GLOBAL CONTEMPORARY CHALLENGES: CONVERGENCES SCENARIO IN INTERNATIONAL LAW

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ABSTRACT

The contemporary international scenario is characterized by a multiplicity of actors and interests, creating a complex web of economic, social and legal relationships. The challenges represented by these new relationships need rapid and efficient responses by Law. This journey seeking the solutions to the conflicts arising from the international arena requires a reassessment of the meaning of the division between public and private spheres of law. Through the growth of Sovereign Wealth Funds, which arises several new paradigms in the economic field, noticeably the convergence between the role of the State and the role of the international investor; through the encounter between the necessity to protect human rights and harmonize the multilateral international trade system, or through the intersections between global governance and the protection of diffuse rights, international law is certainly moving towards the convergence.

KEYWORDS

convergence, international law, sovereign wealth funds, global governance, international trade

INTRODUCTION: ***OLD CONCEPTS, NEW DILEMMAS***

At the philosophical level, it is possible to say that the designation "public" admits an ambiguity in its understanding and reflects, on the one hand, the reality as everything that is seen and heard by everyone and, on the other, the world as a set of interposed human facts rather than a physical space that limits the human existence (ARENDT, 1999, p. 59). The term "private", etymologically originated from "privation", conveys the idea of distance between the individual actions and the fact of being seen and heard by everyone. Therefore, the private sphere rests in the absence of the others and the lack of foreign interest on the individual's actions (ARENDT, 1999, p. 68). The private represents the innermost network where the interests and actions are measured by the individual's will and usefulness.

From that perspective, the Roman Law also outlined the boundaries between the public aspect and the private aspect of law. A statement in the Ulpian's Digest says that publicum jus est, quod ad statum rei romanae spectat, privatum quod ad singulorum utilitatem*, which in English means that the public law is that which focuses upon the status of the Roman commonwealth, while private law pertains to the interests of individuals. However, in the Midde Ages, the collapse of the State and the rise of feudalism dissolved the boundaries between public and private spheres, considering the approximation between the concept of property and sovereignty.*

The classic bipartition between public and private spheres is applied to International Law, especially in neo-latin language-speaking countries, while in countries with Anglo-Saxon tradition, the expression international law *or* Volkerrecht *was chosen to designate the public sphere, and the expression* conflict of laws *or* Privat Internationales Recht *for the private sphere.*

The Public International Law is characterized by the rules intended to govern the behavior of States, not individuals (CASSESE, 2005, p. 3). The Public International Law is the set of rules and legal institutions that govern the international society, aiming at establishing the peace, the justice and the development" (MELLO, 2004, p. 77). However, it is interesting to notice that, when Celso Mello defines international society, he considers not only the State as its entities, but also the individuals and multinational corporations (MELLO, 2004, p. 52).

*The Private International Law comprises the analysis of the legal relationships of the individuals in their international dimension, including the study of the nationality, of the legal condition of the foreigner, of the law enforcement, of the relevant jurisdiction and the ratification of foreign judgments (DOLINGER, 2003, p. 3). According to Nádia de Araújo, the objects of Private International Law comes down to determining the place where the action will be filed, the law to be applied and how the foreign acts and decisions must be enforced (ARAÚJO, 2008, p. 34). The private sphere is basically concerned with the establishment of solutions for the issues posed by the relationships between private parties with international characteristics; in other words, relationships that are in contact with different juridical systems (CORREA, 2000, p. 11) or with implications in the international level (BOGDAN, 2006, p. 3). Henri Batiffol points out that the Private International Law "*travaille à la coordination de systèmes distincts coexistants, afin de soumettre à un régime défini les relations privées qui, par leur caractère international, se présentent comme s'insérant similtanément dans plusieurs systèmes diffèrents". *[Free translation: works with the coordination of coexistent distinct systems, in order to submit the private relationships to a defined regime that, due to their international characteristics, are concurrently inserted in several different systems] (BATIFFOL, 1956, p. 19).*

The classic public international law had the legal rules targeted to the States as subjects of the international law. In modern times, however, there is a plurality of subjects, whose interests became protected by the international law, thus making a revaluation of the public international law imperative. In addition to the States, the multinational organizations, the transnational corporations and the individuals participate in the contemporary international scenario.

