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Presentation

It is commonplace to affirm satisfaction at a new Journal or periodical appearance. The scientific world can feel satisfied with the birth of the Review of International and European Economic Law (RIEEL), which is called to fill an editorial gap in the national and international order that is evident, which also aims to be filled with a decidedly interdisciplinary approach.

Suppose the so-called Global Legal Order revolves around human rights, the preservation and defence of the environment and world governance. In that case, the RIEEL makes governance inclusive of multilateral cooperation. This axis allows it to project itself on all the significant issues that shake our survival and progress as a species from an economic perspective, respecting fundamental principles and values. The menu is vast and open: international economic law, trade, taxation, financing and sustainable development, investments, customs, banking system, migration, free market and competition, environmental rules, pandemics, money laundering, security, means of dispute settlement, international organizations...

Whether the Journal's baptismal happiness finds confirmation, later, will depend on its contributions, that is, on the success, timeliness, and quality of the articles it requests or receives, its punctual appearance, its attractive presentation and the favour of its readers.

All this requires an alert, firm and rigorous management, a capable and motivated team and an advisory board ready to suggest topics and outline guidelines thanks to its wisdom and experience.

The first issue of the RIEEL offers the first section, "Review Articles", of remarkable ambition and impact. Some proposals are presented on codification and progressive law that directly affect the global legal order in two fundamental matters: International fiscal cooperation and the environment. Thus, the first issue already includes a proposal for a General Agreement on International Tax Cooperation, Trade and Global Tax Governance. This study is seasoned with another on the procedural framework that contains some general ideas to facilitate the preparation of an agreement of these characteristics within the framework of the United Nations. This section also includes a work that deals with the codification of international environmental law in its march towards a global pact for the environment.

The number is completed with a series of varied scientific articles written by specialists in international law, financial law and political science, together with some chronicles of conferences and congresses, and a bibliographical review.

Antonio Remiro Brotons

Full Professor of Public International Law

Directive board member of the Review of International and European Economic Law

REVIEW OF INTERNATIONAL & EUROPEAN ECONOMIC LAW
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GENERAL AGREEMENT ON INTERNATIONAL TAX COOPERATION, TRADE, AND GLOBAL TAX GOVERNANCE:

A Proposal

(Part I)

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Review Article

General Agreement on International Tax Cooperation, Trade and Global Tax Governance: A Proposal (Part I)

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Received 20 November 2021, Accepted 25 January 2022

KEYWORDS:

International tax cooperation, global tax governance, international trade, codification and progressive development, United Nations Charter, sustainable development

ABSTRACT:

This article presents a proposal for a general agreement on international tax cooperation, trade, and global tax governance as a support for a neural system of international tax cooperation relations to make effective the channels of tax cooperation between the States of the world in the coming centuries, in a new global tax governance architecture design. In the current post-COVID 19 era, in an unstable framework marked by economic, health, military, migratory crises, etc., international tax cooperation, trade and global tax governance are critical sources towards a new world order inspired by new foundations of global tax governance that allows financing sustainable development.

PALABRAS CLAVES:

Cooperación fiscal internacional, gobernanza fiscal global, comercio internacional, codificación y desarrollo progresivo, Carta de las Naciones Unidas, desarrollo sostenible

RESUMEN:

Este artículo presenta una propuesta de tratado general sobre cooperación tributaria internacional, comercio y gobernanza fiscal global como sistema neural de relaciones de cooperación tributaria internacional para hacer efectivos los cauces de cooperación tributaria entre los Estados del mundo en los próximos siglos, en un nuevo diseño de arquitectura de gobernanza fiscal global. En la actual era post-COVID19, en un marco inestable marcado por crisis económicas, sanitarias, militares, migratorias, etc., la cooperación fiscal, el comercio internacional y la gobernanza fiscal global son fuentes de financiación cruciales hacia un nuevo orden mundial inspirado en nuevas bases de gobernanza tributaria que permita financiar el desarrollo sostenible.

MOTS CLES :

Coopération fiscale internationale, gouvernance fiscale mondiale, commerce international, codification et développement progressif, Charte des Nations Unies, développement durable

RESUME :

Cet article présente une proposition de traité général sur la coopération fiscale internationale, le commerce et la gouvernance fiscale mondiale comme un système neuronal de relations de coopération fiscale internationale pour rendre efficaces les canaux de coopération fiscale entre les États du monde dans les siècles à venir, dans une nouvelle architecture de gouvernance fiscale mondiale. Dans l'ère post-COVID19 actuelle, dans un cadre instable marqué par des crises économiques, sanitaires, militaires, migratoires, etc., la coopération fiscale, le commerce international et la gouvernance fiscale mondiale sont des sources du financement essentielles vers un nouvel ordre mondial inspiré par de nouveaux fondements de la mondialisation. Une gouvernance fiscale qui permette de financer le développement durable.

CONTENTS:

GENERAL AGREEMENT ON INTERNATIONAL TAX COOPERATION, TRADE AND GLOBAL TAX GOVERNANCE:

A Proposal

(Part I)

The parties to this General Agreement,

Emphasizing the necessity of international tax cooperation and global tax governance about the commercial, social and economic relations to achieve the optimal utilization of the world's resources, according to the objective of a sustainable economic development of States and the purposes of environmental and socially sustainable development.

Reaffirming the duty of cooperation in economic and social matters incorporated in the Charter of the United Nations (Article 1.3, Article 13, Articles 55-56 and 62), as well as in other recommendations, declarations and resolutions of the National Assembly and ECOSOC on international tax cooperation such as the Resolutions 1,495 (XV), 1,522 (XV), 1,516 1519 and 1526 (XV), 1815 and especially Resolution 2625 (XXV) of the General Assembly on International Cooperation.

Being desirous of contributing to achievement of the sixteen sustainable development goals (SDGs) of the United Nations 2030 Agenda and the future ones targets (twi 2050; EU 2050; 2063 African Union Agenda, etc.), as well as to the achievement of the Addis Ababa Action Agenda objectives; the Doha Declaration; the Monterrey consensus, and being desirous of contributing with the United Nations, the International Monetary Fund, the World Bank and the OECD, which conforming the platform for international fiscal cooperation, as well as with the rest of stakeholders and states involved in these issues.

Highlighting the necessity to make positive efforts to ensure that the developing countries maximize their possibilities of development through good tax and financial policies inspired by international cooperation and good global governance, that prevents aggressive unilateral measures, promoting inclusive frameworks for international tax cooperation (no one behind).[1]

Emphasizing the relevance of the taxation, international tax cooperation, international trade and global tax governance as crucial financial sources for sustainable development in a globalized world that leads to fair, inclusive, efficient and digitized tax systems.

Recognizing further that the states should make compensation efforts to balance the forces between efficient, digitized and robotic administrations in the face of the taxpayers, intermediaries' and stakeholders' rights, protecting the confidentiality of information, privacy and the flow of personal data, enhancing tax compliance models and tax risk management processes in the framework of the digitalization of tax administrations. Achievements that must be specifically reinforced in environments of health (COVID-19, …), military (WARS) and/or economic crisis.

Resolved to observe the principles and purposes of the global legal order, the legal sources of international tax law and international economic law.

Resolved to preserve the commitments assumed by any of the States derived from the bilateral or multilateral instruments that the parties have taken in these subjects, and,

Convinced to advance in the people's mentality shift, enhancing the international tax cooperation between the states and the international tax governance on the path of global sustainability,

[1] United Nations International Tax Cooperation Committee target.

Have agreed:

Article 1

Set of the general agreement

The present agreement sets a new general agreement on “International Tax Cooperation, Trade and Global Tax Governance”.

This general agreement follows the last generation international economic cooperation treaties, with a holistic view, in line with the new generation of trade agreements (FTAs), dealing not only with economic aspects, but also cultural, social, ethical, and environmental ones.

Article 2

Principles

The respect for the democratic socio-economic principles and the fundamental Human Rights contained in the Universal Declaration of Human Rights, as well as in the Charter of the United Nations and in international tax law and international trade agreements, inspire the present general agreement.

The general agreement on international tax cooperation, trade and global tax governance is supported on the principles of tax justice, legal security, equity and efficiency, transparency, simplification, neutrality, proportionality and sustainability.

The parties shall act in accordance with the undertake international taxation principles, especially with the general principles assumed at the Ottawa Ministerial conference on electronic commerce: Neutrality, efficiency, certainty and simplicity, effectiveness and fairness and flexibility.

A new “Principle of International Tax Cooperation” is set as a new general principle of the global legal system for the promotion, strengthening and consolidation of international tax cooperation among the world States and stakeholders.

Article 3

Proposals

1. The purposes of the present general agreement are:

   a) To achieve international tax co-operation in solving problems of economic, social, technologic, environmental, educational, and humanitarian character.

   b) To acquire sustainable development promoting a new mentality shift of the peoples, as well as multilateral tax and financial policies to address global challenges, seizing the potential of financial innovation, new technologies and tax digitalization policies, protecting the taxpayers’ rights, intermediaries and stakeholders.

   c) To set the framework bases of a new global tax governance architecture design, strengthening "fairness & efficient" regional, national, and international financial and tax policies in the face of the changing global landscape, committed to combating any kind of tax avoidance/evasion and criminal tax, as well as improving tax compliance systems and tax risk management processes of tax administrations.

   d) To promote the mobilization of domestic resources and investments to achieve sufficient resources to provide the basic needs and services for developing countries still underfunded.

   e) To go on the new multilateralism consensus, promoting the effective participation of ministers and finance vice-ministers, tax authorities and representatives of civil society, private sector, SMEs, MNEs, academia, regional and global international organizations,

institutional tax associations, and the rest of the stakeholders, to achieve the objectives of sustainable development through international tax cooperation in a framework of good global fiscal governance.

Article 4

Scope

1. This general agreement contains the cross-cutting, inclusive, and sustainable bases for international tax cooperation-governance, trade tax keys and technological innovation, aimed at achieving efficient, fair-equitable tax systems for the sake of global sustainability. It is intended to contribute towards the efficiency, effectiveness, and fairness of international, national and regional taxation systems while protecting citizens' moral, human and social rights in the relations of the tax Administrations with the taxpayers and stakeholders, following the 2030 and Addis Ababa Agendas, the Monterey Conference and the Doha Declaration and being committed to the future agendas on these issues.

2. This general agreement assumes a wide-ranging global tax governance scope enhancing the necessity of: the international tax cooperation relations between tax administrations (international, national, and regional plans), and the tax administrations and taxpayers, intermediaries and stakeholders in the international and national fields (highlighting the need to further strengthen the protection of taxpayers' rights in cross-border tax transactions); the international administrative cooperation in tax matters; the international cooperation in administrative mutual assistance (tax credits); the international trade tax law issues; the customs tax cooperation; the digitization of tax administrations; the tax risk management models for tax administrations (compliance tax risk processes), the global guidelines for taxation of the digital economy and transfer pricing; Tax education and tax compliance; the environment taxation; the taxpayers rights in the domestic and international sphere; Taxation and Gender; Resolution of tax disputes; Systems for combating tax fraud in the fight against tax avoidance, tax evasion and aggressive tax planning, corrupt-free and transparent tax systems, and in general, environment, social and ethical tax policies.

Article 5

International Administrative Cooperation in Tax Matters

1. The parties of this treaty acquire the commitment to make possible all way of the international administrative cooperation - in matters related to taxes of any nature- with the following purposes:

   a) To redistribution of wealth for public wellbeing and to raise more revenue in an equitable way in the framework of a new social contract inspired on a more inclusive and equitable society.

   b) To get higher tax revenues that contribute to the reduction of the public sector deficit for benefit of all.

   c) To fight against tax evasion and tax avoidance and avoidance in the international market, regarding worldwide earnings.

   d) To maintain national tax sovereignty and the tax balances in a globalization world characterized by an expansion of cross-border transactions and the internationalization of financial instruments. In the global era, tax administrators must extend their reach beyond the borders of the Nation State.

   e) To collect of domestic financial resources to support the efforts for the achievement of the sustainable development and sustainable development goals.

   f) Cooperation between tax administrations is critical in an environment of global crisis for States to maintain their revenues. It must be taken into account especially in situations such as those that cause global pandemics.

2. The administrative tax cooperation may be specified in the following actions:

a) Exchange of tax information between tax administrations regarding the entire tax system. The parties will preserve the commitments assumed on international regulations created on the exchange of tax information between tax administrations, in coherence with the legal framework: Multilateral mutual assistance convention; Bilateral double taxation agreements (articles 25, 26, etc.); Bilateral agreements for the exchange of tax information; The common report standard and the multilateral Competent Authority Agreement on the Exchange of CbC Reports (CbC MCAA), as well as the other two OECD models of competent authority agreements for the exchange of CbC Reports (one for exchanges under Double Taxation Agreements and another for exchanges under Tax Information Exchange Agreements); the tangent actions of BEPs; the Community Directives and Regulations of the European Union and regulations on administrative cooperation in tax matters between the member states of the European Union; the domestic state regulations, etc.

   The parties assume to extend and promote the international cooperation on automatic information exchange and other tax information exchange systems.

b) Exchange of officials and senior officials of the tax and customs administrations. Presence of the officials (requesting country) in the offices of the administrations of the requested country.

c) Participation of officials (from the requesting country) in the investigations of the requested country (interviews with people and examination of files if the legislation of the other country allows it).

d) Simultaneous controls: two or more member states agree to control each one in their respective territory, simultaneously with two or more people in common.

e) Notifications.

f) Exchange of good practices (sharing and evaluation of administrative cooperation actions).

g) Simplification and standardization of administrative and customs procedures.

h) Cooperation in Technical Assistance.

3. The parties express their interest in proceeding in the future to adopt a Protocol of international fiscal cooperation that avoids the gaps and overlaps produced by the different international regulations that exist in this matter (OECD, UN, FATCA, EU, Nordic Convention, Andean pact, etc.). It should be necessary to develop common procedural standards and compatible information and communication technology. Standardization of formats is critical to the efficiency and effectiveness of the administrative cooperation in tax matter.

4. Costs: The States should work to minimize costs through standardized procedures valid for all countries, otherwise short and medium-term costs may be much higher than the benefits.

Article 6

International cooperation in administrative mutual assistance (tax credits)

1. The parties:

   a) Will cooperate in all possible forms of related to any nature taxes.

   b) Will cooperate in the collection of tax credits required by other states taking the necessary measures to ensure such result as if they were their own tax credits.

   c) Will facilitate the proper determination of tax obligations and help to ensure their rights.

   d) Will contribute to combating international tax evasion and avoidance in all spheres: regional, national and international.

e) Will establish as international framework the Multilateral Convention for Mutual Assistance modified by its last protocol and adjusted to the subsequent regulations created in the matter.

f) Will preserve the regulations established in international tax law on cooperation in administrative mutual assistance, with special monitoring of the commitments derived from the agreements signed of a bilateral and multilateral nature. They will also promote and facilitate any kind of administrative assistance in tax matters.

2. In the development of mutual assistance activities by the tax administrations, the national and international legislation will protect the rights of taxpayers, especially the protection of the confidentiality of information, privacy, secrecy of correspondence and industrial secrecy as well as the respect for the principle of non-discrimination.

Article 7

Cooperation in international trade trough commercial tax policies[2]

1. The parties will strengthen international cooperation through the establishment and application of commercial tax policies aimed at:

   a) To promote and diversify commercial exchanges, commercial flows and commercial cooperation projects.

   b) To promote international investments.

   c) To promote the transfer of improvements, technologies, technical training programs, the exchange of technologies and computer systems, experiences and good practices, advice and information systems....

   d) To reduce risks and distortions in trade relations and eliminate obstacles to cooperation in international trade.

   e) Boost cooperation between commercial agents involved and stakeholders.

   f) To promote the exchange of information and technology in the field of international trade.

   g) To open disclosure of national legislation and investment opportunities and benefits.

2. The parties will follow the International Trade Law included in the World Trade Organization and other international treaties and rules binding to them".

3. The parties will favour the celebration of multilateral and bilateral treaties to promote trade and investment and will respect the commitments derived from multilateral and bilateral agreements to avoid double taxation. In general, parties will refuse to use mechanisms such as double exemptions, double non-taxation and international tax fraud in international trade.

4. *Global value chains*: The parties will promote development by encouraging participation and improvement in global value chains, preventing developing countries from obtaining less profit from their participation in the global economy than more advanced ones. To this end, the parties will promote all kinds of initiatives such as the OECD Initiative on Global Value Chains (GVCs), Production Transformation and Development (hereafter Initiative): a global platform for peer learning, among others, trying to incorporate all continents and also the largest possible number of stakeholders.

[2] With the collaboration of **Xavier Fernandez Pons**, Public International Law's associate professor at the University of Barcelona.

Article 8

Customs Cooperation

1. The Parties will promote customs cooperation to improve and consolidate their trade relations, encouraging a customs tax law built based on customs cooperation that allows improving, consolidating and increasing trade relations between States. In addition, they may enhance the application of customs taxes applied to export operations as protection of internal supply.

2. The parties will strengthen their customs structures and improve their operation within the framework of inter-institutional cooperation.

3. Customs cooperation may take the form, among others, of:

   a) Information exchanges.

   b) Development of new techniques in the field of training and coordination of actions of international organizations competent in the field.

   c) Exchanges of officials and senior officials of the customs and tax administrations.

   d) Simplification of customs procedures.

   e) Technical assistance.

4. The parties to this treaty undertake to respect the customs duties and taxes contemplated in multilateral and bilateral treaties and agreements, economic integration treaties or agreements, and national legislation.

5. The parties express their interest in proceeding in the future, to consider, in the institutional framework provided in this Agreement, the conclusion of a Customs Cooperation Protocol.

Article 9

Environmental Taxation

1. The parties will promote a green taxation system that encourages the use of less polluting energies, reducing the negative externalities that harm the environment.

2. The parties will cooperate to establish environmental fiscal policies that promote sustainable development aimed at:

   a) Simplify the tax systems in terms of excise duties

   b) Favour fiscal conditions for the promotion of renewable energies.

   c) Interregional and international cooperation for the protection of the environment and the use of renewable energies

   d) The promotion of environmental educational policies.

3. In general, the use of taxation for non-fiscal environmental purposes that promotes all types of exchanges, experiences, practices, regulations and standards, technical assistance and instruments that contribute to global environmental sustainability will be promoted.

Article 10

Resolution of Tax Disputes[3]

1. The parties shall cooperate to resolve disputes or doubts arising from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and/or capital. They shall also cooperate to address issues referred to them by the agreement or the convention.

2. Where a person considers that actions of a state result or will result in taxation not in accordance with an agreement or a convention, he may, irrespective of the remedies provided by the domestic law of that State, present his case to the States party to the agreement or the convention affected by his case.

3. The states concerned shall acknowledge receipt of the complaint in a timely manner. They shall agree on the rules of functioning of the procedure. The rules of procedure may provide for the appointment of an advisory commission compound by a chair, their representatives and independent experts for the case where they fail to agree on a solution to the case after a reasonable period. The advisory commission shall deliver an opinion that will be compulsory if the States do not agree on a different solution in due time.

4. The parties shall communicate directly to solve the case. The person affected shall request to participate in a hearing or submit evidence or documents that shall be dealt with under the authority of the States. The person affected may appeal in accordance with national rules the decision of the States to reject his complaint, the non-appointment of the advisory commission or the absence of notification of a decision within a reasonable period.

Article 11

Systems combating Tax Fraud

1. The parties will promote the concepts of good tax governance and the importance of a corrupt-free and transparent tax system for economic development, fighting against corruption, money laundering and tax crimes. Law enforcement agencies and tax authorities will cooperate to counter corruption and bribery[*4].

2. The parties shall adopt minimum measures to combat tax avoidance and evasion, which aim not only to eliminate the tax advantages obtained through fraud, but also to identify and apply appropriate penalties and punitive action to the final beneficiaries, as well as to the professionals involved in the development and implementation of the corporate or financial structure for such practices[*].

3. The parties will reinforce the capacity of jurisdictions to meet and to implement in practice their legal obligations arising from international Standards such as Financial Action Task Force (FATF), the UN Convention against Corruption (UNCAC), the UN Office on Drugs and Crime (UNDOC), the Council of Europe Criminal Law Convention on Corruption, the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions, the Standard for Automatic Exchange of Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) and exchange of custom authorities information, the World Bank and the IMF prescriptions, amongst others, to detecting, tracking, and preventing illicit financial flows and every action and all kinds of actions aimed at money laundering, tax crimes and corruption, towards to the overall global transparency framework, with the cooperation of the stakeholders: competent authorities, public bodies, financial institutions and designated nonfinancial businesses and professionals. In particular, the parties will work for further facilitation of inter-agency Cooperation and exchange between authorities, using the sources available to tax administrations and FIUs and the use of new technologies[*].

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[3] Article set by por **Juan López,** Officer to the European Commission. Ph.D. in law, expert in tax law and policy, in its regional, national, international and European aspects, with more than 25 years of experience in bodies in charge of fiscal and tax policies (Economic and Finance Ministry of the Spanish Government and the Commission Services). Tax Policy Adviser at European Commission.

*** Jeffrey Owens,** Project Good Governance and Transparency International Project

4. The States shall cooperate to eliminate legislative discrepancies which allow tax arrangements that result in double non-taxation, by fractionation of activities, profit shifting, or through the use of concept of tax residence for non-establish in any State where the company develop it activities.

5. The parties will promote the adoption of mechanisms and instruments to combat tax fraud, especially aggressive planning structures, included[5]:

   a) Establishing a Common General Anti-Avoidance Rule allowing the authorities of a State Party to disregard corporate arrangements or legal acts practiced in another State Party that the sole purpose is remove or reduce the tax incidence.

   b) Allowing the exchange of tax information about companies based in a State Party which regularly conduct business with companies or persons investigated for tax fraud in another State Party, upon the request of that State.

   c) Establishing cooperation protocols in order to, pursuant to Article 4, obtain credits arising from sanctions or penalties imposed to the taxpayer of a State and that shall be executed by another Contracting State, jointly with their tax credits.

[5] With the collaboration of Jorge Marcelino Junior

1 THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF THE INTERNATIONAL TAX LAW ON INTERNATIONAL TAX COOPERATION AND GLOBAL TAX GOVERNANCE, THROUGH A GENERAL AGREEMENT ON INTERNATIONAL TAX COOPERATION, TRADE AND GLOBAL TAX GOVERNANCE. A PROPOSAL.

In the previous pages, a proposal for a general agreement on international tax cooperation, trade and global tax governance is presented as the basis of a neural system of global international cooperation relations that prevails in the coming centuries to make effective the channels of tax cooperation between States of the world. The goal aspires to arbitrate solutions for sustainable development financing through a new architecture of global tax governance. It is a global policy-rule making proposal based on the same spirit of the United Nations Charter and is inspired by its iconic and global motto:

"We the peoples"

Through this proposal for a general agreement, we try to tilt the pendulum towards the G-193 as a representation of practically all the world States, promoting international tax cooperation, international trade, and global tax governance as ways of financing sustainable development the planet.

With this global policymaking proposal, the role of the United Nations is strengthened as a body that codifies and progressively develops public international law (article 13 of the United Nations Charter). Moreover, in cooperation and tax governance, this international organisation also assumes the proper role to set the broad bases of a future framework agreement or general agreement on the subject.

> Nowadays, more than ever, immersed in a post-COVID-19 economy and stunned by Russia's invasion of Ukraine, in Russia *versus* NATO struggle, the need to rescue the spirit of the San Francisco Charter emerges; we should go back over the residue left by Declarations such as the St. James Palace Declaration in June 1941 and the United Nations Declaration of January 1942, the Atlantic Charter of 1941 (the great principles that presidents signed in their day Roosevelt and Churchill), the Tehran and Yalta Conferences (1943 and 45 respectively), and the Dumbarton Oaks Summit in Bretton Woods, all signed in the development of the bloodiest and most massive war of all time and that brought times of prosperity, development and future. And even more, return to the European Agreement that prevailed for the redistribution of Europe where the principle of peaceful cooperation would be established without any fissure (Andrés-Aucejo, E.).

It seems necessary to draw the new architecture designing the bases of a new world discipline, such as global tax governance and not build randomly, at the mercy of chrematistic, partisan or discretionary interests, at the service of specific economic policies at certain moments in its political history.

Therefore, it should be necessary to change the mentality that leads to a new global legal order that includes a new conception on international tax cooperation relations and good global governance. And United Nations is the World Organization that holds the "institutionalized international cooperation" among its functions following the UN Charter (Andrés-Aucejo E., 2020).

Indeed, the United Nations is the international organization that has institutionalized international cooperation among its purposes and objectives (United Nations Charter and resolution 2625). The G-77 and not only the G-20 have a significant specific weight. And much less the G-7.

The United Nations is the global forum where all the countries have a voice and a vote. Therefore, there is no need for inclusive regulatory platforms where only a few states

create rules and not all are represented. The United Nations is the international organization where the interests of the entire planet are collected, whose States, all of them, here yes, have the capacity to negotiate and sign.

The United Nations is the international forum where there is a supreme body, the General Assembly, with the capacity to reach global agreements either through the Assembly itself or by calling international conferences, where new global regulations are designed, through an orderly process of codification and progressive development of International Law, which not only.

Therefore, it is contradictory to create laws for "the peoples" without "the peoples." Therefore, world regulations require "world parliaments", and the only "world parliament" (metaphorically speaking) is the United Nations General Assembly (not without limitations).

We, therefore, conclude that there is a need for a change in world mentality and for a new global legal system that embraces the bases of a new general agreement or a framework agreement on international tax cooperation and tax governance. With this, the role of the UN is reaffirmed as a priority role for the creation of a global framework agreement on international tax cooperation and global tax governance, due to the following characteristics: its functions of codification and progressive development of International Law (Article 13 Charter); its well-known facet as a body in charge of institutionalized and permanent international cooperation that includes practically all the countries of the world (art. 103 Charter). In addition, the UN is the international organization in charge of the coordination of States and International Organizations, as it has been attributed to it because of Article 1.4 of the Charter of the United Nations. A body that houses the purposes and principles of the world order (arts. 1.3 and 2 of the UN Charter) developed by General Assembly Resolution 2625 (XXV) where the "Principle of Peaceful Cooperation" is typified for the global of the towns. Principles that constitute the most authoritative formulation of the fundamental principles of International Law (F. Mariño).

2 THE IMMINENT AND INCREASINGLY PRONOUNCED NEED FOR THE FINANCING OF SUSTAINABLE DEVELOPMENT (OWENS, J., LENNARD, M. ANDRÉS-AUCEJO, E., 2020)[1]

The sustainable development is a pending issue in the world, also in the world of the second globalization in which we live. And everything seems to indicate that such severe global crisis of health, military, economic, social, migratory, humanitarian nature, etc., make it increasingly difficult for us to set the north towards the financing of sustainable development.

Nothing new we are discovering highflying that the latest trends in sustainable development emphasize the relevance of financing issues in achieving the planet's sustainable development goals.

> "Funding the SDGs is an economic and ethical imperative with major implications for taxation. Countries themselves need to raise more revenue in an equitable way. And the entire international community needs to eradicate tax evasion and tax avoidance".[2]

[1] The content of this section has been mainly translated for this article from the Spanish language (Owens, J., Lennard, M. Andrés-Aucejo, E., 2020).

[2] Cristina Lagarde, Managing Director of the IMF. https://www.oecd.org/tax/countries-must-strengthen-tax-systems-to-meet-sustainable-development-goals.htm

The United Nations Inter-Agency Task Force on Financing for Development[3] warns that the mobilization of sufficient funding continues to be the greatest challenge for the implementation of the 2030 agenda for sustainable development.[4] However, despite the signs of progress and the despite the work carried out to date, the critical investments to achieve the sustainable development goals are still underfunded, as this body shows, which also affirms that the interest in sustainable financing is growing. Again, the transition to sustainability in the financial system is not occurring at the required scale.

The Secretary-General of the United Nations, António Guterres, highlights the need to undertake strategies and an integrated financing system to achieve sustainable development. In his own words: "Given these broad trends, it is clear that the world will not achieve the Sustainable Development Goals without a fundamental shift in the international financial system that enables us to address urgent global threats and restore trust in international cooperation"[5] (…) Unfortunately, as the Secretary-General himself stated in 2019 "Although there is progress to report on financing for sustainable development since the adoption of the Addis Ababa Action Agenda in 2015 it is not happening "at the required scale, nor with the necessary speed".[6]

From the first months of 2020, the world faces a new world crisis derived from the COVID-19 disease. The UN Secretary-General warns that the socio-economic impact of the coronavirus pandemic (COVID-19) requires a large-scale, multilateral response that represents at least ten percent of world GDP to put counter-walls in "the worst crisis since World War II".[7] "The outbreak of COVID-19 has become one of the largest threats to the global economy and financial markets in history" (Carola VALENTE & Federico VICENTI, 2020). [8]

An alarming international environment arises because of the worldwide COVID- 19 epidemic requiring relevant challenges. Nowadays, even more, the financing of sustainable development is possibly, the driving force behind the new globalization. Global economic governance will have to be restored when this global crisis is overcome.

The report on Financing for Sustainable Development 2020 (days ago published) by the Inter-Agency Working Group on Financing for Development[9] contains severe warnings

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[3] Report of the Inter-Agency Task Force on financing for development: Financing for Sustainable Development Report, UNITED NATIONS, 2019, p. xvii.

[4] Financing on Sustainable Development is one of the most prominent fields of the Department of Economic and Social Affairs. The branch of the United Nations Department of Economic and Social Affairs Financing includes different sections such as FFD forum, Addis Ababa Conference, Tax Cooperation; Capacity building; the Inter-institutional Task Force on Financing for Development, etc. (https://www.un.org/esa/ffd/).

[5] FOREWORD, Report of the Inter-Agency Task Force on Financing for Development, Financing for Sustainable Development Report, 2019, UNITED NATIONS, 2019, p. iii.

[6] FOREWORD, Report of the Inter-Agency Task Force on Financing for Development, Financing for Sustainable Development Report, 2019, UNITED NATIONS, 2019, p. iii.

[7] "La recuperación de la crisis del COVID-19 debe conducir a una economía diferente. Todo lo que hacemos durante y después de la crisis debe enfocarse en construir economías y sociedades más equitativas, inclusivas y sostenibles que sean resistentes a las pandemias, al cambio climático y los otros muchos desafíos globales a los que nos enfrentamos" (declaraciones del Secretario General de la ONU, fechadas el 31 de marzo de 2019). Source: REDACCIÓN | EFE 01/04/2020 14:16 (La Vanguardia/ Economía).

[8] "Hence, multinational groups -as the operate in different jurisdictions, geographical areas and markets -are confronted with the need of developing effective business planning in order to minimise the economic impact of the pandemic, as well as to ensure the normal operation of their business" (Carola VALENTE & Federico VICENTI, 2020).

[9] The 2020 Financing for Sustainable Development Report of the Inter-agency Task Force on Financing (https://developmentfinance.un.org/fsdr2020). It is also accesible:

- Summary by the President of the General Assembly of the High-level Dialogue on Financing for Development (New York, 26 September 2019) A/74/559, 21 November 2019.
- Follow-up to and implementation of the outcomes of the International Conferences on Financing for Development Report of the Secretary-General, A/74/260 30 July 2019.
- International financial system and development Report of the Secretary-General**A/74/168 15 July 2019.

about the consequences of the health crisis stemming from COVID 19 on financing sustainable development. There is maximum concern that the results of COVID-10 could derail funding for the Sustainable Development Goals and the Addis Ababa Action Agenda.

The losses of the world stock markets, massive destruction of employment, setbacks in national income, and in general, the negative impact on monetary and economic macroeconomic variables, it gives a glimpse of a very worrying scenario. [10] Hence, the recently issued 2020 Report proposes a package of measures related to avoiding a public debt crisis, injecting liquidity into financial markets, among other measures aimed at not reversing the trend of financing sustainable development and affecting both the public sector, like the private sector and third sector, in the short and medium-term.

All of the above leads us to pay attention to the primary role of national and international taxation as one of the main sources to achieve global sustainable development. In this sense, the Addis Ababa Action Agenda reports the relevance of taxation (domestic and international) and international tax cooperation, as well as the need to eliminate international tax fraud, capital evasion, and illicit financial flows, to achieve the planet's sustainable development goals.[11] The ECOSOC highlights the relevance of strengthening of fiscal regimes, including both fiscal policies and their management, as a priority key of the 2030 Agenda and the Addis Ababa Action Agenda.[12] This body has consistently advocated the need for international cooperation in tax matters. The resolutions of the United Nations Committee of Experts on International Fiscal Cooperation and also the UN General Assembly resolutions reflect the need to promote efficient and effective tax systems that allow maintaining levels of public and private investment, as well as fighting against tax evasion in an environment of enhanced international cooperation. [13]

Towards these ends, the Platform of Experts on International Tax Cooperation, [14] made up of the United Nations, the OECD, the Monetary Fund, has been created in recent times. International and the World Bank. "Major international organisations - including the

- Financing SDGs 4, 8, 10, 13, and 16 Perspectives from the 2019 Financing for Sustainable.
- Development Report; Summary by the President of the Economic and Social Council of the forum on financing for development follow-up, including the special high-level meeting with the Bretton Woods institutions, the World Trade Organization and the United Nations Conference on Trade and Development (New York, 15–18 April 2019) A/74/87*–E/2019/71*-13.

[10] See BALDWIN, R., B. WEDER DI MAURO (Eds.) (2020); DRAGHI, M. (2020); BOSCÁ, J. E., FERRI, D. J. (2020); DURÁN, J. M., ESTELLER, A. "Coronavirus y Finanzas Públicas", IEB, n. 32, 2020.

[11] A/RES/69/313

[12] The ECOSOC calls a meeting on international cooperation in tax matter, April 13, 2017, New York.

[13] ECOSOC resolution 2004/69 on "Committee of Experts on International Cooperation in Tax Matters" (E/2004/INF/2/Add.3, page 14) – 11 November 2004; ECOSOC resolution 2006/48 on "Committee of Experts on International Cooperation in Tax Matters" (E/2006/INF/2/Add.1, page 160) – 28 July 2006; ECOSOC resolution 2007/39 on "Committee of Experts on International Cooperation in Tax Matters" (E/2007/INF/2/Add.2, page 5) – 4 October 2007; ECOSOC resolution 2008/16 on "Committee of Experts on International Cooperation in Tax Matters" (E/2008/INF/2/Add.1, page 44) – 24 July 2008; ECOSOC resolution 2010/33 on "Committee of Experts on International Cooperation in Tax Matters" (E/2010/INF/2/Add.1, page 152) – 23 July 2010; ECOSOC resolution 2011/23 on "Committee of Experts on International Cooperation in Tax Matters" – 27 July 2011; ECOSOC resolution on "Committee of Experts on International Cooperation in Tax Matters" (E/RES/2012/33) – 27 July 2012; Draft ECOSOC resolution on "Committee of Experts on International Cooperation in Tax Matters" (E/2012/L.30) – 25 July 2012; ECOSOC resolution 2011/23 on "Committee of Experts on International Cooperation in Tax Matters" – 27 July 2011; ECOSOC resolution on "Committee of Experts on International Cooperation in Tax Matters" (E/RES/2012/33) – 27 July 2012; ECOSOC resolution on "Committee of Experts on International Cooperation in Tax Matters" (E/RES/2013/24) – 24 July 2013; ECOSOC decision 2013/239 on "Dates and provisional agenda for the ninth session of the Committee of Experts on International Cooperation in Tax Matters" 24 July 2013; Draft ECOSOC decision on "Dates and provisional agenda for the ninth session of the Committee of Experts on International Cooperation in Tax Matters" (E/2013/L.39)- 23 July 2013; Draft ECOSOC resolution on "Committee of Experts on International Cooperation in Tax Matters" (E/2013/L.22) – 10 July 2013; Note by the Secretary-General on "Appointment of 25 members to the Committee of Experts on International Cooperation in Tax Matters" (E/2013/9/Add.10) – 28 June 2013; ECOSOC resolution on "Committee of Experts on International Cooperation in Tax Matters" (E/RES/2013/24) – 24 July 2013; ECOSOC resolution on "Committee of Experts on International Cooperation in Tax Matters" (E/RES/2014/12) – 13 June 2014; ECOSOC resolution on "Committee of Experts on International Cooperation in Tax Matters" (E/RES/2017/2) – 5 October 2016; ECOSOC resolution on "United Nations code of conduct on cooperation in combating international tax evasion" (E/RES/2017/3) – 20 April 2017.

14 https://www.oecd.org/tax/countries-must-strengthen-tax-systems-to-meet-sustainable-development-goals.htm

IMF, OECD, UN and World Bank Group - today called on governments from around the world to strengthen and increase the effectiveness of their tax systems to generate the domestic resources needed to meet the Sustainable Development Goals (SDGs) and promote inclusive economic growth" (14/02/2018). (NICOLI, M., 2018), among many other actions of international organizations, associations, states and other stakeholders.

Thinking to promote a change of mentality that puts the north in a new international economic order with a holistic vision, today we present our proposal for a general agreement on international tax cooperation, trade and global tax governance through the following scheme:

a) In issue 1 of the Review of International and European Economic Law, the first part of the Proposal for a Global Tax Governance and Cooperation Treaty will be presented. It includes its programmatic and articulated part that consists of the following items:

GENERAL AGREEMENT ON INTERNATIONAL TAX COOPERATION, TRADE AND GLOBAL TAX GOVERNANCE. *A PROPOSAL (PART I)*

Preamble

Article 1. Set of the general agreement

Article 2. Principles

Article 3. Proposals

Article 4. Scope

Article 5. International Administrative Cooperation in Tax Matters.

Article 6. International cooperation in administrative mutual assistance).

Article 7. Cooperation in international trade trough commercial tax policies.

Article 8. Customs Cooperation.

Article 9. Environmental Taxation

Article 10. Resolution of Tax Disputes

Article 11. Systems combating Tax Fraud

b) In number 2 of the Review of International and European Economic Law, the rest of the articles missing from the treaty will be completed, abounding in the preparatory works, the background and prior work of this draft general agreement.

