

JUSTICE REFORMS AND MIGRATION OF ADR MODELS
THROUGH THE “NEW” INTERNATIONAL
CONDITIONALITY. THE CAMBODIAN ARBITRATION
COUNCIL

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Justice reform in developing countries is one of the most important priorities of international economic organizations. That purpose is frequently followed by setting up new institutions beyond national authorities, in order to prevent the latter from interfere with the functions of the previous. Theories linking economic growth and rule of law models offer legitimization to the legal transplants, officially at the aim to meet the international standards. Some experiences – such as the Cambodian case considered in the following pages – highlights, however, that this connection is often unbalanced and the new model's regulation seeks more a productive increase than better justice in the field of fundamental rights.

I. INTRODUCTION

The development of interaction dynamics between state legal systems – and between those and the normative standards settled by international organizations – is a common field of study for jurists of different legal branches. The post-soviet transitions of Eastern Europe stand as a demonstration of the ongoing dialogue focused on development of democratic institutions and effective sharing of normative provisions on fundamental rights¹. By the end of last century, comparative studies highlighted a significant increase in the reception cases of Western legal models by the remaining areas

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¹ See K. Topidi, A. Morawa (ed.), “Constitutional evolution in central and eastern europe. expansion and integration in the EU”, Farnham:Ashgate, , 2011. See also G. De vergottini, “Le transizioni costituzionali”, Bologna:il mulino, , 1998, p. 211-212.

of the world². Among developing countries the majority of the imitations of Western normative solutions have been grounded on the conditionality³ imposed by the developed nations – on the commercial treaties – and by the international organizations – on the cooperation and development programs – rather than on the “prestige”⁴ of those models.

The research that is going to be illustrated on the following pages assumes as reference point the promotion of arbitration as an attempt to fight corruption and strengthen “*good governance*” in developing countries. The following exposure technique reflects a specific choice to distinguish the analysis of the “causes”⁵ that have stimulated the migration of ADR (Alternative Disputes Resolution) models and the “results” occurred in recipient countries legal systems.

The case-study selected for this purpose is the experience of international cooperation that established the Arbitration Council of the United Kingdom of Cambodia, to which the jurisdiction on workers' fundamental rights and liberties has

² For a critical approach to the subject, see U. Mattei, L. Nader, “Il saccheggio. Regime di legalità e trasformazioni globali”, Milano-Torino: Mondadori, 2010. Specifically, about the political influence of the united state agency for international development (usaid) on the latin-american countries, see C. Coronel, R. Doughman, E. Duré, A. Irala, M. Palau, “Usaid en Paraguay. la asistencia como estrategia de dominación”, Asunción (Paraguay): base investigaciones sociales, 2012.

³ Since 1952, the principle of conditionality has been implicitly introduced by the international monetary fund (imf) triennial grant policies to force the beneficiary states to adopt a specific balance approach, characterized by a restrictive orientation on public spending. the practice of financial conditionality has known a growing legitimation and diffusion among the lending policies due, above all, to its convergence function between the objectives of contracting parties: the beneficiary interest in obtaining the lending is bound to the implementation of the politics that the borrower considers more appropriate to ensure production growth and, with this, the successful conclusion of the relation with the restitution of the amount agreed. on this argument, M. Guitian, “Fund conditionality evolution of principles and practices”, Washington: Imf pamphlet series, 1981, pp.10-14. After its extension to bilateral and multilateral archetype of non-lending agreements, the practice of conditionality was formalized by art. 60 of vienna convention on the law of treaties of 1969, which states that «the violation of a provision essential to the accomplishment of the object or purpose of the treaty» represents a «material breach» that authorizes the parties to «terminate the treaty or suspending its operation in whole or in part». not every infringement authorized the suspension of relationships, but only those that interest the essential clauses identified by the parties or identifiable through the interpretation of the provisions.

⁴ On the concept of “prestige” as a causal explanation of the legal models circulation, see R. Sacco, “Introduzione al diritto comparato”, Torino: Giappichelli ed.,1990, p.180 (forth edition).

⁵ Following Ran Hirschl’s idea of comparison, «a good theory requires to clarify concepts *as well as* offering causal explanation for observed phenomena»: see R. Hirschl, “On the blurred methodological matrix of comparative constitutional law”, in S. Choudhry (ed.), “The migration of constitutional ideas”, Cambridge: cup, 2006, p. 46.

been progressively conferred. Initially, the article will focus on the two most significant aspects from a comparative point of view: on one hand, the link between the dynamics of finance and the spread of *rule of law* institutes; on the other hand, the role of international organizations in the monitoring transplant processes and the provision of “technical supply” to lead the legal model toward the predefined function. The second part of the analysis will focus on some statistical data concerning the activity of the Arbitration Council, by comparing them with the original targets of the *Labour Dispute Resolution Project* that started and sustained the institution-building experience.

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

Before proceeding with the illustration of facts, here it is important to point out that in the following pages the legal experience is considered as a part of a (more complex) system for the production of an historically-predetermined model of social life. For that purpose, to avoid ambiguity and clarify the consequences of that theoretic approach, it is preferable to study the circulation of legal models in the specific point of view of the “cooperation for development” promoted by the international organizations, as main actors of the ongoing globalizing process. From this perspective the concept of “law” dismiss the usual neutral sense – on the basis of which it comes as a mechanism for the regulation of the social life – while emerges its function as an instrument for the domination of the multiplicity of reality available to an historically predetermined political power⁶.

⁶ N. Irti, “L'ordine giuridico del mercato”, Roma-Bari: La Terza, 2003, p. 8-10.

II. THE PRINCIPLE OF CONDITIONALITY:

FINANCIAL BALANCING AS A WAY FOR CULTURAL HEGEMONY

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

The increasing removal of obstacles to the full development of economic liberties beyond states boundaries – considered necessary for better working conditions⁷ – associate the statutory objectives of some of the most important institutions born in the early postwar: the International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF), the General Agreement on Trade and Services (GATT) and, last, the European Economic Community (EEC).

By the way of those supranational bodies, the industrialized countries have sought the construction of a uniform commercial law that has increasingly claimed its autonomy from the national political powers and, generally, the “other places” intended for political and social negotiation where all the provisions of law take form⁸.

