

**A BRAZILIAN OUTLOOK ON THE (UN)SUSTAINABLE
DEVELOPMENT OF CORPORATE CAPITALISM**

**UMA PERSPECTIVA BRASILEIRA SOBRE DESENVOLVIMENTO
(IN)SUSTENTÁVEL DO CAPITALISMO CORPORATIVO**

JACOPO PAFFARINI

Pos-Doutor em Direito - Faculdade Meridional (Brasil). Doutor em Direito Público pela Università degli Studi di Perugia (Itália). Professor Permanente no Programa de Pós-Graduação Stricto Sensu em Direito, Faculdade Meridional - IMED. Colaborador assistente na Cátedra de Direito Constitucional e Direito Público Comparado, de titularidade do Prof. Dr. Maurizio Oliviero, junto ao Curso de Direito da Università degli Studi di Perugia. Coorientador do módulo de Direito Transnacional no curso de Direito Público Comparado.

ABSTRACT

Last year Brazilian people experienced a worrying prospect for capitalism's ability to self-regulate its growth. In the background, an ideal of "development" as "solidarity among social classes and ethnic groups" – which started with the democratic transition of 1988 and was eventually implemented during the four Workers' Party executives – has unexpectedly disappeared. Beyond the great concern for the future, the Brazilian scenario of the last two years offers sound evidence of the need to promote a strong legal and institutional framework to manage rapid economic growth.

KEYWORDS: Corporate Liability; Sustainable growth; Capitalism's Growth Contradictions; Governance and Government.

RESUMO

No ano passado, o povo brasileiro testou uma perspectiva preocupante para a capacidade do capitalismo de autorregular seu crescimento. No fundo, um ideal de “desenvolvimento” como “solidariedade entre classes sociais e grupos étnicos” – que começou com a transição democrática de 1988 e foi implementada durante os quatro mandatos executivos do Partido dos Trabalhadores – desapareceu inesperadamente. Além da grande preocupação com o futuro, o cenário brasileiro dos últimos dois anos oferece evidências sólidas da necessidade de promover um forte quadro jurídico e institucional para gerenciar o rápido crescimento econômico.

PALAVRAS-CHAVE: Responsabilidade empresarial; Crescimento sustentável; Contradições do Crescimento Capitalista; Governança e Governo.

INTRODUCTION

Last year Brazilian people experienced a worrying prospect for capitalism’s ability to self-regulate its growth. Few main events may be reminded to sustain this statement. The *Lava-Jato* investigations, as well as other inquiries (i.e. *Zelotes*), revealed a context of steady corruption involving politicians, corporations and their controllers; the Rio Doce tragedy reminded us, once again, of the never-ending conflict between environment and industrial capitalism; the *Panama Papers* scandal disclosed the shameful search for “tax havens” by businessmen, as well as the adoption of tax-avoiding arrangements by their corporations. White-collar crimes have recently become the focus of court inquiries but most of the trials are still far from an end, despite the rise of people’s anger against the political establishment and its financial supporters.

In the background, an ideal of “development” as “solidarity among social classes and ethnic groups” – which started with the democratic transition of 1988 and was eventually implemented during the four Workers’ Party Governments – has

unexpectedly disappeared. Along with it, the cross-consensus obtained both among the working class and the élite. Anxieties and new social tensions have never stopped growing since the former President, Dilma Rousseff, was impeached. While judges have shown an active approach to political matters¹, the majority of the congressmen reiterate the domestic competence of the Legislative to resolve “ethical affairs”, including the recent corruption scandals involving political leaders.

Starting from a mass media storyline, the word “crisis” has been adopted in common and academic language to describe a prolonged interruption of economic growth, which has been followed by widespread mistrust of political bodies. Illegal funding of political parties emerges as one of the main issues which put the State’s financial participation in energy companies at risk and fostering the austerity plans supported by the new Executive. A recent constitutional reform has limited public spending for the next twenty years; perhaps an excessive measure in a country with gross inequalities in wealth distribution. Interestingly, no measure has been adopted to increase Executive accountability in light of spreading corporate lobbying.

Beyond the great concern for the future, the Brazilian scenario of the last two years offers sound evidence of the need to promote a strong legal and institutional framework to manage rapid economic growth. All over the world people are becoming conscious of the multiple flaws of market globalization, especially when it is ruled by big corporation standards. However, while postcolonial countries have always suffered company abuses, the sovereign debt crisis has spread the fear of losing standard of living and democratic institutions among Western citizens.