GENERAL AGREEMENT ON INTERNATIONAL TAX COOPERATION, TRADE AND GLOBAL TAX GOVERNANCE. *A PROPOSAL (PART II)*

Article 12. Taxation of digital economy and global transfer pricing policies

Article 13. The taxpayers' rights in the domestic and international sphere

Article 14. Tax education and tax compliance

Article 15. The digitalization of tax administrations

Article 16. Taxation and Gender

Article 17. Alternative Dispute Resolution systems

Article 18. Extractive activities taxation

BACKGROUNDS

PREPARATORY WORKS

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Review Article

The organization of the preparatory work for a Framework Agreement on international cooperation in tax matters: general ideas

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KEYWORDS:

International tax cooperation; global tax governance; international tax cooperation commission; framework agreement; General Assembly; United Nations Economic and Social Council

ABSTRACT:

Three alternative options can be proposed to promote and develop in the United Nations the preparatory work on the initiative for a Framework Agreement on international cooperation in tax matters and global tax governance: 1) Open-ended Working Group of the General Assembly (inter-governmental body) whose mandate shall be to elaborate a general international legally binding instrument (Framework Agreement) to regulate international cooperation in tax issues. Participation in all kinds of stakeholders (including academics) must be guaranteed.2) A similar kind of body (an open-ended working group or ad hoc inter-governmental committee) can be adopted by the Economic and Social Council, with parallel expectations on an extended and plural social and academic participation.3) The Committee of Experts on International Cooperation in Tax Matters is an alternative body to rightly develop the initiative (in such case, its work must be opened to observations of States); the question is whether its mandate must be extended or not by a new Resolution of the Economic and Social Committee. In any case, the previous decision on including the matter in its agenda, the draft must be considered by the General Assembly: 1) discussing the new international treaty during a regular session of the General Assembly, and adopting it by means of a General Assembly's resolution, and 2) adopting by means of a General Assembly's Resolution the decision to organize an International Conference to adopt the text of the new international treaty (this option doesn't exclude the later submission of the project to the final criteria and decision of the General Assembly, but it supposes a factor of legitimacy to support the nitiative).

PALABRAS CLAVES:

Cooperación fiscal internacional; gobernanza fiscal global; comisión de cooperación fiscal internacional; acuerdo marco; Asamblea General; Consejo Económico y Social de las Naciones Unidas.

RESUMEN:

Tres opciones alternativas pueden ser propuestas para promover y desarrollar en Naciones Unidas los trabajos preparatorios de la iniciativa de un Acuerdo Marco de cooperación internacional en materia tributaria:1) Grupo de Trabajo de composición abierta de la Asamblea General (órgano intergubernamental) cuyo mandato será elaborar un instrumento general internacional jurídicamente vinculante (Acuerdo Marco) para regular la cooperación internacional en materia tributaria. Se debe garantizar la participación de todo tipo de actores (incluidos los académicos).2) Un tipo de órgano similar (un grupo de trabajo de composición abierta o un comité intergubernamental ad hoc) puede ser adoptado por el Consejo Económico y Social, con expectativas paralelas de una amplia y plural participación social y académica.3) El Comité de Expertos sobre Cooperación Internacional en Materia Tributaria es un órgano alternativo para el correcto desarrollo de la iniciativa (en tal caso, su trabajo debe estar abierto a las observaciones de los Estados); la cuestión es si su mandato debe ser prorrogado o no por una nueva Resolución del Comité Económico y Social. En todo caso, previa decisión de incluir el asunto en su agenda, el proyecto deberá ser considerado por la Asamblea General: 1) discutiendo el nuevo tratado internacional en un período ordinario de sesiones de la Asamblea General, y aprobándolo mediante acuerdo de la Asamblea General; resolución, y 2) adoptar mediante Resolución de la Asamblea General la decisión de organizar una Conferencia Internacional para adoptar el texto del nuevo tratado internacional (esta opción no excluye la posterior sumisión del proyecto a los criterios y decisiones finales de la Asamblea General, pero supone un factor de legitimidad para apoyar la iniciativa).

MOTS CLES :

Coopération fiscale internationale; gouvernance fiscale mondiale; commission de coopération fiscale internationale; accord-cadre; Assemblée générale; Conseil économique et social des Nations Unies.

RESUME :

Trois options alternatives peuvent être proposées pour promouvoir et développer au sein des Nations Unies les travaux préparatoires à l'initiative d'un accord-cadre sur la coopération internationale en matière fiscale et la gouvernance fiscale mondiale : 1) Groupe de travail à composition non limitée de l'Assemblée générale (intergouvernemental organe) dont le mandat sera d'élaborer un instrument international général juridiquement contraignant (accord-cadre) pour réglementer la coopération internationale en matière fiscale. La participation à toutes sortes de parties prenantes (y compris les universitaires) doit être garantie.2) Un type d'organe similaire (un groupe de travail à composition non limitée ou un comité intergouvernemental ad hoc) peut être adopté par le Conseil économique et social, avec des attentes parallèles en matière de une participation sociale et académique élargie et plurielle.3) Le Comité d'experts sur la coopération internationale en matière fiscale est un organe alternatif pour développer à juste titre l'initiative (dans ce cas, ses travaux doivent être ouverts aux observations des États) ; la question est de savoir si son mandat doit être prolongé ou non par une nouvelle résolution du Comité économique et social. Dans tous les cas, la décision précédente d'inscrire la question à son ordre du jour, le projet doit être examiné par l'Assemblée générale : 1) en discutant le nouveau traité international lors d'une session ordinaire de l'Assemblée générale, et en l'adoptant au moyen d'un vote de l'Assemblée générale résolution, et 2) adopter au moyen d'une résolution de l'Assemblée générale la décision d'organiser une conférence internationale pour adopter le texte du nouveau traité international (cette option n'exclut pas la soumission ultérieure du projet aux critères finaux et à la décision du Assemblée générale, mais cela suppose un facteur de légitimité pour soutenir l'initiative).

The proposal to adopt within the United Nations Organization (UN) a Framework Treaty for International Cooperation in Tax Matters seems to be logical to frame it:

1) within the purpose described in art. 1,3 of the Charter of the United Nations (UN Charter)("To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms [...])";

2) within the functions assumed by the Social Economic Council, formed by 54 States elected by the UN General Assembly, in charge of organizing the work "concerning international economic, social, cultural, educational, health, and related matters" (art. 62.1 UN Charter), and among whose attributions is that "It may prepare draft conventions for submission to the General Assembly, for matters falling within its competence" (art. 62.4 UN Charter).

According to these coordinates, it seems legitimate to think that the draft international treaty (regardless of who comes from the initiative): 1) must previously become an initiative derived from some item on the agenda of the UN General Assembly or a specific initiative that it be included in the agenda of the General Assembly; or 2) it can be an initiative initially assumed by the Economic and Social Council to be worked on within it and, once the preparatory work is finished, transmit it as a draft international treaty to the UN General Assembly. In the first of the two cases, institutional and functional rationality would indicate that the work proposal on an international treaty of this nature would be transmitted to the Economic and Social Council.

Notwithstanding this, it would also not be unimaginable for the General Assembly to choose to entrust this task to an open-ended Working Group; An example, in this sense, is that of the Open-ended Working Group to promote an arms trade treaty: establishment of common international standards for the import, export and transfer of conventional weapons (Resolution 63/240, of the Assembly General, of December 24, 2008). His work culminated in the adoption by the General Assembly, after a negotiating process with various vicissitudes (including two international conferences), of the Arms Trade Treaty of April 2, 2013. This type of body, with intergovernmental roots, allows broad-spectrum participation among the various stakeholders: the Governments of the Member States, specialized agencies, civil society entities (for example, Non-Governmental Organizations or business groups), and also the university academy.

However, and to also calibrate the possibility of resorting to an already existing open-ended Working Group to more quickly implement the work, among the existing ones, it would seem perhaps to be competent to a certain extent the Special Working Group of Open Composition of the General Assembly to follow up on the issues contained in the Final Document of the United Nations Conference on the global financial and economic crisis and its effects on development, created by Resolution 63/205 of December 31 July 2009. However, it is clear, following the mandate of the afore mentioned final document, that any tax action related to this area of activity should be transferred to the Economic and Social Council, following what is set out in the Annex to the Resolution 63/203, of July 13, 2009:

> "38. We stress the need to ensure that all tax jurisdictions and financial centres comply with transparency and regulatory standards. We reiterate the need to further promote international cooperation on tax matters, particularly within the United Nations, among other things, by promoting agreements on double taxation. There should be inclusive cooperation frameworks that guarantee all jurisdictions' participation and equal treatment. We call for the systematic and non-discriminatory application of transparency requirements and international standards for exchanging information.
>
> 39. Illicit financial flows, estimated at several times global ODA, hurt financing for development. Therefore, measures to improve regulation, supervision, and

transparency of the formal and informal financial system should control illicit financial flows in all countries. An increase in the openness of the global financial system will also have a deterrent effect on illegal financial flows, in particular to international financial centres. It will increase the capacity to detect illicit activities".

To this end, the Economic and Social Council is requested to:

"c) Examine the strengthening of institutional arrangements to promote international cooperation in tax matters, in particular the United Nations Committee of Experts on International Cooperation in Tax Matters" (Paragraph 56, Annex).

Therefore, it must be assumed that, in practice, one way or another, it seems almost inevitable that any initiative in a sense described would identify the Economic and Social Council as the main body of the UN in charge of uniting the efforts of the international Organization.

From here, the following considerations can be made:

1) The matter of a possible Framework Treaty for International Cooperation in Tax Matters should be included in the agenda of the Economic and Social Council, for its institutional treatment in the manner that may be agreed upon, at the request of the General Assembly of the UN or of the Economic and Social Council itself, following Art. 9,1 2 of the Rules of Procedure of the Economic and Social Council (ECOSOC Regulation); or, as a consequence of a category I Non-Governmental Organization, processed through the Committee of Non-Governmental Organizations (Art. 9,1, 3 ECOSOC Regulation).
2) The most rational option, based on the institutional configuration of the subsidiary bodies of the Economic and Social Council, seems to be that the potential task of initiating the preparatory work for this international treaty would correspond to the Committee of Experts on International Cooperation in Tax Matters, dependent on the Economic and Social Council.
   In any case, this would mean: 1) assessing whether this committee is implicitly competent to address the task of preparing a draft international treaty, or b) if an additional express authorization is required based on a Resolution of the Economic and Social Council; Art. 14 of the ECOSOC Regulation would legally and institutionally justify this decision.

   In this sense, it is worth evaluating what the powers of the Committee of Experts on International Cooperation in Tax Matters are under Resolution 2004/69, of November 11, 2004:

"(i) Keep under review and update as necessary the United Nations Model Double Taxation Convention between Developed and Developing Countries and the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries.

(ii) Provide a framework for dialogue with a view to enhancing and promoting international tax cooperation among national tax authorities.

(iii) Consider how new and emerging issues could affect international cooperation in tax matters and develop assessments, comments and appropriate recommendations.

(iv) Make recommendations on capacity-building and the provision of technical assistance to developing countries and countries with economies in transition.

(v) Give special attention to developing countries and countries with economies in transition in dealing with all the above issues.

(e) The Committee shall submit its report to the Economic and Social Council at its substantive session in July 2005, to be considered under the sub-item entitled "International cooperation in tax matters".

(f) The Committee shall be serviced by a small technical staff, which shall, inter alia, within existing resources, help collect and disseminate information on tax policies and practices, in collaboration with concerned multilateral".

3) Now, the institutional and political-legal legitimacy would demand that the body of experts open its preparatory work: 1) to the Member States of the UN for the purpose of formulating their comments and/or their observations; 2) to other actors of civil society, global and national; and 3) to the university academy.
4) It does not seem so simple to create an *ad hoc committee* , for example, of government experts (from the material perspective, similar to an open working group dependent on the UN General Assembly) to carry out the drafting work : not so much because of the legal possibility of its creation (the Economic and Social Council would be authorized by Art. 24 ECOSOC Regulation), but because of the financial repercussions of this decision and/or because of the political opportunity that such a body would depend on the Assembly UN General. In any case, the intergovernmental starting point of this type of body would also outline the need to be open to members of civil society and the university academy.

On these parameters, any draft international treaty in this regard:

1) It should be sent to the General Assembly so that it can decide on the definitive form of processing (Arts. 12 to 15 of the Regulations of the General Assembly), even though if you previously came from a mandate from the General Assembly itself, it would be more accessible to processing before it.
2) The practice of the international Organization shows that there would be two basic options: 1) Process the adoption of the international treaty directly in the form of a Resolution of the UN General Assembly; and 2) Convene an international conference to finalize the negotiation of the international treaty. This second option has been used whether the subsidiary body or committee that has previously worked on the issue is intergovernmental or made up of experts and, even though it may delay the adoption of the international legal instrument, it is predominantly legitimate for any project from the perspective of forging of the maximum level of confluence of wills between the States. However, without prejudice to this, holding an international conference has its risks from the perspective of the viability of the final project, even when it guarantees the highest level of common denominator that can urge States to express consent.

Review Article

The rise and fall of the global pact for the environment

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KEYWORDS:

International environmental law; UNG Resolution 73/33; Global pact for the environment.

ABSTRACT:

This article presents a study of the International environmental law as a fragmented system, as well as the following subjects: The French initiative for a global pact for the environment; The process towards a global pact for the environment at the United Nations and the implementation of UNGA Resolution 73/33 on the way forward. It ends with a critical appraisal of the process towards a global pact for the environment.

PALABRAS CLAVES:

Derecho ambiental internacional; Resolución UN 73/33; Pacto mundial por el medio ambiente.

RESUMEN:

Este artículo presenta un estudio del Derecho ambiental internacional como un sistema fragmentado, así como los siguientes temas: La iniciativa francesa para un pacto global por el medio ambiente; El proceso hacia un pacto global por el medio ambiente en las Naciones Unidas y la implementación de la Resolución 73/33 de la AGNU sobre el camino a seguir. Termina con una valoración crítica del proceso hacia un pacto global por el medio ambiente.

MOTS CLES :

Droit international de l'environnement; Résolution UNG 73/33 ; Pacte mondial pour l'environnement.

RESUME :

Cet article présente une étude du droit international de l'environnement en tant que système fragmenté, ainsi que les sujets suivants : L'initiative française pour un pacte mondial pour l'environnement ; Le processus vers un pacte mondial pour l'environnement aux Nations Unies et la mise en œuvre de la résolution 73/33 de l'AGNU sur la voie à suivre. Il se termine par une évaluation critique du processus vers un pacte mondial pour l'environnement.

CONTENTS:

1 INTERNATIONAL ENVIRONMENTAL LAW AS A FRAGMENTED SYSTEM

The existing international legal regime for the protection of the environment is formed by a myriad of sectoral autonomous agreements and other soft law instruments. The core of the system is made up of more than 500 multilateral environmental agreements (MEA) that have an autonomous character and operate in a closed loop, which poses problems of coordination among the different agreements and with other environmental-related instruments (Churchill – Ulfstein 2000). The system lacks an overarching normative instrument which may help unify the current sectoral approach and fill the gaps in the rules laid out in treaties.

The fragmented structure of international environmental law is the result of the historical conditions under which this body of norms was established. Since the initial stages of the development of international environmental law, innovative ways to overcome its structural deficiencies were found. In addition, possible gaps in international environmental law might eventually be filled through the evolution of customary law, with the contribution of international jurisprudence. However, today it is widely recognized that the fragmentation of international environmental law results in gaps and deficiencies at the law-making and implementation levels and reveals important coherence and coordination challenges that difficult implementation at both the international and national levels.

As a result of fragmentation, various important legal elements have been left behind relating inter alia to international responsibility and liability for environmental damage (specially to the global commons), the proclamation of a human right to a sound environment, and the recognition of emerging principles such as 'non-regression'. The system is also confronted to various governance challenges such as the need for a new United Nations Organization for the Environment (UNEO), the viability of an International Environmental Court (IEC) or the establishment of a compliance mechanism to control the overall application of existing sectoral multilateral environmental agreements.

Against this backdrop, the amalgamation of sectoral multilateral environmental agreements and other environmental-related instruments generates dramatic examples of problem shifting instead of problem solving with possible fatal consequences for the global environment. As rightly concluded by two eminent specialists, the existence of multiple parallel, overlapping multilateral environmental agreements might in effect not lead to a higher global protection standard and, as a result, the Earth's environmental conditions have continued to deteriorate despite the accumulating body of environmental law (Kim & Bosselmann, 2013).

In order to remedy this situation, some voices have evoked the need to elaborate a global normative instrument able to fill the existing constitutional gap and improve the functioning of the international body of law for the protection of the environment. In 1987, the Brundtland Report on 'Our Common Future' envisaged a Convention on Environmental Protection and Sustainable Development to be prepared by the United Nations General Assembly (WCED, 1987, paras 85–86). In 1989, Professor Alexandre Kiss advocated a general convention that would declare the obligation to protect and preserve the whole biosphere, set out the fundamental principles derived from that obligation, and included the provisions required to clarify its implementation, as with the United Nations Covenants on human rights (Kiss, 1989, p. 258). In 1995, the International Union for the Conservation of Nature (IUCN), in cooperation with the International Council for Environmental Law (ICEL), presented the text of the Draft Covenant on Environment and Development as a model for a comprehensive conventional instrument on principles and rules related to environment and development (IUCN/ICEL, 1995). In 2017, the *Centre International de Droit Comparé de l'Environnement* (CIDCE) presented a Draft of the International Covenant on the Human Right to the Environment as a possible third pact additional to the 1966 International

Covenants on Civil and Political Rights and Economic, Social and Cultural Rights (CIDCE, 2017).

Along the same lines, some specialists promote today the preparation of a legally binding instrument in the form of a global convention, with a light institutional structure to support its operation providing an umbrella to a wider number of multilateral environmental agreements. In their view, a global pact for the environment has the potential to contribute to improving structural coherence in the international response regime for the preservation of the Earth system while promoting social-ecological goals that respect planetary boundaries in the Anthropocene (Fernández and Malwé 2019). The concrete arguments which support the need for a global pact for the environment having a legally binding character have been summarized by Águila and Vinuales as follows: first, general principles of international environmental law are usually embodied in non-binding texts, a feature that has prevented some principles from deploying their full effects; second, there are a number of gaps and deficiencies which leave important questions open or unsettled; third, little attention is paid to non-linear effects of the said gaps and deficiencies; fourth, there are conflicts between legal instruments eventually conducing to problem-shifting instead of problem-solving; fifth, there remain strong divergences in the interpretation and application of basic systemic principles; sixth, guidance provided by international environmental law to national legislators and courts is neither clear nor strong enough; and finally, at the international level there is also a lack of strong institutional bodies having normative, administrative or judicial powers for the protection of the global environment (Aguila &Vinuales 2019 a, pp. 5-6)

Other authorized environmental law experts, building on theories of global constitutionalism, call for the recognition of a clearly agreed unifying goal, whose exact form and nature is to be decided, setting the fundamental *grundnorm* for the international environmental legal system: namely 'protecting and restoring the integrity of the Earth system'. Such a superior norm (or set of norms and principles) shall be embodied in an agreed global pact for the environment in order to give all international regimes and organizations a shared purpose to which their specific objectives must contribute (Kim & Bosselmann 2013).

2 THE FRENCH INITIATIVE FOR A GLOBAL PACT FOR THE ENVIRONMENT

The current initiative for a global pact for the environment commenced in 2015 when a French legal think tank called the *Club des Juristes* assembled an international network of more than one hundred jurists, from various legal traditions and more than forty nationalities who worked on the project for two years (Parejo & Lobel 2018). The group prepared a preliminary draft of a Global Pact for the Environment that was adopted at an academic event held at the Sorbonne on 24 June 2017 and was subsequently published in a white paper (Le Club des Juristes 2017).

The most innovative environmental provisions of the draft addresse the need to ensure an adequate remediation of environmental damages (Article 7); the duty to ensure environmental education and training (Article 12) and promote environmental research and innovation (Article 13); the duty to adopt effective environmental norms and ensure their implementation and enforcement (Article 16); and the principles of resilience (Article 16) and of non-regression (Article 18). It also contemplates a compliance mechanism, consisting in a Committee of independent experts to facilitate implementation of and to promote compliance with the provisions of the Pact (Article 21). Article 1 of the Pact recognizes for the first time in a global treaty the right of every person 'to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment' and Article 2 stated the duty of every person to take care of the environment.

The draft GPE received several analytical and critical reviews with differing assessments of its legal foundations and potential contribution to improving International Environmental Law. Some scholars contend that the draft pact goes too far, arguing that the project is 'misguided in its one-size-fits-all-environmental-issues approach, unclear as to its effects on existing international environmental law and potentially undermining of current agreed environmental principles' (Biniaz 2017, p. 33). Others maintain that the draft comes up short, criticizing the anthropocentric orientation of the pact's general approach and the limited scope of the draft's proclamation of a human right to the environment. (Kotzé and French, 2018 pp. 822-823, 834).

3 THE PROCESS TOWARDS A GLOBAL PACT FOR THE ENVIRONMENT AT THE UNITED NATIONS

Following a summit chaired by French President Emmanuel Macron held on the sidelines of the 72nd session of the General Assembly, the motion for a resolution on a GPE was formally submitted by France and ninety co-sponsoring countries to the General Assembly on 7 May 2018. After a short but intense debate a consensus could not be reached and the resolution was adopted with 143 votes in favour, five against, and seven abstentions.[1]

General Assembly resolution 72/277, titled 'Towards a Global Pact for the Environment' began the process anew following a new methodological approach. It put the draft pact aside and established an open-ended approach to its ultimate outcome. First, it requested the Secretary-General prepare a 'technical and evidence-based' report on 'possible gaps' in international environmental law and environment-related instruments 'with a view to strengthening their implementation' (para. 1). Then, it established an ad-hoc open-ended working group (OEWG), open to all UN member States, specialized agencies and accredited nongovernmental organizations, to consider the Secretary-General's report and 'discuss possible options to address possible gaps in international environmental law and environment-related instruments' (para 2). As for the outcome of the process, the resolution requests that the working group should define, if deemed necessary, 'the scope, parameters and feasibility of an international instrument, with a view to making recommendations to the General Assembly, which may include the convening of an intergovernmental conference to adopt an international instrument' (para 2).

In November 2018, the Secretary-General of the United Nations presented the report on gaps in international and environment-related instruments. The report's first key finding is that 'there is no single overarching normative framework in international environmental law that sets out what might be characterized as rules and principles of general application' (para 3). It also affirms that the existing system of international environmental law is piecemeal, reactive, and characterized by fragmentation and a general lack of coherence and synergy among a large body of sectoral regulatory frameworks (para 103). The main gaps and deficiencies resulting from the fragmentation and reactive nature of the system of international environmental law are quite categorically summarized in the report as follows: its principles, which are uncertain, are often affected by a lack of international consensus and a lack of clarity (both content-wise and status-wise) that affect their implementation; the fragmentation and general lack of coherence and synergy among a large body of sectoral regulatory frameworks create an important deficit in coordination at the law-making and implementation levels and a need for better policy coherence, mutual supportiveness and synergies in implementation; the articulation between multilateral environmental

[11] The United States, the Russian Federation, the Philippines, Syria, and Turkey voted against the motion; Saudi Arabia, Belarus, Iran, Malaysia, Nicaragua, Nigeria and Tajikistan abstained (the arguments expressed in the discussions and explanations for the votes in UN Doc A/72/PV.88 (10 May 2018)).

agreements and environment-related instruments remains problematic. Thus, the SG report admits the value of an overarching legal framework of environmental principles, noting that a comprehensive and unifying international instrument codifying all the principles of environmental law would contribute to making them more effective and stricter and to their implementation (para 6-5, 43). The report pays also particular attention to the interrelationships between international environmental law and other environment-related instruments in the fields of trade, investments, intellectual property and human rights noting the existence of normative gaps and major challenges (para. 71-76).

The Open-Ended Working Group (OEWG) set-up by resolution 72/277 held three substantive sessions in 2019. Its first session (Nairobi 14 to 18 January 2019) focused on discussing the Secretary-General's report on the gaps in international environmental law and their implications. There was general agreement about the need to ensure that the process would not weaken existing instruments, bodies, or procedures and the importance of working based on consensus so that pragmatic, realistic results could be presented as part of the group's recommendations to the General Assembly. The rule of consensus, a very important strategic objective for some influential delegations, was never formally adopted but it was implicitly assumed as the applicable decision-making procedure for the negotiations. The delegations of the United States and the Russian Federation made clear their opposition to the adoption of a GPE irrespective of its legal form. (Doran et al. 2019 a, p. 8). Most other participants adopted more constructive positions as to the continuity of the process and possible outcomes of the negotiations towards a global pact for the environment.

The main aim of the second substantive session of the OEWG (Nairobi 18 - 20 March 2019) was to discuss 'possible options for addressing possible gaps in international environmental law and environment-related instruments.' The discussions showed deep disagreement on fundamental issues such as: the concept and existence of gaps in international environmental law, the need to codify the guiding principles of international environmental law, and the opportunity to prepare a new international instrument (of a binding or non-binding nature). Given the lack of consensus on the core substantive issues, the debate shifted to mostly procedural aspects, considering possible improvements to existing environmental governance structures, enhanced coordination and cooperation between multilateral environmental agreements and other specific regulatory regimes, and the strengthening of the means of implementation at the national level, without establishing new international legal obligations (Doram *et al*., 2019 b).

The third substantive session of the working group (Nairobi 20 to 22 May 2019) showed general acceptance that the process should seek to 'reinforce the protection of the environment for present and future generations' and 'help to strengthen the application of international environmental law' while not undermining relevant existing legal instruments, frameworks and bodies. Concerning the substantive recommendations to the General assembly, the working group agreed only in two points: strengthening the means of implementation at the national level along the lines of the Montevideo-5 Programme and to increase coherence in the treatment of cross-cutting issues related to multilateral environmental agreements. On institutional matters, as the USA and the Russian Federation showed deeply confronted views, it was agreed to retain the eclectic formula of the outcome document of the Rio+20 Conference stating that UNEP is the leading global environmental authority 'within the United Nations System'. On the issues of principles of IEL, the delegations' positions were at odds; the European Union, supported by other delegations, stressed the importance of principles and called for continuing dialogue, but the United States and other delegations opposed further discussion on these issues and no further progress was made. On the outcome of the process, after very difficult negotiations discussions, an understanding was reached *in extremis* based on three points: continuity of the process, maintenance of discussions on principles, and preparation by UNEA of a

'political' declaration (the word 'political' was added at the last moments) (Doran *et al.*, 209 c).

The outcome of the OEWG discussions was endorsed without debate by the General Assembly in Resolution 73/333 on the follow-up to the report of the ad hoc open-ended working group which's last paragraph decides to:

> Forward these recommendations to the United Nations Environmental Assembly for its consideration, and to prepare, at its fifth session, in February 2021, a political declaration for a United Nations high-level meeting, subject to voluntary funding, in the context of the commemoration of the creation of the United Nations Environmental Program by the United Nations Conference on the human environment, held in Stockholm from 5 to 16 June 1972, with a view to strengthening the implementation of international environmental law and international environmental governance in line with paragraph 88 of the outcome document of the United Nations conference of sustainable development entitled 'The future we want'.

This outcome of the OEWG discussions and its endorsement by the General Assembly in resolution 73/333 must be considered as a setback for the GPE in the form of a treaty and, consequently, for the recognition of the human right to a healthy environment in a new environmental conventional instrument. In fact, UNGA resolution 73/333 confirms that the outcome of the process will be a mere "political declaration" commemorating the creation of UNEP in 1972 with a view to "strengthening the implementation" of existing international environmental law and institutional governance (but not its progressive development in a global treaty).

4 THE IMPLEMENTATION OF UNGA RESOLUTION 73/333 ON THE WAY FORWARD

The calculated ambiguity of resolution 73/333 in its section on further work has left many loose ends which make all the more difficult its implementation. On 18 February 2020, the Governing bodies of UNEP adopted a roadmap for the implementation of resolution 73/333, consisting in consultations to be held in Nairobi in 2020 and in 2021, under the guidance of two CoFacilitators, the ambassadors from Pakistan, Ms. Saqlain Syedah, and Estonia, Mr. Ado Lohmus. The outbreak of the pandemics caused by COVID-19 has further complicated the negotiations that should bring the process set in motion by resolution 77/277 to a conclusion in 2022.

The first informal substantive consultation meeting on the follow up of UNGA resolution 73/333 took place virtually between July 21 and 22, 2020. The discussions largely reproduced the positions manifested by delegations at the OEWG meetings concerning the non-binding character of the declaration to be adopted that support the implementation of existing frameworks and conventions rather than creating new obligations. Some delegations called for an action-oriented political declaration, recognizing an opportunity for States to encourage greater implementation of existing international obligations. The United States delegation strongly opposed drafting a political declaration focused on 'actionizing' the recommendations of General Assembly Resolution 73/333, cautioning against renegotiating the recommendations and working beyond the mandate of the group. On the issue of principles, no progress was made since the delegations insisted in their unmoving position. In conclusion, as stated by MA Tigre:

> The meeting allowed States to share their stance on the scope of the political declaration and the proceedings of international environmental governance. Yet the discussions mostly mimicked the debates held in Nairobi, failing to add much new to the table. Similar to the first Nairobi session, there was a lot of discussion on diverse aspects of IEL, with very few action-oriented solutions proposed. The ambition of countries, with a few exceptions, remains low, with the majority opposing new and

> future-oriented proposals that would better prevent and prepare for environmental crises (Tigre 2020 b, p. 10821).

On 7 October 2020, with a view to assist parties in the preparative work of the following informal consultation meetings and UNEA-5, the co-facilitators distributed a document containing the draft building blocks of a political declaration to be adopted at a high-level UN meeting in 2022 (Letter from the co-facilitators 73/333 - 7 Oct 2020). Although in essence they are mostly recapitulative, the co-facilitators draft building blocks sketch some elements of openness regarding the recommendations formulated in resolution 73/333. However, the draft building blocks prepared by the co-facilitators did not receive the support of all the concerned parties and the United States expressed its belief that the draft building blocks document does 'not set the stage for success for any future negotiations'.

On the light of the above, it is difficult to determine when, where and how Resolution 73/333 is to be implemented. It seems already settled that the process is heading towards the adoption of the political declaration and the special event for the commemoration of the creation of UNEP (UNEP@50) during the resumed session of UNEA-5 in Nairobi from 28 February to 4 March 2022. However, the when and where of the commemoration of the 1972 UN Conference on the Human Environment (Stockholm+50), and its implications for the reinforcement of the normative structure of IEL are still to be clarified.

5 A CRITICAL APPRAISAL OF THE PROCESS TOWARDS A GLOBAL PACT FOR THE ENVIRONMENT

Looking in retrospect, most commentators consider the road travelled to be a relative failed effort. The ambitious legal initiative launched by France and supported by many members of the United Nations has gradually been watered down to become just another in a list of political declarations on sustainable development (de Lassus Saint-Geniès 2020, p. 11).

The advocates of the conclusion of an international treaty establishing the constitutional bases of the global environmental protection system and limiting the perverse effects of fragmentation are numerous and with solid arguments (Kotzé and Muzangaga 2018). They build in the empirical confirmation that humanity is facing a growing environmental crisis of tremendous magnitude that prevents States and social forces from achieving sustainable development and puts their future at risk. Through the industrial and technological revolutions, we have entered the Anthropocene, a new geological era in which humans have become the main driver of global environmental change. Scientific evidence shows that the rate of anthropogenic global impact on the environment is accelerating and may be exceeding the biophysical thresholds of 'planetary boundaries'. In current conditions, the relationship between humans and nature paints a frightening picture of continual and increasing degradation of the Earth's resources and ecological processes. The most vital elements of the biosphere – such as the air, oceans, freshwater, land, forests, biodiversity and habitats – are suffering a sharp deterioration and some are reaching their critical limits. Some islands and coastal territories may totally or partially disappear as a result of sea-level rise due to the effects of climate change. Enough scientific evidence exists of a multidimensional ecological crisis that is endangering the prospects of social sustainability and threatening the survival of humankind on Earth. As the former director of UNEP, Klaus Töpfer, asserted in 2006:

> Today's world is facing an unprecedented environmental crisis … The degradation of the Earth's environment increasingly threatens the natural resource base and processes upon which all life on Earth depends … The urgency of balancing development with the Earth's life support systems is being finally recognized and understood. Now it is time to act upon this understanding (UNEP 2006, p. iii).

However, although sharing these premises, other analysts question the added value of a global treaty on the environment, proposing other alternatives (Voigt 2019). Some challenge the usefulness of any legal or political instrument on the subject, considering that the international system for the protection of the environment, although fragmented into several autonomous treaties, does not present real gaps or require a reformulation of its ordering principles that could be counterproductive (Biniaz 2019). In their opinion, the fragmented structure of IEL is the result of the historical conditions under which this body of norms was established. Since the initial stages of the development of IEL, innovative (and often effective) ways to overcome its structural deficiencies were found. Against this backdrop, these scholars are skeptical about how the proposed GPE could remedy the possible structural deficiencies of the system of international environmental law and governance.

In fact, the reason for the failure of the proposed global pact as a legally binding agreement is of a political nature. From the outset, the major world powers expressed their opposition to the GPE, rejecting the need to consolidate principles and recognize environmental rights. In support of their strategic positions rejecting any further action at the law-making level, some States have sustained that there are not real gaps in the international system of norms concerning the protection of the environment (Argentina). Others opposed the reproach of 'fragmentation' stressing that it has been the will of States to construe this body of law in such a way (United States) and that the 'piecemeal approach' should be regarded as an asset and not as a deficiency of the international legal system (Brazil). In line with these considerations, they have opposed the opportunity to discuss the elaboration of new rules of international environmental law in general and the need to prepare a new global overarching treaty in particular. In their view, the paramount objective of the process towards a global pact for the environment should be to preserve the regulatory and institutional autonomy of existing MEAs and not to add any new super-structural normative instrument. This objective is particularly important for the world's great powers that feel at ease under the existing sectoral amalgamations of autonomous legal regimes thus rejecting the assumption of additional international environmental obligations and commitments. In the same manner, a number of influential delegations opposed the possibility of further discussions on the principles of international environmental law, stating that the issue should be left to the International Law Commission (ILC) of the United Nations. At the end it was only recognized "the role of the discussions on principles" in order to improve its implementation.

The adoption of UNGA Resolution 73/333 has been welcomed by some as a significant milestone towards improving International Environmental Law. However, it can be argued that, in addition to choosing the weakest possible type of international instrument to be adopted (a mere 'political' declaration), the recommendations on the content of the political declaration aim only to strengthen the implementation of existing law, but not to developing new environmental norms. They consist in a repetitious recollection of vague policy objectives expressed in purely hortatory language. The original call for legal ambition implicit in the General Assembly resolution that launched the process towards a Global Compact for the Environment has been progressively diluted into weak policy recommendations (Juste 220 a). At this point, the pertinent question might be: how could a political declaration based on such a weak set of recommendations add value to international environmental law?

6 CONCLUSION

The negotiations surrounding the GPE that were initiated in a spirit of great legal ambition, have reached an impasse regarding the possibility of concluding an international convention that includes environmental human rights. The rejection of the GPE is due to multiple reasons; but it highlights above all the lack of political will of states to advance in the

development of international environmental law in the face of the challenges of the Anthropocene and despite the growing demands of global civil society (Juste 2020 b). For the time being, the set-back of the initiative has taken with it the expectations of promulgating an international Bill of Rights that contemplates and gives constitutional rank to the principles related to environmental human rights. Although the prospects are low, current changes in national governments and the growing awareness of people around the world may eventually lead to a political declaration on a global pact that expresses real commitments to preserve the integrity of the Earth system and enshrines the human right to a healthy environment at the next high-level UN commemorative events scheduled for 2022.

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Article

Rusia y la Organización Mundial del Comercio (OMC): un éxito a pesar de las dificultades políticas (*In Spanish*)

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ABSTRACT:

The collapse of the USSR, and the consequences it brought with it, some of which we are still suffering today, did not prevent Russia from joining the World Trade Organisation (WTO), the epicentre of international trade and one of the pillars of the free market. Its entrance to this Organisation entailed certain difficulties in complying with the conditions required of any Member, be it a State or a customs territory, but Russia has managed to come out of it not only by complying with the provisions of the Organisation itself, but also by going even further. What is more, although its historical record shows great reluctance to accept international jurisdictions, this has not prevented it from applying for membership of the Organisation, which requires its Members to accept the Dispute Settlement Mechanism provided for in the Treaty establishing the Organisation itself. Today, Russia is, since its accession in 2012, a Member that actively participates in the Dispute Settlement Body and is respectful of its decisions.

PALABRAS CLAVES:

Colapso de la URSS; adhesión de Rusia a la OMC; Rusia y el Órgano de Solución de Diferencias

RESUMEN:

El colapso de la URSS, y las consecuencias que trajo consigo, algunas de las cuales las estamos padeciendo incluso en la actualidad, no impidió que Rusia se adhiriera a la Organización Mundial del Comercio (OMC), epicentro de comercio internacional y uno de los pilares del libre mercado. Su adhesión a esta Organización supuso ciertas dificultades para cumplir con las condiciones exigidas a cualquier Miembro, sea este Estado o territorio aduanero, pero Rusia ha sabido salir airosa no solo cumpliendo con lo previsto por la propia Organización, sino yendo incluso más allá. Es más, a pesar de que su trayectoria histórica nos muestra grandes reticencias a la hora de aceptar jurisdicciones internacionales, esto no le ha impedido solicitar la adhesión a la Organización, que exige a sus miembros aceptar de forma obligatoria el Mecanismo de Solución de Diferencias previsto en el Tratado Constitutivo de la propia Organización. Hoy en día, Rusia es, desde su adhesión en 2012, un Miembro que participa activamente en el Órgano de Solución de Diferencias, siendo además respetuoso con sus decisiones.