⁷ One of the main objectives of the *ibrd's articles of agreement* (1944) is «to promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories» (article 1).

⁸ F. Galgano, “Lex mercatoria”, Bologna: Il mulino, 2011, p.12. This article shares the authors point of view for which the «legal particularism» of commercial law is based both on its rule-making technique and on the limited range of human relationships covered by those rules. on the first side, the medieval and contemporary history of *lex mercatoria* testifies the continuous ambition of commercial law to reach its autonomy from civil law (p. 10). what in doctrine is

The development path followed by the *standby arrangements* of the IMF represents good evidence of this tendency. The original version of this type of agreements found its scope in postwar-reconstruction lending to benefit of the most affected states which, in exchange, assumed the commitment to reform specific institutes concerning the regulation of commerce. The main targets were: the elimination of the existing limits to the freedom to conduct a business and external exchanges; the institution of an internal market founded on the principles of competition; the removal of State financial support to the national industry. The normative content of *standby arrangements*, moreover, became more complex in the seventies, when the consequences of the oil crisis on the balance of payments increased the member states' pressure for more cash to the International Monetary Fund. More specifically, an extension of the term of the financial assistance program was granted (from one to five years) linked to more restrictive requests on “aggregate demand” policies. Consequently, those imbalances had been, not only the economic, but also the political basis for cutting the state services' budget⁹.

In the aftermath of Soviet disaggregation, there was an increase of developing countries adhesions to the IMF cooperation programs, of which the Western States were (and still are) the main donors and promoters. The primary objective pursued by global institutions in this historical context is the adjustment of the East Europe and Asiatic economies which have quit the state-planning experience. Usually, the role played by the law in the global market construction and the investments made by Western States in the “exportation” of their legal models is not adequately acknowledged. From these considerations is possible to assert that the adaptation of the national “legal

commonly called «commercial law» effectively regulate neither the *whole*, nor *only* commerce (p.11). one the most important examples of this characteristic is the increasing number of relationships – and so, the subjective rights – ruled by contract statements or through procedures – such as arbitration – deriving from them.

⁹ F. O. Anunobi, “The implications of conditionality”, Lehman: University Press of America, 1992, p.162. The economic theories affiliated to the imf lending policies have always declared the existence of a implied link between the excess of goods demand, inflation and destabilization of the states' balance of payments. on this belief have found an explanation the usual requests of cuts on public spending (especially, those related to the medical assistance) that have been advanced in exchange for the subsidized rates grant by the fund.

when the *standby arrangements* have a long-term duration, the lending conditions are stated in a «*letter of intent*» drawn up by the imf representatives and subscribed by the minister of economy of the beneficiary state. after a long period of absence from the international scene, this typology of agreements have found a new life in the aftermath of the 2008 financial crisis, which has brought many imf member states to make further demand on the assistance programmes.

infrastructure” of any country to the world competition does not start “free” or “spontaneous”, but is imposed as a requirement to be part of the system of international exchanges supported by global institutions¹⁰.

However, there is another totally original aspect that has arisen since the end of the last century: it is the increasing acceptance of the theory asserting a connection between economic development and the constitutional principles promoted by liberalism. Under this influence, the content of conditionality is increasingly moving from the traditional area of commercial and financial law to the main representative aspects of the relationship between public authority and citizens¹¹. For that reasons, at the start of the new millennium the states accession to the main organizations of international commerce and finance is subject to the acceptance of specific standards of human rights protection¹². This implies two very important consequences. First, the trade organizations can express their rating both on the level of economic liberty and the efficiency of national legal systems. Second, the States that aim to enter the system of international relations ruled by World Trade Organization and International Monetary Fund shall reform their normative and institutional framework in order to match the legal models recommended by the latter. Reflecting on this process, legal science has introduced the notion of «political conditionality» to indicate the set of principles and norms – derived from customary international law (*jus cogens*) and the main international bodies' soft law – which shape the legal category of «human rights», «democracy» and «good governance»¹³

¹⁰ U. Mattei, L. Nader, “Il saccheggio”, *supra*, note 2, p. 13. The authors point out the different ways of legal models migration: apart from military domination and the «prestige» of a normative institute, can be traced another way, the «conditional imposition». this expression means that «the acceptance of a system of rules is not totally free. the interested countries are persuaded to adopt the legal structures which meet western standards if they do not want to be excluded from the international market».

¹¹ The global institutions policies try to synchronize economic development and legal system reforms. as is stated by the *world bank development report*, of 1999: «without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible». available at: <http://web.worldbank.org/archive/website01013/web/images/cdf.pdf> (last visited sept. 28, 2015).

¹² M. R. Ferrarese, “Il diritto al presente. Globalizzazione e tempo delle istituzioni”, Bologna: Il mulino, 2002, p. 116.

¹³ P. Uvin, I. Biagiotti, “Global governance and the “new” political conditionality”, in *Global governance*, 1996, 2, p. 377: «yet political conditionality may also be more broadly defined as a set of specific state behaviors – respecting human rights, organizing multiparty elections, working in a good governance mode, and cutting military spending – that are internationally upheld as conducive to development and whose realization is promoted, *inter alia*, through that leverage instrument. the specific state behaviors that are promoted may be said to

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

The intervention of the International Labour Organization (ILO) in the industrial dynamics of Cambodia is not an isolated event, but it is a part of a wider justice reform strategy started in the beginning of the new millennium by the common and coordinated action of the major international organizations¹⁴. Recently the World Bank “activism” in financial and technical support of *judicial transplants* has conferred a preeminence to the theoretical approaches that pose the effectiveness of rights at the center of economic growth programs¹⁵.

The emergence of this trend is a reflection of a clear strategy prepared by the law offices of these organizations, who are asked to make an assessment of the impact of the law (public and private) on the economic performance. The results obtained are the basis for elaboration of the reforms required to initiate or continue a loan. Although the

constitute a regime: sets of internationally dominant principles and norms around which expectations converge and that define acceptable state behavior for both recipient and donor countries».