By highlighting the common ground of these dynamics, this paper aims to show how the present Brazilian deadlock may be ascribed to the main features of capitalism, among which some are “foundational” while others have a “changing” character. For example, there is a widespread knowledge that global competition stresses the lives of working people – since it asks for more flexibility – as well as the States’ capability to apply social policies – by demanding lower taxation rates. Thus,

¹ For “active approach”, in this perspective, we mean an interpretation of the Federal Constitution by the tribunals which aims to allocate decisional powers to the Judiciary both on political matters and on whether the members of the Congress under investigation are allowed to maintain their charge: <http://bit.ly/2hYyKDi>

the global market is challenging constitutional limits to “endless inequality growth”. However, the withdrawal of the State from the economic regulation has been followed by a general request for State intervention to rescue companies “too big to fail” – shifting onto the taxpayers the costs of self-regulation failures. Finally, the present stage of capitalist development has apparently maximized the social costs of financial speculation by unleashing the fear of State and banks’ insolvency.

Even though these contradictions have inspired new developments in the field of legal studies, the jurists’ culture is shaken. In the absence of State controls on the global market, new commercial law models have been shaped starting from corporate uses, through what has been called a «reflexive process». However, the main characteristic of these transnational legal schemes is the tendency to absorb under their discipline not only the private aspects derived from companies’ activities. As shown by some comparative studies, the principle of private autonomy has been boosted as a common standard for the global market regulation. There is no field of international investments where corporation have not insisted on regulating their activities in the host State, as well as any dispute arising from. At the same time, even acknowledging this great pressure by the industrial and financial élite, the distinction between “*economic (self)regulation*” and “*governance*” is still crucial in order to implement human rights and sustainable growth in Brazil.

Within national borders, public powers are struggling to defend the effectiveness of fundamental rights, environmental protection and the democratic process from privatization. Thus, if the consolidation of a global system of business regulation seems unavoidable, there is a little sign of the renewal of constitutionalism – even though there are noteworthy efforts in this sense by public law doctrine².

² Many contributions underline the existence and the need of converge among legal tradition in order to shape an effective governance beyond States’ borders. It is worth recalling the recent collective work, *Introducing global integral constitutionalism*. In *Global Constitutionalism*, Vol 5, March 2016, p.1.

2 CORPORATION RULES, PRIVATE PROFITS, PUBLIC RISKS

Those processes have happened especially since some big corporations prefer to create their “own standard of law”, instead of enforcing State rules. The “Lex Mercatoria”, the arbitration chambers of the different areas of the world and the Unidroit principles are some of the best-known examples of what has been called «a Transnational concept of Law»³. The 2007-2008 crisis severely questioned the sustainability of a self-regulated market but it did not modify the exposed trends. State authorities still denounce the lack of means to prevent the main dangerous practices – as speculation, fraudulent bankruptcies, tax avoidance schemes – which have characterized the development of the “corporate predatory capitalism”.

The maintenance of this situation, despite the evidences of continuous abuses in detriment of the common good, is caused by two main reasons.

First, as it has been recently reaffirmed, the capitalist system cannot exist without some «foundational contradictions», thus, crises are endemic, as they represent «moments of transformation in which capital typically reinvents itself and morphs into something else» (HARVEY, 2015, p. 4). Some dynamics of capital accumulation plainly encourage legal infringements, especially by the Chief Executive Officers (CEO), to which the corporation shareholders frequently offer an extra income to promote their own interests. The maximization of the main shareholders’ profit, as well as corporate limited liability, foster a “factionist economy” within which common good and remaining stakeholders’ interest (employees, consumers, small shareholders) represents a minor goal. The 2007-2008 crisis revealed (again) how conflicts of interests inside corporation governance can undermine company survival and market equilibrium while, at the same time, providing huge profits to those managers and owners without ethical concerns.

Second, inequalities are not only the direct consequence of the current capital accumulation mechanism, but the reflex of legal arrangements consolidated during previous phases of its development. Tax-payers always bore the rebalancing after

³ Among the most recent and complete contributions to this concept (see GLENN, 2005, p. 840).

financial losses. What has changed after 2008, however, is the magnitude of the system breakdown due to new potential of the finance economy after the end of the Golden Exchange Standard. As David Harvey (2015 p.37) noted:

When money was constrained by being anchored, however weakly, in the material availability and relative scarcity of the physical money commodities, then there was a material restraint upon the infinite creation of money. The abandonment of the metallic base of the world's money supply in the early 1970's created a whole new world of possible contradictions. Money could be printed ad infinitum by whoever is authorised to do so. The money supply lay in the hands of fallible human institutions such as the central banks.