Andreas Lowenfeld questions whether the recognition of the foreign law is limited to the moment when a public character falls on it, by affirming that

> *The teaching of Public International Law based on the principles of sovereignty and territoriality of three miles on the sea and nothing else suited almost perfectly to the teaching and the expectations that the private international law was not concerned with the public acts of other States. (…) However, those were simpler times. (…) It is not a mistake to say that governments … regulate, license, tax and punish more and more activities of all kinds, nor to say that more and more activities are taken overseas. (LOWENFELD, 1980, p. 324-325).*

The private international law, on the other hand, was characterized by having rules that derived from each country's internal laws, so as to settle the conflicts of applicable laws. However, it is noticeable that the private international law has gradually been crossing over the barrier of the Überrecht *rules to produce substantive law rules on, for example, the rights and guarantees of foreign people and the contractual relationships through the standardization of the law.*

In this sense, Marilda Rosado points out that:

> *The growing internationalization of our daily lives, as well as the growing interdependence and indeterminacy among the countries, have led to new standards and international relationships, both in the private and in the commercial spheres, thus posing an unprecedented challenge to the Private International Law (RIBEIRO, 2003, p. 19).*

The limits that separate the public sphere from the private sphere, also in issues related to the international law, become fluid in light of the new challenges faced by the law. Therefore, an increasingly dense convergence scenario is established between the public international law and the private international law. That convergence is currently observed in several areas of the international law, with emphasis to the Sovereign Wealth Funds, the provisions to protect the individual rights in light of the international trade and the performance of transnational corporations, as well as the intersection in global governance and the protection of diffuse and collective rights. Therefore, it is fundamental to analyze, in general lines, those contemporary global challenges in order to understand their dynamics of interaction with the law and highlight the points of convergence between the public and the private spheres, showing the intersection between those spheres in the scope of the International Law.

1 THE GLOBAL GROWTH OF THE SOVEREIGN WEALTH FUNDS

The accumulation of the foreign capital reserves, caused by the opening of the markets to international investment in the 1990s, due to the successful export of commodities and due to the

raise in the oil prices, led the countries to seek an alternative to use the international reserves (CARVALHO, 2009, p. 12). Therefore, the safe but low-profitability investments, as well as the investments in Treasuries were gradually replaced for the SWF. Since then, several globally relevant financial groups started to have the SWF among their shareholders (KIMMITT, 2008, p. 122). The Sovereign Wealth Funds (SWF) have been present in the global economic scenario since the mid-twentieth century, but it has become widely known in the last years.

When the countries establish an SWF, they generally seek for a macroeconomic stabilization in markets that are exposed to the fluctuating prices of the commodities. *Another reason observed is the accumulation of wealth for the future generations, through the high profitability as compared to low-risk investments. The recovery or improvement of the national industry has also been a central point in the establishment of the funds.*

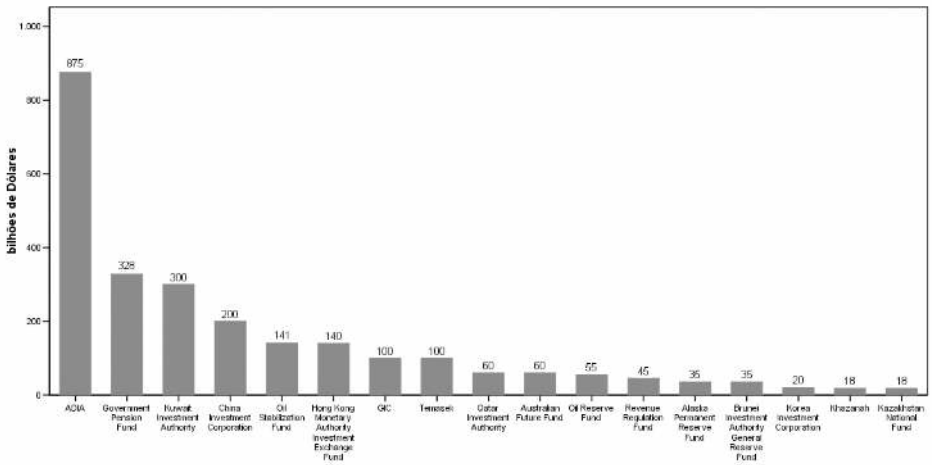
In December 2008, Law no. 11.887 established the Brazilian Sovereign Wealth Fund, subordinated to the Ministry of Finance, "aiming at promoting investments in assets in Brazil and overseas, forming public savings, mitigating the effects of the economic cycles and promoting projects of strategic interest for the country which are located overseas". The Brazilian Sovereign Wealth Fund will be controlled, from the structural point of view, by a Deliberative Council composed of the Minister of Finance, the Minister of Planning and the President of the Central Bank of Brazil.