¹⁴ In the nineties a decisive turning point occurred in the lending policies of the world bank and imf. it is a moment of general exaltation of the models of liberal constitutionalism – of which is celebrated the rational superiority to the principles of “socialist legality”. for the financial institutions it is an opportunity to reaffirm the link between economic growth and the rule of law, and open a way for reconsider the prohibition of interference with the political affairs of the borrower states prescribed at article iv, sec. 10, ibrd articles of agreement. this is confirmed by the studies on the firsts eight «*Justice Reform Projects*» (1995-2007), commissioned by the world bank itself: see, “Justice Reform Projects in Latin America: lessons learned (1995-2010)”, *Working paper no. 70755*, 2011, p. 7, available at http://www-wds.worldbank.org/external/default/wdscontentserver/wdsp/ib/2012/08/22/000425962_20120822175755/rendered/pdf/707550esw0p1090s0learned01995020100.pdf (last visited sept. 28, 2015).

¹⁵ Between 1994 and 2012 there were 36 the projects which aimed to support justice reforms, for an annual commitment of \$24 million. to this figure must be added the presence in many investment projects (388, to be precise) of significant items of expenditure (on average, at least 10% of the total amount of the loan) dedicated to the issues of «*law and justice*» or the «*rule of law*». see “New directions on justice reform – a companion piece to the updated strategy and implementation plan on strengthening governance tackling corruption”, *Working paper no. 70640*, 2012, p.3-4, available at http://www-wds.worldbank.org/external/default/wdscontentserver/wdsp/ib/2012/09/06/000386194_20120906024506/rendered/pdf/706400replacem0justice0reform0final.pdf (last visited sept. 28, 2015).

content of the agreements may therefore vary depending on the characteristics (political, social and legal) of the recipient country, the conditionality of the World Bank and the IMF follows consistent criteria that give to the support activity a certain uniformity in the results.

The «*New Directions on Justice Reform*» is the World Bank document that summarizes best the *modus operandi* of international organizations. In this publication, the Legal Vice Presidency explains in detail why the judicial system of a State carries out functions critical to economic growth, highlighting three different profiles. First, the proper functioning of justice is considered necessary to prevent crimes and mitigate the level of conflict and violence in society, identified as the main barriers to a sustainable development. Second, it attaches to the administrative and criminal jurisdiction a decisive role in the fight against corruption, theft of public property by the ruling *elites* in developing countries and, more generally, in the prosecution of crimes committed in the management of the economy by the public authorities of the State. Finally, the judicial system is recognized as an essential function of "driving" the economy, to the extent that it ensures the growth of the private sector in accordance with the framework traced by the political bodies of the country and the international bodies of the various business sectors. Therefore the Legal Vice Presidency believes that the predictability of the legal effects of contracts, the presence of legal protection of property rights and a system for resolving legal disputes are «key determinants of economic development»¹⁶.

The construction of a theoretical link between rule of law and economic growth has influenced legal science studies too. In fact, when the concept of «development» – as it has been declined during the decennial activity of report and technical assistance of the World Bank – entered in the reflections of comparative doctrine, the same classification of legal systems came out transformed. The traditional divisions are based mainly on the *rule-making process* (common law and civil law) or on the degree of influence of political, religious or cultural factors in the functioning of the legal system of the country (democratic state, socialist state, authoritarian state, theocratic state). However, there are long-established approaches to the comparison that tend to divide legal experiences according to their adherence to the principles of «good governance» and «good

¹⁶ See, "New directions on justice reform", *supra*, note 15, p.2.

government» derived from international humanitarian law and democratic theories¹⁷. It can be traced back to these assumptions the distinction between «developed» and «developing nations» based on the presence or not of fully evolved legal infrastructure and able to efficiently regulate private trade¹⁸. This division plays a particularly important role in terms of migration of legal models. Attempts to transplant have a greater legitimacy from legal doctrine when affecting the countries with a low level of development, but are generally not considered appropriate when the country “receiver” has an evolved legal system. Thus, for example, the “strengthening” of private autonomy – even through the regulation of contractual legal relationships involving rights constitutionally established or, more generally, matters of public law – is presented as one of the most effective remedies in respect of inefficiency of government and public administration in developing countries¹⁹. In contrast, in a mature industrialized context, where administrative law and constitutional law have developed a proven system of protection of public interests, it is believed that a similar solution could question the legal certainty and the very quality of regulation²⁰.

¹⁷ V. Jackson, “Comparative constitutional law: methodologies”, in M. Rosenfeld, A. Sajò (ed.), “The Oxford Handbook of comparative constitutional law”, Oxford, 2012, p. 55-56 e 60. The author warns about the possibility of considering this type of study as real “classifiers”, even when the formal presentation is such. it would be appropriate to distinguish, therefore, the case studies in which the real interest of the comparatist is the definition of constitutional models, rather than those in which the study of foreign law is aimed at the construction of a general theory capable of giving answers to the problems of contemporary democracies (such as the relationship between legality and equality, or between judicial review and democracy).

¹⁸ PJ. Mc Connaugay, “The scope of autonomy in international contracts and its relation to economic regulation and development”, in *Columbia Journal of Transnational Law*, 2000, 39, p. 601. it is interesting to read the author's word: «this article distinguishes “developed” from “developing” nations in a purely functional way. developed nations are those nations that enjoy fully developed legal infrastructures and the ability to effectively regulate commercial activity-principally the major industrialized trading nations of the west, perhaps along with the few most advanced industrialized nations of asia. developing nations are those nations whose judicial and commercial regulatory institutions lack the capacity to perform their prescribed or intended functions effectively, whether because the institutions do not exist, because they are under-developed, because they are under-funded, or because of some other disabling attribute, such as corruption».

¹⁹ PJ. Mc Connaugay, “The scope of autonomy in international contracts and its relation to economic regulation and development”, *supra*, note 18, p. 603.

²⁰ PJ. Mc Connaugay, “The scope of autonomy in international contracts and its relation to economic regulation and development”, *supra*, note 18, p. 602: «the risk of under-regulation occurs because, when a developed nation's otherwise applicable public law is allowed to be displaced by private contractual election, the likelihood is that the contracting parties will elect a lesser or even ineffective regulatory substitute».