While the mass media repeat the mantra "Too big to fail" to justify the massive hijack of public money from public services to "bank bailout", the same «false economic theory» driving the courts approach to corporate abuses, granting impunity to their directors and main shareholders⁴.

Privatization and bailout are practices internationally used by corporations to shift business risks on public shoulders in times of crises. However, this result can be moved up as a result of unfair investment agreements, as it was for Brazil when the country was still enjoying a sound economic growth. For example, art. 23 of Act n.12.663/2012 (*General Act of the FIFA World Cup*) introduced the strict liability of the Brazilian State for damages caused by «third parties» and for «natural phenomena». The obligation to refund economic damages to FIFA was introduced as a result of an international negotiation, although the Brazilian Constitution adopted subjective civil liability as unique rule. The case was examined by the *Supremo Tribunal Federal* (ADI 4976), which stated that the provision respect the Federal Constitution and the national public order. The judgment also "approved" the articles of the General Act of the FIFA World Cup which grant to the international organization free access to the Judiciary and tax exemption.

⁴ As noted by the CORPORATE REFORM COLLECTIVE, *Fighting Corporate Abuse*. cit., 49, «The argument of maximizing shareholder wealth at the expense of all other stakeholders therefore lacks both legal and theoretical support. However, acting against the interests of the company for the sole gain of shareholders has not yet been tested in courts of law as a criminal offence».

The next two paragraphs will develop these aspects, in order to understand the relations between the legal and non-legal dynamics which govern corporate capitalism, as well as their reciprocal nourishing.

3 THE (UN) SUSTAINABILITY OF CORPORATE LIMITED LIABILITY

During the 1990's, the world admired the spectacular achievements of a free-and-with-no-frontiers market since academic studies were celebrating a renewed primacy of human rights legal culture through the growing use of «political conditionality» in investment treaties (especially towards developing countries)⁵. In 2016, in the wake of the European integration crisis and the end of US unilateralism in the Middle East, this scenario seems no longer reliable.

An apparently transversal anti-establishment movement attacked the most questionable features of corporate capitalism, even those which come from the oldest tradition of the legal studies on corporations. So, when the House of Lords of the United Kingdom upheld the limited liability for corporations in the landmark case *Salomon vs. Salomon* (1896)⁶, maybe nobody could imagine the following implications of this decision. The legal recognition of corporate personality soon became an essential quality in international business, as foreign competitors beyond the English borders asked for the same legal protection to their own legislators. Thus, if incorporation has reduced the risks for businesspeople personal assets, nonetheless it has been the target of strong critics as long as it increases the chances of misconduct and dubious company failures⁷. Furthermore, while a “fictional” or “artificial entity” theory about

⁵ UVIN, Peter; BIAGIOTTI, Isabelle. “Global governance and the “new” political conditionality”, in *Global governance*, vol.2, no.3, 1996, 377-400. ANUNOBI, Fredoline O. *The Implications of Conditionality*, Lehman: University Press of America, 1991. For a critical approach about institution-building experience in developing countries, see MATTEI, Ugo; NADER, Laura. *Plunder: when the rule of law is illegal*. New Jersey: Wiley, 2008. See also, PAFFARINI, Jacopo. Fundamental rights and migration of judicial models in the conditionality of investment treaties and transnational public policies. The Cambodian case. *Revista Brasileira de Direito*, Passo Fundo, vol. 10, no.1, 2014, 33-47.

⁶ Available, in English, at the following website page: <http://www.bailii.org/uk/cases/UKHL/1896/1.html>.

⁷ Fists criticism of the «separation of ownership and control» in corporate organization were raised by BERLE, Adolf Augustus; MEANS, Gardiner. *The Modern Corporation and Private Property*. London (UK)- New Brunswick (USA): Transaction Publishers, 1932, p. xlvi: «At the same time that economic

incorporate organizations (and, thus, liability) «may be appropriate for small owner-controlled and financed companies in which shareholder and directors are the same people», it is more problematic when applied to big corporate enterprises. In the aftermath of Wall Street Crash of 1929, Berle and Means (2005) wrote:

At the same time that economic power has built up in the hands of corporate management, the separation of ownership and control has released management from the overriding requirement that it serve stockholders. Profits are essential part of the corporate system. But the use of corporate power solely to serve stockholder is no longer likely to serve the public interest.