MOTS CLES :

Commerce international, développement durable, processus et méthodes de production, Organisation mondiale du commerce, accords commerciaux préférentiels

RESUME :

Les conséquences qui ont été entraînées par l'effondrement de l'URSS n'ont pas empêché l'adhésion de la Russie à l'Organisation mondiale du commerce (OMC), épicentre aujourd'hui du commerce international, et l'un des piliers de l'économie du marché. Cependant, son adhésion allait engendrer certaines difficultés pour pouvoir se conformer aux conditions exigées par l'OMC, conditions qui ne l'ont pas empêché de les respecter, et même d'aller au-delà, ce qui lui a permis d'être à la hauteur des circonstances qu'on attendait d'elle. À ce sujet, il convient de relever que malgré sa trajectoire historique, d'après laquelle la Russie a montré de sérieuses réticences à l'heure d'accepter les juridictions internationales, ceci ne l'a pas empêchée de s'adhérer à cette Organisation, en prenant ainsi l'engagement de se conformer à l'Organe de solution des différends, et à respecter ses décisions.
Mots-clés: Effondrement de l'URSS; adhésion de la Russie à l'OMC; Russie et l'Organe de solution des différends

CONTENTS:

1 INTRODUCCIÓN: DEL COLAPSO DE LA URSS A LA ADHESIÓN DE RUSIA A LA OMC

El colapso de la URSS, y los avatares políticos y económicos que trajo consigo, no solo generó una desmoralización de la sociedad rusa, sino que acarreó una serie de medidas que se fueron adoptando, algunas de ellas de forma apresurada, con el fin de reformar las estructuras de un sistema vetusto y no adaptado a los nuevos retos que se estaban debatiendo entre 1986-1994 en el seno de la Ronda Uruguay, con el resultado de la creación de la OMC, que entraría en vigor el 1 de enero de 1995 (Bermejo García, Romualdo, 1998, pp. 89-126). No obstante, el colapso de la URSS sería el detonante de una nueva era que iba a situar a la Federación Rusa en el punto de mira de la sociedad internacional al tener que afrontar diversos retos, uno de los cuales, y de los más importantes, era adherirse al sistema comercial multilateral de la OMC. No es extraño, pues, que ya en 1993 formulara una demanda de adhesión al GATT, demanda que renovaría posteriormente en 1995 una vez creada ya la OMC, lo que demuestra la voluntad rusa de integrarse en el concierto de naciones regido por un sistema comercial de libre mercado. Este camino aperturista de Rusia se iba a ver facilitado por ser Continuadora de la URSS, lo que le permitió seguir con muchos tratados adoptados por su predecesora a nivel internacional, adaptándolos en algunos casos a la nueva situación jurídica, económica y política internacional.

Desde esta perspectiva, es obvio que si Rusia quería desempeñar el papel que le corresponde a nivel internacional, no podía dejar de lado a una Organización como la OMC que por aquellos tiempos era vista, y así lo fue, como el epicentro del comercio internacional y de las negociaciones comerciales multilaterales. Y es que pronto se vio que esta Organización iba camino de convertirse no solo en la cuna del multilateralismo, sino que generaría un fenómeno globalizador nunca visto hasta entonces, extendiéndose, como es sabido, como un reguero de pólvora por el planeta, tanto para los países en desarrollo, incluyendo incluso a los menos avanzados de estos, a pesar de las dificultades que esto suponía.

El reto era considerable, pues el lastre que Rusia traía consigo era muy importante, dada la herencia que había dejado la extinta URSS, tanto a nivel económico, político y social. Con estos antecedentes, el panorama era sombrío, aunque para sorpresa de algunos, tras 18 años de negociaciones, logró incorporarse a la Organización el 22 de agosto de 2012, pasando a ser el 156 Miembro de esta Organización ginebrina. Rusia sería así el último Miembro de los BRICS (Brasil, China, India, Rusia y Sudáfrica) y del G-20 en pasar el umbral de la OMC, que es, sin lugar a dudas uno de los pilares del sistema económico internacional, y cuyo liberalismo engrasa sus decisiones.

A esto, conviene añadir que existía además una gran desconfianza entre los Miembros de la OMC, pues se había extendido la idea de que Rusia era bastante impredecible en el ámbito comercial, lo que no beneficiaba la adhesión (Cfr. Schewe Christophe, J., 2013, p. 1172). Sin embargo, Rusia aprendería pronto a saber comportarse, al evitar levantar sospechas y evitando dar indicios dudosos a los inversores internacionales, algo que ya constató en la denominada crisis financiera de 1998, crisis que se originó por haber dado pasos similares a los que ya había llevado a cabo los países latinoamericanos durante su famosa crisis de endeudamiento de los años ochenta. Esto no impide poder afirmar que, a pesar de todo, Rusia seguía teniendo sus propias peculiaridades, como se puso de relieve con el fracaso del plan de estabilización monetaria de la década de los noventa. Y es que como se sabe, los errores en el ámbito financiero y monetario internacional siempre se pagan, y el problema es saber el nivel de sus nefastas consecuencias (Palazuelos Manso, Enrique y Vara Miranda, María Jesús, 2002, pp. 36-58; y Granville, Brigitte, 1999, pp. 61-87).

Pero la crisis financiera de 1998 no puso de rodillas a Rusia, ya que, a partir de los años 2000, conseguiría amplios recursos financieros dada la exportación de productos

energéticos, favorecidos por sus altos precios, así como por la alta dependencia energética a nivel mundial (Shadikhodjaev, Sherzod, 2016, pp. 705-731). Pero en el caso ruso, esta situación favorable para Rusia se debía, además, a la fuerte dependencia que varios países europeos (los países bálticos, Polonia, Suiza y sobre todo Alemania) seguían manteniendo en el sector energético, lo que trajo consigo unos ingresos muy importantes al obtener altos superávits comerciales, representando el 49'4% de sus exportaciones, de las cuales el 80% eran de gas y petróleo (Esto era lo que apuntaba la Dirección de Comercio de la UE, en: http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113440.pdf Las cifras que apunta la Comisión Europea es que Rusia había exportado por un valor de 354.828 millones de euros e importado por un valor de 210.698, por lo que el superávit es elocuente). Fue así como Rusia acapararía en esos años cantidades importantes de reservas de divisas- Sin embargo, a pesar de este saludable marco financiero, Rusia no consiguió modernizar mucho su economía, ni a diversificar su sector industrial, por lo que sus pilares económicos seguían siendo débiles, lo que traía consigo que su peso en la economía mundial fuera relativamente bajo, sin que esto haya cambiado considerablemente en la actualidad, si se utilizan los parámetros típicos de las economías de mercado y de las organizaciones económicas internacionales

2 EL MARCO JURÍDICO DE LA ADHESIÓN Y EL DESARROLLO DE LAS NEGOCIACIONES

Para adherirse a la OMC, Rusia ha tenido que llevar a cabo, como cualquier otro Miembro, una serie de modificaciones normativas importantes con el fin de adaptar sus normas comerciales con las de la OMC. Sin embargo, es fácil comprender que, para la Federación Rusa, como Estado Continuador de la antigua URSS, esas modificaciones han sido muy importantes, sobre todo a nivel normativo. No se trata solo de modificar los Tratados celebrados con otros Estados para que se respeten las normas de la OMC, sino que, además, el Estado candidato debe respetar "l'acquis" de la OMC ya en el momento de su ingreso en la Organización (Crepet Daigremont, Claire, 2014, p. 123). Esto significa que Rusia ha tenido que llevar a cabo importantes modificaciones a nivel civil, comercial y fiscal, reformas que tenían que ir encaminadas a transformar de forma sustantiva su economía para adaptarla a una economía de mercado, paso que tanto los Estados Unidos como la UE vigilaban estrechamente, y esto a pesar del Acuerdo de Asociación y Cooperación que esta última negoció con Rusia, en vigor desde el 1 de diciembre de 1997, mientras que con los Estados Unidos, negociaría dos tratados, uno en 1992 sobre relaciones comerciales bilaterales, y el otro en 2006 sobre acceso a los mercados. Sin embargo, al mismo tiempo que se desarrollaban estas negociaciones Rusia tuvo una nutrida serie de controversias comerciales no solo con los Estados Unidos, sino también con Alemania, Bulgaria, Estonia, Finlandia, Lituania, Moldavia, los Países Bajos, Turquía y Ucrania, litigios que tenían sin embargo un trasfondo tanto político como comercial. Esto le sirvió sin embargo como una buena experiencia para digerir mejor lo que le esperaba en el futuro en la OMC.

Un ejemplo de este control y vigilancia se vieron claramente a la hora de renegociar el precitado Acuerdo de Asociación, cuya vigencia terminaba en 2007. Las negociaciones entre las Partes no progresaron, ya que las divergencias entre ellas eran muy importantes. Y es que mientras que la UE quería imponer un Acuerdo preciso y vinculante, Rusia prefería un Acuerdo sucinto, centrado básicamente en el principio de cooperación, que sería completado posteriormente por acuerdos sectoriales (Pozzo di Borgo, Ives, 2007, pp. 4-8). Un Acuerdo se logró así en 2010 sobre los aspectos económicos, técnicos, estado de derecho y el funcionamiento de la justicia, aspectos considerados esenciales para la UE. Sin embargo, tras este Acuerdo, las Cumbres entre las Partes se estancaron a causa de que la UE consideraba que la situación de los derechos humanos en Rusia no era la adecuada, mostrando a este respecto una gran intransigencia (Pozzo di Borgo, Ives y Sutour, Simon,

2016-2017, pp. 7-16). Los acontecimientos ocurridos en Ucrania con el Euromaidán, la anexión o vuelta a casa de Crimea, y diversas reacciones adoptadas por la UE, como fue el caso de las sanciones (A este respecto, Bermejo García, Romualdo, 2014; *ídem* 2015, Mangas Martín, Araceli, 2014; *ídem* 2022; Remiro Brotons, Antonio, 2014, *ídem* 2018), hicieron el resto, trayendo consigo efectos colaterales importantes, tanto a nivel económico como político.

Por otro lado, no se puede ignorar que las negociaciones de Rusia con la OMC en los últimos años transcurrieron en plena crisis financiera que se extendió como la pólvora tras la quiebra del banco *Lehman Broders* el 15 de septiembre de 2008, generándose, como es sabido, una crisis económica y financiera a nivel global, cuyos efectos todavía se resienten en la actualidad, a pesar de la mejora que se ha constatado en los últimos años. Conviene tener presente, además, la guerra en Georgia de agosto de 2008, en la que intervino de forma directa y exitosa Rusia (Blanc Altemir, Antonio, 2009, pp. 556-566, y 2010, pp. 265-308), terminando con el conflicto y reconociendo, además, la independencia de las regiones separatistas de Osetia del Sur y de Abjasia. Ni que decir tiene que todo esto supuso un problema para la adhesión de Rusia a la OMC, al ser ya Georgia miembro desde el 14 de junio del 2000. Y es que la adhesión de un nuevo Miembro se hace en general por consenso, a pesar de que el Acuerdo de la OMC prevé en su artículo XII.2 una mayoría de dos tercios. En este caso Georgia tan solo dio su acuerdo para la adhesión de Rusia el 9 de noviembre del 2011, tras negociaciones y presiones duras hacia el pequeño Estado caucásico, como se podía esperar.

Otro aspecto importante que conviene recalcar es el hecho de que cuando un nuevo Miembro se integra en la OMC, se beneficia de la cláusula de la nación más favorecida tal y como recoge el artículo primero, párrafo 1 del GATT con todo lo que esto implica, pues se va a beneficiar inmediatamente de cualquier ventaja o privilegio intercambiado previamente entre los Miembros de la Organización. No obstante, el nuevo Miembro debe también negociar con los otros Miembros el acceso a esas ventajas, lo que da lugar a negociaciones bilaterales sobre todo con los grandes socios comerciales, cosa que se lleva a cabo al mismo tiempo que las negociaciones en el plano multilateral, tal y como recoge el artículo XII del Acuerdo por el que se instituye la OMC (Bermejo García, Romualdo, 2020, p. 23). Como los Miembros de esta Organización pueden ser Estados o territorios aduaneros, como es la UE, el Grupo de Trabajo que se ha ocupado del caso de Rusia ha reunido a 65 Miembros, lo que constituyó un récord en la Organización.

Cabe preguntarse ahora si las negociaciones de adhesión y la integración de Rusia en la OMC se han llevado a cabo de una forma similar a la de otros Miembros. Una respuesta clara a esta cuestión es problemática, ya que Rusia, desde el primer momento y dada su trayectoria política y económica tras el colapso de la URSS, suscitaba ciertas dudas en otros muchos Miembros de la OMC, de ahí que se le haya exigido compromisos firmes de que respetaría los derechos y obligaciones de los distintos Acuerdos de la Organización. Estos compromisos se encuentran recogidos en el Protocolo de Adhesión, y en el Informe del Grupo de Trabajo sobre la adhesión de Rusia.

En este Informe del Grupo de Trabajo (WT/ACC/RUS/70, WT/MINC11/2, de 17 de noviembre de 2011) se recoge sucintamente los debates que se han producido, y los 163 compromisos específicos de Rusia para adaptar su sistema jurídico a los Acuerdos de la OMC. Incluso en algunos casos se ha ido más allá de lo que prevén los Acuerdos, lo que es conocido como "OMC plus". Este ha sido el caso, por ejemplo, de los derechos de exportación en ciertos productos (Ya Qin, Julia, 2012, pp. 1160 y 1182), como los energéticos, productos de madera, ciertos minerales básicos, etc. Desde este prisma, se ha señalado que *"Russia has created a new Part V-Export Duties in its GATT schedule, detailing products of more than 700 tariff lines duties that are subject to he maximum rate to export ranging from 0 % to 50 % or to specify duties determined by complex formulae. According to*

the Working Party Report on Russia's accession, Russia will implement, from the date of accession, its tariff concessions and commitments contained in Part V of its schedule 'subject to the terms conditions or qualifications' set forth therein… with this statement: The Russian Federation undertakes not to increase export duties, or to reduce or to eliminate them, in accordance with the following schedule, and not to reintroduce or increase them beyond the levels indicated in this schedule, except in accordance with the provisions with GATT 994" (*Ibid*).

Estos derechos de exportación, que suscitaban mucha desconfianza, sobre todo en los países europeos, ya que pensaban que Rusia no cumpliría con sus compromisos, se encontraron con que Rusia rechazó de plano renunciar a ellos, yendo sin embargo en sus concesiones más lejos de lo que prevé el propio sistema comercial, algo novedoso en la OMC.

Respecto a los productos energéticos en el comercio entre la UE y Rusia que continúa estando de mucha actualidad en los tiempos que corren a raíz de la nueva crisis en relación con Ucrania, es necesario recalcar lo siguiente. Dada la importancia que estos representan tanto a nivel económico y comercial, como político, hay que recalcar que, a pesar de la desaparición de la URSS, se ha mantenido en buena medida la tradición de mantener sobre estos recursos naturales un fuerte control estatal, partiendo de la premisa de que estos recursos benefician a la nación rusa en general. Sin embargo, para la UE, y sus Estados que compran estos productos a Rusia, como Alemania, los países bálticos y el resto de países del Este, abordan el tema desde una perspectiva económica liberal. Desde este prisma, Rusia y la UE mantienen dos modelos distintos que tienden a enfrentarse a nivel político, y también sobre las formas de resolverlo, tanto a nivel del Derecho de la UE como en el seno de la OMC. Y es que a pesar de todo lo que se dice sobre la necesidad de reducir esta dependencia de Rusia por parte de muchos países de la UE, la cuota de Gazprom en el mercado de gas de la UE superó en el año de 2018 el 35% (Euronews, 30 de enero 2019), mientras que hoy en día se habla de un 40%. Así las cosas, y a pesar de lo que se dice, la realidad es que como señaló Martín Brudermuller, director del gigante químico alemán, BASF, "cuando llega el frío a Europa, son los rusos los que abren la válvula del gas…", instando además a proteger el proyecto gasístico "Nord Stream 2", que garantiza según él, el abastecimiento energético a Europa (Neue Zurcher Zeitung, 8 de junio de 2019). Como se sabe, este proyecto gasístico es hoy en día una realidad, pero su entrada en funcionamiento se ha paralizado por problemas suscitados a raíz de la actual crisis de Ucrania. Las presiones de los Estados Unidos sobre Alemania en este sentido han sido tan fuertes, que ambos Estados se han comprometido a utilizarlo como sanción económica contra Rusia, siempre, claro está, que no se encuentra una vía diplomática para resolver la crisis. Por lo tanto, un proyecto que nació para facilitar el abastecimiento de gas a Alemania por parte de Rusia se encuentra paralizado porque así lo he decidido el Presidente Biden, al menos hasta ahora, pudiendo generar esta paralización unos costes importantes y un alza de los precios energéticos para los países europeos, pero no para los Estados Unidos, que quieren traer a Europa su gas licuado, o en su defecto gas de Qatar, lo que no se entiende muy bien, evidentemente.

Como se sabe todas estas cuestiones están sobre la mesa a causa de la nueva crisis ucraniana, sin que se haya dado ni por los Estados Unidos ni por la UE una solución a corto o medio plazo a esta dependencia europea de los recursos energéticos rusos, de ahí que por el momento Alemania haya levantado la voz al oponerse a enviar tropas a las zonas limítrofes con Ucrania. Por eso recurre solo a las sanciones de no poner en funcionamiento el "Nord Stream 2" en caso de invasión de Ucrania por tropas rusas. Dicho esto, nada se opone en realidad a que Rusia continúe manteniendo un cierto control sobre los beneficios y las infraestructuras, invocando que, en un sistema comercial internacional liberal, los Estados no solo pueden sino que deben protegerse contra otros Estados con el fin de mantener su poder como ya lo hizo Noruega (Austik Ole, Gunmar y Lembo, Carolina, 2017, p. 668). Y si

lo hizo Noruega ¿no podría hacerlo Rusia? Y es que, aunque Rusia se haya incorporado a la OMC, esto no significa *de facto* que tenga que renunciar o cambiar su política energética a nivel interno, ni tampoco aquella relacionada con sus exportaciones. Como ya se ha señalado *"… This may not be into a mirror of the purposes for how the West regulated its own economy and society. Most likely it will, in some way or another, maintain the hierarchical governance structure based on a quasi-monopoly in the production segment and a transmission and export monopoly, even if formally and organizationally better adjusted to international norms and rules. Adjusted to the Russian situation, it may represent pragmatic changes that could also benefit the Russian society and state"* (*Ibid.*, p. 269).

Estas divergencias entre la UE y Rusia en torno a los productos energéticos no son nuevas, pues tanto a nivel jurídico como práctico, aunque sobre todo en relación con el tránsito, estos problemas ya estuvieron presentes en las negociaciones del Tratado sobre la Carta de la Energía, hecho en Lisboa el 17 de octubre de 1994. No obstante, la prueba de que ambos se necesitan, es que el diálogo no se rompió (Blanc Altemir, Antonio, 2011, pp. 193-198), y ahí seguimos, esperando que la crisis actual que padecemos a causa de Ucrania, lo cambie.

3 TRAS LA ADHESIÓN A LA OMC ¿ES RESPETUOSA RUSIA CON LAS NORMAS DE LA OMC?

Lo primero que conviene apuntar es que Rusia, tras su adhesión a la OMC, ha transformado su economía, al hacer progresos importantes en materia de liberalización del comercio, así como en inversiones. Esto ha tenido además un elemento positivo en la zona caucásica, al entrar en vigor, el 1 de enero de 2015, el Tratado por el que se establece la Unión Económica Euroasiática. Ambos procesos están interrelacionados, y constituyen hitos importantes a pesar de las crisis políticas que se han sucedido en la zona en relación con Ucrania, como ya se ha apuntado, pero también en el Cáucaso. No obstante, Rusia sigue teniendo en su estructura económica ciertos problemas de todos conocidos, como es el caso de la falta de diversificación en su sistema productivo, y sobre todo en sus exportaciones, muy centradas en los productos energéticos. Pero no solamente esos, sino también existe una gran burocracia administrativa, una gestión deficiente y una gran intervención pública, que no generan mucha confianza en los inversores. Sin embargo, esto no ha impedido que Rusia haya tenido superávits tanto en su comercio exterior como en su balanza por cuenta corriente, siendo en esta última de un 7% en 2018.

Por otro lado, hay que señalar que, en el marco de los Acuerdos suscritos en la OMC, se llevan a cabo exámenes periódicos de las políticas comerciales de los Miembros, así como sobre los distintos acontecimientos de una cierta relevancia que pueden influir sobre el sistema comercial global. Aunque todos los Miembros están sometidos a este examen, la frecuencia de estos no es igual para todos, ya que va a depender de la importancia que tiene el Miembro. A Rusia se le hizo por primera vez en 2016 (WT/TPR/S/345, del 25 de noviembre de 2016), y otro mucho más detallado, llevado a cabo por la Secretaría el 6 de diciembre de 2016, en el que se analiza con sumo detalle las peculiaridades de la economía rusa, el régimen comercial, las inversiones, las políticas comerciales por sectores, etc., que retratan el estado de la economía rusa y de su comercio (WT/TPR/S/345/Rev. 1, 198 p.). Es decir, el control ha sido muy minucioso, sin que se detectaran problemas importantes.

Pero no solo se ha hecho estos controles, ya que por su parte el Gobierno ruso emitió su Informe el 24 de agosto de 2016 (WT/TPR/G/345, 15 p.) en el que expone con rigor los retos a los que ha tenido que hacer frente, y que han debilitado su crecimiento económico tras unos años, sobre todo entre 2010-2012, en donde había habido un auge económico debido al alza de los precios energéticos. Y es que se señala que en 2015 y durante los primeros meses del 2016, "el desarrollo de la economía rusa resultó afectado negativamente

por factores externos. El deterioro del entorno económico exterior, sumado a las sanciones comerciales contra Rusia se tradujo en graves consecuencias para su economía, lo que incluyó la depreciación del rublo, una reducción del saldo positivo de la balanza comercial, una mayor incertidumbre económica y un endurecimiento de las condiciones de los préstamos…". Sin embargo, se reconoce que, en el primer semestre del 2016, "la recesión económica se ha mitigado, lo que demuestra que la economía rusa se ha adaptado a los recientes choques externos". Se señala además que la UE es el mayor interlocutor comercial de Rusia, algo ya apuntado, ya que representa más del 50 % del comercio ruso.

Así las cosas, no se entienden las reacciones y las sospechas que llegó a suscitar Rusia en algunos miembros de la Comisión Europea en 2012, año en el que Rusia se integra en la Organización. Esta animadversión se detecta claramente en el discurso que dio el Comisario de Comercio de entonces, De Gucht Karel, el 5 de diciembre de 2012, con el título "*After WTO Accession: Reform and EU-Russia Trade Relations*". (European Comission SPEECH/12/901). En este discurso se deja claro un gran pesimismo hacia lo que Rusia pueda hacer en la OMC, y lo hace además en un tono despectivo, cuando en torno a Rusia señala lo siguiente: "*Three months have now passed and I must say that the picture is if anything less promising than it was then… Far from using its new membership of the WTO as a tool for broader reform-Russia its note even meeting its commitments…*". Sin embargo, señala que la UE necesita a Rusia para el futuro en los términos siguientes: "*This means Europe needs Russia to succeed in the long term: for example, a more predictable regulatory environment will help the many European companies who trade with, and have invested in Russia*". Es decir, para este Comisario de Comercio, originario de Bélgica, lo importante es lo nuestro, lo de Europa, y Rusia solo si nos conviene. Habría que decirle que el respeto a los demás es la principal regla en un sistema democrático del que hace alarde la UE, pero parece que este Comisario no lo practica demasiado.

Pero Rusia no podía dejar sin más de lado a los países que, dada la importancia que les otorga, está vinculada por diez acuerdos comerciales regionales que abarcan a doce Estados (Azerbaiyán, Belarús, Georgia, Kazajistán, la República Kirguisa, Moldavia, Serbia, Tayikistán, Turkmenistán, Ucrania y Uzbekistán), con los que tiene un comercio que representa en torno al 12% del total de Rusia, lo que no es poco, dada la pequeña talla económica de estos Estados. Es más, a los Estados miembros de la Unión Económica Euroasiática (Armenia, Belarús, Kazajistán y la República Kirguisa) no se aplican aranceles (Belarús no es Miembro de la OMC).

Así pues, se puede afirmar que Rusia respeta las normas del sistema comercial internacional desde su adhesión, y un buen ejemplo de ello es su buena voluntad que se refleja en la adhesión a determinados acuerdos posteriores y suplementarios como el Protocolo por el que se enmienda el Acuerdo sobre los ADPIC (Acuerdo sobre los Aspectos de los Derechos de la Propiedad Intelectual relacionados con el Comercio) aprobado el 6 de diciembre, o el de 2005 relativo al acceso a los medicamentos que favorece sobre todo a los países en desarrollo. En este mismo sentido conviene citar al Acuerdo sobre Facilitación del Comercio, cuyas negociaciones se concluyeron en la Conferencia de Bali de 2013, entrando en vigor el 22 de febrero de 2017, una vez que fue ratificado por dos tercios de los Miembros de la OMC. Otras materias han sido objeto del interés ruso como el Acuerdo sobre Tecnología de la Información, concluido en la Conferencia Ministerial de Singapur en diciembre de 1996, al que Rusia se adhirió en 2013. De este Acuerdo forman parte 82 Miembros, lo que representa el 97 % del comercio mundial de productos de tecnología de la información. Es más, en la Conferencia de Nairobi de 2015, unos dos tercios de los Miembros convinieron ampliar su ámbito de acción a más de 200 productos. Por último, Rusia ha mostrado también un gran interés por el comercio electrónico, de ahí que haya firmado la Declaración conjunta sobre el Comercio Electrónico adoptada en la Conferencia Ministerial de Buenos Aires de 13 de diciembre de 2017.

Como ya hemos apuntado, los acontecimientos de Ucrania del 2014 trajeron consigo sanciones económicas que fueron adoptadas por numerosos países occidentales, entre los que se encuentran los Miembros de la UE. A este respecto, Rusia contestó por su parte adoptando en el ámbito agrícola, desde agosto de 2014, una política de substitución de las importaciones agrícolas de los países sancionadores como frutas frescas, hortalizas, carne, pescado, etc. por un período de un año (Informe… WT/TPR/G/345, pár. 29), y continuando después. El resultado ha sido que ambas Partes han padecido sus nefastas consecuencias. Mientras que Rusia era un consumidor fiable y solvente de los países sancionadores, tuvo que buscar nuevos proveedores, mientras los países sancionadores, sobre todo los de la UE, han visto cómo un mercado importante se les iba de las manos, teniendo la UE que adoptar unos desembolsos financieros en el marco de la Política Agrícola Común para paliar los efectos de la pérdida de ese mercado. A este respecto, conviene tener presente que Rusia no tiene, por oposición a la UE, una agricultura muy subvencionada, prestando alguna clase de ayuda a algunos productos específicos, pero en porcentajes bajos. Además, no suele dar subvenciones a la exportación como se recoge en las notificaciones al Comité de Agricultura de la OMC, entre 2012 y 2015. Sin embargo, es un exportador importante de cereales, sobre todo de trigo, que suele canalizar hacia los países en desarrollo y hacia los países del Mediterráneo (Dixit, Diwakar y Parajuli, Thakur, 2019, pp. 509-532).

Así las cosas, se desprende del comportamiento de Rusia que ha llevado a cabo una gran labor en materia de transparencia y de modernización jurídica, satisfaciendo en general de forma muy positiva sus obligaciones con la OMC. Sin embargo, es cierto que sigue habiendo sectores como el bancario, el energético o el de transporte que permanecen controlados por el Estado, aunque es cierto que incluso en estos ámbitos, se respetan las normas del mercado, por lo menos hasta ahora. Por ejemplo, Rusia mantiene un gran control sobre todo en el gas, cuya principal empresa "Gazprom", representa en torno a un 73% de la producción de gas, siendo, además, la única empresa que tiene el derecho a exportar gas de Rusia (Shadikhodjaev, Sherzod, 2016, pp. 8- 9). En el sector de transporte, el artículo V.2 del GATT reconoce la "libertad de tránsito por el territorio de cada Parte contratante para el tráfico en tránsito con destino al territorio de otra Parte contratante o procedente de él, que utilice las rutas más convenientes para el tránsito internacional", todo esto sin discriminación, lo que implica que no se hará distinción alguna que se base en el pabellón de los barcos, en el lugar de origen, en los puntos de partida, de entrada, de salida o de destino. Tomando en consideración que Rusia es el Estado con mayor superficie del mundo (17.098.242 km^2), es fácil comprender que este sector también tiene una especial importancia.

En el ámbito energético conviene apuntar, además, que en las relaciones entre la UE y Rusia, ambas partes intentan conservar sus parcelas de poder, sobre todo en relación con el gas. Y es que como ya se ha señalado por analistas de relieve en este campo, *"… While Russia attempts to use the power of single countries one-side import dependency for their economic and political benefit, the EU is trying through several directives, most importantly the TEP to establish competition rules that will assure a less dominant power to Gazprom in its market, the EU considers itself entitled to regulate the activity of any doing economic activities within the area of the Single Market. A common assumption in the EU is that external relations can be governed in the same way as internal EU affairs and handled similarly by law and institutions regulating economic activities as the EU does for Member States. View from the EU perspective, energy in East-West relations should be treated as just another commodity with policy harmonization across the Community…"* (Ausevik Ole, Gunnar y Lembo, Carolina, 2017, pp. 666-667; Konoplyanik, Andrey A., 2012, pp. 42-56). Además, a esto hay que añadir un aspecto importante, y es que en esta materia la competencia entre el Este y el Oeste se hace tanto con el "*hard law*" como con el "*soft law*", a todos los niveles

4 RUSIA EN EL MERCANISMO DE ARREGLO DE CONTROVERSIAS DE LA OMC

Históricamente hablando son conocidas las reticencias rusas en el ámbito del Derecho internacional a la hora de someterse a las jurisdicciones internacionales permanentes, como es el caso, por ejemplo, de la Corte Internacional de Justicia, teniendo una absoluta prioridad por los tribunales arbitrales (Kostin, Alexey A., 2017, pp. 19-86). Esta realidad histórica rusa iba a suscitar ciertas especulaciones que no estaban relacionadas pura simplemente con los aspectos económicos, sino sobre todo jurídicos, ya que se trataba de ver cómo Rusia iba a adaptar y digerir los cambios necesarios que había que hacer para adaptar su derecho interno al sistema comercial internacional establecido por la OMC, Organización que presenta unas características especiales, siendo una de ellas, y es importante, que no estamos ante una institución especializada de las Naciones Unidas, como la mayoría de las grandes organizaciones internacionales que conocemos, como el FMI, el Banco Mundial, etc.

Esto no ha impedido sin embargo a Rusia adherirse a la OMC, en donde todos los Miembros están obligados a someterse al Órgano de Solución de Diferencias (OSD), en cuyo sistema está incluida la posibilidad de recurrir al arbitraje de conformidad con el artículo 21, párrafo 3 del OSD. Este sistema, que establece un procedimiento general de solución de diferencias para el conjunto de los sectores del comercio mundial, constituye un elemento esencial para aportar seguridad y previsibilidad al sistema multilateral de comercio, cumpliendo una doble función, ya que por un lado sirve para preservar los derechos y obligaciones de los Miembros de la OMC y, por otro, también sirve para aclarar e interpretar las disposiciones vigentes de dichos acuerdos de conformidad con las normas usuales de interpretación del Derecho internacional público (Bermejo García, Romualdo y San Martín Sánchez de Muniáin, Laura, 1996, pp. 182-194).

Si comparamos la participación de Rusia en el sistema de solución de diferencias en relación con otras Miembros importantes, hay que señalar que Rusia ha tenido una participación mediana, en torno a un poco menos de tres asuntos por año, mientras China se muestra más activa, debido también a su mayor peso económico y comercial. Pero son la UE y los Estados Unidos, sin embargo, los que tienen entre ocho y once asuntos anuales desde 1995. Claro, esto se debe a que su participación en el comercio internacional es también mucho mayor (Crépet-Daigremont, Claire, 2019, pp. 126-127). Sin embargo, ha sido como tercera parte que Rusia ha participado de una forma más activa, ya que el sistema le abre las puertas para ello, como ocurre con otros Miembros más o menos activos y poderosos de la Organización, como los Estados Unidos, Brasil, Canadá, China, Corea, la India, Japón o incluso México, sin olvidar a la UE, que es el miembro con más participaciones como tercera parte, al contar con unas 180 participaciones, lo mismo que Japón. Rusia, por su parte, se sitúa en torno a 50, lo que no es poco partiendo de la premisa de que es Miembro desde 2012 (Johannesson, Louise y Mavroidis, Petros C, 2017, p. 357-408). A este respecto, conviene apuntar que el Órgano de Apelación del Tribunal Arbitral ha estado paralizado desde 2019 debido al no nombramiento de los jueces por la Administración Trump, tema que ha sido objeto de acerbas críticas tanto a nivel comercial como político a nivel mundial (Le Temps –Ginebra–, de 21 de octubre de 2019).

Conviene hacer notar que quizás sea todavía un poco prematuro evaluar con precisión los pasos que ha dado Rusia, así como los derroteros precisos por donde irá la participación rusa en el futuro, dadas las crisis políticas por las que ha tenido que pasar con sus vecinos de Europa del Este, y no solo con Ucrania, como la que estamos viviendo en la actualidad, lo que acarrea mucha crispación política económica e incluso jurídica, como ya se ha detectado en algunos asuntos que han tenido lugar con estos países en el Órgano de Solución de Diferencias. A todo esto, conviene recalcar que los asuntos en los que Rusia ha estado inmersa presentan una cierta complejidad técnica y una gran diversidad, debido

sobre todo a sus especificidades en el ámbito del comercio internacional. A esto hay que añadir que, aunque Rusia se haya adherido a la OMC tan solo en 2012, ya tenía una cierta experiencia en litigios comerciales que habían surgido anteriormente, sobre todo con algunos Estados miembros de la UE en el marco del Acuerdo de Asociación, sin excluir algunos asuntos con otros Estados, incluyendo a los Estados Unidos, con el que los volvería a tener también en la OMC.

Conviene destacar, sin embargo, que su comportamiento en esta materia reviste una cierta importancia a la luz de la selección de los litigios en los que se va a implicar, lo que puede traer consigo que favorezca y que influya en el desarrollo jurisprudencial de la Organización en algunos temas específicos. Todo esto acarrea que la presencia de Rusia en el contencioso de la OMC será con toda seguridad beneficiosa tanto para Rusia como para la misma OMC. Esto se desprende ya de las disputas que Rusia ha tenido con ciertos Estados de la UE, vistas las amplias relaciones comerciales que mantiene con ellos. Los litigios más importantes han tenido lugar con Polonia, Finlandia, Estonia y Alemania, con un trasfondo no solo económico, en algunos casos, como fue el litigio con Estonia a causa del cambio de lugar que se llevó a cabo de la estatua del "Soldado de Bronce" erigida en 1947, que representaba un homenaje a los soldados soviéticos caídos en esa zona durante la Segunda Guerra Mundial (Bermejo García, Romualdo, 2020, pp. 75 y sgs., pp. 93- 97 para Estonia y el "Soldado de Bronce").

Un asunto relevante que servirá de ejemplo para otros casos similares, ha sido el presentado por Ucrania contra Rusia referente a las medidas que afectan al tráfico en tránsito, cuyo Informe del Grupo Especial fue emitido el 5 de abril de 2019 (WT/DS512/R, 154 p.). Los hechos invocados por Ucrania estaban relacionados con la prohibición establecida por Rusia de las rutas de tránsito por carretera o ferrocarril que atraviesan la frontera entre Ucrania y Rusia, impidiendo así el transporte de las mercancías ucranianas con destino a Kazajistán o a la Republica Kirguisa, pero que también se aplican para otros países caucásicos. Frente a estos argumentos, Rusia se iba a centrar sobre todo recurriendo a un argumento esencial, y era que esas medidas eran necesarias para la protección de los intereses esenciales de su seguridad, en respuesta a la grave tensión internacional que se produjo en 2014, y que presentó amenazas para los intereses esenciales de la seguridad de la Federación de Rusia, aspecto que está recogido en el inciso iii) del apartado b) del artículo XXI del GATT de 1994".(Ibid., p.24, punto 7.2) Este argumento ruso fue retenido por el Grupo Especial, señalando que las relaciones de Rusia con Ucrania constituyen un caso de grave tensión internacional tal y como está recogido en la disposición precitada del GATT.

Pero la OMC, como otras grandes organizaciones internacionales, presenta unos rasgos especiales que son fácilmente deducibles del peso que tienen las grandes potencias comerciales. Y es que, como ocurre en otros ámbitos de las relaciones internacionales, en una Organización como esta, en donde las medidas de retorsión desempeñan un papel importante, las grandes potencias podrán hacerles frente mejor que los Miembros débiles, disponiendo así de una cierta impunidad. Esto acarrea que sean las grandes potencias comerciales, la UE, China, los Estados Unidos, Japón y los grandes países del G-20, fuera de los ya citados, que controlan el 90% del comercio mundial, los que van a ser los actores principales de esas controversias, incluida evidentemente Rusia. Esto no es óbice para resaltar que Rusia no puede compararse ni con la UE, ni con China, ni con los Estados Unidos, por ejemplo, aunque tendrá siempre una baza muy importante en todo aquello relacionado con los recursos naturales, incluidos, por supuesto, los energéticos.

