvolvimento. Desregulamentação. Globalização. Investimentos estrangeiros. Soberania.

INTRODUCTION

In the mid-80s of the 20th century, **contemporary society underwent profound transformations**, with consequences that reached various dimensions of human existence. From the strengthening of neoliberal ideals, there were processes of economic restructuring, deregulation of markets and easing of the sovereignty of states. These events provoked economic opening and intense use of new technologies, but also reflected in concentration of capital, weakening of rights and social exclusion.

In this context of expanding markets to international areas, the advancement of the activities of transnational companies was highlighted, driven by the intensification of advertising that stimulated the proliferation of exaggerated consumerism. In another band, the exponential growth of these economic conglomerates led their power and influence to dictate the norms for action of the States to whose legislation they should submit.

Convinced that the operation of transnational corporations can leverage the economy and increase technological innovation of the means of production, States have begun to compete with each other to attract foreign investments, with the subjection of their sovereignty to international organizations and the formalization of agreements that offer guarantees to investors, as well as often obliging them to make domestic environmental, labor, tax and other regulations more flexible, in order to create a national environment that favours the entry of foreign capital.

From then on, by means of a methodology based on bibliographic review and analysis of relevant legal documents, the study contemplates in a critical way the attitude of States to relax internal rules in order to attract foreign investments, because this deregulation tends to directly hurt rights that the State should technically protect. The investigation has relevance because it points to the state regulation through the Law as a central factor to the induction of economic conducts that emphasize social benefits, in order to prevent the increase of the internal economy in numerical terms to overlap with the good-individual and national society.

1 DEVELOPMENT AND THE ECONOMY

In general, the first studies that linked development and the economy considered development as the highest stage of economic growth, when reconciled with policies of income distribution and improvement of the population's living conditions. More recent studies, however, point to the understanding that growth within a quantitative notion represents only a portion of development, with boundaries that cannot be confused.

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Indeed, the concept of the term "development" does not find peaceful delimitation, having evolved over the years. Norbert Rouland (1991, p. 186) discusses that, in its emergence, which occurred between the twelfth and thirteenth centuries, the word "development" had as meaning to "reveal, expose", starting to mean the progression from simpler stages to more complex ones only around 1850. Since then, development has been linked to the realization of diverse and complex perspectives, depending on the context in which analyzed, involving social, legal, political, economic and cultural aspects.

When it comes to economics and the development process, it is important to highlight the studies of the Brazilian economist Celso Furtado (1980, p. 17), who identifies development in two ways: the first, concerning the increase of the efficiency of the production system by means of the accumulation and progress of the techniques; the second, concerning the degree of satisfaction of human needs.

Celso Furtado (1980, p. 20) believes that the degree of effectiveness of the production system is not a sufficient condition to measure development as an improvement in the living conditions of the population, and there is therefore a need to replace the classical indicators, as the global national product, the Gross Domestic Product (GDP) or the per capita income, by other indicators that better fit the notion of development as an instrument to satisfy human needs.

In Celso Furtado (2000, p. 102-107), the idea of development includes growth, but goes far beyond it, because development would be linked to the elevation of the material level of life of the people who make up society, by means of a scale of values that reflects the balance of the forces existing and prevailing there.

The importance of the link between the economy and development made the constitutional legal framework also return to the protection of the rights and duties that involve this relationship. In this sense, Gilberto Bercovici (2004, p. 24), argues that the intrinsic relationship between the economy and the implementation of the development process can be verified through the analysis of the constitution elaborated after the end of the First World War, such as the Mexican Constitution of 1917 and the Weimar Constitution of 1919, which inaugurated social constitutionalism and institutionalized economic and social rights.

These constitutions were characterized by bringing, alongside the traditional individual rights, the declaration of social rights or benefit rights, which, linked to the principle of

material equality, have their implementation dependent on direct or indirect benefits from the State. "Social or socializing conceptions, as well as the determination of constitutional principles for state intervention in the social and economic domains, are thus considered the foundations of the new social constitutionalism" (BERCOVICI, 2004, p. 25).