It has been said that Berle and Mean's condemnation of director's broad powers aimed to depict corporations not just «as a business entity», but as «social and political institution» (CHEFFINS, 2005, p. 487). Turning the approach on corporate business matters in such a way has at least two main consequences.

First, if the company is a socially accountable institution, shareholders' interests cannot benefit a general preference on remaining issues, as some economic theories have proposed. It is at the very least dubious to say that «maximizing profits for equity investors assists the other "constituencies" automatically», as well as upholding the fiction that «the participants in the venture play complementary rather than antagonistic roles»(EASTERBROOK; FISCHER, 1991 p. 38). Conflicts of interest are still endemic not just between shareholders, as a whole, and employees, local communities and costumers, on the other side. The rapid increase of revenues of transnational companies has given much more relevance to the divergences among equity owners and between these and the directors' own interests.

Second, if corporate limited liability is justified since it encourages investments which are deemed necessary for "job creation" and the implementation of products' characteristics, there is nothing which justifies the automatic extension of that protection to its managers. Nonetheless, the last one is broadly accepted in the

power has built up in the hands of corporate management, the separation of ownership and control has released management from the overriding requirement that it serve stockholders. Profits are essential part of the corporate system. But the use of corporate power solely to serve stockholder is no longer likely to serve the public interest».

business world, although commerce is now completely different from the time when there was a general identification between the senior executives and the shareholders (CORPORATE REFORM COLLECTIVE, 2005, p. 85).

Since the agency theory influenced most of the landmark courts' decisions on corporate governance and directors' accountability, its costs⁸ – not just for companies' stakeholders, but for the public in general – turned an intolerable burden. In order to continue the exposition, it worth distinguishing two main aspects of liability: one related to the corporate organization, the other to its officers.

4 LEGAL MODELS CHALLENGING THE COMMONWEALTH

Even if most of the corporate decisions – as highlighted by the studies cited above – come from the Chief Executive Officer (CEO) rather than the shareholders, there is a further consideration to be made. Any kind of market presumes some “formally-equal-actors” bargaining according to the forms permitted by State regulation. That is what normally happen for common people, but it does not include enterprises negotiating across national borders. International investment and finance law favoured Western companies, as it allows specific retaliations when the host or borrowing country commits treaty violations, regardless of any connection of those with the repayment of the loan or the specific performance agreed. Nonetheless, the political conditionality of the international treaties has been the “legal arm of Western civilization”, since it has legitimized and promoted normative transplants and adaptation along the 1990's and the beginning of the new century. The more foreign investors sustained the economy of a developing country the fewer have been the

⁸ JENSEN, Michel C.; MECKLING, William H. *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*. In *Journal of Financial Economics*. Vol. 3, no.4, 1976, 305-360. According to the Authors: «We define an agency relationship as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision-making authority to the agent. If both parties to the relationship are utility maximizers, there is good reason to believe that the agent will not always act in the best interests of the principal. The principal can limit divergences from his interest by establishing appropriate incentives for the agent and by incurring monitoring costs designed to limit the aberrant activities of the agent».

objections by the host authority and international observers to the effects of a legal transplant⁹.

At the same time, however, some researchers highlighted that there are few chances of “successful transplant” when it supposed to implement human or workers’ rights. The majority of the reports blame the plutocracy and the corruption ruling the host countries with the consent of local governments – as in the World Bank Legal Vice Presidency “*New Directions on Justice Reforms*”¹⁰. Others have underlined that a similar lack of accountability characterizes company activities, as most of them did not control nor prevent misconduct and abuses by their subsidiaries. Even more significant is the protection granted by Western courts to the holding company, through some kind of “post-modern adaptation” of the *Salomon vs. Salomon* principle of corporate personality. Thus, it is quite impossible to establish any form of accountability at the “centre” of an enterprise network if the directors are conceived as agents appointed by the shareholders to maximize their profits.

Beyond the explicit legal infringements, it is possible to detect some frequent forms of abuse which stand out as demonstration of the anxiety that stands between the normative and the socio-political status of a corporation.