That said, the presence of a "dialogue" between legal science and international institutions can be inferred from the detection of some key determinants in the cooperation projects initiated by the World Bank in the field of justice. First, it can be observed that "*conditionality*" has been directed mainly towards the newly industrialized countries and has served to accomplish multiple actions of assistance and training personnel for the development of self-management skills of disputes and judicial services²¹. The first "lesson" learned by the experts of the World Bank is that interventions to support reforms cannot aim at the "rewriting" of the constitutional principles of justice without taking account of their concrete application. The tendency is therefore to move from one action to support wide-ranging (*«multi-faced approach»*) to a cooperation to meet specific questions (*«problem solving approach»*). Therefore, most of the expenses incurred by the Bank (on average, two-thirds of the investments allocated for each project) are used in the construction of physical infrastructure (buildings and equipment) and logistics (information services, legal publishing, management tools)²².

The Cambodian case stands to demonstrate that, when the "struggle for democracy" faces trade partnership requests, cooperation purposes often deviate from their original route. Furthermore, even the idea of justice come out transformed: the "open market society" asks shorter time for dispute settlement regardless any deep knowledge of a case. The aim is not to reach "substantive equity" in decision-making process but a "fair" and "shared" compromise between the interests involved in a dispute.

The conditionality of loans from the Bank in recent years has therefore shown a predilection for a "pragmatic" approach. In particular, the object of cooperation projects for justice strengthening is restricted to specific questions (*«the needs of end users»*) emerged as a result of a "diagnosis" on the state of Judiciary. In the World Bank idea, «sustainable development» means choosing the area of intervention by using "economic criteria". As stated by the Legal Vice Presidency, the question is not how to reform the judicial system, but when and how the judicial system – with its inefficiencies – prevents proper

21 for a thorough review of the cooperation projects in the field of justice sponsored by the world bank, see r. laver, *the world bank and judicial reform: overcoming "blind spots" in the approach to "judicial independence"*, in *duke journal of comparative and international law*, 2012, 22.

22 R. Laver, "The World Bank and Judicial Reform: overcoming "blind spots" in the approach to "judicial independence", *supra*, note 21, p.199

development of the country²³. Following this approach, the cooperative action of the Bank develops in three steps. The first phase aims to identify the regulatory area (for example, criminal law, copyright law, protection of vulnerable groups, etc.) on which it is intended to act and which must necessarily have some connection with economic growth to fall into the Bank “mandate”. In the following step is required that the processing of the reform proposals is specific enough to produce significant results in the actual conduct of the legal relationship. The program of cooperation must focus an issue that represents a brake on economic growth of the country (for example, corruption or, as it has been for Cambodia, the high level of conflict in industrial relations) and suggest an efficient solution. Finally, after an initial phase of implementation of the program, it is necessary to make an assessment of the impact of innovations – according to the predetermined standards and criteria. Then, in compliance with the issues of participation, the cooperation shall provide the opportunity for the sector stakeholders (non-governmental organizations, local authorities, trade unions, etc..) to propose guidelines to amend the supporting actions.

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

²³ «Rather than beginning with the question of how to modernize the court system, such efforts should begin by asking where failings of the justice system are constraint to equitable development». see, “New directions on justice reform”, *supra*, note 15, p. 9.

purposes of cooperation projects, on the other hand, it try to remedy the lack of confidence of the population towards the courts.

The experience of the legal transplant which involved the field of industrial relations in Cambodia, fully summarizes the features mentioned above, and anticipates some possible scenarios that may derive from the activity of cooperation as it has developed in that case. First of all, the episode highlights how the principle of conditionality works in trade agreements between industrialized and developing countries: it provides an example of how the economic interest becomes the engine of the processes of implementation of human rights and justice reform. Second, the definition of competences and the powers of the Arbitration Council testifies the character at the same time pragmatic and consensual of the cooperation programs of international organizations. The effective performance of the functions of the AC is subject to acceptance by the parties, at first, of the jurisdiction (which is normal since it is an arbitration), subsequently, of the decision within eight days following its publication. Finally, the “Cambodian model”, unlike other attempts of transplant funded in previous experiences from the World Bank, had a continuity that has allowed it to enter into the social dynamics of Cambodia (where the textile industry is the main source of economy and of employment for the population). This has contributed to the gradual transformation of the AC into a permanent organ of the Judiciary in Cambodia, with powers to intervene in the conduct of collective disputes, and basically “irresponsible” in relation to other powers of the Cambodian State (both executive and judicial).

The second part of this contribution focuses on the problematic of the sustainability of this model in the light of the ongoing process for a democratic transition undertaken by many developing nations.

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

During the nineties the reduction of manufacturing costs became one of the most important challenges for the companies facing global trade competition. With the mass exodus of Western companies to the Asian sweatshops, however, public attention was focused on working conditions in the textile sector in developing countries. Western companies were accused of supporting with their investments the dictatorships responsible for the repression of trade union struggles in the factories of the countries in the developing world. Consequently, there has been a spread of the practice of linking the opening of trade negotiations to the willingness of partner country governments to engage in the protection of workers' rights²⁴. The first significant example of this tendency is the North American Agreement on Labour Cooperation (NAALC)²⁵, a supplementary agreement to the treaty which regulates the commerce between the United States, Mexico and Canada from January 1, 1994 (North America Free Trade Agreement). The objective of NAALC is the promotion, «at the highest level possible», of some of the fundamental trade union and worker rights identified in the text of the agreement itself²⁶. The same formula was repeated in other bilateral agreements signed by the United States²⁷ and Canada²⁸ with some countries in the developing world, as a result

²⁴ The practice of including dispositions related to the promotion of working conditions in trade agreements does not remain isolated in the area of established democracies. as noted by S. Polaski, “Protecting labor rights through trade agreements: an analytical guide”, in *Journal of International Law and Policy*, 2004, 14, p. 14: «Canada and Chile have also included labor provisions in at least some of their bilateral trade agreements. Brazil, Argentina, Uruguay and Paraguay have included labor commitments and institutions as part of the architecture of the mercosur common market».