In possession of the understanding that the State is the main promoter of development as well as social welfare, Gilberto Bercovici (2005, p. 52-53), still takes care to highlight that underdevelopment is not a stage of development, but a specific condition, that can be overcome through transformation in the economic, productive, social, institutional and political structures in force, accompanied by adequate and comprehensive planning directed by the State.

For the sake of a wellbeing economy it is still important to highlight the studies of the Indian economist Amartya Sen, whose approach defines development as a process of expanding the capacity of individuals to have choices and make choices, an idea of expanding the social and cultural horizon of people's lives. Within this conception, freedom is a component of development, but not only that: freedom is the main means and the main end of development (SEN, 2000, p. 17-18).

Amartya Sen (2000, p. 17-18) diverges from more restricted views of development that identify it with Gross Domestic Product and the simple increase in personal incomes, arguing that development can be seen as a process of expanding the real freedoms enjoyed by people. From the correlation between development and freedom, the scholar points to the need to remove the main sources of deprivation of freedom, such as poverty and tyranny, lack of economic opportunities, systematic social destitution, neglect of public services and intolerance or excessive interference by repressive states.

For Amartya Sen (2000, p. 32), the success of a society can be assessed according to the substantive freedoms that its members enjoy, as freedom is not only the basis for evaluation for success and failure, but also a determinant of individual initiative and social effectiveness. In this understanding, the individual is seen as a member of the public and a participant in economic, social and political actions, leaving aside the notion of the human being as a patient of an inexorable process, in which he does not influence and cannot take part.

The expansion of freedom has the role of constituting and mediating development, since it excels in the enrichment of human life in an expression of prerogatives that give the individual conditions to avoid deprivation such as hunger, malnutrition or premature death. In this way, institutions are effective means to guarantee and consolidate important freedoms for the development process (SEN, 2000, p. 25-52).

Therefore, taking into account the most recent studies on the importance of economics as the driving force of the development process, it is possible to think of institutions as an instrument for promoting development, not only in the economic sphere, but also social, political and legal. Within this concept is the State and its entire legal structure, which must have the necessary foundations to enable individuals to be able to develop their full potential.

2 GLOBALISATION OF MARKETS, STATE SOVEREIGNTY AND REGULATORY DIFFICULTIES

The phenomenon of globalization of markets has been intensified by the advance of advertising and information technologies. Since then, the activity of economic agents has gained enormous strength because the supply of products and services did not see more borders. The action of the markets, however, raised questions about the role of the State in containing the harmful consequences that such a process inflicted on human societies.

In spite of this, Gilberto Dupas (2005, p. 33) discusses that "global capitalism has completely taken over the destinies of technology, focusing exclusively on the creation of economic value", in a logic in which technological leadership began to determine the general patterns of accumulation, pressing ethical values and moral norms established by society.

While new technologies make it possible to expand the geographical fragmentation of production chains, they also make it possible to use cheap labour on a large scale in many countries, as well as the deterioration of its power of exchange in relation to the natural resources offered there, due to the faster technological incorporation into the services and industrialized products. These large corporations, which combine availability of labour and strategic raw materials in a scenario that disregards borders, sustain the accumulation rates of the capitalist system and introduce immense challenges to world politics, especially with regard to the actions of States (DUPAS, 2005, p. 35-36).

Ulrick Beck (1999, p. 30) defines globalization as an irreversible phenomenon, characterized by the geographical expansion and increasing interaction of international trade, as well as the global connection of financial markets and the growth of the power of transnational companies. The phenomenon implies processes in which States see their sovereignty, their identity, their communication networks, their chances of power and their orientations suffer cross-interference from transnational actors.

Nevertheless, the universalisation and intensification of competition on a global scale, the concentration of entrepreneurial power and the consolidation of a system of world corporations imply the formation of business networks that tend to progressively weaken the power of states. This is because, the figure of border delimitation of States is giving way to economic geography, in which transnational companies operate randomly, integrating and interconnecting markets, in which what is sought, Primarily, they are favorable tax and labor regimes, that is, an environment in which the economic overrides the political, which causes states to lose control of their internal and external sovereignty (ACCIOLY, 2006, p. 70).