The experts were unable to reach a consensus on the definition of those SWFs, but the concern about the consequences of that kind of investment is noticeable. Generally speaking, it is possible to say that the SWFs are governmental investment entities established with multiple purposes. The characteristics of those funds generally involve the allocation of financial assets in a more risky manner, through long-term investments in holdings abroad. In contrast to the traditional governmental reserves, whose basic objectives are liquidity and safety, the SWFs seek high profitability through the simultaneous investment in several sectors of the market. The sources used to form the funds allow a classification between those established from the export of commodities and those formed by the transference of assets from international reserves (TRUMAN, 2007, p. 3).

It is challenging to totally understand the dynamics of the SWFs due to the diversity of the objectives, investment philosophies and the political and economic ambitions. In addition, many funds undergo transition and restructuring processes, changes in the assets allocation standards and the establishment of partnerships with corporations and financial institutions (BUTT, 2008, p. 73).

*One way or the other, the inclusion of the SWFs in the economic discussion agenda, was made in light of the proliferation of such investments in the international scenario. According to the estimates from the International Monetary Fund, the financial volume of the SWFs did not exceed USD 5 billion in the beginning of the 1990s. Nowadays, the estimated total corresponds to USD 3 trillion and, with the forecast of the rising prices of the commodities, that total must reach as much as USD 12 trillion by 2012 (JOHNSON, 2008, p. 2). The major SWF holders are those that hold the striking majority of the global financial assets of that type of investment; therefore, there is a financial concentration in certain players (***Figure 1***).*

Figura 1 – Dimensão dos maiores Fundos Soberanos de Riquezas no mundo (Butt, 2008: 72).



The substantial growth of the SWFs brings, to the legal order, a series of new paradigms to the regulation and structuring of the global economy. The transparency of the funds is one of the main issues discussed by the governments whose companies became the target of those investments. The lack of public and reliable information about the financial volume of the funds, as well as the lack of definition of their actual purposes has raised uncertainties in the countries that host the investments; they question about the institutional structure, the investment policies and the risk management of the funds. Along the last years, the governments have exercised some pressure on the international juridical community towards the elaboration of a "code of conduct" for SWFs (GARTEN, 2007). Along the last years, the governments have exercised some pressure on the international juridical community towards the elaboration of a "code of conduct" for SWFs (GARTEN, 2007). Many countries regard the strengthening of the regulatory structures as fundamental to coordinate the complex interconnection involving sovereignty, opening of markets, globalized economy, protection of investments and balance of internal markets An effective regulation system would be able to verify the source of the financial resources, to analyze the objectives of the project of investment and to prepare legal strategies to ensure, on the one hand, the stability of strategic sectors and, on the other, the continuous attraction of new investors.

In this sense, the European Commission has held studies to determine whether the proliferation of major SWFs, such as those established by Russia, China and countries from the Middle East, poses a threat to the continent's unified market. Some European countries have discussed the adoption of a policy to block the control of national companies by foreign SWFs. The financial authorities from Germany, on the other hand, have considered the establishment of a law to totally block the investment made by SWFs. The United States have recently revised

the legislation concerning the Committee on Foreign Investment in the United States, with specific focus on the establishment of regulatory guidelines for the investment of entities connected to foreign governments (TRUMAN, 2007, p. 7). That revision was carried out after rumors that the American oil exploring company Unocal had been purchased by the China National Offshore Oil Corporation and the proposal for the acquisition of American ports by the Dubai PortsWorld, which is managed and controlled by the United Arab Emirates (CARVALHO, 2008, p. 12). The governmental concern about the political interference in the SWFs has been commonly observed in the industrialized countries, but it is also present in the developing markets. Therefore, the purchase of the Thai telecommunication company Shin Corporation by the Temasek*, controlled by the government of Singapore has resulted in a major geopolitical controversy, that led the Thai government to oversee the USD 4 billion transaction (PONGSUDHIRAK, 2006, 16). The participation of the government of Singapore as a private investor, through the Temasek, in the acquisition of a company from a strategic sector of another State has generated debates on the need for a clear analysis of the origin of the capital, as well as the investment project.*