²⁵ The text of the agreement is available at <http://www.labour.gc.ca/eng/relations/international/agreements/naalc.shtml#naalc> (last visited sept. 28, 2015).

²⁶ Art.1: «The objectives of the agreement are to: [...]promote, to the maximum extent possible, the labor principles set out in annex 1».

²⁷ U.S.-Jordan Free Trade Agreement; U.S.-Singapore Free Trade Agreement; U.S.-Chile Free Trade Agreement.

²⁸ The Canada-Chile Agreement On Labor Cooperation is a supplementary agreement to the free trade treaty between the two countries having similar objectives to the naalc.

of internal pressures exerted by the national unions, determined to put a stop to the relocation of production sites.

From a legal perspective, the weak point of trade agreements containing clauses for the promotion of determining standards of workers protection, is the lack of tools to ensure their effective implementation. The system of penalties normally used in international trade agreements is unfit to cover this task and, especially in cases in which it has been implemented, has been more detrimental to the populations of the developing countries – for which orders from the West are an important source of employment – than for the governments or the multinational corporations, which were actually responsible for the breach of the obligations to protect²⁹.

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

The Cambodian case represents an exception to this trend. Firstly, because for the first time a “reward mechanism” was introduced consisting in the increase of quotas of products intended to have access to the American market in the event of proven improvements in the implementation of the provisions of the national Labour Code³⁰

²⁹ S. Polaski, “Protecting labor rights through trade agreements: an analytical guide”, *supra*, note 24, p.21: «A withdrawal of trade benefits could in some cases result in a diminution of employment that would harm the workers (the victims of the original non-compliance) as much or more than the employers (the perpetrators of labor law violations) and government (which tolerated the violations)». Similar remarks are made on the implementation of the provisions relating to the protection of workers in bilateral free trade agreements between the united states, on the one hand, chile and singapore, on the other by D. Wells, “Best practice” in the regulation of international labor standards: lessons of the U.S.-Cambodia textile agreement”, in *Comparative Labor Law And Policy Journal*, 2006, 27, p. 358: «In neither agreement is there is a process to enforce even the weak obligation that the countries take steps to comply with the international labour organization’s (ilo) fundamental (or core) international labor rights».

³⁰ Art. 10, lett. a) «The parties seek to [...]promote compliance with, and effective enforcement of, existing labour law, and promote the general labour rights embodied in the cambodian labour code». the commercial agreement is available at: http://cambodia.usembassy.gov/uploads/images/m9rzdrzmkgi6ajf0siujra/uskh_texttile.pdf (last visited sept. 28, 2015).

and generally recognized international standards³¹. Secondly, the program provides for regular monitoring of the progress made in working conditions and the effective enjoyment of trade union freedoms. It is carried out on an annual basis directly in the factories and, above all, it is not carried out by the parties to the agreement, but by the staff of International Labour Organization (ILO). Finally, the increase in export quotas is granted in the case of a positive performance of the entire manufacturing sector. Therefore, failure to adapt by one or more employers endangers the recognition of the trade benefits for the entire industry. The latter aspect activates a “horizontal mechanism of pressure” (from the workers and compliant companies to non-compliant ones) that has guaranteed, under the terms of the agreement, a general implementation of national and international provisions on workers' protection without the need for coercive intervention by state institutions³².

Furthermore, as an implementation of the provisions of art. 10 of the Trade Agreement, there are two distinct programs of cooperation undertaken under the direction and control of the ILO: the «Garment Sector Working Conditions Improvement Project» and the «Labour Dispute Resolution Project». The first³³ promotes a training program aimed at educating workers and employers in trade union activities in an attempt to channel towards legal practice social conflict that often resulted

³¹ Art. 10, lett. b): «The royal government of cambodia shall support the implementation of a program to improve working conditions in the textile and apparel sector, including internationally recognized core labour standards, through the application of cambodian labour law».

³² The connection between the system of premiums constituted by the increase in export quotas and the overall performance of the manufacturing sector is, according to keen observers, the "trump card" of the experience of trade between the united states and cambodia. see, S. Polaski, "Protecting labor rights through trade agreements: an analytical guide", *supra*, note 24, p. 22. for a deeper analysis of the export quotas experience see J.A. Hall, "The Ilo's Better Factories Cambodia Program: A Viable Blueprint For Promoting International Labor Rights?", in *Stanford Law And Policy Review*, 2010, 21, p. 427-460. it should be noted, finally, that in the first report prepared by the ilo, two years after the entry into force of the trade agreement, are recorded significant improvements in the enjoyment of trade union freedoms: see, First synthesis report on working conditions in cambodia's garment sector, november 2001, available on the ilo website <http://betterfactories.org/?p=3044> (last visited sept. 28, 2015). on the same page are available all the other following reports.

³³ The garment sector working conditions improvement project, also known by the name of «*better factories cambodia*», is structured in training courses on the application of the labour law rules addressed to employers, workers and other intermediate figures of the organizational structure of the industry in cambodia. the program also provides for the establishment of a committee responsible for consulting on how to implement the legislation, as well as monitoring and evaluation of progress in adapting to international standards, the positive outcome of which is subject to the issuance of the export license to the company.

in murders and attacks against activists. The second program, however, has given rise to the legally more significant aspect of this cooperation: the creation of a permanent arbitration tribunal, independent of other Cambodian institutions, and with functions of judgment in matters of trade union rights and collective disputes. The Arbitration Council (AC) was set up in May 2003 and then, after some fundamental modifications, it was re-established in December 2005.

V. SUSTAINABLE JUSTICE FOR LABOUR DISPUTES? AIMS AND APORIAS OF A “PROBLEM-SOLVING” APPROACH

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

The factual and legal context in which the project has been launched is, in fact, characterized by strong instability of social relations also caused – according to experts of the International Labour Organization³⁴ – by endemic corruption of judicial institutions and the Government that has fueled a general distrust towards the regulation of contractual business relationships and work. However, since the early years of the nineteenth century, Cambodia has become one of the leading nations in which Western companies of the textile sector invest, because, it is not part of the *Multi-Fibre Arrangement* (MFA) and there are no limitations on the amount of cotton that can be exported to Western markets (such as for China, Indonesia, Thailand and others).