Indeed, while the concept of sovereignty is linked to the idea of territoriality, the actions of economic agents go beyond state borders with almost no control, which implies the need to regulate international trade through guidelines that are also international. As a result, spaces traditionally reserved to law and politics tend to no longer coincide with territorial space, which raises questions about the scope and effectiveness of the sovereignty of states.

In view of the extraterritorial nature of the problems that have arisen, José Eduardo Faria (2010, p. 37-38) maintains that States tend to lose autonomy to the market as an instance of coordination of social life because, in the dynamics of international trade, countries are not

the agents who dictate the rules, but those who seek regulations that can help them from the interests of private economic forces.

It should be examined that in principle any national government could refuse to open its economy with the aim of trying to preserve a relative independence in setting its decision-making agenda and also, refuse to link internal decisions to the operational logic of transnational markets (FARIA, 2010, p. 38). However, this option would mean running the risk of mass flight of capital and subsequent difficulties in accessing credit sources and technological innovation, which ultimately determines the conduct of subordinating national governments to the markets.

In this way, the notion of sovereignty has been modified in order to better adapt it to the international legal order, which is undergoing profound transformation. In this sense:

[...] the old concept of the absolute sovereignty of the State - and its power to dispose as well as understand of its borders - was overcome by the evolution of the international order, increasingly integrated with international orders and with values consecrated by humanity as a whole. ignore treaties on the pretext that international and internal orders are independent and that the state, obliging itself to other countries, is not obliged to observe in the internal sphere the sovereign commitment made, to end so to the liking of those who think so, is an act that no longer sympathizes with the current world (MAGALHÃES, 2000, p. 62).

Indeed, the new contours given to the concept of state sovereignty determine the deep interaction between internal and international orders, so that adherence to international documents, as well as respect for the commitments made internationally, are essential to the full recognition of States in the international legal order.

In this tuning fork, formal attributes related to the principle of sovereignty, such as supremacy, unconditionality, inalienability, indivisibility, centrality and unity of the state, are progressively relativized and weakened not only by the substantive power of the markets, but also by the entry on the scene of new local or regional actors, claiming spaces of ever wider political, administrative and fiscal autonomy. (FARIA, 2010, p. 41).

Celso Duvivier de Albuquerque Mello (1993, p. 1987) emphasizes that the so-called "New International Legal Order" is composed of "a set of principles, rules, and private or public practices that govern and organize economic relations among the actors that today determine international society: State, international organizations and transnational groups" so that what is relevant to the concept of sovereignty is related to the self-determination of peoples on the use of natural resources, which deals directly with the very Right of development and mirrors, conflicts of interest between exporting and capital importing countries.

In this context, José Eduardo Faria (2010, p. 42) discusses that there are justices and practices implemented in supranational spaces, with the formation of networks of actors and institutions with functionally regional or global, which require the harmonisation of national legislation, the technical-organizational standardization and bureaucratic unification resulting from the formation of large commercial blocks and the experiences of regional integration.

In addition, the dynamics of the globalized market subjects States to supervisory and controlling mechanisms originating from the most diverse organs and multilateral organiza-

tions. The numerous institutions of this kind perform functions that intertwine and relax the sovereignty of states, such as the World Bank (WB), the International Monetary Fund (IMF), the World Trade Organization (WTO) the Organisation for Economic Cooperation and Development (OECD), and regional economic integration bodies such as the European Union (EU), the North American Free Trade Agreement (NAFTA) and the Southern Cone Common Market (MERCOSUR).

And if, on the one hand, the concept of sovereignty prevails, loaded with the juridical-political precept inherent to it, the need to adapt to the world economic reality of interdependence has evolved the notion of sovereignty to that of territorial competence, in which each State, as a member of the international community, exercises its authority within its territory (MAGALHÃES, 2006, p. 262). At the international level, in order to develop economic-international relations well, States choose to submit their actions to the control of international institutes and organizations.