Otro elemento importante que conviene apuntar es que, hoy en día, Rusia contiene un marco constitucional claro respecto al valor jurídico del Derecho internacional en su ordenamiento, al prever en el artículo 15.4 de la Constitución del 12 de diciembre de 1993 que "los principios y las reglas del Derecho internacional y los acuerdos internacionales de la Federación Rusa son parte integrante de su sistema jurídico. Si el Tratado internacional

comprende otras reglas que las previstas por la ley, se aplicarán las reglas del Tratado internacional". Es cierto, sin embargo, que la Corte Constitucional rusa ha utilizado métodos diferentes a la hora de resolver algunos conflictos entre las normas constitucionales y las supranacionales, sobre todo en el marco de la Unión Económica euroasiática, aunque las sendas que adopta son próximas a la línea jurisprudencial de la Corte Constitucional alemana con su jurisprudencia en el caso "Solange". Por otro lado, los Acuerdos de la OMC no contienen disposiciones referentes a cómo se deben aplicar sus normas ni en torno a su efecto, pero tampoco muchos de sus miembros, incluida Rusia. Sin embargo, en este último caso, parece que Rusia dispone de elementos suficientes, así como argumentos para aceptar el efecto directo de sus normas, lo que no reconoce la UE en general, ni los Estados Unidos tras la adopción del "Uruguay Round Agreement Act", de 8 de diciembre de 1994.

No hay que olvidar tampoco que Rusia, como todas las grandes Potencias, concibe el Sistema de Solución de Diferencias de la OMC, como un instrumento más de sus relaciones internacionales, cosa que practican también los Miembros más relevantes de esta Organización. Esto no significa, sin embargo, que no se la tome en serio, sino que dadas las circunstancias que se han venido sucediendo desde su adhesión, ha hecho lo que ha considerado más oportuno, como lo hacen la UE, los Estados Unidos o China, por citar solo algunos ejemplos. Hay que reconocer, sin embargo que, durante este período, debido a las causas ya mencionadas a nivel político y económico, como todo lo relacionado con Ucrania, su papel no haya sido quizás el deseado, o por lo menos, no todo lo esperado. Y es que de los 17 asuntos que Rusia ha tenido en el sistema de arreglo de controversias hasta 2020, seis han sido como "Reclamante" y en los doce restantes "Demandada". Estos litigios han tenido lugar con la UE, Ucrania, Estados Unidos y uno con Japón, lo que indica que, salvo el caso de Ucrania, todas las controversias tienen lugar con Miembros importantes de la OMC, exceptuando China, con la que, por el momento, no ha tenido ninguna.

5 ¿QUÉ EFECTOS PUEDE TENER LA CRISIS ACTUAL DE UCRANIA PARA RUSIA Y EL SISTEMA COMERCIAL DE LA OMC?

Tras la crisis ucraniana de 2014, y las sanciones de los países occidentales adoptadas contra Rusia, se despertó en este país una sensación de que no solo debían mirar hacia el Oeste, sino también un poco más hacia el Este, es decir Asia. (Duguin Aleksandr G, y otros, 2015). La creación de la Unión Económica Euroasiática, ya mencionada, es un buen ejemplo de ello. Decimos bien un poco más hacia el Este, ya que Rusia siempre fue considerada como una Potencia euroasiática, aunque con ciertos recelos hacia China, y no tanto hacia la India, con la que siempre ha mantenido una relación cordial. Sin embargo, en los últimos tiempos se nota una mayor aproximación hacia China, que se ha agudizado en los últimos años tras el Euromaidán y la crisis ucraniana de 2014. Pero incluso se puede decir, que esta tendencia se está incrementando en la actualidad, tanto desde el punto de vista económico como político, como bien se ha apuntado (Avdaliani Emil, 2019, 5 p.). Esto se debe a que, tras el colapso de la URSS, los rusos pensaban obtener una cierta solidaridad, y se le dio desprecio (Mangas Martín Araceli, 2022), algo muy humillante para cualquiera, pero sobre todo para los valores rusos. Ya se sabe que cada uno es dueño de su propio destino, pero el mundo ha cambiado más que los dirigentes occidentales piensan, un craso error que puede generar no solo una decepción rusa, sino una separación, o incluso un enfrentamiento entre la zona de influencia ruso-china o ruso-asiática contra los países occidentales de dimensión no solo económica y comercial, sino también geopolítica (Avdaliani Emil, 2019).

En este contexto, agravado en la actualidad por los últimos acontecimientos, no es extraño que haya traído consigo un nuevo marco de relaciones entre Rusia y China, el cual, aunque esté aún por determinar, ya se atisba que no será solo por meras razones comerciales y económicas, sino también geoestratégicas. Precisamente de esta cuestión se

hace eco abiertamente la prensa de los Estados Unidos en un interesante artículo de *Newswek, d*el 3 de febrero*,* firmado por Brendan Cole, con el sugerente título "*Putin and Xi to Cement Ties at Olympics Amid Threat of War in Ukraine" (*Cole Brendan, 2022*)* Otro analista, O'Connor Tom, destaca por su parte en este mismo medio que en esta reunión se abordarán "*a wide range of issues related to practical cooperation in the areas of trade, the economy, energy, finance, investment, science and culture",* recogiendo al mismo tiempo la opinión del Profesor de Ciencia Política de la Columbia University Barnard College, de Nueva York, Alexander Coley, según la cual "*the U.S. has already cedet global hegemony, while its worldwide influence continues to wane" (Ídem).*Y es que si examinamos los acontecimientos que se han sucedido en los últimos años en el sistema comercial internacional, algo que es fácil de constatar, pero quizás no tanto de reconocer, nos encontramos con la frase de "America First", pronunciada por Trump, pero que después ha sido adoptada como si fuera una buena hija por el actual Presidente Biden, sin darse cuenta, al menos eso parece, de que están yendo contra uno de los pilares que forjaron el sistema comercial y económico que su propio país impuso, en colaboración con sus hermanos británicos, al mundo en 1945, reafirmado después, y cómo, tras la Ronda Uruguay en el sistema comercial internacional, ya que se trata ni más ni menos que de la libertad de comercio que representa actualmente la OMC. Es más, también es cierto que algunos iluminados pensaban que la llegada de Biden, por ser del partido demócrata, iba a hilar más fino, y sin embargo, se han encontrado con que ha ido más lejos, no solo ya diciendo lo que ya señaló Trump, sino añadiendo en su comportamiento un elemento de "odio" hacia ciertos países o personas que está presente en los sonoros insultos que ha realizado no solo a Putin, llamándole "Killer", sino a cualquier persona que le pueda incomodar, como ha sido el caso del periodista, con ese insulto de todos conocido, que ha dado la vuelta al mundo.

En estas circunstancias, hay que reconocer que esta actitud occidental, tal y como se ha desarrollado en los últimos tiempos, ha tenido por efecto inmediato un gran acercamiento entre Rusia y China, ya que ambos países han comprendido la clara animadversión de los Estados Unidos y de otros de sus grandes aliados que siguen practicando hacia ellos, no solo en el ámbito económico y comercial, sino sobre otros muchos aspectos de alcance político o estratégico mundial. Esto significa en realidad una sensación extraña para los Estados Unidos y otros países occidentales, que se ven obligados a contemplar que un cierto liderazgo chino a nivel mundial, sobre todo en el ámbito económico y comercial, pueda convertirse en una realidad. Desde esta perspectiva, conviene apuntar que la pérdida de Rusia para el mundo occidental sería una especie de catástrofe geopolítica, cuyo alcance para los países occidentales podría ser desastroso. Y es que no hay que olvidar que en este escenario, China sería también un actor relevante en toda Eurasia, aunque no solo, pues podría también ayudar a Rusia en el desarrollo de las zonas árticas, tan de actualidad en los últimos tiempos, y en las que Rusia tiene un gran interés, como se sabe, no solo a nivel estratégico, sino también por sus recursos naturales, algo en lo que están también los países occidentales. (Soerensen Kamilla y Klimenko Ekaterina, 2017). Sin embargo, debido a las últimas crisis relacionadas con Kosovo, primero, y después con Ucrania, en las que Occidente ha adoptado una serie de actitudes críticas hacia Rusia, algo está cambiando sobre el terreno, como lo demuestra el hecho de que ahora, una buena parte de la clase política rusa, no quiera seguir manteniendo un estrecho vínculo psicológico exclusivamente hacia los países occidentales, sino que desean mantener relaciones con ambas partes, es decir Europa y Asia, especialmente con China, pero manteniendo también un marco de relaciones cordiales con la India. Dicho de otra forma, si Biden quería que no se generara un tándem chino-ruso, lo que ha hecho ha sido todo lo contrario, como nos lo están demostrando los acontecimientos actuales.

Esto se debe a ciertas contradicciones en las que se mueve en los últimos años la política estadounidense. Por un lado dicen defender la libertad de comercio, eso sí, siempre que esté sometida al principio de "America First", ya no solo contra Rusia y China, sino

también en relación con los países europeos, a quienes además se les pide que apoyen sus planes, sean económicos o no. Y si alguien, como Alemania en la actualidad, se niega a entregar armas a Ucrania, es un mal aliado. Pero Biden ya ha demostrado tener otra faceta negativa, y es que quiere decidir solo, sin consultar con sus aliados, ni en la OMC, ni en Afganistán para llevar a cabo la "magnífica retirada", a pesar de que también sus aliados tienen centenares de muertos caídos en la zona, y no solo eso, sino también haciendo también caso omiso de los informes presentados por los altos mandos militares estadounidenses. Y puestos ya a hablar de aliados y de la confianza que hay que tener con ellos, ahí tenemos el AUKUS (Australia, Estados Unidos y el Reino Unido), creado, al menos anunciado, a mediados de septiembre de 2021, sin decir nada a sus aliados de la OTAN, eso sí, salvo al Reino Unido, que está dentro. Esto último ha sido calificado como una "puñalada por la espalda" por el Ministro de Asuntos Exteriores Francés, Jean- Yves Le Drian. Pero con Francia, el espíritu y el respeto que hay que tener con sus aliados, no terminaba ahí, pues por esas mismas fechas se iban a encontrar con que los submarinos franceses que Australia se había comprometido a comprar fueron dejados en la cuneta, para intercambiarlos por los submarinos nucleares estadounidenses, sin que se informara a su tiempo al Gobierno francés. Es decir, con amigos como estos, no hace falta enemigos...

En este contexto, tan turbio y desconcertante, el tándem chino-ruso se abre camino tanto a nivel político como económico, aunque habrá que ver hasta donde llega. Políticamente hablando, un hecho relevante se acaba de demostrar en el Consejo de Seguridad de las Naciones Unidas, en la reunión del 31 de enero de 2022, reunión convocada por los Estados Unidos para debatir el tema ucraniano, y que fue votada por diez votos a favor, dos en contra (Rusia y China), y tres abstenciones (Gabón, India y Kenia). En esta ocasión el representante chino ha subrayado que Ucrania no necesita una guerra, y hace también alusión a lo que ya han indicado algunos Miembros, insistiendo en que la situación requería "une diplomatie discrète, pas une diplomatie de micro" (Conseil de sécurité, CS/14783, 8960 séance, 31 janvier 2022).

Pero también se abren expectativas para unas nuevas rutas comerciales chino-rusas en el marco de la "C*hinese Belt and Road Initiative*". Una de ellas consistiría en abrir un corredor económico chino-paquistaní que consiste en crear una red importante de infraestructuras que necesita tanto China como Pakistán, para llevar a cabo actividades económicas en la región de Gilgit-Baltistan, en Cachemira, región que sigue en disputa entre la India y Pakistán. Con este fin, Vladimir Putin está intentando negociar con la India, que representa un gran mercado a todos los niveles, un acuerdo de libre comercio entre la Unión Económica Euroasiática y la India, lo que daría a este país la posibilidad de conectarse al Pacífico por Vladivostok.

En este tándem, la oferta rusa comprende cooperar en varios sectores, como la aviación, la energía, pasando por un reforzamiento de la cooperación militar como base para ir preparando una "asociación estratégica privilegiada"', que incluiría también un acuerdo a largo plazo para importar hidrocarburos rusos. También se señala que habría que añadir un impulso de la ruta marítima Rusia-India, o lo que es lo mismo, la reactivación de la vía Chennai-Vladivostok. Esto sería algo muy importante, pues podría enlazar con la ruta marítima de la Seda liderada por China, que va desde el Mar del Sur hasta el Océano Índico. Como se puede comprender, este plan ruso también pretende reforzar una gran Eurasia, ya que tanto Rusia como la India y China se han asegurado una relación muy fructífera a nivel económico y comercial con Irán. Y es que Irán, debido a su posición geográfica, es un elemento clave para la integración euroasiática. En este proyecto habría que pensar también en desarrollar la zona del Extremo Oriente ruso, zona que a día de hoy no dispone de las infraestructuras adecuadas para tener una cooperación eficiente con China. Esto sería algo muy importante para facilitar a China la cooperación con Rusia en las zona árticas (Soerensen Kamilla y Klimenco Ekaterina, 2017, pp.31-40) A pesar de las dificultades que

la puesta en marcha de este plan pueda suponer, lo que no cabe duda es que, si se lleva a cabo, Vladivostok podría ser en un futuro no muy lejano un centro comercial para la India y Rusia (Ruta de la seda marítima Rusia-India: la reactivación del corredor Chennai-Vladivostok..., 2019), sinque esto pudiera afectar a los intereses chinos en las zonas árticas, debido a que comparten no solo ya intereses comunes, sino también fronteras. Todo esto, claro está, si la India está dispuesta a ello.

El tiempo nos dirá cómo terminará esta crisis que, a todas luces, encierra una gran complejidad, ya que no se limita solo al ámbito económico y comercial, sino que hay otros muchos aspectos sobre el tablero. Y es que no hay que olvidar que la sociedad internacional no solo está cambiando, sino que ya ha cambiado, y esto es algo de lo que algunos Estados no quieren darse cuenta y, mucho menos, reconocerlo. Sin embargo, basta con mirar la evolución de estas dos últimas décadas, para encontrarnos con una China e India relucientes, y una Rusia que se ha despertado, cuando Occidente pensaba que estaba todavía dormida. Es evidente que en estas circunstancias se tendrá que repartir el pastel...

6 CONCLUSIÓN

No se puede decir que Rusia, que ha tenido un buen comportamiento en la OMC, y pudiendo presumir de una adhesión exitosa, sin embargo, desde el punto de vista político, parece que todo ha ido en su contra. Basta con ver la fecha de su adhesión, 22 de agosto de 2012, y compararla con el inicio del Euromaidán, 21 de noviembre de 2013, y ver que casi coinciden. Es cierto que la Revolución Naranja había ocurrido antes, pues data de finales de noviembre de 2004 hasta enero de 2005, que sería la que prepararía el Euromaidán. Tras estos acontecimientos tenemos el tema de Crimea, en 2014, que ha vuelto al lugar que le corresponde, y de dónde nunca debía haber salido; y la crisis del Donbás, que ahí siguen separados *de facto* de Ucrania. Luego vino el conflicto en Siria, en donde Rusia tuvo un papel relevante a partir del 2015, tras la vergüenza de la intervención de ciertos países de la OTAN en Libia.Y los problemas prosiguen en la actualidad a un nivel no ya estrictamente regional, sino mundial, como se está viendo.

Después llegó la Administración Trump, cuyas reivindicaciones a nivel comercial descolocó a la UE y a China, pero no tanto a Rusia, llegando a tener con este país un trato cordial. La llegada de Biden a la Presidencia ha suscitado una serie de preocupaciones en Rusia, que le ha estado vigilando de cerca, y todavía más tras haber llamado "Killer" al presidente Putin, exabrupto que le costaría tener que venir a Ginebra para verse la cara directamente con los líderes rusos. Todo esto no ha impedido que Rusia haya cumplido con sus obligaciones en la OMC, demostrando que es un país serio y respetuoso con las reglas comerciales internacionales. Este buen comportamiento ruso, no ha tenido sin embargo una correlación por parte de los países occidentales, comenzando por las sanciones adoptadas tras la anexión de Crimea, que no han llevado a ninguna parte. Es más, se está amenazando ahora una vez más con sanciones muy graves o nunca vistas contra Rusia si esta lleva a cabo acciones militares contra Ucrania, sin especificar cuál sería el umbral que daría lugar a esas sanciones, a pesar del *lapsus* que dejó caer el Presidente Biden, tan comentado en los diferentes medios, y que ha dado lugar a muchas especulaciones. Todo esto está planteando problemas de todo tipo que pueden poner en peligro las relaciones comerciales de Rusia con los países occidentales, como se sabe, lo que perjudicaría, llegado el caso, a todas las Partes. Es evidente que la responsabilidad de esta situación no es exclusivamente de Rusia, a pesar de que haya sido la que ha sacado los carros de combate y enviado paracaidistas a hacer maniobras, pero dentro de su territorio, que es su derecho, ya que parece que ciertos medios han estado hablando de que ya estaban en Ucrania y que Kiev, su capital, corría peligro. La orden de salida del personal diplomático no esencial dada por los Estados Unidos ha venido a echar leña al fuego, ya que incluso el propio Gobierno ucraniano no ha comprendido esta decisión. Es decir, los ucranianos estaban más tranquilos que los

americanos, a pesar de que, si todo esto pasara a ser una realdad, serían los más afectados. Todo esto no nos impide afirmar que quizás sería conveniente una cierta modernización del funcionamiento de esta importante Organización que es la OMC, algo en lo que está la nueva Directora, la nigeriana Ngozi Okonjo-Iweala, deseándole buena suerte en ello, porque también hay muchos leones y leonas en la Organización...

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Article

The BVerfG PSPP/Weiss *Urteil* and the Euro Area: a Constitutional Crossroads, a Dead-End… or Perhaps Not So Much?

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KEYWORDS:

PSPP, BVerfG, EMU, Proportionality, Fundamental Rights, Ultra Vires Kontrolle

ABSTRACT:

This article comments on the BVerfG Second Senate's PSPP/Weiss *Urteil*, which declared as *ultra vires* the Decisions of the European Central Bank on a Public Sector Purchase Programme (PSPP), on the previous BVerfG's case-law on such *ultra vires* control of EU derivative legislation, as well as on the EUCJ's Weiss Judgement which upheld such Decisions, in response to a preliminary reference submitted by the aforementioned Second Senate in the same case. The paper also reviews whether such EU legal acts truly breached the fundamental right to vote of the complainants before the BVerfG, as the Judgement found, or if it was rather an abstract claim due to an economic and political discrepancy in relation to the contested acts but lacking any actual legal relevance. The conformity with EU law of the BVerfG's doctrine of its *ultra vires Kontrolle* on EU secondary law is also discussed, noting that its PSPP/Weiss *Urteil* has been the first German ruling to annul EU legal acts in application of such doctrine. The article concludes reflecting on the formal legal effects, if any, as well as on the unformal ones (maybe many), of this BVerfG' Second Senate judgement over the future of the Euro Area.

PALABRAS CLAVES:

PSPP, BVerfG, UEM, proporcionalidad, derechos fundamentales, control *ultra vires*

RESUMEN:

Este artículo lleva a cabo un comentario acerca de la Sentencia PSPP/Weiss de la Sala Segunda del BVerfG que declaró *ultra vires* en Alemania las Decisiones del Banco Central Europeo sobre un Programa de Compra de Deuda Pública (PSPP), acerca de la previa jurisprudencia de dicho Tribunal germano en relación con ese tipo de control jurisdiccional interno del Derecho derivado de la UE, así como, en la medida precisa, acerca de la Sentencia Weiss del Tribunal de Justicia de la Unión Europea, que validó tales Decisiones en respuesta a una cuestión prejudicial planteada, asimismo, por la citada Sala Segunda, en el mismo caso Weiss. El estudio también examina si tales actos jurídicos de la UE realmente vulneraron el derecho fundamental de voto de los recurrentes ante el BVerfG, tal y como concluyó la Sentencia de este, o si se trataba, más bien, de una reclamación abstracta debida a una discrepancia económica y política en relación con los actos impugnados, realmente carente de relevancia jurídica. La conformidad con el Derecho de la UE de la doctrina del BVerfG acerca de su control *ultra vires* sobre el Derecho derivado de la Unión es también objeto de discusión, teniendo en cuenta que la Sentencia PSPP/Weiss del BVerfG ha sido la primera en anular actos jurídicos de la UE en Alemania haciendo aplicación de tal doctrina. El artículo concluye reflexionando sobre los efectos jurídicos formales, si es que tiene alguno, así como acerca de los informales (puede que muchos), que esta Sentencia de la Sala Segunda del BVerfG alemán puede tener en relación con el futuro de la Eurozona.

MOTS CLES :

PSPP, BVerfG, UEM, proportionnalité, droits fondamentaux, contrôle ultra vires

RESUME :

Cet article commente l'arrêt PSPP/Weiss du Deuxième Sénat du BVerfG, qui a déclaré *ultra vires* les décisions de la Banque Centrale Européenne sur un Programme d'achat du secteur public (PSPP en anglais), la jurisprudence antérieure du BVerfG sur un tel contrôle *ultra vires* de la législation dérivée de l'UE, ainsi que l'arrêt Weiss de la CJUE qui a confirmé ces décisions, en réponse à un renvoi préjudiciel soumis par le deuxième sénat susmentionné dans la même affaire. L'article examine également si ces actes juridiques de l'UE ont réellement violé le droit fondamental de vote des plaignants devant le BVerfG, comme l'a constaté l'arrêt, ou s'il s'agissait plutôt d'une réclamation abstraite due à une discordance économique et politique par rapport aux actes contestés, mais dépourvue de toute pertinence juridique réelle. La conformité avec le droit européen de la doctrine du BVerfG concernant son *ultra vires Kontrolle* sur le Droit secondaire de l'UE est également discutée, en soulignant que son PSPP/Weiss Urteil a été le premier arrêt allemand à annuler des actes juridiques de l'UE en application de cette doctrine. L'article conclut avec une réflexion sur les effets juridiques formels, s'il y en a, ainsi que sur les effets non formels (peut-être nombreux) de ce jugement du Deuxième Sénat du BVerfG sur l'avenir de la Zone Euro.

CONTENTS:

1 THE BVERFG'S PSPP/WEISS *URTEIL*: A DISRUPTIVE JUDGEMENT (WITH LEGAL INCONSISTENCIES)

The PSPP/Weiss and others *Urteil*, rendered on 5 May 2020 by the Second Senate of the *Bundesverfassungsgericht* (BVerfG)[1], has struck both legal and economic worlds like an earthquake. It resolved an individual constitutional complaint (*Verfassungsbeschwerde*) filed by several German citizens against the European Central Bank's (ECB) Decisions on a Public Sector Purchase Programme (PSPP)[2], and also against the *Weiss* prejudicial Judgement of the European Union's Court of Justice (EUCJ).

The complainants contended that the aforementioned Decisions breached their individual rights to vote, as enshrined in Article 38.1 of Germany's *Grundgesetz* (GG). The BVerfG's Second Senate delivered this judgement after addressing a preliminary reference to the EUCJ, whose Grand Chamber responded with its Judgement of 11 December 2018, supporting the conformity of the contested Decisions with EU law[3]. The BVerfG's Second Senate then granted the plaintiffs the opportunity to extend their challenge to that EUCJ ruling.

In order to rule on such individual constitutional complaints, an *ultra vires* control of both the contested ECB Decisions and the EUCJ Weiss Judgement was carried out in the BVerfG's PSPP/Weiss and others Judgement. The BVerfG's Second Senate was thus acting *de facto* as a higher-level court (which is not *de jure*) than the EUCJ. On one hand, the PSPP/Weiss and others *Urteil* considered whether the alleged incompetence in the contested ECB Decisions and EUCJ Judgement was due to the breaching of the proportionality principle enshrined by EU law. On the other hand, it examined whether the aforementioned EU acts circumvent the prohibition of the monetary public budgeting of Member States, as provided for by Art. 123.1 of the Treaty on the Functioning of the European Union (TFEU).

The latter complaint was declared unfounded, albeit with no little amount of legal, and even economical, criticisms of the EUCJ's Weiss Judgement, something which does not seem typical of a judicial ruling. In contrast, the former claim (the ECB incompetence in the enactment of the PSPP for failure to comply with the proportionality principle), in a certainly singular judgement, was considered to not have been breached, but also as yet unfulfilled.

Basing on these findings, the Second Senate of the BVerfG's *PSPP/Weiss Urteil* closed by addressing a mandatory injunction to the ECB to issue a new Decision, motivating the PSPP's fulfillment of the principle of proportionality in accordance with the legal parameters of EU law as they were (surprisingly) established by the same BVerfG' Second Senate, and not by the EUCJ itself. Moreover, the latter's Weiss Judgement was declared *ultra vires* and devoid of legal binding force in Germany for breaching the communitarian principle of proportionality and, with it, that of limited conferral of powers to the EU.

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[1] BVerfG 5 May 2020, 2 BvR 859/15 (*PSPP/Weiss*), available in German at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200505_2bvr085915.html (last visited 17 February 2022). A partial and not completely accurate translation into English is available at https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html (last visited 1 October 2020). A private complete translation from German into Spanish may be found at http://idpbarcelona.net/docs/actual/caso_weiss.pdf (last visited 17 February 2022).

[2] Decision of the Governing Council of the European Central Bank of 22 January 2015 on an expanded asset purchase programme, press release available at https://www.ecb.europa.eu/press/pr/date/2015/html/pr150122_1.en.html (last visited 17 February 2022),

Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme [2015] OJ L 121/20, and its successive amendments by the ECB's Decisions (EU) 2015/774 [2016] OJ L 303/106, (EU) 2015/2464 [2015] OJ L 344/1, (EU) 2016/702 [2016] OJ L 121/24, (EU) 2016/1041 [2016] OJ L 169/14, and (EU) 2017/100 [2017] OJ L 16/51.

[3] Case C-493/17, *Weiss* [2018].

This verdict, as well as its legal grounds, is inconsistent in many respects with its own self-declared premises. The *ultra vires control* that it carried out is contrary to EU primary law and to the case law of the EUCJ, as well as, in various ways, even to the German *Grundgesetz* itself. Moreover, the triggering legal factor of that control in the case (the breach of the plaintiff's fundamental right to vote) was not actually such due to the abstract, preventive, and merely discursive nature of the alleged infringement.

All these aspects will be discussed in the following sections, while the final one concludes by focusing on the legal impact (if any), as well as the (not so little) factual influence of this Judgement on the EU Economic and Monetary Union (EMU).

2 THE BVERFG'S *ULTRA VIRES* CONTROL AND THE CONDITIONAL ANNULMENT OF EU DERIVATIVE LAW IN PSPP/WEISS

Many legal scholars are extremely critic with this Judgement (Amelie Champsaur, Cleary Gottlieb Steen, & Hamilton, 2020; Editorial Comments, 2020; Marzal, 2020; Meier-Beck, 2020). In PSPP/Weiss, the Second Senate of the BVerfG declared legal acts of derivative EU Law void in Germany for the first time ever. This was all due to the BVerfG's auto-labelled as "*ultra vires* control" on the national constitutionality of EU derivative law. Such control, however, was not established by the BVerfG in PSPP/Weiss and others. With a remote precedent in its Maastricht *Beschluss*, it was defined in its Lisbon Treaty *Urteil*, refined in its Honeywell Decision and confirmed in its OMT Judgement[4].

The BVerfG's Lisbon Treaty *Urteil* settled its *ultra vires* control on evident EU's excesses of competence, as follows: "When legal protection cannot be achieved at Union level, the Federal Constitutional Court checks whether the legal acts of the European institutions and bodies comply with the subsidiarity principle of Community and Union law (Article 5(2) TEC; Article 5. 1 sentence 2 and Article 5(3) TEU Lisbon version), to the limits of the sovereign rights that have been transferred to them by virtue of the principle of singular and restricted conferral of competences (…). The Federal Constitutional Court also checks whether the inviolable core content of the constitutional identity of the Basic Law is respected in accordance with Article 23 (1) Sentence 3 in connection with Article 79 (3) GG" (§ 240).

The BVerfG's Honeywell *Urteil* added, firstly, that this national *ultra vires* control must be reconciled with the role of the EUCJ in order to keep uniformity and coherence of EU law throughout the Union. Secondly, it noted that it must be conducted by the BVerfG in such a way that reflects the openness of German constitutional and legal system, giving the EUCJ the chance to previously adjudicate on the validity and interpretation of European law, while allowing it a margin of tolerance for error (*sic*: with this pejorative word, "error", the German court is patronizingly referring to what is merely a technical discrepancy between judges of similar highest level, each belonging to different, albeit coordinated, legal systems).

Maastricht, Lisbon, and Honeywell *Urteilen* did not actually come to anything substantial, in terms of EU secondary law concrete annulments. Furthermore, the manner in which the BVerfG judgements were made surrounded "friendliness" clauses in relation to the European integration, and in a spirit of cooperation with the EUCJ, appeared sufficient to pacify any potential friction, and this may be what led to the inaction of the European Commission in relation to the infringement procedure.

But the seeds were sowed, the weeds were not reaped, and finally the ticking time bomb blasted, showing in all its crudeness, not only that the very idea of a national

[4] BVerfG 12 October 1993, 89, 155 (*Maastricht Treaty*); BVerfG 30 June 2009, 123, 267 (*Lisbon Treaty*); BVerfG 6 July 2010, 126, 286 (*Honeywell*); BVerfG 14 January 2014, 134, 366 (*OMT*).

continuous *ultra vires* control of EU derivative law opposes to the European integration, but also the deep legal (and even economic) destructive effects of such national judicial control for the very factual existence of that integration, in the shape of the Economic and Monetary Union, which was arranged and established by, and because of, the Member States' reciprocal legal commitment. This is not, of course, beneficial, for a united Europe, the fostering of which is for Germany a constitutional obligation (Article 23, and Preamble, of the German GG).

An invalid measure of EU secondary law was rendered equivalent by the BVerfG in Weiss/PSPP to an undue amendment of EU primary law, or to the transferal to the EU of the *Kompetenz-Kompetenz* (§§ 102 and 136). However, the ECB Decisions establishing the PSPP did not actually amend the Treaty nor the ECB Statutes, let alone confer new monetary powers on the ECB. Such Decisions were enacted as secondary law and aimed to create a situation of price stability, which is a core principle of the ECB/EBCS's mandate, according to the Treaties.

Another issue concerns the fact that the PSPP may, or may not be, disproportionate or excessive with regard to the achievement of such an objective, in breach of the communitarian principle of proportionality. If this is the case, the corresponding EU secondary legislation would then be definitively invalid, but the competence in controlling and declaring such invalidity has been clearly transferred to the EUCJ by every EU Member State. Furthermore, this has been achieved by all of them conjointly and in equal terms, as such transfer was made through the joint legal instrument that all of them convened on: the EU primary law, particularly Articles 19 TEU and 267 TFEU.

That an *ultra vires* EU measure of secondary law involving a lack of competence is not an amendment of the constitutive Treaties *stricto sensu*, but, more accurately, their unfulfillment, results from the fact that these ones only admit their explicit amendment according to the procedures that themselves establish to the effect. In a nutshell, the EU Treaties forbid their tacit amendment by way of the simple enactment of antinomic secondary EU law, what amounts to the absence of the *Kompetenz-Kompetenz* in the hands of the EU.

The respect to EU primary law, including the principle of conferral, as well as, accordingly, the compulsory foundation of each measure of EU derivative law on at least one legal basis in EU primary law, is among the main validity communitarian parameters of EU law legislation to be monitored by the EUCJ, as part of its generic mandate to ensure that the law is observed in the interpretation and application of the Treaties (Article 19 TFEU).

Annulments of EU secondary law measures, moreover, are not lacking in the ECJ case-law[5] (even if they certainly do not abound). But that can be explained to a large extent, as the same BVerfG's Second Senate put it in its PSPP/Weiss and others Judgement (§ 111), because the EU Treaties provide a set of guarantees to render such infringement as an infrequent situation. EU primary law establishes a complete system of control of secondary and tertiary legislation by the EUCJ, chiefly through the validity's prejudicial referral and the action of annulment.

A united Europe (as Article 23 of the German *Grundgesetz* puts it) is incompatible with 27 national *ultra vires* controls dependent on at least the same number of national Courts, and each with varying national constitutional detailed parameters, according to which an EU legal derivative measure might be constitutional in some Member States and not in others. That would lead to the break of uniformity of EU law.

[5] For instance, Case C-376/98 *Germany v. European Commission* [2000], which annulled Directive 98/43/EC, on Advertising and sponsorship of tobacco products.

This breach of EU law amounts, by the way, to the violation of the very German *Grundgesetz* (particularly, of its aforementioned Article 23), since the annulment in Germany of EU legal acts, and of an EUCJ Judgement, carried out for the first time by the BVerfG's Second Senate in PSPP/Weiss and others, is clearly contrary to a "united Europe".

That the Member States cannot have given up the *ultra vires* control of EU legislation, as contended by the BVerfG's Second Senate in PSPP/Weiss and others (*Ibid*), is plainly denied by Articles 344, 262-264 and 267 TFEU. *Tertium non datur*: either the *ultra vires* control is supranational, or it is national (both things, at the same time, are mutually incompatible, and thus legally untenable).

The *ultra vires* control of EU derivative legislation has necessarily to be not only unique but also centralized in the ECJ's hands. If it is abandoned in those of one (or few) national Courts, that simply breaks EU law unity and uniformity in a different way to those that may be jointly established by the Member States in the own EU primary law (special statutes of derogation in specific Protocols, or similar rules enshrined in the body of the Treaties).

The second assumption upon which the BVerfG based its *ultra vires* control in PSPP/Weiss and others (§ 11), that the Member States are Masters of the EU Treaties, simply does not hold. Or at least, not in that way. Masters of the Treaties are, in common, the sum of all the EU Member States, not only a single one of them alone (Germany in the instance), nor each of them one by one.

The expression "Masters of the Treaties" really implies that the EU Member States drafted (or adhered to) the EU constitutive Treaties, by means of which those very States decided to commit one another, and that EU Member States are free to amend or terminate the Treaties by mutual consent. There ends their collective mastery of EU Treaties, only to be exerted jointly by all of them according to the procedures provided for by the own EU Treaties.

A single Member State is Master of the EU Treaties in the form of its freedom to provide or refuse consent to amendments of such Treaties, or to withdraw from them. Be it according to the general rules of international law (Vienna Convention) if the corresponding Treaties lack provisions on such withdrawal, be it according to the specific rules which they actually have established to that respect (Article 50 TEU).

For all the rest, as long as there is no explicit primary law convened by all Member States that excludes one or more of them from the fulfillment of certain parts of the EU Treaties (and there is no special Protocol on Germany and the EMU, or on Germany and the EUCJ), those parts are as compulsory on that Member State as they are for the other ones. Germany cannot unilaterally apart itself from the fulfillment of EU law and EUCJ judgements regarding the EMU without an infringement of the rules it committed itself, as an EU Member State, to respect *bis-à-bis* the rest of the EU Member States (that, by the way, did the same).

This lack of the two basis upon which the BVerfG supported its *ultra vires* control of the ECB Decision on the PSPP, and of the EUCJ's Weiss Judgement, makes such control simply untenable, while at the same time constitutes an infringement of EU law, thus liable to the procedures provided for in Articles 258 and 259 TFEU (whatever it may actually happen in the praxis).

3 TAKING RIGHTS SERIOUSLY? FROM SOLANGE TO PSPP/WEISS

The BVerfG's Solange Judgements, in a positive step forward for European integration, prompted the filling of an important gap in the original EEC Treaty: the initial lack of a European Community's Bill of Rights. This story is well known (firstly, by their praetorian definition as general principles of communitarian law ever since the EEC Court's

Internationale Handelsgessellschaft Judgement, and ultimately through their constitutionalization in the EU Charter of Fundamental Rights and the Lisbon Treaty).

In a nutshell, such contribution of the BVerfG to a united Europe may be labelled as "altruist". The main purpose were fundamental rights by themselves. Regrettably, it does not seem to have happened the same with the BVerfG's Second Senate PSPP/Weiss and others *Urteil*. It has been economy (and maybe even prejudice).

EU has nowadays a wide and complex system to protect fundamental rights within the scope of its own legal acts. In this instance, a violation of a fundamental right was merely the path to reinforce (even legitimize) the foundations of the BVerfG's national *ultra vires* control over acts of EU derivative law, leading to their annulment. The alleged violation was of a purely abstract nature, without actual damage to the plaintiffs' concrete faculties, powers or legitime interests legally protected by such fundamental right.

Namely, the BVerfG's Second Senate, as the plaintiffs claimed, built in PSPP/Weiss and others its *ultra vires* control chiefly upon the basis of the German electors' fundamental right to vote, enshrined in Article 38.1 GG (§§ 98-101). It happens, however, that the right to vote cannot act as an internal constitutional brake for ECB's supranational decisions that could be made by the *Deutsche Bundesbank* if the EU wouldn't exist (or if Germany were not one of its Member States, or, at least, if it were excluded from the EU's Monetary Policy by a specific Protocol or a similar arrangement of EU primary law). Otherwise, Art. 88 of the German Basic Law, envisaging the autonomy of the *Deutsche Bundesbank*, and -moreover- requiring such autonomy to the ECB, would also be itself plain and simply unconstitutional.

Etsi Europa non daretur ("as if Europe wouldn't exist", paraphrasing Grotius), there would simply not be violation of that very fundamental right of the plaintiffs if the same program to purchase German State's bonds would have been decided, established and implemented by the sole action of the *Deutsche Bundesbank*, and not by way of implementing a Decision coming from the ECB, in which the Deutsche Bundesbank has, moreover, a quota of participation. In view of that, the German participation in European integration (which is an internal constitutional obligation to Germany according to Art. 23 GG) must not (and cannot) add an additional ground of substantial unconstitutionality to a decision that could be made by German institutions in compliance with its national Constitution, should Germany not be a Member State of the European Union. Art. 23 GG (the "Europe clause" in the German Constitution) forecloses such legal finding, so that the substantial constitutional parameter cannot be more stringent, as far as fundamental rights is concerned, for the law of the European integration than that constitutionally required to acts and decisions exclusively made and implemented within the national or internal legal sphere, with no EU connection.

Article 23 GG demands an equivalent (but not necessarily identical) protection of fundamental rights by the European Union to that provided by the *Grundgesetz* itself outside the realm of the integration's law. Bearing in mind that the EU is made up of 27 States, it cannot simply be required to provide the same level than the one given by each and one of the 27 national Constitutions at the same time. Therefore, the connection with a basic core of the German *Grundgesetz*, by means of the right to vote, declines.