It is also noticeable that, bearing in mind the high volume of capital controlled by some SWFs, there is some concern about what the sudden changes of capital flow - due to the reallocation of financial assets - may cause to the international economic balance through, for instance, sudden price changes. Some market analysts also point out that the growing participation of the SWFs in the internal markets may justify the reversion of the privatization trend set for the last 30 years. The forecasts indicate a majority control over companies by governments or entities controlled by governments, thus paving the way for protectionist reactions, which would result in retaliatory measures and countermeasures, leading to reversal of the multilateral structure in the international trade.

The need to understand the risks posed by the SWFs has led to the formation of an assessment strategy that would comprise structural, governance, transparency and behavioral aspects. According to Mitchell (2008, p. 338), the structural aspect includes the clearness of objective, the source of resources of the fund and the investment strategy. The governance is assessed through the independence of the fund's investment policies in relation to the State. The assessment of transparency involves the publication of activity reports, knowledge of the investments made by the fund and access to the investment agents' identities. The behavior is connected to the nature and speed of the management of the fund's financial assets. However, that attempt to establish a reference framework for the SWFs combines many arbitrary aspects and focus on the economic assessment and does not address any legal questions and gaps.

According to Truman (2007, p. 8), while the type of management of the SWFs is determined by the sovereign State government to where they belong, any governmental entity that acts beyond its borders is no longer sovereign and must seek cooperation solutions. The international apprehension remains, owing to the risks of undue flexibilization of the tax policy and the prejudice to the right of competition (DAVIS, 2001, p. 32). This is so because the SWFs are generally not regulated by the national tax authorities, so that those funds are not subject to the same level of discipline as the private investors.

In the field of the international political economy ideologies, the increase in the participation of the SWFs in the markets represents a contradiction between nationalism and liberalism. The liberal theory is compromised with free markets and minimum State intervention, whereas the nationalists defend a subordination of the economic activities to the interests of the State. As regards especially the SWFs, the liberalists point out the technology, expertise and capital involved in the process of foreign investment in a company (LAVELLE, 2008, p. 135).With a totally opposing view, the nationalists regard the threat represented by the foreign state-owned capital in national companies as dominant, especially in strategic sectors.

The major legal questioning the may be made refers to the status of the SWFs constituted with legal personality different from that of the State, but controlled by the government and subject to the State interests. That dichotomy is directly connected to the search for protection of the State sovereignty in light of the commercial activities performed by an investment fund controlled by another sovereign State. The proliferation of the SWFs has led to the need to seek legal answers to the new scenario of convergence between the role of the States as subjects of public international law and the conformity of the instruments of economic regulation of the private international law.

2 THE PROTECTION OF THE HUMAN RIGHTS AND THE MULTILATERAL TRADE SYSTEM

The free trade and the human rights are post-war trends that evolved in parallel, separate and, sometimes, inconsistent paths. The new international economic order, based in the stimulus to one single global market, has derived from the Bretton Woods agreement. An equalitarian and free trade regime was regarded as indispensible for world peace. However, many factors changed that view and resulted in a different trade policy. Instead of the International Trade Organization then proposed, a set of minimum rules, without any institutional structure, was adopted. The General Agreement on Tariffs and Trade (GATT) became an efficient tool for the reduction in customs taxes, thus resulting in a more thorough look on the commercial policies of each State. That investigation of the commercial policies led to the growing concern about subsidies, dumping and technical barriers. In 1994, with the establishment of the World Trade Organization (WTO), many topics of normative controversy started to be regulated.

However, the human rights is a theme that still raises a high number of questions in the international society.Which action should be taken in case of a conflict between, for example a specific human right and an international trade rule of law, whether such rule is internal, community or international? Should the rules related to human rights superpose those regarding the international trade or, for the sake of progress of the mankind, should the free trade be protected on a predominant basis? Should the legal order advance towards the preparation of a new set of rules that concurrently protect the free trade and the fundamental individual rights?