The analysis then shows that the free movement of goods, the formalisation of international agreements and the internationalisation of political decisions demonstrate a loss of the hard core of power of states, namely their sovereignty, that in the international sphere does not have the same valorous preponderance that prevails in the internal sphere of the countries.

Nevertheless, even internally, the traditionally interventionist role of States has undergone major transformations, because the speed demanded by globalized consumption has imposed an intense dynamic of substitution of the goods and services offered. The phenomenon has led economic agents to adopt strategies specially designed to put pressure on governments to reduce barriers, in order to give states the role of guaranteeing the stability of the legal order and facilitating the functioning of markets (FARIA, 2010, p. 24).

The performance of transnational companies has great prominence within this movement that affects the role of States. This is because the main characteristic of a transnational company is its ability to centrally guide its operations in various parts of the world, through a global planning to increase its influence and expand its consumer market. Operating as if there were a world market, these conglomerates relativize local interests, since national markets are considered less important (BAPTISTA, 1987, p. 25-26).

From the legal point of view, transnational corporations are subject to national jurisdictions, however, due to their economic power, these new international actors end up imposing on countries a series of pressures for deregulation, related to the easing of environmental laws, tax benefits and work regimes (DUPAS, 1999, p. 113). States tend to give in to the pressures of these conglomerates, because the main instrument of transnational corporations is the ability to say "no", in a context where the power of the world economy vis-à-vis the national states consists of "not investing" (DUPAS, 2005, p. 41).

In this new dynamic imposed by the globalized market, countries see themselves within a vicious cycle of submission of state interests to the interests of economic agents, a process that places the capacity to attract foreign investments as a condition for the economic development of the States.

3 OS ESTADOS E OS INVESTIMENTOS ESTRANGEIROS

One of the most intriguing effects of the phenomenon of globalization and expansion of the markets is the realization that States are going in a competition to attract capital from foreign investments, which focuses on the fall of their original ability to coordinate, market control and regulation.

Foreign investments are one of the main sources of external financing in developing countries (FONSECA, 2008, p. 31) and consist of the transfer of tangible and intangible assets from one country to the other, with the purpose of using generating wealth through total or partial control of the owner of the assets (SORNARAJAH, 2004, p. 7).

Even states with strong industry tend to admit them, because they see in foreign investment the supplementation of capital and technology they need, as well as the possibility of promoting competition in their own domestic market (MAGALHÃES, 2006, p. 258). The inflow of capital from abroad is also able to influence the fixing of the international confidence index in relation to the economic stability of states.

In Brazil, the discipline of foreign investments is provided for in Article 172 of the Federal Constitution, which states that "The law will discipline, based on the national interest, foreign capital investments, encourage reinvestments and regulate the remittance of profits" (BRAZIL, 1988).

At the international level, the World Trade Organization supports foreign investments through the Agreement on Trade-Related Investment Measures (Agreement on Trade-Related Investment Measures - Trims). Trims entered into force in 1995 and forms part of the multilateral treaties on trade in goods included in the "Annex Ia" to the Marrakesh Agreements, which binds all WTO members.

The purpose of Trims is to promote trade clearance and prevent the use of investment measures that are incompatible with the basic provisions of the General Agreement on Tariffs and Trade (GATT) such as discrimination against foreign products and investors, the use of investment measures that may lead to quantitative restrictions or measures that require specific quantities of local content (WTO, 1995).

Still in the multilateral sphere of supervision of foreign investments, it is also important to highlight the role of the World Bank, through the system of the International Center for Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (Multilateral Investment Guarantee Agency - MIGA), which were created in 1966 and 1988, respectively, with a view to leveraging foreign investments in developing countries (ITAMARATY, 2020).

The Bilateral Investment Agreements (Bilateral Investment Agreements - Bits), however, constitute the most significant set of rules on the promotion and protection of investments abroad. Bits "are instruments through which two countries, usually a developed country and a developing country, seek to regulate relations in matters of investment in order to increase their flow" (PERRONE-MOISÉS, 1998, p. 24).