5 ESCAPING TAXATION

The Panama Papers scandal reminded to public opinion that it is simple (and profitable) to avoid taxes through the use of offshore companies and, above all, that it is “lawful” in most of the cases. Contradictions in tax law recently gained more

⁹ (Mc CONNAUGAY, 2001, 595-656). 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»

¹⁰ World Bank Legal Vice Presidency, *The World Bank: New Direction on Justice Reform. A Companion Piece to the Updated Strategy and Implementation Plan to Strengthening Governance, Tackling Corruption*, May 2012. Available at: <http://bit.ly/2ocvOF2>

consideration in academic studies, as the sovereign debt crisis stresses the paradox of this huge amount of multinational revenues which are constantly subtracted from the public budget (POGGE; METHA, 2016 p. 173-204). From this perspective, it may be said that tax policies have always been subjected to a kind of compliance with longstanding economic theories. Classical economic studies usually assume taxes as a cost for enterprises that is eventually paid by the consumer, since it is added to commodities prices. If this statement may be true in an ideal economy, it has been proven hard to uphold with reference to corporations, whose one key investment is always in legal advice to get around fiscal regulations. Hence, tax and offshore secrecy systems are the main pieces of a complicated tax-avoiding system which, however, exploits the gaps left by «outdated principles» of the international tax system. According to some of the most advanced studies:

This flaw is the failure to treat multinationals according to the economic reality that they operate as integrated firms under central direction. Instead, a principle has become gradually entrenched that they should be taxed as if they were separate enterprises in each country dealing independently with each other. This can be referred to as the Separate Enterprise – Arm's Length Principle (SE-ALP). (CORPORATE REFORM COLLECTIVE, 2014., p.14).

This approach was already anachronistic before the Panama Papers scandal, but there no agreement on the possible solutions yet. It is worth saying that the SE-ALP is based on the international tax treaties of 1920, when investments “beyond the borders” basically consisted of loans. The country where the business was based could tax profits, while the state of residence of the investor could tax any form of income (interest, royalties, dividends and fees). This basic scheme was adapted to multinationals without any appropriate regulation to reconstruct the corporate subsidiaries' control chain. Thus, today it is quite common that multinationals have a «Parent company» in the country of origin and a “Base entity” – to hold assets and receive incomes – in a tax-haven country. The operating companies of different areas of the planet pass fees, royalties and interests – which are not taxed in the host country – to the offshore unit through a holding company based in a country with *ad hoc* tax treaties (Uruguay, Singapore, Switzerland, for example), therefore they are subject to

no or low withholding taxes. Finally, the profits – which do not result from a sale activity or fees for services carried out by the operating company – arrive in classical tax heavens through a conduit holding company and they can be reinvested in loans to the firm’s affiliates or foster circuits of “shadow banking” with all the potential risks for the financial markets which have already been highlighted by some studies¹¹.

When the Panama Papers were published, at least 57 Brazilian politicians and rich citizens were named as shareholders of 107 offshore corporations. The main reason why Brazilians set up offshore companies is to protect their money from political and economic uncertainty which may occur in their country¹². Even though offshore companies are not illegal, United Nations experts believe they are one of the biggest problems for equitable development and support their abolition in order to protect the economies of developing countries¹³.

6 AVOIDING LIABILITY

Another central dilemma of corporate governance is represented by directors’ personal interest, which – as highlighted above – is frequently in contradiction with that of the other stakeholders. The Enron scandal in 2002 raised a strong reaction by the media and promoted a debate with widespread effects, also in Brazil. Beyond the transnational effectiveness of the Sarbanes-Oxley Act (SOX Act) – which extended its operability to US investments in foreign companies – the Brazilian Security Exchange Commission (Comissão de Valores Mobiliários, CVM) has regulated some concepts which were part of internationally accepted standards of corporate governance. As a consequence of the introduction of generic legislation requirements innovative Best-Practices Codes have been drafted, especially under the direction of Brazilian Institute for Corporate Governance (IBGC) and the CVM. Although voluntary norms have

¹¹ Among the recent contributions, see RIXEN, 2013, p. 435-459.

¹² That is what Marcelo Hallake, a Sao Paulo based lawyer who advise companies for the law firm Jones Day, has said to *Forbes* about his country: <http://bit.ly/2j0G962>

¹³ See, the press conference of the Independent Expert on the promotion of a democratic and equitable international order, Alfred De Zayas: <http://bit.ly/2kp4Ghy>

proven inadequate against CEO misconduct. If they may produce positive effects when applied to small and medium businesses, non-legislative standards for Corporate Social Responsibility lack effectiveness on multinationals enterprises. The huge number of subsidiaries, manufacturing sites or extractive locations, indeed, make it hard to carry out an effective control by the parent and the holding companies. For example, distances and extremely isolated places may be the causes of a superficial monitoring and a failure to prevent environmental accidents, as happened in 2010 when the *British Petroleum* oil spilled in the Mexican Gulf. Those difficulties should be added to managerial self-interest, which, in this case, probably played an important role in covering up warnings on engineering problems in extractive activities and downplaying potential risks¹⁴.