With the increase in production volume, however, the problem of conflict in the workplaces does not disappear. On the contrary, in the years following the signing of the

³⁴ H. Van Noord, H. Hwang, K. Bugeja, “Cambodia’s arbitration council: institution-building in a developing country”, Geneva, *ilo working papers*, 2011, p. 2, available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_166728.pdf (last visited sept. 28, 2015).

US-Cambodia bilateral trade agreement the number of industrial disputes reached the maximum level³⁵. The need to bring the contrast inside the legal procedures and mutual recognition between the social parties – that is essential to engage in any form of negotiation – are the basis of the current features of the Arbitration Council. Its functions are set out in Article 310 and following of the Cambodian Labour Code, within the regulation of individual and collective labour disputes (Chapter XII) and of collective industrial action (Chapter XIII). The criteria for selection and training of the judging panel members, along with all aspects of the procedure and the issuance of the arbitration award, are subject to the regulation of Prakas 99 of 21 April 2004, issued by the Ministry of Labour³⁶.

The analysis of the legislation relating to the capabilities of the AC and the time of the arbitration procedure allows us to make an initial framework that highlights the unique character of this organism. First, despite the establishment of the Arbitration Council originated from a cotton trade treaty, its functions of judgment are not limited to this area, but have been extended, since the beginning, to all collective disputes regardless of the productive sector within which have arisen. Even more significant, however, is the wording of the second subparagraph of Article 312 which establishes the authority to decide not only disputes concerning trade union rights deriving from Cambodian and international law, but also «other disputes»³⁷, i.e. those disputes from which collective benefits could potentially arise for one or other of the parties to the conflict. The allocation of a decisive role in the control of labour relations, moreover, is reinforced by the provisions of Article 34 of Prakas, which gives to the Arbitration Panel «full powers

³⁵ By the study of the ilo documents and the reports of the arbitration council may be inferred a direct relationship between the growth in the volume of business and number of collective disputes: while the first passed by an amount of \$ 26.5 million in 1995 to \$ 2.8 billion in 2007, the latter, from 17 to 80 during the same period. See H. Van Noord, H. Hwang, K. Bugeja, “Cambodia’s arbitration council: institution-building in a developing country”, *supra*, note 34, p. 3 “and the arbitration council annual report”, 2011, p. 4, available, as the previous and subsequent reports, at: <http://www.arbitrationcouncil.org/en/media/publications/annual-reports> (last visited sept. 28, 2015).

³⁶ In the cambodian legal system, the *Prakas* is a sublegislative source of law and one or more ministers jointly are competent for the emanation. normally the prakas contains provisions that specify the content of laws and therefore plays a vital role in addressing the choice of the court, especially in a country where the judicial class has not developed a “culture of independence” from political power.

³⁷ «The council of arbitration legally decides on disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. the council's decisions are in equity for all other disputes».

of intervention» in the controversy. The latter is required to take appropriate action in order to stop violations of the rules and the negative effects that are derived: in particular, the AC may ask the reparation of the damages suffered by the parties, included the reinstatement of unfairly dismissed employees (point A) and the interruption of ongoing collective action (point C)³⁸.

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

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

³⁸ Art. 34, *Prakas* no. 99: «in matters referred to the arbitration panel, the panel shall have the power and authority to fully remedy any violation of provisions provided in the labour law, implementing regulations under the labour law, collective bargaining agreements or other obligations arising from the professional relationship between employer and employee. within the limitations of the labour law and this prakas, it has the power and authority to provide any civil remedy or relief which it deems just and fair [...]».

imposes a burden on the Panel to issue its decision within 15 days. It is not disputed that the brevity of this term contrasts strongly with the formulations that give full investigative powers to the arbitrators about the workplace conditions or that require them to examine all the documents brought by the counterparties in support of their demands³⁹.

The «problem-solving approach», which denotes the entire operation of transplant, is not clear only with regard of the delimitation of the judicial area – as has already stated above – but also with regard to the objectives. Therefore, if fifteen days are a clearly too short a period of time to “do justice”, it is not a coincidence that the legislative provisions requiring the Panel to examine only the issues that have led to the failure of previous attempts of conciliation⁴⁰ and to seek, before opening the judgment, a new basis for a mutual agreement between the parties.

As already known, the arbitral award can find his foundation in principles of transnational justice rather than sources of law. As in Jan Paulsson's⁴¹ *Idea of Arbitration*:

the law is a possible means, but not the only one, nor necessary the best. And so we discern that the purpose of arbitration is not to achieve compliance with the law. Legal justification may help because legitimacy may generate acceptability, but is not the primary objective [...] This does not mean that they are not attached, and profoundly so, to fundamental principles of law. There is no paradox. The principles in question are not invention of the law. To the contrary, they are antecedents of law. Ethics, utilitarian calculation, the hardwired influences of natural selection on behavioral biology — call them what we will; at some level we reach the granite of basic terms of social interaction

³⁹ Art. 312, par. 3 e 4, of labour code: «The council of arbitration has a broad power to investigate the economic situation of the enterprises and the social situation of the workers involved in the dispute. The council has the power to make all inquiries into the enterprises or the professional organizations, as well as the power to require the parties to present any document or economic, accounting, statistical, financial, or administrative information that would be useful in accomplishing its mission. the council may also solicit the assistance of experts».

⁴⁰ Art. 312, par. 1, of labour code: «the council of arbitration has no duty to examine issues other than those specified in the non-conciliation report or matters, which arise from events subsequent to the report, that are the direct consequence of the current dispute».

⁴¹ J. Paulsson, “The idea of arbitration”, Oxford: Oup, 2013, p.14-15.

that cannot be compromised and do not require explanation. Law must embody them; it cannot determine them

Further confirmation of this reading can be traced in the annual-reports in which the Arbitration Council takes stock of its activities and their future developments: the insistence with which the statistics relating to the increase in cases submitted to the AC are contrasted with a substantial decrease of strikes aimed primarily to demonstrate a commitment to the pacification of industrial relations⁴².