The Bits foresee the concept of investment and the sectors covered, disposing on the desire to promote greater economic cooperation between the parties and encourage the flow

of private capital, besides creating favorable conditions for this. Bits also seek to make it clear that the entity, foreign or controlled by nationals of the other party, will be entitled to the protection established by the treaty regardless of whether it was incorporated in the receiving country of the investment (LOWENFELD, 2011, p. 555).

It is noteworthy that Bits, in general, usually contain clear obligations and rules focused on the field of protection of foreign investments, with a strong legal structure and efficient systems of execution and enforcement of sanctions. The rules on environmental and labor standards within these agreements, however, tend to be quite flexible, presenting little precision, clarity and conformation of concrete obligations. Similarly, dispute resolution is usually limited to investment and investor protection rules (COSTA, 2006, p. 70).

Nevertheless, the recognition of international rules on foreign investments "contributes to improving the business environment, increasing legal certainty for the investor and reducing the risk of investing" (THORSTENSEN; MESQUITA; GABRIEL, 2018, p. 8-9).

The economic strength of transnational investor companies was evident at the beginning of the 21st century, when a survey promoted by UNCTAD in 2001 found that among the 100 largest world economies, 71 were countries and 29 were transnational conglomerates (FARIA, 2010, p. 34). These data confirm, therefore, that the race between states to attract foreign investors is not unreasonable, since the numbers obtained can maximize the final performance of their economies.

In another band, the facility to transfer industrial plants and work units, according to their interests, gives transnational companies extraordinary power to negotiate the place of expansion of their activities with any State, independent of the continent where it is located. And when such companies do not have their requirements met, they withdraw their investments from the countries that offer them obstacles and as soon as they relocate them in other states (FARIA, 2010, p. 34).

In fact, what determines the operation of a transnational corporation in host countries is the economic support offered. Thus, new localities become attractive to the detriment of others, because they offer competitive advantages, such as tax incentives and skilled labour (NETO, 2006, p. 100). Business power grows before the States and, instead of companies competing for new consumer territories, it is the States that compete with each other offering incentives in the search for capital from abroad.

This finding makes the proliferation of questions against the investment agreements entered into inevitable, which tend not to concern themselves with the interests of the international community or the recipient country, and unless these documents reflect a balance between the rights of foreign investors and the regulatory interests of the countries receiving investments, their future viability will be constantly challenged, because they tend to contain rules that generate imbalance in a relationship that was intended to be reciprocal (SORNARAJAH, 2004, p. 267-208).

Thus, although it is found that the action of countries to attract foreign investments is related to the objective of promoting the development of their domestic economy, it is not possible to leave aside the no less important finding that market forces, represented by large transnational companies and conglomerates, see in this condition the very fragility of the States, that when competing with each other through the offer of incentives, end up attending

to private interests that, almost always, do not fit with the ideals of promoting social well-being.

4 FOREIGN INVESTMENT AND DEVELOPMENT PROMOTION

The admission of resources from abroad is linked to the development need of the receiving State, which is convinced that it will be able to through the transfer of capital and technology from transnational companies that choose to establish activities in their territory.

From the links of development with social, legal, political, economic and cultural aspects, its importance made the term transpose the sphere of the economy and became the object of protection by the Law, both in the international sphere and within the internal framework of States.

Furthermore, the origin of "development" as a normatively assured right dates back to the Charter of the United Nations of 1945, which in the preamble and in Article 1.3, stressed that the component States committed themselves to preserving the equality of law of the large and small nations and to establishing conditions under which justice and respect for obligations arising from treaties and other sources of international law could be maintained, in order to promote social progress and better living conditions within a broad freedom, as well as to promote greater international cooperation to address international economic, social, cultural or humanitarian problems (UN, 1945).

Already in 1986, this right was issued in a worldwide declaration, called "Declaration on the Right to Development", adopted by Resolution 41/128 of the General Assembly of the United Nations, whose preamble took care to provide that:

[...] development is a comprehensive economic, social, cultural and political process aimed at the constant improvement of the well-being of the entire population and of all individuals based on their active participation, free and significant in the development and fair distribution of the resulting benefits (UN, 1986).