Moreover, the BVerfG Second Senate's PSPP/Weiss and others *Urteil* does not actually remedy any individual violation of a concrete fundamental right, but simply upheld an abstract, *a priori* and hypothetical political and economic dissent of the plaintiffs against the contended EU acts. This actually amounted to put a non-constitutionally required bridle to the present and future of European integration, in breach of the own Article 23 of the German Basic Law, and to go beyond the BVerfG's constitutional mandate of repairing actual, direct violations of individual fundamental rights.

Any measure (not only the PSPP) adopted in a context of economic integration will logically have economic effects. Hence, the only case in which those economic effects may be legally detrimental to fundamental rights occurs where and inasmuch such effects have a direct, measurable and illegal impact on the appellant's specific economic and legal patrimony, in terms of the actual content constitutionally defined of the affected fundamental right.

The BVerfG Second Senate's PSPP/Weiss and others Judgement simply responded to the abstract, political and economic fears of the plaintiffs, which they sought to give an appearance of legal coverage by claiming that such fears were included within the content of their voting rights as constitutionally recognized by the German *Grundgesetz*, while indeed there actually not existed any effective connection with such rights, since the complainants were not in fact prevented from voting, nor their national parliamentary representatives were lacking the capacity of national political control over their Government (the German *Bundesregierung*) in all what is related to European affairs.

That the plaintiffs cannot influence the ECB with their vote[6] is just as true as with regard to the *Deutsche Bundesbank* under the German Basic Law itself (Article 88 GG), according to the patterns of the German ordo-liberalism. So, if the latter situation is in accordance with the national Constitution and does not infringe the plaintiffs' voting rights, exactly the same applies to the former one, in legal terms.

The PSPP/Weiss and others Judgment simply concurred with the purely abstract fears of the plaintiffs. Or at least, it did so partially: not on grounds of a circumvention to the ban of monetary State financing according to Article 123.1 TFEU, as the appellants pointed out, and the BVerfG's Second Senate rejected in Weiss/PSPP. But, certainly, it admitted their additional claim about the lack of a sufficient motivation on the fulfillment of the communitarian principle of proportionality by the contested ECB Decisions, and by the very EUCJ Weiss Judgement that upheld such ECB Decisions.

This complaint, as well as the content of the PSPP/Weiss and others Judgement, are expression of also abstract and preventive fears on the possibility that the PSPP's ECB Decisions, as well as their confirmation by the EUCJ's Weiss Judgement, could potentially have been opening the door to future decisions of the ECB (not yet actually adopted, beyond the PSPP itself) affecting the fiscal and economic policy.

Such a claim, rather than a genuine legal one, simply represents the mere expression of a political (and economic) disagreement (or even personal fears) directly against the ECB and the EUCJ, because of the PSPP. At the same time, it is only a hypothetic and preventive claim. And, by the way, it is also an expression of a political or economic disagreement against other German citizens that, because of their agreement (or simply, their lack of explicit disagreement) with those EU legal acts, didn't challenge them before the BVerfG.

A mere lack of political agreement does not violate anyone's fundamental right to vote; it is rather its natural fulfillment, for it does not only prevents the existence of legitimate disagreements, but also presupposes such disagreements within a free community of citizens. That is just the political process which the right to vote generates, as (incomprehensibly, as compared to its verdict) the very BVerfG's Second Senate PSPP/Weiss Judgement put it in its legal grounds.

[6] Maybe not directly, but indirectly, for the German Government has a share in the appointment of the members of the Governing Council of the European Central Bank, according to Article 283 TFEU.

4 THE BVERFG'S PSPP/WEISS *URTEIL*: A DIRECT CONTROL AND ANNULMENT OF EU SECONDARY LAW ACTS… IN VIOLATION OF THE OWN BVERFG'S CASE-LAW?

Evoking previous case-law of the BVerfG, this Judgement states that "acts of institutions, bodies, offices and agencies of the European Union cannot be directly challenged before it (cf. BVerfG 142, 123)". But surprisingly, the same BVerfG ruling deprived of any legal effect in Germany to the ECB Decisions on the PSPP as well as the Weiss EUCJ as *ultra vires* acts (§ 234), and ordered the *Bunsdesbank* to no longer participate in the implementation and execution of the ECB Decisions on the PSPP (§ 235).

Both things at a time (unchalleangeability and annulment) are antinomic, and consequently untenable. If the contended EU acts are not challengeable before the German Court, it necessarily follows that the German Court cannot deprive them of legal effect in Germany. Consistent with the premise, instead, would have been any legal declaration by the BVerfG's Second Senate making the Federal Government, or even the *Deutsche Bundesbank*, liable of the hypothetic violation of the appellants' fundamental right caused by those EU acts, owing to the participation of the former in the endorsement or the implementation of the latter.

Likewise, the aforementioned German Constitutional Judgement could not have derived from such internal liability any legal consequences in the benefit of the appellant's violated right in terms of the annulation of those EU legal acts in Germany. Not only out of the suitable accomplishment of EU law, but simply out of mere coherence with the well-established BVerfG's case-law on such direct, internal unchallengeability of EU legal acts.

5 THE PSPP/WEISS CONCEPTION OF THE EUCJ'S MANDATE DISREGARDS ARTICLES 267 AND 344 TFEU

The BVerfG's PSPP/Weiss and others Judgment not only penetrates into the communitarian interpretation of EU primary law on the monetary, economic, and fiscal policies. It does the same with the interpretation of procedural rules on the competences (or, as the Second Senate put it, on the mandate) of the EUCJ, with the self-declared aim to extend what the German judicial organ labels as its *ultra vires* control also against the EUCJ Weiss Judgement, on the grounds of the support that the latter gave to the contested ECB Decisions establishing and amending the PSPP.

Oddly enough, the German Court did not base its *ultra vires* control on the EUCJ's Weiss prejudicial Judgement upon the EU primary law governing the preliminary reference (Article 267 TFEU), but instead solely did so upon Article 19 TUE, which regulates the general role of the CJEU as EU institution and simply mentions, but does not lay down the law on, the prejudicial referral as such. Article 19 TFEU states that the EUCJ's mission is to ensure the respect of law in the interpretation and application of EU Law, and refers, among others, precisely to Article 267 TFEU the procedural and substantial concretion of the EUCJ's role as far as the preliminary reference is concerned.

Significantly, the PSPP/Weiss and others *Urteil* omitted any mention to the fact that Article 267 TFEU confers to the EUCJ the (exclusive) competence to adjudicate on the validity of EU secondary law. Nothing was said about Article 267 TFEU as well, which obliges national courts of last instance to address the prejudicial reference to the EUCJ if they wish to obtain a validity control over EU secondary law which might conclude with its eventual annulment (something that can only happen by means of a ruling of the EUCJ).

It is also well-established doctrine of EUCJ's case-law (starting from its *Foto-Frost* Judgement of 22 October 1987, affair C-314/85, marginals 14-18) that the Member States' judicial organs cannot consider EU law legal acts as non-compliant with EU primary law, nor declare them invalid, precisely (as the BVerfG's Second Senate itself acknowledged in

Weiss/PSPP) because such isolate judicial finding in one Member State would break the unity of EU law as well as the coherence of its judicial control.

The BVerfG's Second Senate in PSPP/Weiss said that the EUCJ's Weiss Judgement was an *acte eclairé* (§ 225), but also that such EUCJ's Judgement was an incomprehensible ruling (§§ 116, 153 and 214). Such apparently contradictory contention is of no surprise. It could simply be an attempt to justify the fact that the BVerfG had not readdressed a prejudicial referral on the subject again to the EUCJ. However, it has been accurately objected that the core of the BVerfG's Second Senate PSPP/Weiss Judgement's grounds that led it to declare the annulment, as *ultra vires* EU acts, of the contested ECB Decisions, and of the own EUCJ's Weiss Judgement, simply were not raised by the former in its prejudicial referral to the latter, or at least, that they were not at the core of the referral itself (Editorial Comments, 2020).

If the corresponding EUCJ's prejudicial judgement is deemed as incomprehensible by the *a quo* national court, the latter should not simultaneously claim (as the BVerfG's Second Senate PSPP/Weiss Judgement did) that such incomprehensible preliminary EUCJ's judgement constitutes, in the sense of EUCJ's case-law, either an *acte claire* (according to the EUCJ's rulings in *Da Costa en Schaake* of 27 March 1963, affairs C-28, C-29 and C-30/62, paras. 6 and 7, and of 6 October 1982, *Cilfit*, affair C-283/81, marginals 13-15), or an *acte eclairé* (EUCJ's *Cilfit* Judgement, cit., paras. 16-20), which relieves national courts of last resort from the communitarian obligation (currently *ex* Art. 267 TFEU) to address -or even readdress- the preliminary reference in such circumstances.

Quite on the contrary, the BVerfG's Second Senate was legally compelled by EU law to try at least a second preliminary reference that might had allowed the EUCJ to shed (more) light (*éclairer*) on the points of its *Weiss* judgement that the Second Senate did not simply comprehend, or regarded as obscure. Once again, it is well established doctrine by the EUCJ that the same national court which has made a prejudicial referral is entitled to submit again any new information which might lead the own EUCJ to give a different answer (Orders of 5 March 1986, C-69/85, *Wünsche Handelsgesellschaft*, para. 2, of 28 April 1998, C-116/96 REV, *Reisebüro Binder GmbH*, paras. 9, and of 30 June 2016, Case C-634/15, *Sokoll-Seebacher*, para. 19).

The EUCJ's doctrine in *Wünsche Handelsgesellschaft* also underlines that it is not permissible for a national court to use such right to refer further preliminary references as a means of challenging the validity of a previous prejudicial judgment, since that would amount to call into question the distribution of competences between national courts and the own EUCJ, as set forth by Article 267 TFEU (again, Order of 25 March 1986, C-69/85, *Wünsche Handelsgeschelschaft*, para. 15). Prejudicial judgements of the EUCJ become *res iudicata* for national courts when they have to decide the national principal *a quo* procedure (once more, Order of the EUCJ of 5 March 1986, C-69/85, *Wünsche Handelsgesellschaft*, paras. 12 y 13).

Other than this only kind of cases, in which the same *a quo* national court can try a further preliminary reference within the same principal judicial procedure before the latter is settled, the EUCJ's case-law does not allow all the other national courts to challenge the validity of an existing prejudicial judgement. Nor even does it allow such thing to the same national court within any other principal national procedure than that which gave place to the corresponding prejudicial Judgement of the EUCJ.

The EUCJ's Weiss judgement has already become *res iudicata* to the BVerfG. This means that the right to resubmit the prejudicial referral to the EUCJ turns into an obligation to the national court *a quo* against whose decisions there is no judicial remedy under national law (in this instance, the BVerfG's Second Senate was such), before giving resolution to the national principal procedure (that's to say, the constitutional individual complaint filed

before it by the German plaintiffs), should such Court not comprehend any aspect of the EUCJ's prejudicial Sentence already delivered.

On the other hand, having referred the plaintiffs (and the Federal Government) to the action of annulment provided for in Article 263 TFEU was already of no legal effect in the instance, because the time to bring such action to the (General) Court (two months ever since the official publication in the EU Journal of the contested measure, according to such TFEU Article) had largely expired by the time the Second Senate's PSPP/Weiss and others Judgement was delivered. And, of no minor importance, Article 263 TFEU requires, for a private citizen's standing to appeal, that the contested EU act be addressed to that person, or be of direct and individual concern to her or him, and moreover, if that contested act is a regulatory act, it must not entail implementing measures.

The aforesaid abstract complaint of the plaintiffs, and the lack of an illegal individual negative direct effect deriving for them to the contested EU measures, which would have been an unsurmountable obstacle to the communitarian admissibility of an action of annulment filed by the plaintiffs, may help understand the procedural way chosen by them, before the BVerfG, and not before the EU's General Court (which is the competent organ to adjudicate at first instance the actions of annulment, according to Article 256.1 TFEU).

6 THE BVERFG'S PSPP/WEISS AND THE LEGAL FUTURE OF THE EMU

Prima facie, the constitutional future of EMU, as well as its constitutional present, could have been seriously affected (or at least, hindered) by the BVerfG's Second Senate PSPP/Weiss Judgement of 5 May 2020. According to it, the own PSPP, due to its huge macroeconomic coupled effects, seemed to be unconstitutional in Germany, the demographically and economically largest Member State of the EU.

In this sense, PSPP/Weiss could be regarded not simply as a constitutional crossroads, but rather as a dead-end for the EMU, and with it, to a large extent, for a united Europe, despite what's provided for by Art. 23 of the own German *Grundgesetz*. In turn, the PSPP and, in general terms, eventual future huge monetary measures, will certainly not be able to be decided and implemented by the *Deutsche Bundesbank* alone, since the monetary policy has been transferred, as an exclusive competence, to the EU.

But, regardless of all that, the conclusion of the deadlock is simply untenable. There are ways of overcoming the predicament. In legal terms, there seems to even exist more than one path to manage it, and the praxis offers additional ones.

The first one lies in the EU infringement procedure. Within the context of the EMU, Germany has already been warned for its excessive deficit against EU law, although with no sanction effectively imposed for it. But in the BVerfG's Second Senate PSPP/Weiss and others *Urteil*, the infringement of EU law was even more serious. It has been a "rebellion", and as already seen, it is not grounded on legally tenable grounds, differently from the Solange saga (especially Solange I, in the face of the then inexistent EC-wide declaration of fundamental rights).

There now exists the EU Charter of Fundamental Rights, as well as other communitarian resources to protect fundamental rights. Moreover, the main legal foundations of the BVerfG's PSPP/Weiss and others Judgement do not lie in an actual, effective violation of any individual's specific fundamentals rights, but in a merely political, legal and economical discrepancy on the part of the plaintiffs (which was shared, or at least upheld, by the own BVerfG's Second Senate) against the ECB and the EUCJ's contested acts (as well as against non-complainant German citizens).

In this case, a sole EU admonition may not be sufficient, given the huge macroeconomic transcendence of the violation, its consequential systemic risk for the whole

euro area (including Germany), as well as the economic and reputational damages that the German retiring of the PSPP could entail. Nevertheless, EU law in general, and EUCJ case-law in particular, are of a high dynamic nature, and have proved to find ways to adapting to drawbacks or barriers coming from national constitutional imperatives, be it directly by means of EUCJ case-law (*Internationale Handelsgesschelschaft*, "*Taricco* saga"), or through amendment of EU primary law (Lisbon Treaty and the EU Charter of Fundamental Rights).

The path followed by the "*Taricco* saga", in which the Italian Constitutional Court clearly placed the national constitutional identity at the core of its preliminary referral to the EUCJ, but at the same time gave the latter the chance to transactionally solve the problem (Editorial Comments, 2020), seems to have been closed by the BVerfG. The EUCJ's Weiss Judgement is *res iudicata*, and it legally forecloses a repetition of the preliminary referral within the same *a quo* national judicial procedure, as demanded by the EUCJ's *Wunsche Handelsgeschellschaft* doctrine.

In terms of EU law, primacy still resists. Besides, all the other German national courts (which act as lower Courts in what regards the BVerfG's doctrine established in its PSPP/Weiss and others Judgement) cannot be deprived of the power to address to the EUCJ a preliminary reference because of a legal provision of national law by virtue of which the assessments made by the higher court are binding on them.

According to well-established EUCJ case-law, any lower national court is free to refer a question to the EUCJ for a preliminary ruling if the former considers that a legal assessment made by its national superior court could lead to give a judgment contrary to the EU Law (EUCJ Judgements of 9 March 2010, C-378/08, *ERG and Others* vs. *Commission of the European Communities*, paragraph 32, of 5 October 2010, C-173/09, *Elchinov*, para. 27, and of 15 January 2013, Case C-416/10 *Jozef Križan and Others*, paras. 68 and 69).

The general binding effects and the primacy of the EUCJ Judgments over antinomic national judicial rulings also apply to all other German non-judicial institutions, bodies, and agents, under the penalty of incurring, otherwise, in violation of EU Law. Especially, but not only, because of Articles 4.3 (Member States' commitment to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising from the Treaties or resulting from the acts of the institutions of the Union, to facilitate the achievement of the Union's tasks, and to refrain from any measure which could jeopardize the attainment of the Union's objectives) and 344 TFEU (Member States' undertaking to not submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein).

As regards what has factually happened, the ECB did release additional documents motivating the principle of proportionality's fulfillment by the PSPP within the term (three months) given by the BVerfG's Second Senate PSPP/Weiss Judgement (Utrilla, 2020). There seems to occur, accordingly, that the EMU lives on, and will live, as also does the EU's monetary policy which has been laid by the Member States (including Germany) on the hands of the ECBS, headed by the ECB (accordingly with what Article 88 of the German *Grundgesetz* provides for, by the way).

However, the BVerfG's Second Senate PSPP/Weiss and others Judgement added *de facto* dissuasive elements. Those elements certainly will not act within the EU's legal system as any more than an additional element within the factual context surrounding the decisions of the European legislator. And maybe also for the European Judge, amounting somehow to what has actually happened with the *Taricco* saga: that finally, the blood did not reach the river. Or at least, maybe not so much … for the time being.

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Article

Sustainable Development and Trade Treaties

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ABSTRACT:

Traditionally, international trade regulation has focused on the liberalization of exchanges and has paid little attention to labour and environmental aspects of production processes and methods in the countries of origin. Currently, there is evidence of the need to integrate sustainable development more intensively into trade agreements. This study examines various initiatives promoted in this regard in: the multilateral and plurilateral trade negotiations undertaken within the framework of the World Trade Organization, which have so far produced scant results; preferential trade agreements, which currently usually include chapters on sustainable development, including numerous provisions on labour and environment; and through unilateral measures that condition imports of products based on their processes and production methods at origin, whose compatibility with current international trade regulations sometimes raises much controversy

PALABRAS CLAVES:

comercio internacional, desarrollo sostenible, procesos y métodos de producción, Organización Mundial del Comercio, acuerdos comerciales preferenciales

RESUMEN:

Tradicionalmente, la regulación internacional del comercio se ha focalizado en la liberación de los intercambios y ha prestado una escasa atención a los aspectos laborales y ambientales de los procesos y métodos de producción en los países de origen. Actualmente, se evidencia la necesidad de integrar más intensamente el desarrollo sostenible en los tratados comerciales. Este estudio examina diversas iniciativas impulsadas en tal sentido en: las negociaciones comerciales multilaterales y plurilaterales emprendidas en el marco de la Organización Mundial del Comercio, que hasta ahora han dado escasos resultados; acuerdos comerciales preferenciales, que actualmente suelen incorporar capítulos sobre desarrollo sostenible, incluyendo numerosas previsiones sobre cuestiones laborales y ambientales; y a través de medidas unilaterales que condicionan las importaciones de productos en función de sus procesos y métodos de producción en origen, cuya compatibilidad con las vigentes normas comerciales internacionales suscita, en ocasiones, mucha polémica.

MOTS CLES :

commerce international, développement durable, processus et méthodes de production, Organisation mondiale du commerce, accords commerciaux préférentiels

RESUME :

Traditionnellement, la réglementation du commerce international s'est concentrée sur la libéralisation des échanges et a accordé peu d'attention aux aspects sociaux et environnementaux des processus et méthodes de production dans les pays d'origine. Actuellement, il existe des preuves de la nécessité d'intégrer plus intensément le développement durable dans les accords commerciaux. Cette étude examine diverses initiatives promues à cet égard dans : les négociations commerciales multilatérales et plurilatérales entreprises dans le cadre de l'Organisation mondiale du commerce, qui n'ont jusqu'ici produit que peu de résultats ; les accords commerciaux préférentiels, qui comprennent actuellement généralement des chapitres sur le développement durable, y compris de nombreuses dispositions sur les questions de travail et d'environnement ; et par des mesures unilatérales qui conditionnent les importations de produits en fonction de leurs procédés et modes de production, dont la compatibilité avec les réglementations commerciales internationales en vigueur suscite parfois de nombreuses controverses.

CONTENTS:

1 INTRODUCTION: THE TRADITIONAL LEGAL BASES OF THE MULTILATERAL TRADING SYSTEM AND UNSUSTAINABLE ECONOMIC DEVELOPMENT

The relationships between international trade and sustainable development are complex. On the one hand, a well-regulated and managed international trade can contribute to a more efficient use of resources on a global scale, reduce the costs of cleaner technologies and encourage exports from developing and least developed countries, helping to reduce their levels of poverty. On the other hand, international trade can also go against sustainable development when, for example, social or environmental dumping is practiced, using the low labour or environmental standards of certain countries to minimize accounting costs.

In theory, as postulated by the Kantian approaches of Ernst-Ulrich Petersmann (2013: p. 90) in favour of a "cosmopolitan constitutionalism", international trade and sustainable development could be reconciled under a well-structured institutional and regulatory framework, which would promote international trade and sustainable development on a global scale, taking due account of economic, social, and environmental aspects.

However, traditionally, international law has been characterized by a marked fragmentation and imbalance between its various specialized legal regimes. Thus, the international regulation of trade has tended to focus on the liberalization of cross-border exchanges (the *free trade*) and has paid insufficient attention to the socio-labour and environmental conditions of production in the countries of origin, leaving such issues for other regulatory areas, such as the International Labour Organization (ILO) or the United Nations Environment Programme (UNEP), characterized by their scarce coerciveness in practice.

Initially, the United Nations (UN) Conference on Trade and Employment, convened in 1946 by the Economic and Social Council, did foresee that the international regulation of trade would have to be explicitly linked to social and labour issues, which were reflected in the resulting Havana Charter (UN, 1948). This treaty, of Keynesian inspiration and which intended to create an International Trade Organization (ITO), included, for example, a relevant Art. 7 on "Fair Labour Standards". However, as it is well known, the Havana Charter obtained very few ratifications and did not enter into force.

The General Agreement on Tariffs and Trade (GATT) of 1947 ended up operating as a partial substitute for the failed Havana Charter, losing the holistic approach of the latter and focusing on promoting a progressive liberalization of international trade in goods. The Preamble of the GATT of 1947 reflected a productivist conception of development, focused on economic growth, including as an objective "the full use of the resources of the world and expanding the production and exchange of goods".

After the Rio de Janeiro Summit in 1992, the 1994 Marrakesh Agreement, establishing the World Trade Organization (WTO), incorporated a reference to sustainable development in its Preamble, alluding to "the optimal use of the world's resources in accordance with the objective of sustainable development [...]". However, the provisions introduced in the WTO Agreements on aspects related to sustainable development were few or very sparing in words. In 1995, the WTO created a Committee on Trade and Environment, but it has a merely consultative nature (Sinha, 2013).

In this way, the effective relevance of sustainable development within the multilateral trading system was, to a great extent, at the expense of future multilateral trade negotiations, which to date have produced very few results, and of the interpretations in the WTO dispute settlement system. Certainly, the panels and the Appellate Body of the WTO have made some valuable contributions in the search for a legal conciliation between trade and

environment, but this interpretive path has its limitations (Condon, 2009; Cosbey and Mavroidis, 2014; Trachtman, 2017).

Thus, multilateral trade rules have continued to focus on the elimination or reduction of barriers (tariffs and non-tariff barriers) and on non-discrimination between like products. The analysis of likeness has continued to focus mainly on the physical characteristics of the final products, drawing a veil over their various processes or production methods at origin that do not leave a physical trace in the final product (*non-product-related processes and production methods,* npr-PPMs), which have only been taken into account in some unique cases and, essentially, by way of exception, as in the emblematic case *United States – Import prohibition of certain shrimp and shrimp products.*[1] The possible justification for certain unilateral trade measures regarding npr-PPMs under current WTO rules continues to generate much debate (Fernández Egea, 2008; Conrad, 2011; Maggio, 2017; Sifonios, 2018; Calle Saldarriaga, 2018).

It must be recognized that developing countries have traditionally been opposed to the imposition of unilateral trade restrictions based on npr-PPMs, which they usually perceive as improper extraterritorial interferences, and that Principle 12 of the Rio Declaration on Environment and Development of 1992 provided that "unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided" and that "environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus" (UN, 1992).

In practice, trade liberalization on a global scale has been contributing for decades, along with other factors, to promoting an "unsustainable" economic development,[2] favouring the creation of complex global value chains and the relocation of industries to countries with lax regimes in labour and environment, seeking to maximize the benefits of transnational capital and forgetting negative externalities.

Certainly, the liberalization of the global trade has contributed, during the last decades, to the great growth experienced by China and other emerging countries and to the reduction of their poverty rates, but the growing discontent of those left behind from the benefits of such globalization, the worrying climate change and other serious environmental and health emergencies are showing, with increasing urgency, the need to thoroughly review the traditional design of the international trade regulation, requiring a determined integration of sustainable development within its rules (Rodrigo, 2015: 149).

In this aspiration to a more sustainable international trade, the SDGs, approved by resolution 70/1 of the General Assembly of 25 September 2015, with its holistic universal agenda that combines economic, social, and environmental objectives (UN, 2015). The SDGs try to promote prosperity conceived as inclusive human development, with an economic, social, and technological progress "in harmony with nature" (UN, 2015: 2).

The need for sustainable international trade, which takes into account the labour and environmental conditions of production, emerges, particularly, from SDG 8, on "inclusive and sustainable economic growth" and "decent work for all" (UN, 2015: 19 and 20), and SDG 12, on "sustainable consumption and production patterns", which calls for reviewing

[1] Where the Appellate Body ended up concluding that the United States could, under certain conditions, prohibit the importation of shrimp from a country, such as Malaysia, that did not provide mechanisms to prevent the accidental death of sea turtles in shrimp fishing, as a measure related to the conservation of exhaustible natural resources justifiable under the general exceptions of Art. XX of the GATT of 1994, understanding that the highly migratory nature of sea turtles conferred a sufficient link to the United States authorities (WTO, 2001a). Other disputes in the WTO regarding the conservation and sustainable use of biodiversity abroad are analysed in Fernández Pons (2021a).

[2] The expression "unsustainable" is taken from Pigrau i Solé (2017).

production methods and the consumption of resources and goods, taking into account their entire life cycle (UN, 2015: 22 and 23).

The EU, which was one of the main architects of the traditional multilateral trading system, today tends to present itself, with increasing determination, as one of the WTO members most in favour of a profound reform of this international institution, to update it taking into account the SDGs. The EU is now trying to promote, simultaneously and effectively, an open, fair, and sustainable international trade (Douma, 2017; Gruni, 2018; Fernández Pons, 2021b).

The Communication on "The European Green Deal", presented in December 2019, insists that the EU must act as a "global leader" and its trade policy must serve to export its values to the world and promote sustainable development, committing third countries in labour and environmental issues (European Commission, 2019a: 2 and 20).[3]

In February 2021, the European Commission presented a Communication entitled "Trade Policy Review – An Open, Sustainable and Assertive Trade Policy", emphasizing that the EU's trade policy must promote, both inside and outside its territory, "greater sustainability in line with its commitment of fully implementing" the SDGs (European Commission, 2021a: 1). According to the European Commission, "global trade rules are in urgent need of being updated" to make "globalization more sustainable and fairer" and the EU trade policy "should use all the tools at its disposal to support social fairness and environmental sustainability", including among its fundamental priorities "leading efforts to reform" the WTO (European Commission, 2021a: 10), which are specified in an annex entitled "Reforming the WTO: Towards a Sustainable and Effective Multilateral Trading System" (European Commission, 2021a: Annex).

In this context, this study aims to examine the extent to which proposals to integrate sustainable development into the regulation of international trade are taking shape (or not) in: the multilateral or plurilateral trade negotiations undertaken within the framework of the WTO; the conclusion of preferential trade agreements; or in unilateral trade measures, which are especially controversial when they penalize the import of certain products based on their processes and production methods in the countries of origin.

2 SUSTAINABLE DEVELOPMENT IN MULTILATERAL AND PLURILATERAL TRADE NEGOTIATIONS OF THE WTO

Various issues related to sustainable development have been raised in the trade negotiations sponsored by the WTO. In the agenda of the multilateral trade negotiations carried out under the Doha Round, which began in 2001 and has not yet been completed, social and labour issues have not been included, showing that, as the EU now critically observes, these issues continue to be a "taboo" in the WTO (European Commission, 2021a: Annex, 2), but various aspects related to the environment do appear, such as: the relationship between the current WTO rules and the specific trade obligations established in some multilateral environmental agreements; ecological labelling; and the elimination or reduction of tariff and non-tariff barriers to environmental services and goods, such as recycling machinery, solar panels or windmills (WTO, 2001b: paras. 31-33). However, these negotiations, like the Doha Round in general, have been yielding very few results to date, evidencing the difficulties in achieving major global consensus in a context of accentuated multipolar rivalry.

[3] According to Sanahuja (2020-2021: 88), the European Green Deal supposes an approach to trade with environmental and geopolitical principles that is very different from the traditional liberal approach that the EU has championed for many years.

A specific case in which the negotiations in the WTO can be considered successful has been that of the revision of its Government Procurement Agreement (GPA). It shall be emphasized that it is a plurilateral agreement, whose parts are mainly advanced economies, and this fact facilitated the achievement of consensus. It is interesting to point out that the original GPA concluded in Marrakech in 1994 did not contain (surprisingly) explicit references to sustainability. In 2012, thanks to the impetus of the EU and the United States chaired by Barack Obama, it was possible to adopt a new version of the GPA, which entered into force on 6 April 2014 (Anderson and Muller, 2017). The new GPA of 2012 includes various provisions on environmental aspects in public procurement. It expressly contemplates, when defining the "technical specifications" that may appear in a public tender, those related to "processes and methods" for the "production and provision" of goods or services.[4] Likewise, under the GPA of 2012, a work programme on sustainable public procurement has been created within the framework of the WTO.[5]

Unfortunately, in other issues to be negotiated among all WTO Members, the fruits have so far been very few. The environmental issue already included in the original agenda of the Doha Round and in which more progress has been made is that related to fishing subsidies, which on many occasions can contribute to the overexploitation of fishing resources. The SDGs have helped drive these negotiations, which have been explicitly linked to SDG 14.6. This express connection between the SDGs and negotiations in the WTO is commendable, showing a way to overcome the traditional fragmentation between various sectors of the international legal order. The European Commission has strongly supported these negotiations, underlining that this example of synergy between the UN and the multilateral trading system should be taken as a model to specify other possible contributions of the WTO to the "sustainability objectives of the global community" (European Commission, 2018a: 6). In any case, these negotiations are proving to be complex, since fisheries subsidies are a particularly sensitive issue for many developing and least developed countries, which demand a marked special and differential treatment on this issue. In principle, it was planned to try to adopt said agreement at the twelfth WTO Ministerial Conference (MC12), to be held in Geneva from November 30 to December 3, 2021. On November 24, 2021, a draft agreement was presented, still with quite square brackets (WTO, 2021a). However, on 26 November 2021, the WTO General Council decided to postpone the MC12 indefinitely given the growing travel restrictions due to the new omicron variant of the virus that causes COVID-19 (WTO, 2021b). Therefore, it will be necessary to wait for a future appointment to complete these negotiations.

In addition to the issues that are already being negotiated in the strict sense, the EU and other Members are recently promoting new initiatives on environmental issues to be discussed (and eventually negotiated) in the framework of the WTO. For example, the EU presented on 30 October 2020 a "Non-paper on possible trade and climate initiative in WTO" (European Commission, 2020). On 17 November 2020, 50 WTO Members (including the EU and its Member States) distributed a "Communication on Trade and Environmental Sustainability" (WTO, 2020) and launched with it the so-called "Trade and Environmental Sustainability Structured Discussions" (TESSDs), which seek to complement the work of the Committee on Trade and Environment and other relevant committees and bodies of the WTO. The TESSDs, which are being coordinated by the Canadian and Costa Rican ambassadors to the WTO, are open to all WTO Members and to dialogue with external stakeholders, including the business community, civil society, international organizations and academic institutions (WTO, 2020, paras. 2, 4 and 7). It is noteworthy that, in November 2021, China and the United States have joined as new co-sponsors of the TESSDs (WTO,

[4] Art. I:u:ii of the GPA of 2012.

[5] Art. XXII:8(a) of the GPA of 2012 and WTO (2012).

2021c). However, it is still very uncertain the future of these recent initiatives, beyond generic communications or joint declarations, such as those sponsored by the EU and other WTO Members in December 2021 on trade and environment (European Commission, 2021b). On 7 February 2022, numerous WTO Members taking part in the TESSDs met to review a proposed 2022 work plan and exchange views on priorities for discussion (WTO, 2022).

3 PROVISIONS ON SUSTAINABLE DEVELOPMENT IN PREFERENTIAL TRADE AGREEMENTS

The WTO agreements have always coexisted with preferential trade agreements (PTAs), which have usually consisted of customs unions or free trade zones. However, the scant results obtained in the Doha Round trade negotiations seem to have led, in recent years, to a great proliferation of PTAs, which have been promoted, particularly, by the largest economies with countries particularly related. These recent PTAs are characterized by their extensive content (goods, services, intellectual property, investment, government procurement, etc.) and usually contain, particularly in those led by advanced economies, numerous labour and environmental provisions, which involve a change of model in the regulation of international trade (Anuradha, 2017: 241) and strengthen the regulatory interconnection between economic, social and environmental aspects within the international legal system (Bonet Pérez, 2019: 163-165; Huici Sancho, 2021: 277-283).

A good example is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The origin of this agreement was the Trans-Pacific Partnership (TPP) promoted by the United States during the presidency of Barack Obama with eleven other countries of the Pacific rim (with the very significant exclusion of China). The TPP was done at Auckland (New Zeeland) on 4 February 2016. But Donald Trump decided, on 23 January 2017, that the US would not ratify the TPP, and this agreement did not enter into force (Ji and Rana, 2019). The rest of the TPP negotiating countries decided to go ahead with this initiative, introducing certain changes. The formal signing ceremony of the CPTPP was held on 8 March 2018 in Santiago (Chile) and it entered into force on 30 December 2018. Currently, the CPTPP has eight States parties: Australia, Canada, Japan, Mexico, New Zealand, Peru, Singapore, and Viet Nam (Australian Government, 2022).

In the Preamble of the CPTPP, the parties reaffirm the importance of promoting "environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge…". The CPTPP includes numerous labour provisions in its Chapter 19 on "Labour", which repeatedly refers to the ILO Declaration on Fundamental Principles and Rights at Work of 1998 and its follow-up and alludes to the concept of "decent work" as defined by the ILO. The CPTPP also contains numerous environmental provisions, particularly in its Chapter 20 on "Environment", which covers, in addition to general commitments, specific precepts on, for instance: "Multilateral Environmental Agreements" (Art. 20.4); "Trade and Biodiversity" (Art. 20.13); "Invasive Alien Species" (Art. 20.14); "Transition to a Low Emissions and Resilient Economy" (Art. 20.15); "Marine Capture Fisheries" (Art. 20.16), which includes a specific regulation on fisheries subsidies and demonstrates the ability of the PTAs to deal with stuck issues within the multilateral trading system; and "Conservation and Trade" (Art. 20.17). The CPTPP provides that its general mechanism for dispute settlement, regulated in its Chapter 28 ("Dispute Settlement") and which includes the establishment of a panel of experts, also applies to possible disputes over the two aforementioned chapters on labour and environment.

The CPTPP can be considered one of the most ambitious PTAs in labour and environmental matters (Chen, 2019: 22) and provides a regulatory model that could inspire

other international trade agreements and future reforms of the multilateral trading system. However, some authors observe that the true effectiveness of this labour and environmental provisions must be verified in practice, because the main purpose of these provisions could be providing a patina of sustainability concern in treaties aimed primarily at expanding trade and investment (Meidinger, 2019: 195).

The EU has also launched an ambitious agenda of commercial negotiations with third countries, among which it is worth mentioning, for example, those carried out with: South Korea, Colombia-Peru-Ecuador, Central America, Canada, Singapore, Japan, Vietnam, and Mercosur (European Commission, 2021c). All these negotiations are characterized by their great breadth (including provisions on trade in goods, services, intellectual property, foreign investment, government procurement, competition and other issues that go beyond the provisions of the multilateral trading system) and usually include a chapter entitled "Trade and Sustainable Development" (TSD), with numerous socio-labour and environmental provisions.

Taking as an example the TSD chapter of the EU-Mercosur agreement in principle announced on 28 June 2019 (European Commission, 2019b), it comprises 18 articles, which include substantive provisions on: objectives and scope (with explicit allusions to the SDGs); right to regulate and levels of protection; transparency; multilateral labour agreements and standards (with various references to decent work); multilateral environmental agreements; trade and climate change (with specific references to the 2015 Paris Agreement); trade and biodiversity; trade and sustainable forest management; trade and sustainable management of fisheries and aquaculture; trade and responsible management of supply chains, etc… From an institutional point of view, it includes the creation of a Sub-Committee on Trade and Sustainable Development (TSD Sub-Committee) and a specific mechanism for dispute settlement.

This systematic inclusion of TSD chapters in the PTAs negotiated by the EU is laudable and is a clear way to assert the regulatory influence of the EU at an international level, as some authors have already analysed (Raess, Schmieg and Voituriez, 2018). In contrast with the traditional focus of the multilateral trading system on *free trade* and its scant references to social and environmental issues, the new PTAs promoted by the EU have a holistic vision.

In any case, the TSD chapters should not remain in generic provisions, being necessary to specify them and guarantee their effective application in practice. Some analysts have observed that there are provisions in TSD chapters, such as those relating to the sustainable management of forests in the aforementioned EU-Mercosur agreement, which could have very little practical relevance in the face of productivist policies such as those of President Jair Bolsonaro in Brazil (Ghiotto and Echaide, 2019) and the EU is currently trying to negotiate, to this end, a more demanding regime on this issue (European Commission, 2021c: 4). Some Mercosur authors have criticized the TSD chapter and the growing environmental requirements of the EU, which they see as signs of a new "regulatory protectionism" of the EU, which would like to "dye everything green" (Raboi, 2020). On the other hand, it is disturbing that these TSD chapters include their own dispute settlement mechanism, which is softer than the mechanisms established to guarantee other chapters of PTAs.