In an attempt to promote an approximation between those two fields, the UN Committee on Economic, Social and Cultural Rights affirmed that trade liberalization "must be understood as a means, not an end. The end to which trade liberalization should serve is the objective of

human well-being to which the international human rights instruments give legal expression" (UNITED NATIONS, 1999, p. 2).

Anyway, it is obvious that the capacity of movement of capital through the geopolitical frontiers brings consequences to the human rights. The violation of human rights has been present in the legal scenario since before the economic integration, but the growing number of sectors regulated by multilateral and bilateral agreements on trade and investment brought forward new possibilities of abuse that have not been provided for and received legal treatment. The tensions are clear between the legal regimes that regulate the international trade and the human rights, but it is necessary to search for synergy aspects between those two fields. The international trade and investment policies and the private practices on international business must be included in the human rights framework, thus constituting a means to achieve the international goals of pacification and development (STIGLITZ, 1999, p. 390).

The preamble to the Marrakesh Agreement, for example, does explicitly express any concern about the human rights, but brings expressions such as "standard of living" and "sustainable development" to light. The sustainable development, according to Amartya Sem (1999, p. 11), requires removing one of the main freedom restriction forms: poverty, just like tyranny, lack of economic opportunities, as well as systematic social deprivation, negligence of the public institutions and the repressive practice from the States. Despite the unprecedented development of the standards of living, the contemporary world denies fundamental freedom to a great number of persons. The fundamental freedom comprises not only the main aim of the development, but also its main means. The political freedom help to promote the economic security. Social opportunities facilitate the economic participation. The economic benefits help to generate public and private resources for the social benefits. Therefore, freedom is interrelated and strengthening, thus building a mechanism to promote the development that experienced by the international trade.

In addition, even if the international trade is, at GATT level, limited by clauses such as the Most-Favored-Nation rule and the National-Treatment rule, there is no specific provision to restrict the trade of products as far as the protection of human rights goes. Article XX of the GATT acknowledges, however, that the States may interrupt trade agreements without constituting a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade, in order to adopt measures to protect public morals and human, animal or plant life or health. Besides, the WTO Appellate Body of the Dispute Resolution System observed, in previous reports, that the provisions of article XX of the GATT must be construed in view of the preamble to the Marrakesh Agreement (WORLD TRADE ORGANIZATION, 1998, p. 50).

Generally speaking, however, the interpretation of the international obligations is subject to article 103 of the Charter of the United Nations, establishing that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". Even if the most concrete references to the human rights is made in the Universal Declaration of Human Rights and in the specific Covenants, the Charter of the United Nations bring important references to the protection of human rights, inter alia*, those that refer "to reaffirm faith in*

fundamental human rights, in the dignity and worth of the human person" (Preamble) and "promoting and encouraging respect for human rights and for fundamental freedoms for all" (Article 1).

Therefore, it is obvious that, in the event of a conflict between the obligation to protect the human rights, acknowledged in the Charter of the United Nations, and a commercial commitment arising out of international treaties, the obligation provided for in the Charter must prevail, thus binding the interpretation of the treaty to that obligation. Consequently, the GATT and other WTO agreements must be construed in light of the human rights rules. Likewise, the private obligations of commercial nature, as well as the private investment agreements, must be subject to the obligation erga omnes *of protecting the human rights.*

The interaction between the international trade system rules and the mechanisms to protect the human rights may be illustrated by the case of protecting the intellectual property. At medicines' level, the patents represent the dominant factor to determine the prices, and they are protected by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It is possible to observe that this public international law provision substantially comprises the international guarantee of a private right. The Agreement sets forth the patent ownership by the author - individual or corporation - for twenty years, thus preventing that third parties are able to produce the medicament, but allowing exceptions to the exclusivity right in specific cases of interest for the public health or social welfare. The parallel importation, for instance, allows countries to purchase cheaper versions of the patented medicines without restrictions. The compulsory licensing, in turn, allows that governments produce generic versions of the medicines (WORLD TRADE ORGANIZATION, 2006, p. 4). As the TRIPS is implemented, there will be a more severe restriction to the domestic production of generic medicines, especially in emerging countries that produce generic versions to other countries (SCHERER, 2001, p. 13).