This ideal of labour justice has never been questioned by the promoters of the two international projects that have given financial support to the activity of AC: the *Labour Dispute Resolution Project* – directed by the ILO – until 2009 and the *Demand for Good Governance Project* – directed by the World Bank – which was completed in March 2014. In contrast, the model of the Cambodian arbitration tribunal is sponsored by the Legal Vice Presidency of the World Bank, as «an example of the application of an iterative, problem-solving approach to justice reform»⁴³.

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

It is necessary to add to the description above the important turning point marked by the signing of the *Memorandum of Understanding on Improving Industrial Relations in the Garment Industry* (MoU) on 28 September 2010. The agreement, signed by some of the most representative unions of the country, has been promoted by International Labour Organization and by World Bank in order to ensure greater predictability of results in the

⁴² As recorded by the *annual report 2011*, p. 4: «as at the end of 2011, the correlation between the lowest strike record in the garment industry and the highest number of labour disputes received by ac suggests maturing of industrial relations in the cambodian garment sector»

⁴³ See, “New directions on justice reform”, *supra*, note 15, p. 9.

application of legislative provisions and to encourage dialogue between the social parties, especially in the mean of arbitration proceedings⁴⁴.

The signatories expressly recognize the importance of a conciliatory approach to the dispute in order to ensure an improvement in working conditions and to prevent unlawful conduct by the employees or the employers⁴⁵. Significant are the provisions on negotiations at the enterprise level. In particular, it has been stated that no association of workers may give rise to strikes against the agreement reached as a result of the conciliation procedure in front of the AC when it has been signed by the most representative trade unions in the workplace⁴⁶.

The statements that have most contributed to increasing centrality of the Arbitration Council in the Cambodian industrial system, however, are those contained in points 5 and 6 of the MoU. The former establish the compulsory nature of any conciliation agreement reached in front of the Panel which is recognized, by the latter provision, as the exclusive judicial body for any disputes which arise about its implementation. Therefore, a «*Council Bilateral Agreements*» has a general effect inside the workplace and the parties are bound to implement any relevant decision from the Panel. Point 6 repeats the same commitment towards all the future controversies that would arise between the signatory parties, regardless of the existence of any prior conciliatory agreement. This provision, *de facto*, introduces a binding arbitration for most of the collective labour disputes that will arise in Cambodia by refraining the parties from any appeal to the State courts⁴⁷.

⁴⁴ The text of the agreement, translated into english, is available on the ilo website: http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-phnom_penh/documents/genericdocument/wcms_145234.pdf (last visited sept. 28, 2015).

⁴⁵ See point 2 of the *memorandum of understanding*: «both parties support cba [council bilateral agreements] in order to achieve certainty and predictability and to protect rights and terms of work condition for both parties».

⁴⁶ See point 3 of the *Memorandum of understanding*: «both parties support the mrs [most representative status] as the exclusive bargaining agent on behalf of all workers in the enterprise. minority unions can participate in the process by choice but along with all employees must respect the authority of the mrs union, and have no right to initiate or disrupt bargaining or to object to any cba reached by mrs union»

⁴⁷ At point 6 of *Memorandum* it is settled, in fact: «[...] where an arbitration decision on dispute of rights is given, the employer and workers and their representatives accept that the decision is final and binding on them.[...]»

Reflecting on the potential consequences of the latter provision, perhaps even more than the formers, it is clear that main objective of the MoU is to guarantee that the benefits related to the rapidity of the arbitration (i.e. the smooth continuation of the production, the continuity of company's profits and employment contracts) are not compromised by the opening of a trial. Consequently, it seems to be clear a subordination of the objective of «good governance» and guaranteeing social rights – pursued by the international projects that have given support to the reform of justice – to the main interest for the industrial growth of the country. A relief that is not even mitigated by the AC Staff, for which the assurance of a decision within 15 days is a transversal advantage, therefore, is not limited to one party of the conflict: «[...] This speedy standard of AC dispute resolution enables both enterprises and their workers to focus on the productivity and income»⁴⁸.

It is appropriate to consider part of this framework even the provisions that seem to introduce elements of eminently-legal rationality in the experience of institution-building in Cambodia. Thus, for example, the provisions of the Prakas 99/2004 requiring the arbitrators to indicate the edicts of the law or the collective agreement which form the basis its decision (Article 38)⁴⁹ do not seem to play a substantial role in the spread of the rule of law in the face of the conciliatory and economist tendency of the procedure within the AC.

These considerations can be repeated also in the light of the subsequent *AC Procedural Rules* adopted pursuant to Article 31 of the Prakas by the Ministry of Labour on the advice of the Arbitration Council itself. These are divided into seven «Rules», each of which is in turn divided into subsections: they shows no trace of formulations that engage the arbitrators to ensure the predictability of contractual effects or certainty of fundamental rights, whereas particular attention is paid to the outcome of the procedure and to reduce costs. With regard to the first profile, is established that in carrying out their activities arbitrators are required to conform to considerations of «fairness»⁵⁰ and, in approaching the study of the dispute, they must take into account that reconciliation «is

⁴⁸ See Arbitration council annual report 2011, p.7.

⁴⁹ The importance of this prediction can be grasped if we consider that the cambodian courts traditionally do not usually justify their judgments in law. see, in this regard, H. Noord, H. Hwang, K. Bugeja, "Cambodia's Arbitration Council: Institution-Building In A Developing Country", *supra*, note 34, p. 12.

⁵⁰ Rule 4.8.

always the desirable option»⁵¹. The second profile is the most mentioned objective in the *Procedural Rules* and is consistently associated in the text with the need to reach a rapid decision⁵². For this purpose, in order to ensure the effective short time limits for the composition of the Panel and the proper constitution of the party to the proceedings, is encouraged the use of the telephone communication as legal notification⁵³.