To evaluate the effectiveness of the TSD chapters, the EU has been including, within the regular monitoring of the implementation of its PTAs, a specific monitoring of such chapters. In February 2018, the European Commission already identified "15 concrete and practicable actions" trying to make the TSD chapters more effective (European Commission, 2018b).

Recently, following the aforementioned Communication to review the EU's common commercial policy (European Commission, 2021a), the European Commission is trying to promote possible improvements in the design and monitoring of TSD chapters. To that end, the European Commission launched open public consultations on 23 July 2021, which concluded on 5 November 2021 (European Commission, 2021d). In May 2021, the European Commission requested an independent study, which was commissioned to the London School of Economics and Political Science (LSE Consulting), to compare the provisions on trade and sustainable development included in various PTAs promoted by the EU and by other advanced economies (such as Australia, Canada, the United States, Japan, New Zealand, or Switzerland) in order to identify best practices. The final version of this report has been published in February 2022 (LSE Consulting, 2022).

4 UNILATERAL TRADE MEASURES BASED ON THE SUSTAINABILITY OF PROCESSES AND PRODUCTION METHODS

As noted above, under current WTO rules it is difficult to justify the unilateral imposition of restrictions on imports of certain products based on processes or production methods that do not leave a physical trace in the final product, but this is not impossible. With this in mind, some WTO Members, particularly advanced economies, have already imposed for a long time import restrictions on some products, such as fish and timber, if sustainable management of fisheries and forests is not ensured by the countries of origin (Marquès i Banqué, 2019; Pons Ràfols, 2021).

Currently, the EU is, with the encouragement of the European Green Deal, the WTO Member that is most vigorously promoting the imposition of restrictions or "penalties" on imports of very diverse types of products based on their carbon footprint or deforestation linked to its production, which are of special relevance for the fight against climate change and the preservation of biodiversity. Some of the measures or proposals that the EU has launched in this regard are highly controversial, particularly from the perspective of developing or emerging countries, which often question their compatibility with current WTO rules.

Next, some of these measures promoted by the EU will be referred to, beginning with an example of a measure that is already in force and has been challenged before the WTO dispute settlement system. Thus, in December 2019 and January 2021, claims were filed against the EU for certain measures relating to palm oil and biofuels based on palm crops by Indonesia (WTO, 2019) and Malaysia (WTO, 2021).

Both countries are the largest producers of palm oil in the world (used, among other purposes, to produce biofuels) and some studies indicate that the expansion of palm cultivation in Southeast Asia (and other tropical countries) has been doing, to a large extent, through the deforestation of primary forests, destroying important carbon sinks (EU External Action Service, 2019).

Indonesia and Malaysia note that the EU's classification of biofuels as sustainable had initially focused on emissions from direct land use, but more recently the EU has also wanted to take into account the effects of the so-called indirect land use change (ILUC) and this would be penalizing the biofuel obtained from palm oil. Indonesia and Malaysia note that this biofuel had traditionally been considered in the EU as a sustainable biofuel, but that this situation has changed with Directive (EU) 2018/2001 (EU, 2018), known as Renewable Energy Directive (RED) II, the Commission Delegated Regulation (EU) 2019/807 (EU, 2019) and other complementary rules.

According to this new EU regulation, palm cultivation is considered to present, in general, a high risk of ILUC. The carbon no longer absorbed after the deforestation

determines that this biofuel cannot generally be considered as sustainable. Indonesia and Malaysia argue that these EU measures generally penalizing biofuel derived from palm oil are, for various reasons, inconsistent with WTO rules. Both claims have considerable economic and legal interest, which some authors, anticipating what the WTO adjudicative bodies may end up determining, have already addressed from different positions (Mitchell and Merriman, 2020; Mayr, Hollaus, Madner, 2021).

It is also necessary to refer to one of the most prominent (and controversial) proposals of the European Green Deal, consisting in the establishment of a carbon border adjustment mechanism (CBAM). The European Commission has presented a regulation proposal on 14 July 2021, which will designated as the CBAM Regulation Proposal (European Commission, 2021e). Pending the approval of this initiative by the European Parliament and the Council, the CBAM is proposed as part of the "Fit for 55 Package" and is considered "as an essential element of the EU toolbox to meet the objective of a climate-neutral Union by 2050 in line with the Paris Agreement" (European Commission, 2021e: p. 16, para. 9).

The proposed CBAM tries to address the problem of so-called carbon leakage, which occurs when industries intensive in greenhouse gas (GHG) emissions tend to relocate from countries that impose higher demands on their domestic producers (as is the case of the EU with the cap and trade system established in its Emissions Trading System, EU ETS) towards more permissive countries or when, although such relocations do not take place, there is an increase in imports of goods with high embedded emissions from more permissive countries. Carbon leakage implies that GHG emissions are not reduced on a global scale, but simply change their country of origin or may even increase globally, by concentrating the production of certain goods whose production usually releases high emissions (such as steel, aluminium, cement…) in less demanding countries. Although the risk of carbon leakage is not new, it is understandable that the ambition of the objectives set out in the European Green Deal and the so-called European Climate Law (EU, 2021) increase this risk and the concern of the EU.

The CBAM Regulation Proposal is technically complex. Initially, various alternatives were considered for its design, such as the creation of a border tax adjustment (inspired by the specific provision of Art. II:2(a) of the GATT of 1994) or the inclusion of importers of certain goods in the EU under the EU ETS (Fernández Pons, 2020). The European Commission has finally opted for a third way, which can be described as an original border regulatory adjustment mechanism. Its logic, succinctly described, is that EU importers of certain products originating in third countries (in principle, fertilizers, aluminium, cement, electricity, iron and steel) will have to acquire public certificates (CBAM certificates) for carbon emissions embedded in imported goods, based on the real emissions released during the production process in the country of origin. The amount of such CBAM certificates will be determined by the European Commission according to the weekly average price of emission rights auctioned within the framework of the EU ETS. In this way, importers of the aforementioned goods in the EU will be subject to regulations and pecuniary charges equivalent (although not identical) to those of domestic producers of such goods subject to the EU ETS. If the production of the goods in the countries of origin is already subject to an emissions trading system or some type of payment for the GHG emissions released there, the importer in the EU may apply the corresponding discounts and acquire less CBAM certificates. The mechanism therefore tends to equate the price of the carbon released in installations located in the EU and that of the embedded emissions in the aforementioned imported goods, preserving the competitiveness of the industries located in the EU and promoting greater efforts in third countries to reduce emissions and to implement more decarbonised production processes.

The CBAM Regulation Proposal is a good example of the international leadership that the EU wants to exercise in the fight against climate change and the energy transition. The

European Commission always insists that its proposal has been designed to be fully compatible with WTO and other international rules. Some scholars observe that, being the CBAM a case of unilateral measure with an extraterritorial projection, based on processes and production methods in third countries that do not leave a physical trace in the final product, its justification under the current rules of the WTO is still a legally complicated issue open to discussion (Markkanen, Viñuales, Pollitt, Lee-Makiyama, Kiss-Dobronyi, Vaishnav, et al., 2021: 37-44).

Several countries, including China, Russia and India, have been expressing their concern about this EU proposal, considering that it is incompatible with WTO rules and even with basic principles of the international regime against climate change itself, as the principle of common but differentiated responsibilities, alleging that the CBAM Regulation Proposal imposes on the import of goods from any third country (regardless of its degree of development and its level of national commitments) a price for embedded emissions equivalent to that paid within the EU ETS (Markkanen, Viñuales, Pollitt, Lee-Makiyama, Kiss-Dobronyi, Vaishnav, et al., 2021: 50-54). Russia concludes, for example, that the EU proposal is an example of disguised trade protectionism (Markkanen, Viñuales, Pollitt, Lee-Makiyama, Kiss-Dobronyi, Vaishnav, et al., 2021: 51). The concerns and criticisms of various WTO Members about the CBAM proposed by the EU have been expressed in the regular meetings of various WTO bodies.[6] Therefore, it is likely that, once this proposal is approved in the EU, claims will be raised before the WTO dispute settlement system or that some powers will even be tempted to use other pressure measures. Therefore, the EU should persevere in the soft power of dialogue and "climate diplomacy" (Fajardo del Castillo, 2021), without prejudice to the assertiveness that the current complex geopolitical context also requires.

The set of measures promoted by the European Green Deal that affect international trade has been expanded with other initiatives presented by the European Commission on 17 November 2021, such as a proposed regulation to stop the marketing of certain products associated with deforestation (European Commission, 2021f). This proposal contemplates prohibiting the commercialization of certain raw materials (specifically, palm oil, cocoa, coffee, beef, and soybeans) and products derived from them when their production is linked to deforestation or forest degradation, including the prohibition of the importation of such products into the EU based on the deforestation carried out in their respective countries of origin. In this way, it is intended to put pressure on third countries to stop deforestation on a global scale, which in large part is usually associated with the expansion of the production of the aforementioned selected raw materials. It should be noted that the prohibition does not refer only to illegal deforestation, but also to those deforestations authorized by internal legislations after 31 December 2020, explicitly alluding to the provisions of SDG 15.2, on sustainable forest management (European Commission, 2021f: 24, para. 15). A complex regulation is included to guarantee the traceability of the selected goods.

Introducing this initiative, Frans Timmermans, Executive Vice President responsible for the European Green Deal, stated that "to succeed in the global fight against the climate and biodiversity crises we must take the responsibility to act at home as well as abroad" (European Commission, 2021g). However, there are many criticisms that are already being expressed from some of the countries that could be most affected by these measures, such as Brazil, Indonesia, Colombia... Thus, for example, a Brazilian association of soybean producers considers that this is a proposal with "protectionism disguised as environmental conservation" and it is "an affront to national sovereignty" of the countries of origin, by also penalizing deforestation carried out in accordance with the internal legislation of the country of production (Agence France Press News, 2021). It is therefore likely that the approval of

[6] See, for example, WTO Committee on Trade and Environment (2021: 18-23).

this measure by the EU will also end up giving rise to claims before the WTO dispute settlement system.

In addition, it is pending that the European Commission presents a relevant proposal for a directive aimed at promoting more sustainable corporate governance, specifying due diligence throughout the entire global supply chain and taking into account social and environmental conditions of production in the countries of origin. On the course of such an initiative see European Commission (2021h).

The ideal that seems to inspire this battery of measures promoted by the EU consists of moving from the traditional general principle of non-discrimination between physically similar products (with exceptions) to a new regulatory paradigm, which would start, as a basic principle, from the need to distinguish between products (and services) based on their sustainability, taking into account the environmental and labour conditions of the processes and production methods in the countries of origin. Synthetically and paraphrasing Hamlet: to be a sustainable product or not to be a sustainable product, this is (now) the question.

But such a distinction is technically complex (requiring careful traceability of products and their raw materials from their origins) and it is also complex from different points of view (legal, political, economic…). Note, for example, within the EU itself, the current debate on whether nuclear power or natural gas should be considered as sustainable or not.

5 FINAL REMARKS: TOWARDS A MORE SUSTAINABLE INTERNATIONAL TRADE?

The relevance of sustainable development in the multilateral trading system and other international trade agreements has been following a complex and still incomplete path from fragmentation to normative interconnection.

In any case, this transition from the traditional international trade regulation model (very focused on free trade) to a new regulatory model that emphasizes promoting sustainable international trade, taking the SDGs as a reference, will not be easy.

Certainly, the EU is trying to lead an in-depth reform of the WTO rules and can find allies in other advanced economies (including Biden's United States) and certain developing countries. But there are still many disagreements with China, Russia, India, Indonesia, and other emerging economies.

Faced with the difficulties in achieving new major consensuses in the WTO, advanced economies are promoting the inclusion of numerous socio-labour and environmental provisions in PTAs. This is, in principle, positive, since it corrects the traditional fragmentation of international law. But these are not times for complacency. It must be underlined that the main objectives of international trade agreements continue to be the promotion of trade and investment between the parties and it is necessary to ensure that this multiplication of provisions on sustainability is not a mere 'decoration' and that these provisions are subject to controls and dispute settlement mechanisms equal (or, at least, equivalent) to those of the rest of the provisions of the treaties.

The new regulatory paradigm that the EU and other advanced economies are trying to promote, lifting the veil that has generally been covering the conditions of production at origin, generates resistance, especially when it takes the form of unilateral trade restrictions or penalties with an extraterritorial scope, such as those measures intended to put charges on imported products based on the carbon emissions released in the country of origin.

It remains to be seen how various measures of this type that the European Commission is currently promoting, such as the CBAM Regulation Proposal, will end up being specified and applied in practice. And it also remains to be seen how other countries,

particularly emerging and developing countries, will end up reacting in front of those measures, because these countries tend to see them as forms of disguised and extraterritorial protectionism, and they look at the SDGs through their own prisms, focusing on special and differentiated trade treatment, development aid or the principle of common but differentiated responsibilities.

It is also still legally uncertain whether the adjudicative bodies of the WTO will consider such unilateral measures compatible with multilateral trade rules, accepting an evolutionary interpretation of the criteria to determine the analysis of the likeness between products (including their respective npr-PPMs) or, at least, a broader view of the exceptions and their possible extraterritorial reach.

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Article

The amendment of the European Stability Mechanism

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KEYWORDS:

European Union, Economic and Monetary Union, European Stability Mechanism, European Monetary Fund, Banking Union, Single Resolution Fund

ABSTRACT:

The depth of the economic crisis that began in 208 led to financial stabilization instruments in the European Union (EU). After a period of transience and provisionally, the European Stabilization Mechanism (ESM) allowed the Economic and Monetary Union (EMU) countries to consolidate a permanent financial assistance fund. In 2017, the Commission proposed revising the ESM to revoke its international organizational character and transform it into an EU agency included in the EU's institutional structure. The strong opposition of some Member States (MS) has avoided this possibility. The ESM Treaty has been revised and signed by the Eurozone states and maintains its intergovernmental nature. In any case, some new functions have been added, including its establishment as the Single Resolution Fund (SRF) backstop facility only in case of extreme need and when its liquidity is insufficient. Creating this support to the SRF is essential for consolidating the Banking Union.

PALABRAS CLAVES:

Unión Económica y Monetaria, Mecanismo Europeo de Estabilidad, Fondo Monetario Europeo, Unión Bancaria, Fondo Único de Resolución

RESUMEN:

La profundidad de la crisis económica iniciada en el año 2008 condujo a la creación de instrumentos de estabilización financiera en el ámbito de la Unión Europea (UE). Tras un período de transitoriedad y provisionalidad, el establecimiento del Mecanismo Europeo de Estabilización (MEDE) permitió la consolidación de un fondo permanente de asistencia financiera los países de la Unión Económica y Monetaria (UEM). En 2017, la Comisión propuso la revisión del MEDE con la intención de revocar su carácter de organización internacional y transformarlo en una agencia de la UE incluida dentro de la estructura institucional de la UE. La oposición decidida de algunos Estados miembros ha evitado esta posibilidad. El Tratado constitutivo del MEDE ha sido revisado y firmado por los Estados de la Eurozona y mantiene su naturaleza intergubernamental. De todas formas, se ha aprovechado la ocasión para ampliar sus funciones, entre las que se destaca su constitución como el instrumento de último recurso del Fondo Único de Resolución (FUR) sólo en caso de extrema necesidad y cuando su liquidez no fuera suficiente. La creación de este apoyo al FUR es considerado una condición esencial para consolidar la Unión Bancaria.

MOTS CLES :

Union économique et monétaire, Mécanisme européen de stabilité, Fonds monétaire européen, Union bancaire, Fonds de résolution unique

RESUME :

La profondeur de la crise économique qui a débuté en 2008 a conduit à la création d'instruments de stabilisation financière au sein de l'Union européenne (UE). Après une période transitoire et provisoire, la mise en place du Mécanisme européen de stabilisation (MES) a permis la consolidation d'un fonds permanent d'assistance financière aux pays de l'Union économique et monétaire (UEM). En 2017, la Commission a proposé la révision du MES dans le but de lui retirer son caractère d'organisation internationale et de le transformer en une agence de l'UE incluse dans la structure institutionnelle de l'UE. Une opposition chez de certains États membres a empêché cette possibilité. Alors le traité instituant le MES a été revu et signé par les États de la zone euro et conserve son caractère intergouvernemental. En tout cas, cela aura été le moyen d'élargir ses fonctions, y compris celle de la constitution qui n'imposera le fonds de résolution unique (FRU) qu'en tant qu'instrument de dernier recours en cas d'extrême nécessité et lorsque la liquidité n'est pas suffisante. La création de ce soutien au FRU est considérée comme une condition essentielle à la consolidation de l'Union bancaire.

CONTENTS:

1 INTRODUCTION

The financial crisis that began in 2008 highlighted some of the main structural weaknesses in European monetary integration. One of the characteristic elements of the situation was the interconnection between financial difficulties and sovereign debt problems. Although the origin was in the financial sector, it gradually spread to other economic sectors.

The shortcomings in the construction and development of the Economic and Monetary Union (EMU) have prevented the European Union (EU) from adopting an appropriate and flexible response to the severe consequences of crises. EMU was initially built based on a monetary union with decentralized fiscal policies and no accurate coordination of MS' macroeconomic policies, with a central instrument, the European Central Bank (ECB), whose main objective was to avoid inflationary pressures

The tools to ensure the viability of monetary Union were set up, on the one hand, through the creation of the Stability and Growth Pact (SGP), aimed at ensuring the sustainability of public finances. On the other hand, the institutionalization of the no-bailout rule implies that budgetary decisions are the sole responsibility of states, ruling out the possibility that the whole of EMU will assume the public debt of a Eurozone country.

However, reality showed that this set of rules was not enough to ensure the financial stability of the Eurozone in times of crisis. In this situation, the paralysis of the interbank markets led to a problem that affected the structural components of EMU. The banking crisis made it difficult when it obstructed the financing of the real economy, and the states agreed on instruments to help banks in trouble, which caused their public debt to increase exponentially and worsen its quality.

In this sense, developments have revealed that the EU in general and members of EMU lack the appropriate tools to prevent the crisis. Moreover, once immersed in the problem, the Union also did not have the necessary financial assistance devices to prevent the situation's aftermath from spreading to the whole Eurozone and did not have the sufficient agility required for a true monetary union to provide the necessary assistance to states in difficulty.

In other words, the development of sovereign debt crises highlights the need for a resolution and management mechanism that could alleviate the profound socio-economic consequences of emergencies.

2 THE NEED TO CREATE A EUROPEAN STABILIZATION MECHANISM

The economic crisis that began in 2008 led the MS of the European Union to adopt various corrective or palliative measures that, until the first months of 2012, had the common feature of being temporary and not necessarily homogeneous.

The first Eurozone country to suffer from the sovereign debt crisis was the Hellenic Republic. In the absence of a crisis management mechanism, the Eurozone states decided to provide financial assistance to Greece on 2 May 2010 through bilateral loans worth 80 billion euros. This sum was complemented by additional aid from the International Monetary Fund (IMF) of a maximum amount of 30 billion euros, which raised the sum of the bailout to 110 billion euros. Financial assistance was conditional on Greece implementing an economic adjustment program negotiated by the Greek Government with the Commission, the ECB, and the IMF.

As market pressure continued, Eurozone countries took a further step by establishing a 500 billion euros financial mechanism in the Council meeting on 10 May 2010, joined by 250 billion euros committed by the IMF for Eurozone countries with funding problems. Two elements constituted the instrument.

The first component was the European Financial Stabilization Mechanism (EFSM), set up by Council Regulation 407/2010 of 11 May 2010 and adopted on Article 122.2 TFEU. EFSM allows the Union to assist an MS with difficulties if these are caused by natural disasters or exceptional occurrences, which that State has not been able to control. Regulation 407/2010 considers the global financial crisis an extraordinary situation as provided for in Article 122.2 TFEU. It, therefore, enables the possibility of granting, under strict conditionality, loans or lines of credit to the MS in difficulty until the maximum limit of 60 billion euros.

The European Financial Stability Facility (EFSF) was the second element. EFSF was a special-purpose instrument established by agreement between the Eurozone members and with the capacity to guarantee pro-rata loans for up to 440 billion euros. In June 2010, the euro area members signed the Framework Agreement of the EFSF. They became the shareholders of a public limited company incorporated in Luxembourg called "European Financial Stability Facility Société Anonyme". The EFSF Framework Agreement entered into force on 4 August 2010 and provided for its liquidation on 30 June 2013.

The facility's function consisted, essentially, of granting loans to Eurozone states with financial difficulties, with the endorsement of the Eurozone members, which were, at the same time, shareholders of the EFSF. This entity was financed in the international capital market with the support of the guarantees conferred by the shareholders. In return for the aid, the beneficiaries accepted a program of economic and budgetary adjustments to reduce the public deficit and ensure debt sustainability (Pastor Palomar, 2014, p. 297-298). In principle, it had a complementary character to the EFSM, and, unlike the latter, it was created without a legal basis in the founding Treaties. Nevertheless, essential functions were reserved for the European Commission within the framework of applying the instruments designed in the EFSF (Carrera Hernández, 2020, p. 17).

Regarding the participation of the IMF, the discrepancies and the internal debate that its participation caused should be pointed out. On the one hand, it was argued that generalized acceptance would imply a failure of the EMU. It would reduce the credibility of the Union on the international stage; on the other, the IMF's intervention was justified on the grounds of the Commission's lack of experience in the design, management, and implementation of economic adjustment programs, and the ability of the European institutions to force countries to implement policies was doubted (Casanova Domenech & Millet Soler, 2019, p. 161-163). In fact, and since its participation in the first rescue of the Hellenic Republic, the IMF took part in the instruments and operations to deal with the financial crises in Greece, Portugal, Ireland, and Cyprus (Pisani-Ferry, Sapir & Wolffeu, 2013, p. 53-99). It also participated in the situation in Spain. However, it did not provide funds but instead supervised, together with the European Union, compliance with the conditionality provided for in the financial aid program, especially in providing technical assistance in the reform of the financial sector (Pisani-Ferry, Sapir & Wolffeu, 2013, p. 5).

2.1 THE ADOPTION OF THE ESM TREATY AND ITS COMPATIBILITY WITH THE FOUNDING TREATIES

The persistence of the crisis led to the creation of the European Stability Mechanism (ESM) through an international treaty concluded by, at that time, the 17 MS of the Eurozone; on 2 February 2012, entered into force on 27 September 2012. The ESM, which replaced the EFSF, is an international organization based in Luxembourg. Since 1 July 2013 represents the only instrument granting financial assistance to Eurozone countries with difficulties to capitalize autonomously.

The birth of the ESM was not without problems, and among the most relevant, the need to make the instrument compatible with the so-called no-bailout clause. Indeed, article 125.1 TFEU prohibits the Union and its member states from assuming economic

commitments by one of them, regardless of the national authority responsible for meeting them. It prevents the assumption of States debt by the Union or the rest of the EMU members.

In this context, the European Council adopted on 25 March 2011, Decision 2011/199, which inserted in the TFEU a new provision according to which the EMU countries instituted a stability mechanism that would be activated when it was essential to safeguard the strength of the Eurozone[1]. This new provision, article 136.3 TFEU, affirms that granting all necessary financial assistance under the mechanism will be subject to strict conditionality.

The modification operated through the European Council Decision was challenged before the Supreme Court of Ireland, which formulated several preliminary questions before the CJEU. Thus, the Irish parliamentarian Mr. Pringle argued that using the simplified revision procedure provided in article 48.6 TEU was contrary to the primary law. According to the applicant, the Decision scope implied a competence alteration incompatible with the provisions of the founding Treaties relating to the functioning of the EMU. Furthermore, Mr. Pringle invoked that Ireland, expressing its consent to be bound by the ESM, would assume obligations incompatible with the founding Treaties, insofar as the formerly contained provisions contrary to the latter on economic and monetary policy.

The CJEU judgment of 27 November 2012 determined the validity of Decision 2011/199 and the compatibility of the ESM with EU law[2].

The Court affirmed that the vehicle allowed by the European Council Decision did not invade the exclusive competence of the Union in matters of monetary policy. It was a complementary aspect of the new regulatory framework for strengthening the economic governance of the Union, and, ultimately, it was an instrument included in the field of economic policy. The CJEU asserted that the primary purpose of the Union's monetary policy is to maintain price stability. At the same time, the ESM seeks to fulfill a different goal: to preserve the euro area's solidity. The mere fact that this economic policy measure may have indirect repercussions on the euro's stability does not allow it to be associated with a monetary policy measure. The ESM does not aim to maintain price stability but instead seeks to meet the financing needs of its members. ESM must cover the granting of assistance with the capital that its shareholders have disbursed or through the issuance of financial instruments. It is not authorized to promote conventional monetary policy measures such as setting interest rates or issuing currency.

In this sense, the ESM constitutes a complementary aspect of the new regulatory framework for strengthening the economic governance of the Union. This framework establishes closer coordination and supervision of the financial and budgetary policies developed by the MS and seeks to consolidate macroeconomic firmness and the viability of public finances. From this perspective, the ESM is a complementary instrument, a corrective mechanism, which comes into play when coordination measures fail (Martínez Mata, 2013, p. 89).

Regarding the compatibility of the ESM Treaty with EU Law, the Court declares that the purpose of the non-rescue clause, mentioned previously, and contemplated in article 125 TFEU, does not consist in prohibiting any financial assistance in favor of an MS. The provision aims to encourage MS to preserve budgetary discipline that allows, in turn, maintaining the financial solidity of the EMU. Thus, there is room for financial assistance mechanisms compatible with this clause, provided they are essential to safeguard that

[1] European Council Decision 2011/199/EU of 25 March 2011amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, OJ L 91, 6.4.2011.

[2] Judgment of the Court (Full Court) of 27 November 2012, Pringe, C-370/12, ECLI: EU:C:2012:756

"higher objective", which is the financial stability of the euro area as a whole. The clause tries to ensure that the MS observe a healthy budgetary policy, certifying that, when they incur in debts, they remain subject to the logic of the market. Therefore, it does not prohibit granting one or more States financial assistance to a member who remains liable for its commitments vis-à-vis its creditors if the conditionality attached to such service is appropriate. In this context, the clause would not prohibit all financial aid, but only that which implies the direct assumption of the debts of said State.

In any case, if the amendment scope of article 136 TFEU had as its objective the creation of a tool such as the ESM, it would not have been necessary. The necessity of a prior modification of the TFEU to establish a permanent instrument capable of providing financial support to the MS was a German condition required to constitute a solid foundation in the original law on which to cement the mechanism (Barysch, 2010, p. 2).

Setting up the ESM as an international organization rather than an EU agency is linked to the previous background. ESM was founded as the "natural successor" to the EFSF, which had an intergovernmental character. Likewise, it has been justified that the large number of funds necessary to finance the ESM, in the absence of EU budgetary resources, caused the reluctance of EU states, not members of the Eurozone, to assume financial contributions and associated risks (De Witte & Beukers, 2013, p. 813). In any case, the delay in the subsequent text approval and the urgencies derived from the crisis consequences led the States to use the intergovernmental procedure to create the ESM (Hinojosa Martínez, 2014, p. 234-235).

2.2 THE ORGANIZATIONAL STRUCTURE AND FINANCING INSTRUMENTS

The members of the ESM are currently 19 Eurozone states. Each of them contributes to the capital of the ESM, to a total of more than 704 billion euros[3]. The responsibility of each participant is limited to its part of the subscribed capital stock. The contribution to the capital of the ESM determines the decision-making capacity of the countries, given that the number of voting rights attributed is equal to the number of shares each member has subscribed to the authorized capital of the ESM (art. 4 ESM Treaty). Thus, Germany has the highest percentage of the vote, with 26.96%, followed by France with 20.74%, Italy with 17.79%, and Spain with 11.82%. The countries with the lowest vote percentage are Malta with 0.07%, Estonia, 0.18%, and Cyprus, 0.19%.

In this regard, the German Constitutional Court determined the need, in its judgment of 12 September 2012, to exclude the risks of possible liability for Germany over 190 billion euros of its contribution to the share capital of the ESM. It forced the adoption of an interpretative declaration to the ESM Treaty to guarantee that no additional state contributions would be made to the ESM. Indeed, the German Constitutional Court (GCC) imposed several conditions for its ratification. Accordingly, the German Parliament should approve future ESM bailouts individually. GCC also stipulated that Germany must attach an interpretative statement to its treaty ratification instrument stating that its liability is limited to 190 billion euros unless the German Parliament approves an increase and that the confidentiality of the information provided by the ESM will not prevent the German Parliament from being informed about the functioning of the ESM[4].

[3] Each country contributes to the proportions set in Annex I and Annex II to the ESM Treaty. The participation band ranges from the 511 million that Malta contributes to the 190 billion euros that the Federal Republic of Germany allocates.

[4] The Judgement can be consulted at following web page: https://www.bundesverfassungsgericht.d/entscheidungen/rs20120912_2bvr 139012.html

2.2.1 Financial assistance

The main objective of the ESM is to mobilize funds and provide support for the stability of its members under strict conditionality when they experience or are at risk of experiencing severe financing problems (art. 3 ESM Treaty).

A varied set of mechanisms are foreseen to carry out its assistance activity. The most outstanding is granting loans to countries with difficulties accessing the capital market and recapitalizing financial entities (both already used by the ESM during the financial crisis). Together with them, there is the possibility of acquiring bonds in primary and secondary debt markets and providing financial assistance to the States, on a preventive basis, in the form of credit lines. In all cases, the host country is obliged either to assume a program that includes economic restructuring measures through a macroeconomic adjustment program or to satisfy eligibility conditions, which may affect fundamental rights, circumstances that provoke resistance in the affected countries (Donaire Villa, 2018, p. 18-28).

As has been said, granting financial assistance is subject to strict conditionality in all cases. The terms are specified in a Memorandum of Understanding (MoU) negotiated between the MS that has requested the aid and the European Commission. MoU must be fully compatible with the economic policy coordination measures provided for in the TFEU. With the prior approval of the Board of Governors, the European Commission will sign the MoU on behalf of the ESM. In coordination with the ECB and the IMF, it will ensure compliance with the conditionality of the financial assistance instrument. In short, financial stability and conditionality appear as two elements of the ESM and any assistance program adopted under it (Urbaneja Cillán, 2019, p. 96).

Since it entered into force, the ESM has acted on three occasions providing liquidity to Spain, Cyprus, and the Hellenic Republic, in 2015, within the framework of the third financial assistance program[5].

In the Spanish case, the financial sector's recapitalization aid was agreed upon during the validity of the EFSF. The signing of the financial assistance agreement was concluded between the EFSF and Spain. On 25 June 2012, the Spanish Government requested external aid in restructuring and recapitalizing financial institutions. It was the first time that financial assistance was granted to an MS, with a clear and restrictive mandate to recapitalize the financial sector (Corti Varela, 2015, p. 125). The request for aid was registered under the terms of financial assistance by the EFSF, which would provide it until the ESM was available, at which point the latter would take responsibility[6].

The assistance activity has undergone significant changes because of the crisis caused by Covid-19. Eurogroup, at its meeting of 9 April 2020, agreed to make available to the States a line of loans, called Pandemic Crisis Support (PCS) through the ESM, aimed at backing and reinforcing the financial stability of the members of the Eurozone[7].

The design and characteristics of the aid were defined at the Eurogroup meeting held on 8 May and implemented by the ESM Board of Governors[8]. The type of intervention chosen consists of granting loans on a preventive basis to guarantee their financing. The ESM Treaty

[5] Details on the participation of the ESM in the Hellenic and Cypriot financial assistance can be found on the following websites: https://www.esm.europa.eu/assistance/greece and https://www.esm.europa.eu/assistance/cyprus

[6] Memorandum of Understanding on Financial Sector Policy conditions, made in Brussels and Madrid on 23 July 2012, and Financial Assistance Framework Agreement, made in Madrid and Luxembourg on 24 July 2012, BOE no. 296, of 10.12.2012.

[7] The press release of the meeting can be consulted on the following website: https://www.consilium.europa.eu/en/press/press-releases/2020/04/09/report-on-the-comprehensive-economic-policy-response-to-the-covid-19-pandemic/

[8] The press release of the meeting can be consulted on the following website: https://www.consilium.europa.eu/es/press/press-releases/2020/05/08/eurogroup-statement-on-the-pandemic-crisis-support/

provides two kinds of precautionary credit lines, the conditional precautionary lines of credit, addressed to the MS with a healthy economy and respecting the PEC criteria; and the credit lines with reinforced conditionality if the State does not meet the requirements in its entirety, but its economy can be considered healthy (arts. 13 and 14 ESM Treaty). As we will have the opportunity to examine in the next section, the access conditions have been subject to substantial changes in the revised ESM Treaty.

About the covid-19 crisis, the second modality has been selected. The volume of aid planned would initially comprise a sum equivalent to 2% of the State's GDP in 2019, approximately 240 billion euros, of which about 25,000 million would be destined for Spain. Nevertheless, it could be adjusted depending on the severity of the pandemic and its economic consequences. The period to request the credit line ends in December 2022. Like all credit, it must be repaid, within a specified period, with a maximum term of 10 years, at a discounted interest rate lower than that set in the market. Specifically, the requesting country should pay a margin of 10 basis points (0.1%) annually, a single initial service fee of 25 basis points (0.25%), and an annual service of 0.5 basis points (0.05 %) (Urbaneja Cillán, 2021, p. 80).

This instrument is constituted with a finalist character. It is aimed at helping to cover the expenses in medical care services. The responses related to prevention and treatment were addressed to reduce the pandemic's consequences, which have occurred since February 2020. In principle, and unlike the rest of the ESM interventions, the beneficiaries would not be subject to the fulfillment of strict economic conditions. The requesting country will only be bound to dedicate the amount to financing the pandemic response plan that it elaborates with the ESM and the Commission and justifies the request for the loan (Markakis, 2020, p. 373). There is no macroeconomic adjustment plan, and the standard surveillance system envisaged within the framework of the European Semester will be applied (Carrera Hernández, 2020, p. 21). In this sense, the Commission has established that aid supervision must be proportionate to the nature of the health, social, and economic difficulties caused by the pandemic[9].

However, no country in the Eurozone has requested a justified credit line in this program. Aside from reputational issues, the absence of candidates may be because Eurozone MS can access financing in ways more attractive, like the ECB's debt purchase program and other loans and grants provided by the EU (Guttenberg, 2020, p. 2).

In effect, through its Decision 2020/440, the ECB approved, in March 2020, a temporary program for the purchase of assets of the States affected by the pandemic, known as the "PEPP" (Pandemic Emergency Purchase Program). PEPP authorizes central banks of the Eurozone the purchase assets for a maximum value of 750 billion euros, which has been increased to 1,850 billion[10]. Likewise, other programs such as SURE, with 100 billion euros, and especially the Next Generation EU program, which with 750 billion euros, provide financing in the form of loans and grants that are more interesting to States.

2.2.2 The organic structure

ESM has the following organization: the Board of Governors, the Board of Directors, and an Executive Director.

The Board of Governors comprises a government representative from the MS responsible for financial matters. It is chaired either by the Eurogroup President or by one of

[9] The conditions can be consulted on the following web page: https://www.consilium.europa.eu/media/44011/20200508-pcs-term-sheet-final.pdf

[10] Decision 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase program, OJ L 91, 25.3.2020.

the Governors elected for two years. By a qualified majority, the Board of Governors takes the decision; this is 80% of the votes expressed by the MS. Since 13 January 2018, the President has been Mr. Mario Centeno, President of the Eurogroup.

The Commissioner for Economic and Monetary Affairs, the President of the ECB, and the President of the Eurogroup if he is not President or Governor participate as observers. Occasionally, representatives of other international organizations (such as the IMF) or the EU states who are not EMU members but participate in the ESM may participate in an operation to assist a specific member of the Eurozone (art. 5 ESM Treaty).

The Board of Directors composition reproduces that of the Board of Governors, each of the latter being the ones who must appoint an administrator and an alternate representing each MS. Administrators are selected from among highly competent persons in economic and financial matters, and their mandate is revocable at any time (art. 6 ESM Treaty). Finally, the Board of Governors elects the Executive Director for five years, renewable for one term. He must have the nationality of an MS, adequate international experience, and a high level of competence in the economic and financial field. He is responsible, among other functions, for presiding over the meetings of the Board of Directors and participates in the Board of Governors. He is the legal representative of the ESM and manages the current affairs of the institution under the direction of the Board of Directors (art. 7 ESM Treaty). The Executive Director is Klaus Regling, a German national who has served as Executive Director of the EFSF.

Finally, an Auditors Committee is also envisaged, made up of five members of recognized competence in auditing and financial matters, including two representatives of the supreme audit bodies of the MS and one of the European Court of Auditors. The tasks assigned to him consist of carrying out independent audits, inspecting the accounts of the ESM, and verifying that the income statement and balance sheet are correct (art. 30 ESM Treaty).

Regarding controversies, an arbitration clause is foreseen favoring the CJEU. In the first instance, when a dispute on interpretation or application of the ESM Treaty arises, the decision corresponds to the Council of Governors. The latter will decide on disputes among ESM members and between members and the ESM concerning the Treaty interpretation and application, including any dispute on compatibility decisions taken by the ESM with its founding Treaty. If a member of the ESM appeals the decision, the matter will be submitted, in a second instance, to the CJEU, whose judgment will be binding on the parties involved in the dispute, who must adopt the necessary measures to comply with it (art. 37 ESM Treaty).

In any event, the Court will not assess the conformity of the conduct of the ESM or its Treaty with EU law, which constitutes further confirmation of the ESM's autonomy from that legal order (Bianco, 2015, p. 467).