The development depends, then, on the promotion of several aspects, with the purpose of providing well-being to the population and fair distribution of the benefits derived from the exploitation of the economic activities promoted.

Thus, the development of a state depends on its economic growth, but it also involves the creation of structures necessary for people to improve their basic living standards in fields ranging from education and health to consumption, leisure and information.

Since financial resources are needed to realize the importance of rights demanded by development, this fact determines the intense promotion of trade activities by States, as well as the search for foreign investments in the globalized world economy scenario.

According to José Eduardo Faria (2010, p. 34), as a condition to attract or withhold investments, which are job generators and allow the elevation of local levels of economic activity in the states, the economic conglomerates do not hesitate to demand tax exemptions

to adaptations in labor, social security and environmental legislation, as well as numerous other state, financial and legal guarantees.

For José Eduardo Faria (2010, p. 35), the assumption of countries to these demands makes governments give up significant portions of their decision-making and regulatory autonomy, favoring the exploitation of the labor force in the conditions that interest the capital. This causes individuals to live without protective laws effectively guaranteed in their universality, in a logic in which the advance of deregulation of the economy is deepening inequality and exclusion (FARIA, 1997, p. 48-50).

On this basis, Eduardo Saldanha (2009, p.14) argues that it is essential to impose an ethical dimension on the legal instrument that, in turn, provided the economy with a "reflective character on the ultimate aims of legal and economic activity in a society, interrupting the isolation of essentially quantitative and dogmatic methods of analysis" in order to insert the need to evaluate the processes of generation and division of wealth from the competition between ethical reasoning and legal reasoning. This approach puts the Law in a position that really has conditions to answer questions related to the distribution of wealth and expansion of human freedoms, in order to reconcile social breadth with the dictates of economic efficiency.

In spite of this, Flávia Piovesan (2006, p. 389) disagrees that there is a need to increase the social responsibility of companies, since they are the major beneficiaries of the globalisation process, exemplifying the importance of encouraging them, by means of legal rules, to adopt human rights codes relating to trade activity, as well as to impose trade sanctions when they violate rights, among other measures, to exercise control over international financial investments.

Foreign Direct Investment (FDI) is one of the main sources of financing for the development of countries and is fundamental for the promotion of so-called sustainable development, since billions of dollars are needed to improve living standards and reduce global poverty, as well as to replace unsustainable practices with sustainable ones, be it industrial, energy, environmental or other.

[...] It is necessary, in this sense, to establish rules that not only attract foreign investments, but are capable of promoting the development of countries. Foreign investment can produce positive and negative effects on the development process of countries, rather than properly administered.

Thus, the promotion of protection to foreign investments derived from the actions of transnational companies without their respective counterpart in promoting the development of receiving countries is not reasonable, because it contradicts the very aims pursued by States, in addition to giving rise to negative policies of suppression and violation of human rights, as can be seen from the analysis of the case "Kiobel vs. Royal Dutch Petroleum".

The "Kiobel vs. Royal Dutch Petroleum" case involved the American company Shell and its operations in Nigeria. The issue was brought before the Supreme Court of the United States by the Ogoni people on the grounds that Shell had been complicit in the violation of human rights committed against the population of that region of Nigeria during the Abacha dictatorship between 1992 and 1995. In this regard, it has been established that the corporation has assisted and provided resources for the Nigerian government to carry out repression against Protestants against Shell, that since the beginning of the exploitation of oil activi-

ties in that region caused environmental and social damage. The violations included acts of torture, extrajudicial executions and crimes against humanity. To end the long legal battle, in 2009, Shell agreed to pay \$15.5 million to the victims' relatives (RUGGIE, 2014, p.63-64).

The case raised refers to the reflection on the need to adopt more efficient international and national normative measures, in order to link the actions of transnational companies to respect for human rights, so that the performance of these conglomerates can actually revert into development for the States that receive their investments.