A further level of guarantees, aimed at strengthening the judicial vocation of the Arbitration Council, is detectable in the context of the provisions on the arbitrators appointment. The Article 311 of the Labour Code stated that they «shall be chosen from among judges, members of the Advisory Committee of Labour, and generally among prominent figures known for their moral qualities and their competence in economic and social matters». The appointment of the 15 arbitrators is formally accomplished by an act («*Prakas*») of the Ministry of Labour but the choice is accomplished one-third by the associations of workers, one-third by employer unions and one-third by the Ministry of Labour. Only the associations who are part of the Consultative Committee of Labour, however, take part in the elections. The reform introduced by *Prakas* 99/2004 has maintained the annual term of office (Article 2), but has added the further requirement that each member must be renewed by the Minister unless preclude occurring reasons of health, criminal convictions or incompatibility (indicated in Article 7). The arbitrators, in fact, serve for life («as they remain in good standing»⁵⁴), and this certainly contributes to the formation of an expertise in the field of dispute resolution. The latter provisions find a positive acknowledgement in the last Report of the AC, which shows both a substantial

⁵¹ Rule 4.10: «settlement through conciliation is always the desirable option and the parties at all times retain the right to settle on their own terms including during the course of the arbitration».

⁵² Rule 4.9: «postponements of arbitration hearings are costly and undesirable. postponements will only be granted by the arbitration panel where all parties to the arbitration agree such postponement».

⁵³ Rule 6.3: «because time is of the essence in the conduct of proceedings of the arbitration council, the use of telephone communications is encouraged among all persons involved, unless the labour law, the *prakas* or these rules specifically require written communication. in any case, proof of such communication may be required».

⁵⁴ H. Noord, H. Hwang, K. Bugeja, “Cambodia's arbitration council: institution-building in a developing country”, *supra*, note 34, p. 25.

increase in the disputes examined by the Panel (from 145 cases in 2010 to 255 in 2012) and a high percentage of cases «successfully concluded»⁵⁵.

Finally, it is worth considering data on the use of the “*return-to-work orders*”, with which the AC has the ability to impact on the effective enjoyment of the rights enshrined at constitutional level⁵⁶. Also on this side, the *Report 2012* points out that only 16% of the ordinances did not find implementation while in the rest of the cases the production continued normally pending the conclusion of the arbitration proceedings. The less reassuring data – and on which the Arbitration Council, however, does not seem to express any concern – is that the number of orders for interruption of strike issued has more than tripled since the signing of the *Memorandum of Understanding* (from 14 in 2010 to 45 in 2012)⁵⁷. This is an element that strengthens even more the consideration of this institution-building experience as a highly-intrusive attempt to intervene in the system of social relations of the country.

VII. FINAL CONSIDERATIONS

In times of globalization private legal autonomy seems to be involved in a never-ending “accumulation tendency”: the spread of arbitration, which emerges as the cutting-edge of labour dispute resolution, represents one of the most significant examples. Likewise, we are witnessing well-established global industrial relations shaping a «global labour law regime»⁵⁸, which does not obey the traditional boundaries that previously separated private and public law. The Cambodian Arbitration Council represents just one of the more recent experiences related to the implementation of an alternative labour

⁵⁵ Disputes are considered “closed positively” when a settlement agreement has been reached before trial (34% of the disputes submitted) or where the arbitration decision had actually lead to the normalization of business relation (36% of cases). see the arbitration council annual report 2012, p. 4.

⁵⁶ Art. 37 of the Constitution of the United Kingdom of Cambodia states that the right to strike and to demonstrate peacefully must be exercised within the limits defined by law. to this regard, article 312 *et seq.* of the labour code dictate the general predictions regarding the strike, in which it is still considered illegal the strike accomplished when the arbitration procedure has not been completed yet (art. 320).

⁵⁷ See The arbitration council annual report 2012, p. 4.

⁵⁸ See R. Ragowski, “Reflexive labour law in the world society”, Cheltenham: Edward Elgar publishing, 2013, p. 265.

justice. Governments of industrialized countries are constantly concerned about bureaucracy in industrial relations. A “cost-effective jurisprudence” embodies the enduring target of national labour policies. Some reforms exemplify this wide-spread tendency, i.e. the United Kingdom’s *Employment Act* of 2002, which have strengthened the role of the ADR in order to provide an easier route to a compromise settlement between the parties. In particular, the activity of the Advisory, Conciliation and Arbitration Service (ACAS) is decisively supported by means of an informal, confidential but firmly statutory procedure, similar to the United States Federal Mediation and Conciliation Service (FMCS)⁵⁹. In both cases the national legislations have shaped a multistep-grievance procedure in order to encourage communication, successfully achieve agreements and prevent further steps in front of the court⁶⁰.

The Cambodian institution-building experience demonstrates that business growth may open a new perspective for the implementation of some fundamental rights, while it may threaten the satisfaction of others. Pressures by transnational corporations may have a great influence on social policies of developing countries: this shows that social justice is not possible in the absence of some democratic conditions – such as freedom of speech, assembly and, above all, trade union freedoms – and equal access to justice.

The political conditionality of investment treaties is one of the most important means to bridge over differences in market regulation between Western and non-Western countries, but, on the other hand, its limits are evident, as it cannot guarantee to what extent the model received reflects the original. On this matter is now concerted an increasing doctrinal debate: when and how may a legal transplant contribute to the achievement of sustainable development for Third World countries? Furthermore, if the globalization of economy boosted a «forum shopping» trend – in which the transnational corporations are regularly implicated – how can ADR models be an appropriate solution for social issues emerging in developing countries?

⁵⁹ See the fmcs’ arbitration policies and procedures from the code of federal regulation available at <https://www.fmcs.gov/services/resolving-labor-management-disputes/arbitration/arbitration-policies-and-procedures/> (last visited sept. 28, 2015).

⁶⁰ See D. L. Gregory, F. A. Cavanagh, “A comparative assessment of labour dispute resolution in the United States & the United Kingdom”, in *St. John’s law review*, 2007, 81, p. 39-40.

It seems that political and social dialectics has been globally overcome through the “immediate-mediation” of commodities and money and, in that perspective, we are witnessing to a simplification of the world’s legal complexity⁶¹. As long as «labour disputes» are perceived as obstacles to economic growth, national governments and corporations in developing countries will seek their “rapid” and “cheap” resolution through the present ADR instruments.

⁶¹ See P. Barcellona, “Ipotesi interpretativa del processo di globalizzazione” in *Democrazia e Diritto*, 2003, 4, p. 18.