The Board of Governors and the Board of Directors adopt decisions by mutual agreement, a qualified majority, or a simple majority. Previously, it must reach for each vote, a quorum of two-thirds of the number of members with voting rights. The adoption of a decision by the joint agreement will require the members' unanimity in the vote, though abstentions do not prevent the adoption of a decision. Approving a decision by a qualified majority requires 80% of the votes cast while, in urgent cases, the qualified majority rises to 85% of the votes cast (art. 4 ESM Treaty). MS votes, as mentioned previously, are weighted and correspond to the number of shares of the capital subscribed[11].

[11] Art. 5.6 ESM Treaty indicates the decision-making areas where the unanimity of the Governing Council is required to adopt certain decisions. By way of illustration, the approval of a financial assistance instrument for a Member State in difficulties, the modification of the list of financial assistance instruments available to the ESM, or the approval of applications for membership of the ESM.

3 THE AMENDMENT OF THE TREATY ESTABLISHING THE EUROPEAN STABILITY MECHANISM.

3.1 THE EUROPEAN COMMISSION'S PROPOSAL TO CREATE A EUROPEAN MONETARY FUND

On 6 December 2017, the Commission approved the proposal to establish a European Monetary Fund (EMF) launched from the transformation of the ESM[12]. The EMF would succeed him and assume his rights and obligations. It would be integrated into the institutional framework of the EU and transformed into an EU body with its legal personality and subject to its operating rules. The mutation of the organization should take place from an agreement of the MS participating in the EMU where the capital of the ESM would be transferred to the new EMF.

The legal basis used would be based on Article 352 TFEU, the same legal basis that would be used to extend, in the future, new functions to the EMF. As stated by the Commission in the explanatory memorandum of the proposal, this action would be necessary to preserve the financial stability of the euro, and the founding Treaties do not provide any other legal basis for the EU to achieve this objective. This proposal would be complemented by the possibility of an international agreement between the Eurozone participants to transfer funds from the ESM to the EMF.

The future EMF would assume the functions entrusted to the ESM, and new tasks would be assigned. In this sense, it could constitute a standard protection mechanism for the Single Resolution Fund (SRF) within the Banking Union. The SRF would be activated when the available resources were insufficient to face a financial institution restructuring. This resource should be fiscally neutral to the extent that any disbursement made to a financial institution would be recovered in the medium term[13].

The Commission proposal contained, from a substantive point of view, essential innovations compared to the original ESM Treaty. First, the EMF would safeguard the euro area's financial stability and of the participating MS. At the same time, the current ESM Treaty only speaks of a necessary intervention to protect the euro area's financial stability as a whole and of its MS. The deletion of the reference to "the whole" of the euro area would allow intervention in a crisis affecting a specific country without a systemic emergency involving the entire Eurozone. Second, the EMF would operate in favor of the banking system in two ways: a direct recapitalization of credit institutions and granting lines of credit or guarantees in favor of the Single Resolution Board (Megliani, 2020, p. 678-679). As we will have the opportunity to examine in the next section, a large part of the innovations suggested in the Commission's proposal are reflected in the revised ESM Treaty.

The incorporation of the EMF into the organizational structure of the EU, as we shall see, was quickly discarded. According to the Commission's proposal for a regulation, the EMF would be responsible to the European Parliament and the Council for executing its functions. Incidentally, the EMF should present an annual report on its activity to the Commission, the Council, and the European Parliament. Furthermore, the European Parliament could ask the Executive Director of the EMF, who would be obliged to reply orally or in writing. As a result, the acts of the EMF should be consistent with the EU Treaties and the EU Charter of Fundamental Rights and could be challenged before the CJEU.

In this sense, it is worth recalling the case-law of the CJEU, where various situations related to the actions of the ESM have been ruled. In the Mallis case, the Court stated that,

[12] Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM (2017) 827 final of 6.12.2017.

[13]. Statute of the European Monetary Fund, Annex to the Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM (2017) 827 final of 6.12.2017.

although the Eurogroup approved the conditionality associated with the rescue of the Cypriot banking system approved by the Board of Governors of the ESM, this endorsement could not constitute a basis for annulment. Eurogroup was an informal body, and it was not an EU institution because it was not among the different Council formations and its acts were not binding but merely informative[14]. While in Ledra, the CJEU reiterated that the granting of assistance to Cyprus by the ESM was an international act beyond the domain of EU law. The Court underlined that in this process, the Commission has the task of ensuring consistency of the decision of the ESM with the EU legislation, and this circumstance could imply an action for damages, even though the burden of proof would be difficult to substantiate[15].

As progress has been made, the negotiations within the Council quickly raised the difficulty of modifying the legal nature of the ESM. Consequently, it soon became apparent that it was impossible to achieve unanimity from the Council as required by Article 352 of the TFEU. Indeed, on 6 March 2018, a group of MS under the initiative known as the New Hanseatic League openly expressed against the deepening and communitarization of EMU[16].

This initiative was established in February 2018 when the finance ministers of Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, the Netherlands, and Sweden signed a founding document writing down the opinions and values shared in the debate on the architecture of the EMU[17]. Among the ideas shared, it was pointed out that any measure aimed at deepening the instruments of the Eurozone should emphasize the real added value that the proposals provide and not on the transfer of powers from MS to the EU. Specifically, about the reform of the ESM, it was indicated that the ESM should be strengthened, although decision-making should remain firmly in the hands of the MS. The importance of maintaining the intergovernmental structure and preserving the voting rules in force was also stressed. Likewise, creating the credit line that will support the SRF was advocated[18].

This position has been preserved throughout the negotiating process, in such a way that on 8 November 2018, the States participating in the initiative of the New Hanseatic League issued a specific statement concerning the ESM. In this document, they support the establishment of a strengthened ESM. If it remains intergovernmental, that is, the Commission proposal is rejected. In addition, regarding the granting of financial assistance, some requirements were defined that had to be satisfied for a State to benefit from financial aid, such as guaranteeing debt sustainability, verifying the borrower's ability to pay, and introducing collective action clauses (CAC) of a single member. The CAC allows a qualified majority of debtors to agree to a debt restructuring that is legally binding on all bondholders, including those who vote against the restructuring[19].

At the meeting of the Heads of State and Government of the Eurozone countries held in December 2018, it was decided that the ESM would retain its intergovernmental nature,

[14] Judgment of the Court (Full Court) of 20 September 2016, Mallis et al/European Commission, European Central Bank, C-105-109/15 P, ECLI: EU:C:2016:702.

[15] Judgment of the Court (Full Court) of 20 September 2016, Ledra Advert Ltd et al/ European Commission, European Central Bank, C-8-10/15, ECLI: EU:C 2016:701.

[16] The statement can be consulted on the following web page https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-integration-of-the-esm-into-eu-law-by-creating-an-emf/03-2021

[17] It has been stated that the emergence of initiatives of these characteristics appears, in part, as a consequence of Brexit, which introduces a new dynamic in European politics by changing the coalition logic between the EU Member States. The loss of a powerful ally pushes smaller and relatively affluent states like the Nordics to express their preferences more audibly (SCHULZ, 2020, 415-416).

[18] The document can be consulted on the following website: https://www.government.se/statements/2018/11/shared-views-of-the-finance-ministers-from-the-czech-republic-denmark-estonia-finland-ireland-latvia-lithuania-the-netherlands-sweden-and-slovakia-on-the-esm-reform

[19] https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-integration-of-the-esm-into-eu-law-by-creating-an-emf/12-2020

closing the possibility of its transformation into an EU body. Nevertheless, the option of including within its provisions a protection function that could face the possible shortcomings of the SRF was maintained[20]. In this sense, at its meeting on 13 June 2019, Eurogroup reached a political agreement on a proposal to revise the ESM Treaty. It includes, among others, the stipulation of a common mechanism for budgetary protection in the face of future tools for budgetary protection against bank resolutions and the establishment of cooperation tools between the Commission and the ESM. However, some technical details had to be specified[21]. On 4 December 2019, the Eurogroup, in its ECOFIN format, accepted the complete reform of the ESM Treaty[22].

Despite the political agreement on the content of the review, the Italian Government was reluctant to sign the deal because of the controversy between the coalition members that formed the so-called Conte II Government on the compromise reached. (GALLI, 2020, 263-264). Final consensus on the entire amendment Treaty reached on 30 November 2020[23].

The reform came to a halt in early 2020 because Italy opposed a specific aspect of the review: the obligation to introduce so-called single-member collective action clauses (CACs) that would procedurally facilitate a debt restructuring of a single country (Galli, 2020, p. 266-267). CACs allow a large majority of bondholders to agree to a debt restructuring that is legally binding on all creditors, including those who vote against the restructuring. The purpose of this possibility is to enable the restructuring of the debt of an ESM member if its debt burden is unsustainable and its ability to pay is questionable.

The impact of these clauses on the dynamics of sovereign guaranteed loans is not easy to predict because, on the one hand, it avoids discrimination between creditors that may form a blocking minority and creditors that are not. On the other hand, it opens the door to possible abuses against minority holders. It must be borne in mind that sovereign bonds are in the hands of a wide range of resolving subjects (commercial banks, investment banks, central banks, pension funds, vulture funds, retail investors). Retail investors pursue investment objectives that differ from institutional investors and are less able to cover losses in the event of a restructuring (Megliani, 2021, p. 85).

In any case, the revised ESM Treaty contains the commitment to introduce the CAC that provides for the aggregate vote of a single member for the year 2022. The legal modalities for its implementation will be agreed upon in the Economic and Financial Committee, considering the constitutional requirements determined by MS in such a way as to ensure that the legal impact is identical in all members (recital 11 Preamble of ESM Treaty).

Finally, on 27 January and 8 February 2021, the ESM countries signed the Agreement amending the ESM Treaty. The Agreement provides a legal basis for new tasks assigned to the ESM. The revised Treaty will be in force, foreseeably, during the year 2022, once the 19 members of ESM express their consent.

The ESM reform is a consequence of the institution's evolution during the last years. In part, stimulated by the recognition of importance and experience it has acquired in managing assistance programs. Its purpose has been to continue with the ESM position as a

[20] Declaration of the Euro Summit of 14 December 2018, Doc. EURO 503/18.

[21] The text of the proposed revision of the ESM Treaty can be consulted on the following website:https://www.consilium.europa.eu/media/39772/revised-esm-treaty-2.pdf

[22] The document can be consulted on the following web page: https://www.consilium.europa.eu/en/meetings/eurogroup/2019/12/04/

[23] The final text of the agreement amending the Treaty establishing the European Stability Mechanism can be consulted at the following electronic address:https://www.consilium.europa.eu/media/47294/sn04244-en19.pdf

crisis resolution mechanism in the euro area and to improve the financial instruments that are part of the set of actions of the ESM (Aerts & Bizarro, 2020, p. 160).

3.2 THE MOST SIGNIFICANT ADJUSTMENTS TO THE TREATY AMENDING THE EUROPEAN STABILIZATION MECHANISM

3.2.1 The backstop facility to the Single Resolution Fund

On 15 July 2014, through Regulation 806/2014 of the European Parliament and of the Council, the Single Resolution Mechanism (SRM) was created. SRM is a uniform procedure for the resolution of credit institutions subject to the Single Supervisory Mechanism (SSM)[24]. A single authority that avoids possible divergent interpretations of its provisions controls it. This authority is the Single Resolution Board (SRB), which, since 1 January 2015, has been constituted as an EU agency with legal personality and with a specific structure per its functions (art. 42 Regulation 806/2014).

The Single Supervisory Mechanism (SSM) was established on 15 October 2013, through Council Regulation 1024/2013[25]. SSM is an entity made up of the ECB and the national supervisory authorities entrusted with inspecting credit institutions in the Eurozone. It is not a federation of national supervisors or a college of supervisors since the ECB is ultimately responsible for its operation. Consequently, it is granted a set of powers (López Escudero, 2014, p. 197).

Regulation 1024/2013 attributes to the ECB specific powers and functions to supervise the credit institutions of the States participating in the Monetary Union to contribute to the security, solidity, and stability of the financial system in the EU. SSM does not include the financial system as a whole. It embraces credit institutions at the individual level and extends to the supervision of financial holding companies and mixed financial companies, excluding insurance companies. In principle, it is an instrument destined primarily at the countries of the Eurozone, but it is flexible. It can be extended to any member of the EU, regardless of its currency, if it maintains "close cooperation" between its competent authorities and the ECB[26]. Supervision is dual since the ECB only supervises the so-called “significant entities” (whose characteristics are described in article 6.4 of Regulation 1024/2013). The corresponding competent national authority (CNA) supervises those that do not have this quality. The ECB focuses on those considered more systemically essential or meet certain conditions.

In May 2014, the European Parliament and the Council adopted Directive 2014/59, which determines the rules and procedures for the rescue and resolution entities in the financial system[27]. The purpose is to harmonize the national laws that regulate the rescue and resolution of credit and investment entities. The underlying issue is that banking entities have enjoyed a particular resolution mechanism, far removed from the general principles of liquidation. The fundamental differential element has consisted in the fact that the authorities of the MS have injected taxpayers' money into the entities in crisis, which has

[24] Regulation nº 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation nº 1093/2010, OJ L 225, 30.7.2014.

[25] Council Regulation nº 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013.

[26]. 2014/434/EU: Decision of the European Central Bank of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5), OJ L 198, 5.7.2014.

[27] Directive of the European Parliament and of the Council 2014/59 of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891, and Directives 2001/24, 2002/47, 2004/25, 2005/56, 2007/36, 2011/35, 2012/30 and 2013/36, and Regulations nº 1093/2010 and nº 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014.

made it possible to safeguard part of the liabilities. However, it has been at the cost of putting the stability of the public sector at risk.

Directive 2014/59 harmonizes national rules on bank resolution and provides for cooperation between the national authorities of the MS. It gives them ordinary powers and instruments to deal with bank resolution processes. Still, it leaves them with a relatively wide margin of discretion, susceptible to divergent decisions between national authorities. This harmonizing framework is insufficient for countries whose credit institutions are supervised within the framework of the SSM. In the same way that a specific and unique supervisory instrument has been adopted for all critical financial institutions, they needed a particular resolution mechanism that allows the centralized application of Directive 2014/59 by a single authority.

Regulation 806/2014, as we have mentioned, creates a uniform procedure for the resolution of credit institutions subject to the SSM by a single authority, the SRB, which avoids possible divergent interpretations of its provisions. With the SRM, Regulation 806/2014 also creates a Single Resolution Fund (SRF) that helps finance the cost of resolutions if entities in crisis cannot cover their losses.

The financing and operating rules of the SRF are excluded from the EU sphere. MS have opted to conclude an international treaty, the Agreement on the Transfer and Mutualization of contributions to the SRF, signed on 21 May 2014 and entered into force on 1 January 2016. This intergovernmental option responds to pragmatic approaches, which react to the need to guarantee, without obstacles, the creation and operation of SRF. Some States were very concerned about the possibility that their constitutional authorities could rule against the Regulation governing the SRM and the SRF if it included the possibility of pooling banking risks and facilitating an interstate transfer of resources. The alternative of an ordinary review of the TFEU was risky and with little chance of success given the express refusal of two members (De Gregorio Merino, 2015, p. 7-8).

SRF is endowed with approximately 55,000 million euros, which is the volume of resources equivalent to 1% of the number of guaranteed deposits of all authorized credit institutions in all participating MS, which must be collected progressively until 2024 and financed through contributions made by credit institutions that are subject to the SSM. From the beginning, the allocated amount was considered manifestly insufficient if the euro area were to be the object of a banking crisis affecting several critical financial institutions. The reason pursued with the constitution of the SRF is more to guarantee the system's financial stability than not to absorb losses or provide capital to financial entities in a resolution situation (Busch, 2015, p. 298).

About this issue, it became necessary to define a budgetary protection mechanism that would act in case of extreme need and when the liquidity of the SRF was not sufficient. It would be used as a last resort and would mean a temporary pooling of the possible risk. In principle, MS agree on the relevance of its existence and its advisability as a medium-term neutral budgetary instrument since beneficiary entities would have an obligation to repay the borrowed funds they had used. In fact, in October 2017, the Commission emphasized that the protection mechanism had to be of adequate size, quick to activate, and neutral from a budgetary point of view for being operational in banking crises. There should be no room for national considerations or segmentation in its implementation. The financial and institutional architecture should ensure full effectiveness in achieving the objectives of the backstop[28].

The main aim of this protection mechanism, according to the Commission, would be to inspire confidence in the banking system by strengthening the credibility of the measures

[28] Reflection paper on the deepening of the economic and monetary Union, COM (2017) 291 final of 31.5. 2017.

taken by the SRB. It would only be activated as a last resort instrument if the SRF's immediately available resources were insufficient for capital or liquidity purposes[29].

The funder will be the revised ESM. The support mechanism will take the form of a revolving line of credit, under which the ESM will be able to grant loans to the SRB. The loans granted will enjoy the status of preferred creditor, subordinated only to IMF loans. The size of the credit line has been initially set at 68 billion euros. This nominal limit assumes that the amount available for backup must always be equal to or less than the nominal limit. In any case, the Board of Governors may, by mutual agreement, review and adjust the sum of money[30].

The backstop will be introduced in 2024 but may be available sooner, provided banks make enough progress in reducing their risk exposure. The Agreement on the transfer and mutualization of contributions to SRF, negotiated in parallel with establishing an EU resolution framework, has also been amended to include the backstop facility to the SRF[31].

The amended ESM Treaty foresees that support will be available only to the extent that the current resolution framework remains in the present terms of reference, establishes a complex decision-making process, and provides for the establishment of an early warning system so that the ESM can guarantee timely receipt of disbursed funds. The SRB articulates the decision to request SRF backing according to a procedure consisting of two phases. First, the Executive Director proposes the support based on the request of the SRB, and the Board of Governors decides the opportunity to grant a support mechanism that covers all the uses of the SRM. In the second stage, the Board of Governors determines the financial terms of the facility, including the nominal ceiling and its possible adjustments, as well as the provisions on the procedure for verifying compliance with the required conditions and other demands related to its operation.

The financial support's detailed financial terms and conditions will be specified in an agreement with the SRB, which will be approved by the Board of Directors by mutual agreement and signed by the Executive Director (art. 18 A.1 and 5 ESM Amended Treaty). The Board of Directors may decide by mutual agreement to delegate this task to the Executive Director. The decision to activate the financial support instrument must be taken within 12 hours after the request made by the SRB; in the case of a particularly complex resolution operation, it can take up to 24 hours (Dias & Zoppè, 2021, p. 9).

There is an additional provision for an emergency voting procedure if the European Commission and the ECB conclude in separate assessments that the failure to adopt a decision urgently by the Board of Directors on loans and disbursements under the support would threaten the economic and financial sustainability of the euro area (art. 18 A.6 ESM Amended Treaty).

This decision will be adopted under the criteria outlined in Annex IV of the amended ESM Treaty. Among those criteria, its character of last resort and the neutral taxation of the instrument in the medium term stand out, which implies that the SRF repays the loan with money from bank contributions within three years. This period can be extended for another two years (Dias & Zoppè, 2021, p. 8).

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[29] *Towards the completion of the Banking Union*, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic, and Social Committee and the Committee of the Regions, COM (2015) 587 final de of 24.11.2015, p. 15.

[30] Board of Governors Draft resolution for the nominal cap and the provisions on the procedure for verifying compliance with the condition of the permanence of the legal framework for bank resolution. El documento se puede consultar en la siguiente página web: https://www.consilium.europa.eu/media/41669/20191206-draft-bog-resolution-1-nominal-cap.pdf

[31] The agreement amending the agreement on the transfer and mutualization of contributions to the Single Resolution Fund can be consulted on the following website: https://www.consilium.europa.eu/media/47292/sn01616-en20-002.pdf

In any case, unlike the current instruments of the ESM, by providing support to the SRF, the revised ESM will financially support an entity of the EU, and not a State, since, as we have mentioned, the SRB is an agency of the EU (Aerts & Bizarro, 2020, p. 164). In exchange, the amended ESM Treaty provides that this support will be carried out, without prejudice to the legislation of the European Union and the powers of the institutions and bodies of the European Union, and always as a last resort and to the extent that it is fiscally neutral in the medium term (art. 12.1a ESM Amended Treaty). The underlying intention of this provision is to avoid a possible infringement of EU law.

3.2.2 Instruments and procedure to support the financial stability of the ESM Member States

Under the original ESM Treaty, precautionary financial assistance can take two forms: a preventive conditional credit line (PCCL); or an enhanced conditions credit line (ECCL). The conditionality attached to them will be detailed in a memorandum of understanding. Article 14 of the ESM Treaty does not determine substantial differences between the two instruments and entrusts the Board of Directors with adopting guidelines on the modalities of implementation of the precautionary financial aid (in particular, on the eligibility criteria and the procedures to be followed). The guidelines establish the conditions under which an MS can apply to one instrument. Access to both tools is reserved for the MS where the economic and financial situation remains healthy. ECCL is open to ESM members who do not fully meet the eligibility criteria for the PCCL and are, therefore, in "worse" economic and financial conditions (Dias & Zoppè, 2021, p. 5).

The modification of the ESM Treaty has reformed this situation clarifying the eligibility criteria and the conditions for making one or another instrument available (art. 14 and Annex III ESM Amended Treaty). In general terms, the requirements for access to the PCCL have been tightened since the amended Treaty requires that the beneficiary not be subject to an excessive deficit procedure, nor should it experience excessive macroeconomic imbalances. The ESM guidelines applicable to the original ESM Treaty require respect for the SGP or the recommendations of the Council adopted within the framework of an excessive deficit procedure and respect for the commitments acquired within the framework of the excessive imbalance procedure (Markakis, 2020, p. 367).

On the other hand, from another perspective, access to assistance can be considered more rigorous and objective, as is the case of the criteria related to the tension in the financial markets. The ESM guidelines applied to the original ESM Treaty require that the requesting State not have bank solvency problems that could pose systemic threats to the stability of the euro area financial system. In the amended ESM Treaty, it is only required that the banking sector of the requesting State does not have serious vulnerabilities that put its financial stability at risk (Dias & Zoppè, 2021, p. 6).

In return, access to a PCCL would not require an MoU detailing the conditionality but rather a letter of intent highlighting the political will of the MS. The President of the Board of Governors will entrust the European Commission with assessing whether the political intentions included in the letter of intent are entirely consistent with the economic policy coordination measures provided for in the TFEU. In particular, with any act of European Union legislation, including any opinion, warning, recommendation, or decision addressed to the member of the ESM in question (art.14.2 ESM Amended Treaty).

The surveillance procedure is modified, and it is specified that both the Executive Director, who did not participate in surveillance in the original ESM Treaty, and the European Commission, in contact with the ECB, jointly and, whenever possible, also together with the IMF, will be in charge of supervising compliance with the conditionality attached to the financial assistance mechanism. (art. 13.7 ESM Amended Treaty).

These instances will prepare a report verifying the continuous respect of the eligibility criteria (PCCL) or the conditions fulfillment of the policy established in the MoU (ECCL). Suppose the report concludes that the ESM member in question continues to respect the eligibility criteria for the PCCL or meets the conditionality attached to the ECCL. In that case, the credit line will be maintained. However, if it determines that the ESM participant no longer respects the eligibility criteria of the PCCL or does not comply with the conditionality attached to the ECCL, access to the credit line will be suspended, unless the Board of Directors decides, by mutual agreement, to manage the line of credit. If the ESM member has already obtained funds, an additional margin will apply; unless the Board of Directors assesses based on the report that the non-compliance is due to events beyond the control of the assisted State. Nonetheless, if the line of credit is not maintained, another form of financial assistance may be requested and granted following the applicable rules under the ESM Treaty (art. 14.5 to 14.7 ESM Amended Treaty). The possibility of increasing the margin or maintaining precautionary aid even though the conditions have not been met are assumptions not contemplated in the original ESM Treaty (Markakis, 2020, p. 368).

3.2.3 Independence and accountability: the relevance of the Executive Director

The changes brought about in the ESM Treaty are intended to broaden and clarify the ESM mandate about its participation in economic governance in the euro area in general and in particular vis-à-vis the Commission. This function is reinforced in the amended ESM Treaty. It is added to the initial task of mobilizing financing and providing support for the States' financial solidity of the Eurozone. The Executive Director will be able to monitor and assess ESM members' macroeconomic and financial situation, including the sustainability of its public debt, and carry out analysis of relevant information and data. To this end, he will work with the European Commission and the ECB to ensure complete consistency with the economic policy coordination framework provided for in the TFEU (art. 3 ESM Amended Treaty).

The amended ESM Treaty gives a clear mandate to the Executive Director to assess the debt sustainability of MS. It offers an explicit legal basis for cooperation between the European Commission and the Executive Director, inside and outside financial assistance. It clarifies that the ESM should not coordinate economic policies among the ESM member, for which the Union legislation provides the necessary provisions (Dias & Zoppè, 2021, p. 2).

The close cooperation between the European Commission and the ESM, represented by its Executive Director, is institutionalized through a memorandum, subject to the approval of the Board of Directors by mutual agreement (art. 13.8 ESM Amended Treaty). From this perspective, the European Commission ensures consistency with European Union legislation, particularly with the economic policy coordination framework. At the same time, the ESM performs its analysis and evaluation from a lender's perspective (recital 5B Preamble ESM Amended Treaty).

In addition, the revised ESM Treaty provides that actions by the ECB or the Commission under the ESM Treaty commit only the ESM (recital 10 Preamble ESM Amended Treaty). In addition, it is warned that the European Commission will ensure that the financial assistance operations provided by the ESM are, where appropriate, compatible with European Union law and, in particular, with the coordination measures of the economic policy provided for in the TFEU (art. 12.4 ESM Amended Treaty).

The amended Treaty also modifies the procedure for granting aid for financial stability, where the involvement of the Executive Director acquires a relevance that was not contemplated in the original ESM Treaty. Its activity has acquired a prevalence in the procedure for granting financial assistance. When a State addresses a request for financial aid, the President of the Board of Governors will entrust both the Executive Director and the

European Commission in contact with the ECB to carry out specific tasks jointly. These include assessing the existence of a risk to the euro area's financial stability as a whole or its MS, evaluating the actual or potential financing needs of the ESM Member concerned, and considering whether the public debt is sustainable and whether the financial stability assistance amount can be repaid. This evaluation will be performed transparently and predictably, allowing a sufficient margin of judgment. Such an assessment is expected to be carried out in conjunction with the IMF whenever appropriate and possible (art. 13.1 ESM Amended Treaty).

If the collaboration does not lead to a common opinion, the European Commission will perform the general evaluation of the sustainability of the public debt. At the same time, the ESM will evaluate the capacity of the State in question to repay the ESM (recital 11 B Preamble ESM Amended Treaty).

Likewise, based on the evaluations mentioned above, the Executive Director will propose to the Board of Governors granting financial assistance through one of the instruments provided for that purpose (art. 13.2 ESM Amended Treaty). Furthermore, the Board of Governors will entrust the Executive Director and the European Commission, in collaboration with the ECB, jointly and, when possible, together with the IMF, with the task to negotiate, with the ESM member in question, an MoU including the conditionality attached to the financial assistance. Unlike the original ESM Treaty, the European Commission and the Executive Director will sign the MoU on behalf of the ESM (art. 13.3 y 13.4 ESM Amended Treaty). Together with the IMF, they will supervise compliance with the conditionality attached to the financial assistance mechanism (art. 13.7 ESM Amended Treaty).

4 FINAL CONSIDERATIONS AND REFLECTIONS

The duration and persistence of the sovereign debt crisis led to creating a permanent instrument that would grant financial assistance to the countries of the Eurozone that had problems financing themselves autonomously. The creation and articulation of the ESM were not without problems. Due to its need to make its existence compatible with the provisions of the founding Treaties. As an international organization outside the system of agencies of the European Union, its nature does not prevent some European institutions, such as the Commission and the ECB, from having an impact highly relevant in the functioning of the ESM.

The revision of the ESM Treaty was initially proposed as an instrument that would transform the international organization of the ESM into an EMF, whose legal nature would be that of an EU agency with its legal personality, thereby including the future EMF within the institutional setting of the EU. EMF was driven by allowing the ESM acts to be accountable to the Commission, the Council, and the European Parliament and auditable by the CJEU. It quickly became plausible that such a transformation was impossible given the explicit and robust opposition of a significant group of MS. In any case, the aspiration to establish, in the future, an EMF: has not perished; it is like an underground stream, and it can emerge again, this time taking on a nature similar to that of the European Investment Bank (EIB) (Megliani, 2020, p. 685).

Likewise, the amendment of the ESM made it possible to add new functionalities and improve the financial assistance instruments and their operation. Among the new functions, the constitution of the ESM stands out as the SRF's instrument of last resort. The creation of this SRF facility is considered an essential condition to consolidate one of the pillars of the Banking Union.

In addition, it must be pointed out the clarification and precision of the criteria that must be met to access the different instruments, where the role of the Managing Director of

ESM has been reinforced. In any case, the governance system remains practically intact, and the improvement in the accountability of the ESM has been minimal. From this perspective, the amended ESM Treaty can be seen as a missed opportunity for a more comprehensive reform of the ESM.

Along these lines, one aspect to consider is the reputational cost of the financial assistance granted by the ESM acquired during the most severe years of the economic and financial crisis derived from the sovereign debt. The ESM, regardless of its welfare activity, lacks reputational prestige and has become so politically expensive that it will be used only in extreme circumstances when it is too late, and there are no possible alternatives. An example is the financial program adopted by the ESM in the context of the consequences derived from the Covid-19 crisis. Despite the favorable conditions, no States have applied for the loans offered by the ESM; other less expensive options, not only from the economic point of view but also politically, have been preferred.

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Article

La cláusula de la nación más favorecida según la Comisión de Derecho Internacional *(In Spanish)*

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Exhaustion of domestic remedies, ICSID, Most Favored Nation Clause (types), International Law Commission, International Court of Justice, GATT, Incorporation by reference, Investment/Investor, WTO, Developing countries, Reciprocity, Ejusdem generis Rule, Rules of interpretation, Procedural Rules, Bilateral Investment Treaties (models) National Treatment, Treatment no less favorable, Arbitral Tribunals.

ABSTRACT:

International economic law has not been the object of particular attention by the International Law Commission. The only point that has been dealt with is the one related to the so-called Most Favored Nation Clause. In 1978 the Commission elaborated a draft of articles, trying to induce from a practice of bilateral treaties useful rules for future negotiators and legal operators. The draft did not go further for different reasons. Years later, in 2006, the Commission decided to revisit the Clause, considering its massive inclusion in bilateral investment treaties and the problems raised by its interpretation. Focusing on the practice of arbitral tribunals, the Commission wondered, among other questions, about the scope of the Clause, an issue that revolved around the interpretation of the ejusdem generis rule and raised the central and highly controversial point of its applicability to procedural rules. The Commission understands that the Clause is applicable to the provisions on dispute settlement if that is the will of the parties and encourages the States to make it explicit; if not, the courts will have to do it. To facilitate its task the Commission proposes a series of factors. The Clause cannot, however, be invoked to alter the jurisdiction of the courts or the limits ratione personae, materiae and temporis of the treaty. Drawing the line between the jurisdiction of the court and the admissibility of the claim may be a complex task. The Commission concludes, in 2015, that the Clause has not changed in nature since the 1978 draft was adopted. It is up to the States that negotiate the Most Favored Nation Clauses to decide whether or not they should include the provisions related to dispute settlement; failing that, the courts must do so, case by case, in accordance with the rules of interpretation codified in articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969), without it being

possible to simply transfer the interpretation of the Clause inserted in one treaty to that of another, even if its wording is identical.

PALABRAS CLAVES:

Agotamiento de recursos internos, CIADI, Cláusula de la Nación Más Favorecida (clases), Comisión de Derecho Internacional, Corte Internacional de Justicia, GATT, Incorporación por referencia, Inversión/Inversor, OMC, Países en desarrollo, Reciprocidad, Regla ejusdem generis, Reglas de interpretación, Reglas procesales, Tratados bilaterales de inversiones (modelos) Tratamiento Nacional, Tratamiento no menos favorable, Tribunales arbitrales

RESUMEN:

El Derecho internacional económico no ha sido objeto de la particular atención de la Comisión de Derecho Internacional. El único punto del que se ha ocupado es el relativo a la llamada Cláusula de la Nación Más Favorecida. En 1978 elaboró un proyecto de artículos, tratando de inducir de una práctica de tratados bilaterales reglas de carácter dispositivo útiles para futuros negociadores y operadores jurídicos. El proyecto no se convirtió en tratado por diferentes razones. Años después, en 2006, la Comisión decidió ocuparse de nuevo de la Clausula, considerando su inclusión masiva en los tratados bilaterales de inversiones y los problemas que planteaba su interpretación. Centrándose en la práctica de los tribunales arbitrales, la Comisión se preguntó, entre otras cuestiones, por el alcance de la Cláusula, cuestión que giraba en torno a la interpretación de la regla ejusdem generis y suscitaba el punto, central y muy controvertido, de su aplicabilidad a las reglas de carácter procesal. La Comisión entiende que la Cláusula es aplicable a las disposiciones sobre arreglo de diferencias si esa es la voluntad de las partes y alienta a los Estados a que lo expliciten; si no, deberán hacerlo los tribunales. Para facilitar su tarea la Comisión propone una serie de factores. La Cláusula no puede, sin embargo, ser invocada para alterar la competencia de los tribunales ni los límites ratione personae, materiae y temporis del tratado. Fijar la línea entre la competencia del tribunal y la admisibilidad de la demanda puede ser una tarea compleja. La Comisión concluye, en 2015, que la Cláusula no ha cambiado de naturaleza desde que se adoptó el proyecto de 1978; compete a los Estados que negocian las Cláusulas de la Nación Más Favorecida decidir si éstas deben incluir o no las disposiciones relativas al arreglo de diferencias; en su defecto, deberán hacerlo los tribunales, caso por caso, conforme a las reglas de interpretación codificadas en los artículos 31 y 32 de la Convención de Viena sobre derecho de los Tratados (1969), esto es, de acuerdo con sus propios términos, dentro de su contexto y conforme a su objeto y fin, sin que quepa trasladar sin más la interpretación de la Cláusula inserta en un tratado a la de otro, aunque su redacción sea idéntica.

MOTS CLES :

épuisement des recours internes, CIRDI, clause de la nation la plus favorisée (types), Commission de droit international, Cour internationale de Justice, GATT, incorporation par renvoi, investissement/ investisseur, OMC, pays en développement, réciprocité, règle ejusdem generis, règles d'interprétation, règles procédurales, traités bilatéraux d'investissement (modèles), traitement national, traitement non moins favorable, tribunaux arbitraux

RESUME :

Le droit international économique n'a pas fait l'objet d'une attention particulière de la Commission de droit international. Le seul point traité a été celui de la clause dite de la nation la plus favorisée. En 1978, la Commission avait élaboré un projet d'articles essayant d'induire d'une pratique de traités bilatéraux des règles de caractère dispositif utiles pour les négociateurs et les opérateurs juridiques dans l'avenir. Le projet n'a pas conduit à l'adoption d'un traité pour différentes raisons. Quelques années plus tard, en 2006, la Commission a décidé de s'occuper à nouveau de la clause tenant en compte son inclusion massive dans les traités bilatéraux d'investissement et les problèmes de son interprétation. La Commission, concentrée sur la pratique des tribunaux arbitraux, s'est interrogé, parmi d'autres questions, sur la portée de la clause, un sujet lié à l'interprétation de la règle ejusdem generis, et ce qui suscitait le point, central et très controversé, de son applicabilité aux règles de caractère procédural. La Commission considère que la clause est applicable aux dispositions sur le règlement des différends si telle est la volonté des parties, et elle encourage aux états à l'exprimer ; autrement, ce sont les tribunaux arbitraux qui devront le faire. La Commission propose une série de facteurs afin de faciliter la tâche. La clause ne peut toutefois pas être invoquée pour modifier la compétence des tribunaux ou les limites ratione personae, materiae et temporis du traité. Établir la ligne entre la compétence du tribunal et la recevabilité de la requête peut être une tâche complexe. La Commission a conclu en 2015 que la nature de la clause n'a pas changé depuis l'adoption du projet de 1978. Il appartient aux états qui négocient les clauses de la nation la plus favorisée de décider si ces clauses doivent inclure des dispositions relatives au règlement des différends. Sinon, ce sont les tribunaux qui devront le faire, cas par cas, conformément aux règles d'interprétation codifiées aux articles 31 et 32 de la Convention de Vienne sur le droit des traités (1969), c'est-à-dire, conformément au sens ordinaire de ses termes, dans leur contexte et à la lumière de son objet et de son but, sans pouvoir transférer l'interprétation de la clause d'un traité à un autre traité même si la rédaction est identique.

CONTENTS:

1 MARCO DE REFERENCIA

El Derecho internacional económico no ha sido, precisamente, objeto de la particular atención de la Comisión de Derecho Internacional en su tarea de codificación y desarrollo progresivo del Derecho Internacional. El único punto dentro de ese rubro del que se ha ocupado a lo largo de los años es el relativo a la llamada cláusula de la nación más favorecida (CNF), primero entre 1967 y 1978, siendo su fruto un proyecto de artículos sin fortuna [1], y luego, entre 2009 y 2015, cuando se conformó con la adopción del resumen y conclusiones del informe final de un grupo de estudio [2].

La cláusula de la nación más favorecida es una de las técnicas indirectas -como también lo son las cláusulas de tratamiento nacional y de reciprocidad- de las que puede servirse un tratado para determinar el contenido concreto de derechos y obligaciones de las partes y de sus beneficiarios. Su propósito, en septuagenarias palabras de la Corte Internacional de Justicia, en la sentencia de 27 de agosto de 1952 que dirimió la controversia surgida entre Estados Unidos y Francia sobre los derechos de los nacionales del primero en un Marruecos bajo protectorado francés, es establecer y mantener en todo momento una igualdad fundamental, sin discriminación entre los países interesados, evitando situaciones de relativa desventaja respecto de terceros que han negociado con más habilidad o posteriormente [3].

El proyecto de 1978 se elaboró sobre una práctica de tratados bilaterales de amistad, comercio, navegación y relaciones consulares, que eran su nicho tradicional. Se trataba de inducir una serie de reglas que, con carácter dispositivo (art.29), sirviese a los negociadores para precisar la redacción de las CNF y facilitase su interpretación por los operadores jurídicos.