In the international context, in 1973, the United Nations created a Commission to discuss the theme "transnational corporations and human rights", whose intention was to draw up a "UN Code of Conduct on Transnational Enterprises" was frustrated by strong resistance on the part of the States. At the same time, the subject returned to prominence after the elaboration of the so-called "Marco Ruggie" (named after its creator, John Ruggie) approved by consensus within the United Nations in 2011 and recognized for fixing the "Guiding Principles on Business and Human Rights" (UN, 2011).

The so-called "Marco Ruggie" contains 31 principles, which were elaborated with the fixing of three guiding pillars, namely, "protect, respect and repair". Since then, States have been given the obligation to protect human rights, companies have been given the responsibility to respect human rights and the need for adequate and effective resources to repair damage in the event of non-compliance with these rights by companies (UN, 2011).

In fact, although they are not binding, the principles derived from the "Marco Ruggie" represent great progress for the international discussion of the theme "transnational companies and human rights". Regarding progress towards binding obligations, it should be noted that at the 26th UN Session, held on June 26, 2014, Resolution A/HRC/26/L was adopted, that established an Intergovernmental Commission whose purpose is to prepare a legally binding international instrument to regulate the activities of transnational enterprises.

Thus, in the absence of a mandatory international regulation that limits the actions of transnational companies, it is up to the State itself, therefore, require that the practice of business activities respect the normative institutions that support human rights in their internal context, in order to direct the aims of economic activity to meet the assumptions of development.

Jurgen Habermas (2001, p. 65) stressed that it is not possible to effectively use the function of allocation and discovery of self-regulated markets without bearing the social costs and the disparate divisions that are incompatible with the conditions of integration of societies composed in a way liberal and democratic. Thus, it should be emphasized the importance of the State's normative intervention in the economic field in order to promote actions that revert in respect to human rights and promotion of social welfare, pillars of development achievement.

In this sense, the studies of Calixto Salomão Filho (2008, p. 97-100) highlight law as a preponderant factor for regulating economic activity and inducing agents to make choices aimed at the common good, since well-designed rules are able to create a cooperative environment, in which decisions are made in a natural and not coercive way.

In fact, according to the author, creating an environment conducive to cooperation is the most important institutional task of the States:

Firstly, as has already been seen, cooperation, unlike individual behaviour, does not naturally appear in society. There is in this statement no Hobbesian conception of human nature, but simply the recognition that there are social conditions that hinder its behavior. This condition is basically the fear of the strategic behaviour of the counterparty. If this is so - and this seems to be a reasonable presumption -, then it is enough for the Law to create conditions for the disappearance of this fear for cooperation to find fertile field (SOLOMON SON, 2008, p. 100).

Calixto Salomão Filho (2008, p.101) also takes care to point out that the presence of cooperation in regulated sectors is fundamental to development, because it ensures greater effectiveness to the rules and decisions of the regulatory body, as well as ensuring the parties the possibility of discovering the behaviors of greater social benefit in the midst of the performance of market agents.

The proper regulation of the activities of economic agents, including the activities of foreign investors, must be made, first, within the internal scope of the States, through its Legislative Power, so that qualitative developmental purposes are met.

In spite of this, it should be emphasized that development is an objective pursued by the Federative Republic of Brazil, whose purposes can be found in Article 3 of the Federal Constitution of 1988, which provides:

art. 3º Are fundamental objectives of the Federative Republic of Brazil:

I - to build a free, just and supportive society; II - ensuring national development; III - eradicate poverty and marginalisation and reduce social and regional inequalities; IV - promote the good of all, without prejudices of origin, race, sex, color, age and any other forms of discrimination (BRAZIL, 1988).

Article 170 of the Federal Constitution of Brazil also provides on the principles that will govern the operation in the economic order, which, "founded on the valorization of human work and free initiative, aims to ensure everyone a dignified existence, as dictated by social justice [...]". In the same sense, Article 219 of the Federal Constitution of Brazil praises the importance of the market for the promotion of well-being, providing that "The internal market integrates the national heritage and will be encouraged in order to enable cultural and socio-economic development, the well-being of the population and the technological autonomy of the country [...]" (BRAZIL, 1988).