The rules regarding the intellectual property in the TRIPS are considerably less strict than those included in more recent bilateral free-trade treaties. These new agreements impose more restrictions to the use of the intellectual property on medicines, making it harder, for example, the admission of generic medicines after the patent has expired. In addition, some extend the patent term for over twenty years, thus imposing a limitation to the compulsory licensing and forbidding the parallel importation (SCHERER, 2001, p. 14). Despite the harmful effects of the protections to the intellectual property contained in these agreements, the participation of many countries, mainly the emerging ones, may be associated to the fear of a commercial sanction in case of non-accession (SCHERER, 2001, p. 8).

In the case of the intellectual property on medicines, the arguments to protect the patents include the need to protect the intellectual property as a means for continuous scientific innovation, as well as the individual right of the authors to receive the credits for their work. it is worth pointing out that there is no parity between the private intellectual property rights on an invention, which is granted by the public law rules, and the public right to have access to medicines, which is fundamental for the mankind. Anyway, the major issue on the intellectual property is its use as a device to settle the prices of the medicines, frequently making them inaccessible to a great number of people.

The dichotomy between the search for economic growth through the execution of agreements that oblige countries to deny a human right to their citizens provokes a passionate debate on which aspect must prevail (STEINER, 1988, p. 79). Some international legal instruments have defended the predominance of the human rights on the commercial obligations. The main argument for such position is the fact that the individual human rights are the weaker and more vulnerable, and they must take priority where there is a commercial conflict of interests. However, other international law documents establish the possibility of limitation of the human rights to protect the collective interests. The International Covenant on Civil and Political Rights, for example, admits the restriction on certain rights - liberty of movement, religion, press, and association with others - to protect the national security, the public order and the public health. The Covenant also allows that countries to suspend the human rights due to public and official circumstances that threaten the life of the nation but forbidding the derogation of the right to life and liberty, as well as the use of torture. In addition, the restriction must always occur as the last resource to achieve a common specific aim, always presenting the least restrictive character possible (STEINER, 1996, p. 132).

At community law level, for instance, the interaction between the protection of the human rights and the execution of agreements made the European Union include a human rights clause in its agreements with non-member countries. That clause classifies the respect to human rights and to democratic values as core values to maintain a relationship with the European Union. The human rights clause has been included in agreements of several disciplines, especially those on the cooperation for the development, commercial exchanges and financial aid, as in the case of the EU-India Cooperation Agreement on Partnership and Development, whose Human Rights clause had its legitimacy confirmed by the Opinion 2/94 of the European Court of Justice.

The system to include this clause in the agreements consist of the so-called essential clause, setting forth that the respect for the fundamental rights and liberties provided for in the Universal Declaration of Human Rights must pose as a parameter for all the conducts of the parties to the agreement and, in the additional clause, addressing the hypothesis of non-compliance with the agreement due to violation of human rights. Therefore, the agreements entered into under the effect of those human rights clauses offer more transparency and commitment with the general objectives of the International Law (MILLS, 1997, p. 270). One possible consequence of including this type of clause in agreements will be its application to private contracts as well, through the strengthening of the regulatory structures and the national legislation. In this aspect, it is obvious the crystalline convergence between the public community law rule and its projection towards the internal rules of private law and the covenants between private entities.

In this sense, it is important to observe that, although the obligation to protect the human rights is attributed mostly to States and intergovernmental organizations, the Universal Declaration of Human Rights imposes to all individuals and bodies the responsibility to promote the human rights. The article XXIX of the Declaration states that "everyone has duties to the community in which alone the free and full development of his personality is possible". Therefore, the actions of private players capable of producing a substantial impact on the society must not be

exempt from the incidence of obligation to guarantee the fundamental rights and liberties, through the full and concrete implementation of the rights granted in the international instruments.

The contemporary interest in developing efficient measures to introduce the protection of human rights also in the contracts and agreements of private entities emerged from the absence of solid structures to regulate the activities of transnational corporations (NEWELL, 2000, p. 121). The need to prepare a code of conducts for the transnational corporations has been inserted for decades in the international agenda, making institutions such as the Organization for Economic Co-operation and Development (OECD) to produce documents containing behavioral standards for the corporations. However, those documents are already outdated in relation to the codes of conduct that many companies have prepared internally (McLaren, 2000: 192); also, they do not have a binding nature in relation to the conduct of transnational corporations. In spite of those restrictions, some authors point out that those codes of conduct prepared at OECD level, for example, represented a turning point in the sense that it encouraged the companies to prepare their private codes and a consensus in relation to the practices regarded as proper to the corporate behavior in international trade (MUCHLINSKI, 1999, p. 49; SEYFANG, 1999, p. 26).