If it is always difficult to prove the responsibility of holding companies for abuses committed by a subsidiary in a developing country, this is because Western jurisprudence on this issue is nothing but an expedient to uphold the fictional separation between “nodes of the same business net”. The leading case on this field has been the pronouncement of the US Court of Appeal (Second Circuit) which rejected a claim filed against *Union Carbide* for the environmental disaster in the Indian region of Bhopal. The decision was adopted on the grounds that Union Carbide India Ltd (UCIL) – the operative company in the location where the accident occurred – «is a separate entity, owned, managed and operated exclusively by Indian citizens in India»¹⁵.

Thirty years later, the “separate entity approach” is still a serious obstacle to the recognition of joint-responsibility in lawsuits involving multinationals¹⁶. The Rio Doce tragedy reminded to Brazilians the human and environmental costs of extractive

¹⁴ Recently, an internal report leaked to *Greenpeace* and published by the *Financial Times* inform about a regular underestimation of incidents and stakeholders’ warnings by the British Petroleum managers in extractive sites in USA and Mexico. The news about the leak caused strong reactions by several US Congressmen: <http://bit.ly/2nOVJ2l>

¹⁵ The decision is available in this webpage: <http://bit.ly/2peErwT>

¹⁶ As a result of this restrictive judicial approach, activists’ campaigns usually bring a straight focus on the holding company conducts, in order to obtain the attention of Western public opinion and, especially, political institution.

economy, especially when controls by the local authority are lacking¹⁷. But it also reminded that a locally-based enterprise (Samarco Ltd) jointly owned by two giants of the mining industry (the half-Australian-half-English BHP Billiton and the Brazilian Vale Ltd) cannot be the only responsible because its management is clearly “hired” by the two multinationals. Nonetheless, instead of responding to the local judicial authority for civil compensations, BHP Billiton and Vale have promoted and upheld a «*Framework Agreement*» for the restoration of the environment and the local communities affected by Samarco dam failure¹⁸. The Agreement mandates the creation of a further legal entity – *Renova Fundação* – that is an «autonomus Foundation» which should lead the compensation of the damages, according to «a transparent and participative proceeding»¹⁹.

From a broad-spectrum perspective, the aim of the entire operation is questioning both the competence and the impartiality of Brazilian justice institutions in dealing with such a huge catastrophe. Vale and BHP have opened a news portal on their website in order to provide continuous updates on the steps toward restoration, in a way that may be seen as an “alternative storytelling” or a reply to Brazilian mass media and NGOs. Finally, there is no consensus on the amount of money necessary for restoration – as the Samarco assets are clearly scarce. On the contrary, a huge distance exists on what has been offered by BHP and Vale – as a result of the negotiation with the Federal and Minas Gerais governments²⁰ – and what the Public Prosecutors have asked²¹.

¹⁷ For some relevant considerations on this aspect of the accident, see the Dom Philips’ article in *The Guardian*, 25 November 2015: <https://www.theguardian.com/sustainable-business/2015/nov/25/brazils-mining-tragedy-dam-preventable-disaster-samarco-vale-bhp-billiton>

¹⁸ The Framework Agreement between Samarco, Vale, BHP Billiton, the Brazilian and the Minas Gerais governments was ratified on 5 may 2016 by the Court of Appeal of Brasilia. However, it was suspended by the *Suprema Corte de Justiça* on the 1 July 2016, due to inadequate previous discussion with the Prosecutors and the local community affected. In the aftermath of this decision Vale and BHP declared that they will continue to promote the restoration activities as previously dealt: <http://glo.bo/2983cTI>

¹⁹ That statement can be met among the BHP press releases: <http://www.bhpbilliton.com/media-and-insights/news-releases/2016/10/update-samarco-7>

²⁰ On 28th July 2016, both Samarco and Vale committed themselves to provide 3 billions of Brazilian *reais* as a first payment of the 6 billions fixed in the Framework Agreement of previous May. See, the announcement at <http://bit.ly/2jDGqb9>

²¹ On May the 3rd, 2016, the *Ministério Público Federal* affirmed that the Framework Agreement does not consider the real magnitude of the environmental and human calamity. Thus, it asked for 133 billions of *reais* as counter-claim. See <http://glo.bo/1rkBOdr>

7 SELLING OFF INDUSTRIAL INFRASTRUCTURES AND JOBS

The 2008 financial crisis revealed some hidden and contradictory aspects of the global banking system which should not be downplayed in order to advance a real reform proposal, as it seems to be a priority for most Western governments’.