From the description of the constitutional provisions cited, it can be seen that the development pursued by the Federative Republic of Brazil is not limited to the increase of numerical values in the market, but it introduces a qualitative dimension of improving the living conditions of the population. For these purposes, the constituent also ensures the intervention of the State in the economic field, providing, in Article 174, that "As a normative agent and regulator of economic activity, the State will exercise, in the form of the law, the functions of supervision, incentive and planning [...]" (BRASIL, 1988).

Taking as an example the constitutional regulations of Brazil, it is concluded that it is not up to the State to distance itself from its internal regulations of protection and promotion of development for the purpose of attracting foreign capital. Development is an objective and cannot be left out of negotiations that can relax their inherent rights, such as environmental, labour and tax rights. State intervention through law to regulate these areas in the face of foreign investors is essential.

Jurgen Habermas (2001, p. 73) praises the need for an awareness of the obligation of cosmopolitan solidarity in civil societies and in the public political spheres of geographically wide regimes that are developing, because only a change in the consciousness of citizens, effective in terms of internal politics, as well as the self-understanding of actors able to act globally, can make them understand themselves more and more as members of the framework of an international community and that therefore, they are subject both to essential cooperation and to mutual respect for interests.

It is certain that the goal of any company is to achieve profit. And the expansion of transnational companies to different countries is always guided by the possibility of maximizing these profits. However, even entrepreneurial activity must comply with the public objectives of responsibility for promoting the development of States, and even if this is not the maximum to be pursued by corporations, is an ideal that can be directed through state regulatory intervention.

And to foster real development, the actions of States when trying to attract foreign investment must not happen without the primacy of human rights, because economic growth alone does not mean development, when the country no longer wants items related to the protection of the environment, labor relations and others. Finally, a more active state action is necessary, at the core of the struggle so that social welfare is not subtracted from the interests of market forces.

FINAL CONSIDERATIONS

The advance of globalization and expansion of markets, with the culmination of the technological revolution, focused on a weakening of the capacity of response of the national states through the supervision, control and intervention on the international flows of capital. The process triggered a crisis in the sovereignty of the States, which, in order to adapt to the new reality of the globalized market, were forced to sign international agreements to regulate the economic relations disseminated in the transnational context.

The advance of neoliberal ideals of deregulation of markets has found fertile soil and has grown the performance of transnational investor companies, with ramifications in several regions of the planet. The economic power of these large business conglomerates started to dictate the direction even of state policies, since the search for foreign investments caused the dispute between states for attracting new investors, through the offer of incentives that, often focus on relaxing national standards to protect the rights of individuals.

The States' search for foreign investments is legitimate, especially when it comes to poor countries, which see the entry of capital from abroad the chance to leverage their internal economy, with the promotion of technology transfer, improvement of the means of production and allocation of new jobs. However, the relaxation of market regulation regulations to attract external investments can only mean attention to the interests of market forces, without commitment to the internal development of countries.

The principles contained in the “Marco Ruggie” of 2011 constitute the great level of orientation of the actions of transnational investor companies in the international sphere. Although its pillars “protect, respect and repair” are not binding, they still represent great progress for the international discussion of the theme “transnational companies and human rights”.

In this context, the regulatory intervention of market activities within the internal scope of the States is the greatest response to overcome this deficit of mandatory regulations established in the international context. It is necessary that the State leads the realization of the development through the due normative intervention in the economic field, in order to reconcile the performance of market forces with respect for fundamental human rights, mainly because the development, in its contemporary sense, it covers qualitative spheres of human well-being.

From that point on, the importance of government action through law is seen in order to constitute a regulatory system capable of addressing social inequalities and compensating for imbalances caused by market forces, in order to enable real development, which is not linked only to the wealth and investments embedded in society. In this tuning fork, state intervention is essential to promoting complementarity between market growth and human development.

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