A specific point of concern is the clear disparity between the rights and obligations of the transnational corporations. The economic history reveals a predominance of the rights of investors as compared to the obligations assumed by them to adhere to commercial contracts. Although the strengthening of the national and international regulation of the activities of the transnational corporations help create guidelines to assess the responsibilities of the companies with their hosts, it is clear that, due the absence of implementation and enforcement mechanisms, the level of protection against violations to the human rights due to irresponsible investments and practices remains low.

The global contemporary challenge in the economic sector consists of how to influence the globalization process so as to eliminate human suffering, poverty, exploitation, exclusion and discrimination. Bearing in mind that the trade is the driving force of the globalization, it is essential that its regulating rules do not violate the human rights. The state and supra-state rules concerning the international trade, as well as the private agreements and contracts, must not countervail the rules that grant protection to the fundamental rights and guarantees at the international level. As the human rights are erga omnes *obligations, or principles of law, they must exercise influence on the interpretation and application of the trade-related rules. Consequently, the international trade, which represents a field that naturally comprises the private interests of those involved in commercial transactions, converges with the protection to the human rights, a field where the public interests befalls on a direct basis. International trade and human rights must be, above all complementary and converging fields.*

3 GLOBAL GOVERNANCE AND THE PROTECTION OF DIFFUSE AND COLLECTIVE RIGHTS

The global governance represents a combination, according to Rosenau (1992, p. 17), of voluntary

human interactions that regulate the international actions directed to commonwealth. They consist of a form of management that emerges from the institutions, processes, rules, formal agreements and informal mechanisms that provide a field of action for the human activities. The governance is based in the sharing of expectations, as well as the internationally conceived institutions and mechanisms. That management is set under the scrutiny of the legal view, from the moment that it imposes a set of new rules and institutes to the international order, addressed to the accurate regulation of several areas of the human activity. The regulation of those actions by non-state entities represents an important development, and it may be regarded as an initial milestone of global governance, where a restructuring of the distribution of power at the international level is observed.

The use of the term "global" aims at representing the coordinated action at local, transnational and international levels, instead of the relationship only among the States, in order to seek solutions for their controversies. There is an implicit acknowledgement of the interconnection between the individual actions and the global results, such as the discharge of carbon dioxide in the atmosphere by a local company, thus contributing to global warming, as well as between global actions and local results; for instance, the transnational capital flow and the regulation of the national savings. Therefore, the global governance serves to manage the public and the private sectors, that are projected beyond the State boundaries (STEPHAN, 1999, p. 1558).

Consequently, global governance refers to the process that aim at the management and solution of the issues that involve several Governments, including (a) converging efforts between public and private entities to prepare rules, (b) the production of normative provisions by international bodies, thus leading to the execution of agreements, (c) the interstate negotiation for the execution of treaties, (d) the resolution of disputes by international organization, (e) the development of codes of conduct by the governments, (f) the preparation of codes of conduct, agreements and action policies by the private sector, and (g) the coordinated action by international regulatory agents (BODANSKY, 1999, p. 603).

Therefore, the scenario of global governance is the global society. However, there is a strong controversy as to the existence of an international society, in the sense of sharing social and legal values between the national spaces and the international level. Some scholars point out that mankind moves towards an international society with values and rules shared through solidarity. Others, on the other hand, defend that there is no international society, as there is no congregation of rules between the different nations, and any attempt to achieve it would lead to disputes between the different characteristics of the legal systems. While the liberals defend that the non-state players have decisive influence in the international scenario, the realists tend to affirm that only the States determine the policies at international level. Anyway, it is not the participation of non-state agents that constitutes a new phenomenon, but the speed with which such agents are influencing the global governance process.