First, we should start from a “founding contradiction” in financial economy: the fractional reserve banking. It is worth remembering that lending up to the 90% of the money collected is an internationally accepted practice and neither senior managers nor the Basel Committee on Banking Supervision has ever acted in order to reduce this percentage. This is a money creation process in which States have no or very reduced control, as it is totally based on “input” (credit requests and borrower guarantees) processed by commercial banks. Recently, the access to short-term credit has been intentionally made much cheaper, officially, to increase the volume of commercial affairs. Financial groups jumped into the industrial market attracted by simple and fast earnings. However, their first (and sometimes only) concern was not implementing or restoring the productive capability of a corporation, but paying back credit interests and share the profits. Thus, a significant amount of money came into existence (and so added to the international financial circuit) just because the commercial banks loan it to speculators. Frequently, they were simple speculations, like, for example, derivative market exchanges or company take-overs directed to sale and lease-back their supplies and properties (CORPORATE REFORM COLLECTIVE, 2014 p.34). Those activities represent a danger, not only for financial market equilibrium (i.e. credit insolvency), but in terms of employment and national manufacturing capability. During the last twenty years, indeed, insolvent companies were bought, their properties sold by the directors in order to share the proceeds among shareholders, then leased-back to resume industrial activities for a sort period without a clear strategy. That is what happened to many Western enterprises which have fallen into crisis and immediately separated from the “healthy part” of an industrial group, as the UK’s *MG Rover* in 2004 and *East Coast Railways* in 2007. Their

production was never restored, nevertheless huge profits – in the second case, backed by public money – were earned by some finance groups, which never had a plan to run the corporation, but just to “extract value” by selling its assets. The recent presidential elections in USA, as well as the raise of anti-EU movement, have finally disclose an hidden but widespread anger against the extreme freedom enjoyed by the banking system, which is recognized as the main responsible for the “desertification” of industrial districts and deterioration of employment conditions.

Second, this huge amount of money injected in the “real economy” (i.e. industrial business) has manipulated the traditional aims of investment activities. Until the 1990’s financial activity regulation was settled by national legislators, but, as soon as the Anglo-Americans won the “Cold War”, mandatory rules were perceived as outdated and more likely to improve political corruption. The Western blame of socialist governments of Eastern Europe fostered a sort of undisputable faith in the benefits of a less State-driven market, as well as a general confidence that events like the 1929 crisis were highly improbable in the XXI century. As noted by Brian R. Cheffins (2005 p. 494):

Coincident with the growing disenchantment with government regulation, during the 1980 and the 1990s market-oriented conservativisms increasingly characterized theoretical analysis of private law issues in United States. Contractarian corporate law scholarship fell directly into the line with such trends since academic embraces this approach tend to share an overriding trust in contracts and marketplace. More concretely, they are content to presume that business participants are better positioned to structure arrangements affecting companies than lawmakers and professors.

Nonetheless, corporate governance scandals – like in the *Enron* case in 2004 – have «cast some doubt on the desirability of imitating the American model» CHEFFINS, 2005 p. 494) and raising the key issue of directors’ liability. As the most accepted theories see incorporation as a way to maximize shareholders’ profits, managers are intentionally overpaid to realize this purpose. This approach has heavily conditioned –as we have seen – the burden of proof in civil and criminal trials. It is not simple to prove misjudgement in commercial affairs, it becomes more difficult when the shareholder interest should prevail, even against the interest of remaining

stakeholders. For example, the current international banking system, grounded on the “fractional reserve”, looks unsustainable in the light of the endemic conflict of interests between those who deposit their money in the bank and those who hold the bank equities.

Banks themselves wanted to put less into reserves because these funds earned very little return, and from a shareholder value point of view were not being used effectively. Leverage ratio crept upwards [...] To encourage these ways of maximizing shareholder value, senior managers in banks offered their managers, traders, dealers and advisers bonuses that reward high returns, without implementing an adequate risk measurement system (CORPORATE REFORM COLLECTIVE, 2014 p. 63-4).

Beyond directors’ abuses, there is another set of problems that comes from the money creation process lead by commercial banks. The global race for GDP growth is shaping a twisted competition between governments policies, which downplays human and environmental costs of capitalism endless accumulation. In recent times, international experts have finally recommended an effective financial regulation as a key point to oppose systematic abuses committed by unscrupulous directors. It should be highlighted that those practices have found legitimacy since the GDP has been used as a measure of nations well-being, not just of business performances. So, preserving human rights and sustainable growth starts from rescuing economists and governments policies from the misleading parameters which cultivated the “GDP fetishism”. That means to build a control mechanism on the “money-creation process” in order to prevent any further discretionary access to credit not in line with some globally shared political (and not just economic) goals.