In addition, the controversial nature of global governance, as regards the international legal order, is even greater due to the interchange of legal institutions between different systems and due to its global consolidation. That phenomenon is observed, for instance, through the

imposition of a legal principle by an international body, not only to the States, but also to the national legal systems, as it occurs in the case of the respect for the universal human rights. The direct transference of a legal institute from one system to another, as it was observed in the American invasion for the democratization process in Iraq, also illustrates the interchange of institutions. Other examples include the imposition of a procedural principle that belongs to an international organization to a national legal system and, in contrast, the transfer of a national law principle to the international legal order.

More attention is paid to the global governance concepts at the end of the 20th century and the beginning of the 21st century, as a result of the awareness regarding the interconnection of the human activity on the planet. Discoveries on the interdependence of the species and habitats for survival, on the effects of the human activity on the biosphere, and on the volatility associated to the fast cash flow through the national borders contribute to the sense of globalization of the human society. It is in this context, and with wider knowledge on the potential damage deriving from those human processes, that the idea of global governance assumes greater importance. The challenges of structuring societies so that their activities do not cause irreversible damage to the biosphere, while producing a sustainable development, have drawn increased attention on global governance as an alternative to achieve the public good at an international level (WIENER, 1999, p. 732).

The philosophy that concerns the environment, as pointed out by Lejbowicz (1999, p. 167), is opposed to that of the territory. The environment is an almost immaterial space that ignores the States, giving them a transnational responsibility. The protection of the environment emerges, therefore, as one of the strongest examples of diffuse and collective rights on which the interference of global governance is outlined. Non-governmental organizations, transnational corporations and individuals begin to participate actively in decision-making processes relating to international environmental policies, especially in the era of globalization.

This facet of the contemporary international scene points perhaps to a globalization of law. A single cosmopolitan legal system is not found in the horizon, though it is coveted by many lawyers. The process of establishing global governance, on the other hand, affects some areas of law in specific matters, even if they affect an increasing number of objects. The existence or the establishment of common legal principles does not represent a project of legal cosmopolitan codes, but the fundamental capability of communication between legal systems and between cultures (D'AGOSTINO, 1996, p. 45). This dialogue is a tool to show how legal instruments coexist and interact, and perhaps to show how the diversity of legal systems should be maintained.

The globalization has allowed the civil society to become the key player in the process of global governance and to push international institutions towards the development of international measures to solve the problems. Governance is no longer limited to those speakers enrolled in the conferences of the United Nations. Instead, it expands to all legitimate stakeholders affected by the challenges that transcend national borders. As a result of such displaced exclusivity of the decisions of States to a plurality of agents, governance becomes complicated and diverse, thus dissolving the boundary between public international law and private international law.

CONCLUSION

The distinction between public and private international law was strengthened in the context of increasing individualization of political thought and legal authority in the modern State. It was a method of managing both the conflicts between contiguous territoriality and the restriction to absolute individualization (CUTLER, 1997, p. 269). The operational context of these disciplines, however, has undergone major changes in the post-modernity.

The contemporary global challenges are so many that they have led Erik Jayme to use the term "post-modern international law" to conceptualize a multicultural dimension able to differentiate the precedent law from the axiological contents considered currently (MIRAGEM, 2005, p. 312). The State now acts beyond its borders as a private investor, through the creation of sovereign wealth funds. The incidence of public interest standards for ensuring human rights is growing even in private contracts of international trade. The concept of individualization of State-controlled legal authorities is revisited from the movements of redistribution of power in the international scenario promoted by global governance.

Thus, in the pursuit of a law applicable to the complex interrelated international community, Philip Jessup emphasized that the term "international law" was inappropriate, since it suggested the inclusion of relations of only one State with another (TIETJE et al. 2006, p.27). For Jessup, the international community is outlined by the emergence of transnational situations that involve a considerable diversity of players such as individuals, corporations, States, international organizations and other groups. Avant garde in its conception, the transnational law would be the regulatory framework governing these situations, including every law which regulated actions and events transcending the national border. Both the public and the private international law would be included, as well as other rules of law which not fully incorporated into one of these classifications (JESSUP, 1956, p. 3).

In the current scenario, as pointed out by Klare (1982, p. 1361), it is a mistake to imagine that the legal discourse or the liberal political theory contains a model for public/private distinction capable of being filled with certain contents or applied in a certain way to concrete cases emerging in the post-modern international law. There is no public/private distinction; instead, there are lots of ways of thinking about the public and the private, and these ways are constantly subject to revision, reformulation, and rereading.

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