The last international summits (especially the 2017 *World Economic Forum* in Davos) considered the rebirth of political populism as an urgent issue and finally backed an open dialogue towards acknowledging a shortage of effective results in fighting wealth inequalities²². The other major concern was climate change, because the answer should not be limited to the “logistics” of industrial production – such as

²² According to the World Economic Forum *Global Risks Report 2017*, the raising inequality perceived «points to the need for reviving economic growth, but the growing mood of anti-establishment populism suggests we may have passed the stage where this alone would remedy fractures in society: reforming market capitalism must also be added to the agenda».

“bio-technologies” or “green energies”. The reason is that the rapid earnings from the injection of short-term credits prevent industrial planning and inhibit research innovation for sustainable commodity production²³. Hence, it has been observed that much more could be done in reducing CO₂ emissions if «the responsibility for money creation would be placed with an independent agency that – unlike our banks – would be democratic, accountable, and transparent, so money would become a truly public good. (HICKEL, 2016).

CONCLUSIONS

According to David Harvey (2015, p.14):

If crises are transitional and disruptive phases in which capital is reconstituted in a new form, then they are also phases in which deep questions can be posed and acted upon by those social movements seeking to remake the world in a different imagem.

Thus, in the current international context it may be profitable to push for fundamental reform and abandon “unstainable development” where corporate abuses are frequent. However, understanding the underlying contradiction is a prerequisite to advance any reform, therefore, strengthening academic dialogue and cooperation on these issues should be a priority for Brazil. Beyond the country’s distinctive characteristic, indeed, the features highlighted above can be found wherever multinationals invest their money. An endless accumulation of wealth is only possible by means of a continuous advance of the geographic borders of corporate business, and thus a common answer is the only way to resolve the human and environmental crises that they caused.

BIBLIOGRAPHY

²³ As noted by HARVEY (2015 p.252): «Capital cannot, unfortunately, change the way it slices and dices nature up into commodity forms and private property rights».

ANUNOBI, Fredoline O. **The Implications of Conditionality**, Lehman: University Press of America, 1991.

BERLE, Adolf Augustus; MEANS, Gardiner. **The Modern Corporation and Private Property**. London (UK)- New Brunswick (USA): Transaction Publishers, 1932.

CHEFFINS; Brian, R. *Corporations*. In CANE, Peter; TUSHNET, Mark (eds). **Oxford Handbook of Legal Studies**. Oxford: Oxford University Press, 2005, 485-509.

CORPORATE REFORM COLLECTIVE, **Fighting Corporate Abuse**. Beyond Predatory Capitalism. London: PlutoPress, 2014.

EASTERBROOK, Frank H.; FISCHER, Daniel L. **The Economic Structure of Corporate Law**. Cambridge, Massachusetts: Harvard University Press, 1991.

HARVEY, David. **Seventeen Contradictions and the End of Capitalism**. Profile Books: London, 2015.

HICKEL, Jason. **To deal with climate change we need a new financial system**. In The Guardian, 5th November 2016.

JENSEN, Michel C.; MECKLING, William H. Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure. In **Journal of Financial Economics**. Vol. 3, no.4, 1976, 305-360.

MATTEI, Ugo; NADER, Laura. **Plunder: When the Rule of Law is Illegal**. New Jersey: Wiley, 2008.

Mc CONNAUGAY, Philip J. The Scope of Autonomy in International Contracts and Its Relation to Economic Regulation and Development, in **Columbia Journal of Transnational Law**, Vol. 39, no.3, 2001, 595-656.

PAFFARINI, Jacopo. Fundamental rights and migration of judicial models in the conditionality of investment treaties and transnational public policies. The Cambodian case. In **Revista Brasileira de Direito**, vol. 10, no.1, 2014, 33-47.

POGGE, Thomas; METHA, Krishen. **Global Tax Fairness**. Oxford: Oxford University Press, 2016.

RIXEN, Thomas. **Why regulation after the crisis is feeble**: shadow banking, offshore financial centers and jurisdictional competition. In Regulation and Governance, Vol.7, no.4, 2013, 435-459.

UVIN, Peter; BIAGIOTTI, Isabelle. "Global governance and the "new" political conditionality", in **Global governance**, vol.2, no.3, 1996, 377-400.