En absoluto se pretendió alumbrar una norma de derecho internacional general aplicable en defecto de una obligación asumida mediante tratado (art.7). El proyecto advertía que no cabía una aplicación retroactiva de sus artículos -lo que no dejaba de ser superfluo, dado el carácter dispositivo de sus reglas- y dejaba a salvo los supuestos de sucesión de Estados, responsabilidad internacional o apertura de hostilidades (arts. 27 y 28).

[1] La Comisión de Derecho Internacional se interesó por vez primera en la CNF en 1964 en el marco del examen de "Los tratados y los terceros Estados". En 1967, considerando su importancia como instrumento de política comercial, la Comisión decidió inscribir la cuestión de "la CNF en el derecho de los tratados" en su programa de trabajo. Once años después, en 1978, aprobó un proyecto de artículos que elevó a la Asamblea General de las Naciones Unidas. En los diez años siguientes la Asamblea General invitó a los Estados miembros a formular observaciones. Finalmente, en 1991 (decisión 46/416, de 9 de diciembre de 1991), acordó dar carpetazo al proyecto "trasladando(lo)…a la atención de los Estados miembros y Organizaciones intergubernamentales interesadas a fin de que, en su caso, lo tomen en consideración según convenga".

[2] En 2006 el grupo de trabajo sobre el programa a largo plazo de la Comisión de Derecho Internacional se planteó la oportunidad de volver sobre la CNF. Al año siguiente un grupo de trabajo informal examinó la cuestión. En 2008 la Comisión decidió inscribirla en su programa. En 2009 constituyó un grupo de estudio. Su fruto fue un informe final cuyo resumen y conclusiones adoptó la Comisión el 23 de julio de 2015.

[3] Véase en ICJ Reports, 1952, p. 176 ss.

Ocioso es decir que los derechos de las partes y beneficiarios de una CNF tienen su base en el tratado que la inserta, como ya advirtió la Corte Internacional de Justicia en la sentencia de 22 de julio de 1952 al resolver sobre las excepciones preliminares planteadas por Irán en el caso de la Anglo-Iranian Co. planteado por el Reino Unido [4], y que el tratamiento más favorable que se busca se encuentra en los tratados suscritos con terceros por quien(es) lo concede(n), aunque no ha de descartarse que dicho tratamiento se localice, a menos que se desprenda otra intención de las partes, en la legislación o prácticas internas (fuente natural, por otro lado, de la llamada cláusula de tratamiento nacional).

El tratamiento de la nación más favorecida es -a diferencia de la incorporación por referencia- cambiante, ya que cambiantes -además de indeterminados- son los textos a los que remite.

Consecuentemente, el trato recibido en virtud de la CNF puede no sólo mejorar, sino también empeorar, a no ser que de la redacción de una concreta cláusula se desprenda la consolidación de las ventajas (v., por ej., art. II.1 GATT). En el asunto, ya mencionado, de los Derechos de los nacionales de los Estados Unidos en Marruecos, la Corte consideró incompatible con la intención de las partes la pretensión norteamericana de seguir beneficiándose de tratados consulares concertados por Marruecos con terceros países, ya terminados.

2 SOBRE LA NATURALEZA Y ALCANCE DE LA CLÁUSULA DE NACIÓN MÁS FAVORECIDA

La cláusula de nación más favorecida puede ser unilateral o sinalagmática.

a. En el primer caso, sólo una de las partes concede a la otra (u otras) el trato de la nación mas favorecida; en el segundo, las partes se conceden mutuamente dicho trato. Las cláusulas unilaterales se vinculan históricamente a relaciones desiguales (por ej., entre las partes en un tratado de paz, con vencedores y vencidos), pero pueden responder a otras circunstancias, como la naturaleza de las cosas (por ej., el disfrute de una vía fluvial o un canal de navegación) o un propósito asistencial (cuando la concede un país desarrollado a otro en vías de desarrollo). Cabe que la unilateralidad sea puramente formal, si el Estado que concede el trato más favorable se cobra la gracia por otras vías.
b. En cuanto a las cláusulas sinalagmáticas, los beneficios que las partes obtienen de ellas pueden no ser equiparables, pues las cláusulas operan desigualmente, según sea el nivel de trato de cada una de ellas con terceros y los límites y excepciones que incorporen.

Asimismo, las CNF pueden ser incondicionales o condicionadas. La condición más característica de las sinalagmáticas es la del trato recíproco, por la que se concede al beneficiario el trato del tercero más favorecido siempre que esté dispuesto a pagar con la misma moneda o su equivalente al concedente [5].

En cuanto al alcance de la cláusula, los negociadores gozan de libertad para precisar su objeto material, los beneficiarios y la identidad de los terceros que sirvan de referencia. Los problemas surgen cuando la cláusula calla o es incompleta. El límite objetivo más característico se encuentra en la regla eiusdem generis, según la cual la disposición cuyo

[4] Véase en I.C.J. Reports, 1952, p.93 ss.

[5] El proyecto de 1978 distingue entre cláusulas *incondicionales*, cláusulas *condicionadas* y cláusulas sometidas a la condición de *trato recíproco* (arts. 11, 12 y 13). El proyecto ofrece algunas precisiones (arts. 15, 16, 18, 22) expresa la cohabitación de la CNF con la cláusula de tratamiento nacional (art. 19) y se ocupa del factor tiempo (nacimiento, suspensión y terminación) de los diferentes tipos de CNF (arts. 20 y 21).

beneficio se pretende ha de identificarse con el objeto propio de la cláusula, el cual se presume -en defecto de otra intención de las partes- coincidente con el del tratado en que se inserta. La regla no es de fácil aplicación, como veremos a continuación.

3 SOBRE EL "NO" CONVENIO DE CODIFICACIÓN Y DESARROLLO PROGRESIVO EN SEDE DE LA COMISIÓN DE DERECHO INTERNACIONAL

El proyecto de artículos de la Comisión no condujo a la convocatoria de una Conferencia intergubernamental que hiciera de él un nuevo Convenio de codificación y desarrollo progresivo.

Entre las razones que se han dado cabe mencionar:

a. El recelo de un buen número de Estados ante la falta de una disposición específica sobre la excepción de las uniones aduaneras y el temor de que el proyecto de artículos fuera un obstáculo para los procesos de integración regional. Los objetivos de los miembros de una unión aduanera o de una zona de libre cambio, se verían, en efecto, frustrados si Estados ajenos pudieran acceder a sus ventajas en virtud de una CNF. De ahí la exclusión del supuesto en la práctica totalidad de los tratados (el propio GATT lo recoge en su art. XXIV). Si dicha práctica es, para unos, la prueba de una norma general que salva la imprevisión de los negociadores, para otros demuestra todo lo contrario. En 1978 la Comisión de Derecho Internacional no se atrevió a mencionar la excepción como norma general dada la oposición de los países -entonces- socialistas.
b. La percepción de que protegía insuficientemente los intereses de los países en desarrollo; y ello a pesar de que el proyecto incorpora reglas especiales en relación con estos países (sistema de preferencias generalizadas, acuerdos entre Estados en desarrollo dentro de organizaciones intergubernamentales propias, reglas sobrevenidas en beneficio de estos países) (arts. 23, 24, 30); así como con el tráfico fronterizo (art. 25) y los países mediterráneos (art. 26). La claúsula de nación más favorecida clásica -sustancialmente un medio para asegurar la no discriminación entre Estados o los beneficiarios de una determinada regulación- no parece idónea en relaciones con partes desiguales; de ahí que en las relaciones de países desarrollados con países en desarrollo se aplique el principio contrario, el de la discriminación, que se traduce en una especie de desigualdad compensadora, principio esencial del nuevo orden económico internacional que hizo su camino al hilo del proceso de descolonización. Esto daría pie a las CNF de dirección única, concedidas por los países desarrollados a los países en vías de desarrollo sobre bases, a su vez, no discriminatorias entre quienes pertenecían a una misma categoría. El tratamiento preferencial de los países en vías de desarrollo por los países desarrollados, sin reciprocidad, es un componente del sistema GATT (y hoy de la OMC).
c. La impresión de que no expresaba con claridad la compleja relación entre las CNF de los tratados bilaterales y los tratados multilaterales

4 LA REACTIVACIÓN DE LA CLÁUSULA DE NACIÓN MÁS FAVORECIDA POR PARTE DE LA COMISIÓN DE DERECHO INTERNACIONAL A PARTIR DEL AÑO 2006

Varios fueron los motivos por los que en 2006 la Comisión de Derecho Internacional decidió ocuparse de nuevo de la CFN, destacando entre ellos:

a. La extensión del campo de aplicación de las CNF, que ya eran piedra angular del GATT (art. I), en el marco de los acuerdos OMC.
b. La inclusión masiva de las CNF en los tratados bilaterales de inversiones y acuerdos de integración regional que prosperaron a partir de la década de los ochenta del pasado siglo; y,
c. los problemas que en la práctica venía planteando la interpretación de las CNF llegado el momento de su aplicación, especialmente en relación con los mencionados tratados de inversiones, dados los pronunciamientos divergentes y hasta contradictorios de los tribunales arbitrales.

La Comisión tuvo muy pronto claro, teniendo en cuenta las observaciones de un buen número de Estados, que no se trataba ahora de revisar y actualizar el proyecto de artículos de 1978, que seguía siendo una base válida como punto de partida, sino de orientar a los negociadores de tratados susceptibles de incluir CNF y de identificar las tendencias que la práctica, especialmente en la aplicación de los tratados de inversiones, revelaba sobre su interpretación.

El grupo de estudio se desprendió enseguida, justificadamente, del examen de la CNF en el marco de la OMC. La CNF -multilateral, automática e incondicional- baña todo el sistema, primero del GATT y, luego, de la OMC. Del comercio de bienes se extendió a los servicios y a los aspectos comerciales de los derechos de la propiedad intelectual. Con excepciones: uniones aduaneras y zonas de libre cambio, medidas de salvaguardia, tratamiento especial y diferenciado de algunos supuestos…El grupo de estudio entendió que esta Organización cuenta con un sistema cerrado de arreglo de controversias capaz de unificar doctrina.

5 EL ANÁLISIS DE LA CLÁUSULA DE NACIÓN MÁS FAVORECIDA DESDE EL PUNTO DE VISTA DE SU APLICACIÓN E INTERPRETACIÓN A LA LUZ DE LOS TRIBUNALES ARBITRALES

No era esa, en cambio, la situación de los tribunales arbitrales llamados a decidir sobre las diferencias nacidas de la aplicación de los tratados bilaterales de inversiones. De ahí que el grupo de estudio se volcara en la práctica de esos tribunales, a la que dedicó la parte más extensa de su informe.

Tres son los aspectos que, particularmente le interesan desde el punto de vista de su aplicación e interpretación:

i. la definición del beneficiario de la cláusula;
ii. la definición del tratamiento que se impone; y,
iii. la definición de su alcance, aspecto éste el más controvertido.

5.1 LA DEFINICIÓN DEL BENEFICIARIO DE LA CLÁUSULA;

En relación con el primer aspecto, recordemos lo que dispone el proyecto de artículos de 1978. Según el proyecto, al acordar la CNF un Estado contrae la obligación de otorgar a otro (o a las personas o cosas que se encuentran en una relación determinada con él), un trato no menos favorable que el tratamiento más favorable conferido a un tercer Estado (o a las personas o cosas que guardan con éste idéntica o análoga relación) (v. arts. 4 y 5). La definición ha sido criticada por su falta de claridad: ¿de qué personas se trata? ¿de qué cosas? ¿de qué relación? El principio ejusdem generis o de especialidad es el a veces endiablado eje sobre el que gira la aplicación de la cláusula (arts. 9 y 10).

Centrado en los tratados bilaterales de protección de inversiones, el informe del grupo de estudio entiende que los beneficiarios son, en este caso, las inversiones y/o los inversores de un Estado, en circunstancias similares a las inversiones y/o inversores del

tercer Estado y satisfaciendo el principio ejusdem generis. El problema de definir que se entienda por inversor e inversión tiene un carácter general que rebasa el ámbito de la CNF.

5.2 LA DEFINICIÓN DEL TRATAMIENTO QUE SE IMPONE

En relación con el segundo aspecto, cabe preguntarse en qué consiste un tratamiento no menos favorable. No obstante, en último término, las dudas que puede plantear la comparación entre el tratamiento previsto en el tratado suscrito por el Estado que contiene la CNF y el tratamiento que ofrece el tratado suscrito con el tercer Estado se resuelven atendiendo a la voluntad del beneficiario, pues es éste el que al invocar la CNF está haciendo su propio juicio de valor estimando que le conviene su aplicación (aunque objetivamente puede que no sea así).

5.3 LA DEFINICIÓN DE SU ALCANCE

El tercer aspecto es, como ya hemos advertido, el más problemático.

Como ya se decía -y dice- en el artículo 9 del proyecto de 1978, una CNF permite adquirir únicamente los derechos que entran dentro de los límites de la materia objeto de la cláusula. Se tata de la regla ejusdem generis. Partiendo de esta base, ¿es aplicable la CNF a las reglas de carácter procesal o sólo a las reglas sustantivas o de fondo?

Esta interrogante-árbol cuenta con ramificaciones: 1) ¿permite la CNF invocar un procedimiento de arreglo de diferencias no previsto en el tratado de base, pero sí en el tratado suscrito con el tercer Estado?; 2) ¿permite la CNF extender un procedimiento de arreglo a diferencias no previstas en el tratado de base, pero sí por el tratado suscrito con el tercer Estado?; y, 3) permite la CNF prescindir del plazo de espera (seis, doce, dieciocho meses) que impone el tratado de base para acudir al arbitraje tras acudir antes preceptivamente a la jurisdicción interna, plazo que no existe en el tratado suscrito con el tercer Estado?

La interrogante-árbol encontró una primera respuesta hace muchos años, en la sentencia arbitral pronunciada el 6 de marzo de 1956 en el asunto Ambatielos (Reino Unido/Grecia), que recomendó atender a la intención de las partes según se deduzca de una interpretación razonable del tratado y estimó que la administración de justicia era parte importante de los derechos de los comerciantes y debía ser, por ello, incluida en la expresión todas las cuestiones relativas al comercio y la navegación a la que hacía referencia la correspondiente CNF [6]. Cuatro años antes, en el caso de la Anglo-Iranian Oil Co. ya mencionado, la Corte Internacional de Justicia había declarado, por el contrario, que la CNF no tenía nada que ver con los asuntos jurisdiccionales entre Estados.

En el arbitraje de inversiones fue la sentencia en el asunto Maffezini c. Reino de España (2001) la que abrió la caja de Pandora, al permitir a Maffezini plantear una demanda en el marco del CIADI sin haber transcurrido los dieciocho meses previstos en el tratado hispano-argentino tras la interposición de una demanda ante los tribunales internos, pero no en el hispano-chileno, invocado en aplicación de la CNF [7].

[6] Véase en RIAA, XII-91.

[7] El tribunal advirtió que, en todo caso, había cuatro situaciones en que no cabía invocar eficazmente la CNF: 1) cuando una parte contratante ha condicionado su consentimiento a la obligación de agotar los recursos internos; 2) cuando el tratado articula el arreglo de diferencias sobre la base de una disposición de *opción irrevocable*; 3) cuando se pretende cambiar una instancia de arbitraje específicamente acordada (por ej. CIADI) por otra; y 4) cuando las partes han acordado un sistema de arbitraje muy institucionalizado con reglas de procedimiento precisas. Esta relación de supuestos era, por lo demás, abierta a la posibilidad de que se identificaran otros elementos de *política pública* limitativos del funcionamiento de la CNF.

Las decisiones posteriores de otros tribunales arbitrales se presentaron en orden disperso. Unas seguían Maffezini (por ej. Siemens, AWG, Camuzzi); otras lo contestaban (Salini, Impregilo, Telenor, Plama, Wintershall…). En último término, lo que estaba en discusión era la intención de las partes en dar mayor o menor recorrido a la CNF y la presunción que debía tomarse, si debía tomarse alguna, como punto de partida (Plama, Telenor, Wintershall, muy estrictos; Austrian Airlines, Suez, interpretación sin prejuicios).

6 CUESTIONES ABORDADAS POR LOS TRIBUNALES EN LA INTERPRETACIÓN DE LA CLÁUSULA MÁS FAVORECIDA SEGÚN LA COMISIÓN DE DERECHO INTERNACIONAL

El grupo de estudio de la Comisión de Derecho Internacional concluyó en su informe final que eran tres las cuestiones abordadas por los tribunales arbitrales al interpretar las CNF en relación con las disposiciones relativas al arreglo de diferencias. A saber:

a) La primera cuestión era discernir si la CNF era susceptible de aplicarse a las disposiciones sobre arreglo de diferencias. Su respuesta es afirmativa. Así será si esa es la voluntad de las partes. ¿Lo han hecho? Ese es el punto. Las partes pueden pronunciarse expresamente en el tratado, en un sentido u otro; lamentablemente, no suelen hacerlo, prefieren la ambigüedad.
Internistas e internacionalistas suelen discrepar. Los últimos parecen más decididos a exigir una intención de las partes clara e inequívoca para admitir la extensión de la CNF a las disposiciones relativas al arreglo de diferencias, dado que en el orden internacional los derechos sustantivos no comportan automáticamente derechos procesales que garanticen su disfrute.

b) La segunda cuestión estriba en determinar si las condiciones relativas a las disposiciones sobre arreglo de diferencias que pueden invocar los inversores tienen incidencia sobre la competencia del tribunal arbitral. La CNF no puede ser aprovechada para alterar dicha competencia, como no lo puede ser para modificar los límites ratione personae, ratione materiae o ratione temporis del tratado. El punto requiere tirar la línea entre las condiciones de competencia del tribunal y las de la admisibilidad de una demanda.
La distinción no es fácil de establecer. Para un buen número de tribunales el plazo de dieciocho meses establecido por el tratado hispano-argentino era una condición previa al establecimiento de la competencia; no respetarlo equivalía a privar de competencia al tribunal (ICS, Daimler, Financial Services A.G…), a menos que se probase que era intención de las partes aceptar modificaciones de la competencia a través de la CNF; para otros era una cuestión de admisibilidad, susceptible de beneficiarse de la CNF (Hochtief, Teinver…).
El Informe del grupo de estudio observa que de los dieciocho casos en los que, hasta la fecha, se había invocado una CNF con éxito, doce se referían a esta disposición estableciendo un plazo de abstinencia de dieciocho meses. La CNF fue para ellos la bula que les permitía comer carne en cuaresma. Cuando se ha tratado de utilizar la CNF para hurtarse a otra clase de disposiciones concernientes al arreglo de controversias (como aprovechar un procedimiento de arreglo no previsto por el tratado de base, pero sí por el tratado con el Estado tercero, o extender su aplicación a diferencias no contempladas por aquél) la maniobra ha fracasado en la mayoría de los casos.
Nuevamente aquí, internacionalistas e internistas pueden discrepar. Para los primeros la disposición sobre los dieciocho meses se emparenta como una forma de expresión de la regla del agotamiento de los recursos internos. Los

segundos pueden considerarla un simple obstáculo al derecho del inversor que contraría el objeto principal de un tratado de inversiones.

c) La tercera cuestión se pregunta por los factores pertinentes en el proceso de interpretación cuando se trata de determinar si la CNF del tratado se aplica a las condiciones previstas para invocar las disposiciones sobre arreglo de diferencias. El grupo de estudio ha considerado algunos de esos factores. Así, el principio de contemporaneidad; la pertinencia de los travaux préparatoires; la práctica convencional de las partes; o el sentido del contexto, en particular el equilibrio entre disposiciones específicas y disposiciones generales y el principio expressio unius.

Hay que tener en cuenta el hecho de que -amén de la simetría o asimetría de las partes en cuanto a su poder de negociación- hay Estados con políticas de promoción inversora que se traducen en la disposición de un modelo de tratado a partir del cual negocian los ajustes requeridos por la otra parte. Ambos puntos han beneficiado tradicionalmente a los países desarrollados en sus relaciones con los países del llamado tercer mundo, pero también están presentes en las relaciones norte-norte y sur-sur. Un examen comparado revela, por otro lado, que los rasgos comunes a estos tratados permiten reducir los modelos a tres o cuatro, que se van enriqueciendo recíprocamente con la experiencia que se deriva de su práctica y jurisprudencia.

7 CONCLUSIONES DEL GRUPO DE ESTUDIO DE LA COMISIÓN DE DERECHO INTERNACIONAL

Las conclusiones del grupo de estudio, endosadas por la Comisión de Derecho Internacional, han sido:

- Las CNF no han cambiado de naturaleza desde la época en que se adoptó el proyecto de artículos de 1978, que sigue siendo una base para su aplicación e interpretación.
- La interpretación de las CNF debe acometerse aplicando las reglas de los artículos 31 y 32 de la Convención de Viena sobre Derecho de los Tratados (1969).
- La cuestión central que plantea la interpretación de las CNF es la de la determinación de su alcance y a la aplicación de la regla ejusdem generis.
- La aplicación de las CNF a las disposiciones relativas al arreglo de diferencias en el arbitraje de inversiones ha aportado una nueva dimensión a su consideración.
- Compete a los Estados que negocian las CNF decidir si éstas deben incluir o no las disposiciones relativas al arreglo de diferencias; en su defecto, deberán hacerlo los tribunales, caso por caso.
- La Comisión subraya que las técnicas de interpretación consideradas en el informe final del grupo de estudio están destinadas a ayudar a la aplicación e interpretación de las CNF [8].

Dejémoslo, pues, muy claro. La CNF inserta en un tratado ha de interpretarse de acuerdo con sus propios términos, dentro de su contexto y conforme a su objeto y fin, aplicándose las reglas de interpretación codificadas en los artículos 31 y 32 de la Convención de Viena sobre derecho de los Tratados (1969).

La interpretación de la CNF ha de hacerse caso por caso. La interpretación de la CNF inserta en un tratado no debe trasladarse, sin más, a la de una CNF inserta en otro tratado, aunque su redacción sea idéntica.

[8] Las referencias a los trabajos de la Comisión de Derecho Internacional pueden consultarse en la página *web* de la Comisión *legal.un.org/ilc* Ahí, *Analitical Guide to the work of the ILC, Topics completed. 1.3 Most-Favoured Nation Clause.*

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Article

Is a United States of Europe possible?

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KEYWORDS:

United States of Europe; European Federalism; European Treaty Reforms; Europarties; People and Peoples of Europe

ABSTRACT:

The federalist desire for a United States of Europe is impossible today because it is not widely shared by national political elites and public opinion. However, progressive European integration has its own dynamics, driven mainly by economic factors. For the time being, this ongoing process is not resulting in a federation because of the political differences between the member states: the confrontation between pro-Europeans and Eurosceptics has become a structural characteristic of the European Union, although the level of integration achieved would now be difficult to reverse.

PALABRAS CLAVES:

Estados Unidos de Europa; Federalismo Europeo; Reformas de los Tratados Europeos; Europartidos; Pueblo y Pueblos de Europa

RESUMEN:

La aspiración federalista de unos Estados Unidos de Europa hoy no es posible porque las élites políticas y las opiniones públicas nacionales no la comparten mayoritariamente. No obstante, la progresiva integración europea tiene una dinámica propia, impulsada sobre todo por razones económicas. De momento, este constante proceso no culmina en un Estado federal por las diferencias políticas entre los Estados miembros: la confrontación entre europeístas y euroescépticos se ha convertido en un rasgo estructural de la Unión Europea, aunque sea difícilmente reversible el nivel de integración alcanzado.

MOTS CLES :

États Unis d'Europe; Fédéralisme Européen, Réforme des Traités Européens; Europartis, Peuple et peuples d'Europe

RESUME :

L'aspiration fédéraliste d'uns États Unis d'Europe n'est pas possible aujourd'hui car les élites politiques et l'opinion publique de chaque des pays ne la partagent de façon majoritaire. Néanmoins la progressive intégration européenne à une dynamique propre, poussé sur tout pour des raisons économiques. Pour l'instant ce constant procès ne culmine en un État fédéral à cause des différences politiques entre les États membres : la confrontation entre européistes et eurosceptiques est devenu un trait structurel de l'Union Européenne, bien que le niveau d'intégration obtenu soit difficilement réversible.

1 MAIN TEXT

Let me answer this question now, before further analysis: obviously not at this time. Realists need not discourage those of us who identify with the project of European federalism and does not prevent the defense of this worthwhile idea in the long term, even if it is still with minority support. To begin with, it should be remembered that the idea of progression towards European integration is historic (following the early antecedents of the Middle Ages, the Renaissance, and the Enlightenment, the first pro-European intellectual movements emerged in the 19th century), and, in this regard, everything changed with the creation of the European Community in 1957 (the Treaty of Rome), a huge historical achievement. It is true that, since then, progress has been gradual and sectoral without a final plan, while more and more states have integrated: from the original 6 to the current 27 members (with the sole exception of *Brexit*, an enormous fiasco), developing from a mere common market to a Union with a supranational political vocation.

In its 64-year history, a hybrid system has taken shape that is difficult to define: what is the European Union (EU)? It is more than just an international alliance of states, but less than a federal state. It is simultaneously confederal and federal, with intergovernmental and supranational elements. In short, as Jacques Delors (arguably the best President the Commission had between 1985 and 1995) said, it is an "UPO" ("Unidentified Political Object") which is not a state and has no people to represent, but which has many imperative competences binding on all its members. Basically, the EU remains a club of nation states that have found in this entity a way of dealing with globalisation in a (more or less) coordinated way in an attempt to preserve their interests. The situation is as follows: the EU is *supreme* in its domains (delegated by states and therefore reversible), but it is not *sovereign*. States could dissolve the EU, but not vice versa. This is because in the legislative lattice the states have ensured that the intergovernmental institutions (the two Councils) predominate over the supranational ones (the Commission, the European Parliament (EP) and the Court of Justice). The explanation is simple: the states do not want to have a European superstate ruling over them; as a result, the EU is a deliberately weak entity.

However, the EU objectively has enormous potential. It is: 1) the world's leading trading power, 2) the world's leading donor of development aid, 3) the world's second largest exporter of manufactured goods, 4) has a high per capita income, 5) has a high level of scientific development, 6) enjoys efficient inclusive social services, 7) has the world's largest diplomatic corps, and 8) if the armed forces of the 27 were added together, the EU would be the world's second largest military power, even without the UK. The big question is: does any of this do us Europeans any good? Hardly, because the EU has none of the attributes of a sovereign state: no real government, no single foreign policy, no army of its own, no fiscal power. To make this paradox clearer, just add up any global statistical index on trade, R&D, education, health, GDP and so on for the 27 as if they were a single state: the EU would automatically become the world's leading or second-ranking power, depending on the sector.

The obstacles to a United States of Europe are many, some objective and some subjective, some real and some apparent, and they are varied - political, economic, social and cultural - but in theory they could all be overcome. It is worth pointing out the enormous advantages of statehood for the EU: 1) its legitimacy would no longer only be derived from its results/benefits (when there are any), but would rest on the principle of European popular sovereignty accepted and assumed by the citizens (as is the case today with nation states), 2) a real division of powers (Executive/ Legislative / Judicial, with all their attributes), 3) a federal distribution of competences clearer than those existing today, 4) full economic and fiscal governance with a European Central Bank similar to the US Fed, 5) harmonised welfare

states, 6) real Euro-parties, not the virtual ones we have at present, 7) unified diplomatic, military and police forces, and 8) single representation in the UN, IMF, WB, WTO and others.

As the EU is nowhere near achieving these, it has moved forward blindly (when it does, because at times regression is clear) due to the lack of a clear strategic project giving it direction, and no such project exists because there is no consensus, so any specific debate regarding this issue would be very divisive today. The rhetoric is therefore maintained (*ever closer union*), which is indeterminate and non-committal, being an empty phrase to state that one wants "more Europe", without specifying what would be desirable to make it "better" than the current one. The EU has several shortcomings: it has representative limits, poorly accountability (elitist, technocratic and sometimes opaque) and it is only relatively effective in its responses to citizens' demands. It was certainly not up to the task during the Great Recession of 2008 because of its absurd determination to impose “sacrosanct” policies of austerity to control debt and deficits. In this regard, the lost decade deepened the gap between the winners (few) and the losers (many), and most negatively, discontent has almost always been capitalised on by the far right, particularly with the major refugee crisis of 2015, which was badly mismanaged by the EU. However, there has been a clear turnaround with the Covid-19 crisis since 2020.

In these circumstances: what is to be done? We could try to articulate the following proposals: 1) simplify the institutional system, which is objectively cumbersome, variegated and inefficient, and poorly understood by citizens from a subjective viewpoint, 2) streamline the overly complex procedural mechanisms that exist today and make them less obscure, 3) complete economic and monetary union and tackle banking and fiscal union in depth with a European Treasury and permanent Eurobonds (that said, what was radically novel was the creation of temporary bonds to deal with the pandemic), 4) shape a more credible and truly "common" foreign and defence policy, especially after the Western powers’ disaster in Afghanistan (August 2021) and 5) foster genuine civic solidarity among Europeans with more cultural impetus and more social redistribution. Clearly these objectives are very easy to state yet very difficult to put into practice because of the deep-rooted resistance they engender in the influential sectors of elites and public opinion that would rather “regress” to their national states.

One of the EU's major political problems is its poor democratic quality: it is true that it would be a mistake to extrapolate the democracy of nation states to the EU, which lacks their attributes, but there should be no excuse for not addressing the EU's representative and decision-making shortcomings. For example, the EU has imposed measures of far-reaching impact without real open and pluralistic debate: from austerity policies to intervention in the issues of wages, collective bargaining, pensions, and even administrative reforms. This happened with Greece with the bailouts and even forced a change of government in 2011 (from Papandreou to Papadimos) in 2011 and was repeated in Italy (from Berlusconi to Monti). In other words, the EU acted in an extremely intrusive manner without the will of Greek and Italian citizens being considered. So, on the one hand, there has been a deterioration in the democratic quality of nation states (in Eastern Europe this is already a very serious problem, particularly in Hungary and Poland), and on the other, this has not been compensated for at the supranational level because European democracy leaves much to be desired.

A specific problem of the EU is its strange, dysfunctional institutional architecture, with two Councils controlling national governments and three EU institutions (Commission, EP and Court of Justice) with fewer real powers (though these have been increasing). This is without mentioning the increasingly powerful, though opaque European Central Bank, perhaps the only materially federal institution the EU has, even if it does not (yet) have all the attributes of the US Fed which, in addition to deficit control, intervenes in growth and employment. Nevertheless, with Draghi and Lagarde there have been important advances,

though in a more attenuated way: the former's famous *do whatever it takes* was crucial to cut short the speculative assault on the euro. It is very difficult for citizens to identify with the current unbalanced, incomprehensible, and obscure EU institutional model. In this respect, the EP comes under particular scrutiny: although its functions have continued to grow, it (still) has some considerable limitations. For example: 1) it cannot decide on its seat (Brussels, Strasbourg and Luxembourg, a dysfunctional and costly nonsense in every sense), a matter of competence of the European Council by unanimity, 2) it has no "constituent power" in the Treaties because it is not *sovereign*, 3) it has no legislative initiative, this a monopoly of the Commission, 4) it cannot legislate on many non-communitised matters, 5) it lacks fiscal power (the famous *no taxation without representation* principle does not work here), 6) there is no dialectic between government majority and opposition minority, 7) there are no real Europarties (those that exist are virtual), 8) it represents neither national peoples nor the (still) non-existent "European People" (in theory, it represents European "citizens") and 9) if anything, not only is its work little known by the general public, it is also relatively non-transparent, although there have been certain recent improvements.

Despite these limitations, it must be recognised that the EP enjoys some advantages: 1) it is the most legitimate European institution as it is the only one elected by popular vote, 2) it cannot be dissolved in advance (its five-year legislatures are guaranteed), 3) it does not depend on any government and therefore has its own rules of procedure and agenda, and 4) it is not dominated by partitocracy because there are no real Europarties. What the EP lacks: 1) the power to legislate on matters currently reserved for the states, 2) the power to decide on its seat (the vast majority of MEPs favour Brussels as the only seat), 3) the power to turn the Council of the EU into a second chamber of the states, 4) the power to create genuine Europarties and 5) the power to elect the Commission on its own.

A classic argument of Europhobes and Eurosceptics is that, in the absence of a European People, a United States of Europe is impossible. They even go further: the current EU (which is not a state) seems to want to be one, which is supposedly inappropriate *per se*. Consequently, many of its decisions are illegitimate and undemocratic. Apart from the fact that democratic multinational states can exist (there are several examples), it is unfair to argue that the EU's undeniable democratic deficit renders its decisions illegitimate. This is because EU decisions are taken by democratic nation states, which means that the EU has at least indirect and derivative legitimacy.

This is wholly related to the question of the "European People" (a community of citizens, not an "ethnic" people, so by definition, a community of peoples). It is true that regular Eurobarometers show that the vast majority of the citizens of the 27 have a much higher primary attachment to their respective nation state than to the EU, and that the EU is accepted, per se, if it is *useful*. Therefore, instrumental support based on rational cost-benefit calculations clearly predominates. Considering this, the Great Recession of 2008 was doubly disastrous: 1) it has widened the gap between winners (few) and losers (many) and 2) it has strengthened the radical populist right as never before. However, the joint responses to Brexit and Covid-19 have provoked a significant turnaround. In short, this is an area where it is not easy to reconcile an attachment to primary national identities with one that is not merely pragmatic towards the EU. This is also the case not only because of the shortcomings identified above, but also because we do not even know what our final borders will be. As the question of incorporation remains open, it is impossible today for citizens to internalise a clear European territorial space: without a definitive "map" it is very difficult to take on board something as vague as "Europe" or even the EU as a state unto "itself" that defines a certain shared identity in the world. The other major critical argument is that Europe is so linguistically and culturally heterogeneous that federalisation would be impossible, not to mention the problem of not having a common lingua franca among Europeans (English is an imperfect substitute). India relativises both objections: India is as heterogeneous as the EU -

for example, some 500 languages and dialects are spoken and only 40% of citizens speak Hindi - and yet it is a single federal state.

Rather, the problem in this area is twofold: 1) public opinion today seems largely unprepared for a supranational scenario and 2) elites lend little support in shaping a pan-European sentiment. The European Treaties recognise "European citizenship", but as something derived from and secondary to national citizenship. Considering this, two suggestions could be made: 1) it would be very opportune for the media to stop including information on Europe as international or foreign news, because European affairs are no longer international or foreign at a practical level for its members, and 2) when European citizens travel or reside in another European country other than their country of origin, saying that they travel or reside "abroad" should be avoided.

In the economic sphere clear progress has been made in integration, although there are still too many weak areas, apart from the excessive prolongation of misguided orthodox austerity policies at any cost. What is true is that recently there has been a significant rectification with the approval of the substantial neo-Keynesian *Next Generation* funds from 2020-2021. However, economic and monetary union is not yet complete, despite successive emergency measures adopted after 2008 to save the euro. As yet there is no way to achieve fiscal union, create a European tax (levied by European authorities), or mutualise permanent debt (the temporary mutualisation to deal with the pandemic has been a positive step in that direction). Without a European Treasury, a European Debt Agency, and permanent Eurobonds, it is unlikely the euro will become a global currency (even though it is already the second most widely used currency in the world after the dollar) because it is has no state backing. The other problem remains that of the differing interests between the North and the South, as well as the East: it is very disappointing to see the debates on the 2021-2027 multiannual budget in which the Community share is reduced to a ridiculous 1% of GDP. Not to mention the incomprehensible tolerance of unjustifiable tax havens such as Ireland, Luxembourg, Cyprus and even the Netherlands, although improvements are beginning to be made in this respect.

Ultimately, particular responsibility lies with the political elites, who always prioritise the short term: the Europragmatists of the "central bloc" (Populars, Socialists and Liberals) are proving to be very apathetic, the Eurofederalists (Greens and a certain sector of the renewed radical Left) are weak and the Eurosceptics and Europhobes are strong (Conservatives and radical Right, with a sector of the "orthodox" radical Left). If the three "core bloc" groups - who are the decision-makers - were more consistent, it would not be difficult to extend federalist agreements with the Greens and the renewed radical Left and this would form a strong qualified majority in favour of greater supranationality. While this is not resolved, democratic deficit, the continuation of exhausted economic policies (though with not insignificant current rectifications) and the absence of a clear pan-European civic project will persist.

The consequence will be the ongoing consolidation of populists and identitarian nationalists of an essentialist type: EU authorities often complain about this issue but fail to act effectively to reverse it. Nevertheless, the 2019 EP elections halted what seemed to be an unstoppable rise of the *ultras*: for the first time since 1979 turnout increased (just over 50 per cent) and pro-European options were strengthened. In this respect, a certain strategic reorientation of the *extremists* who have ceased advocating an exit from the EU or its dissolution, to downgrading it from within to a return to the old European Economic Community without integrationist political vagaries is not without significance.

So, what is the EU lacking? Firstly, it must overcome the obsession with always reaching near-unanimous consensus solutions, which leads to paralysis or short-termism. The EU should lose its fear of open political debate as opposed to the criteria of technocratic

elites who supposedly know "what needs to be done", and so the need to increase the debate on ideas and projects. If this is not done and only short-term, almost unanimous agreements are sought, then populists will be given the opportunity to protest about all the EU's problems and oppose its dysfunctions. So, one can and must disagree with specific EU policies without fear of being labelled "Eurosceptic". Is there only one "right" way to build Europe? As this is clearly not the case, it would be much better to dare to accept the free engagement of alternative projects. To be more concrete: what should European federalists do? : 1) explain in greater detail the benefits of moving towards a United States of Europe that would both allow an improvement in democratic quality and afford more means for social redistribution, 2) make the prohibitive cost of a non-Europe clearly evident, because disunion would make us much more vulnerable and absolutely irrelevant in today's world, 3) debunk with facts the fallacies of the Europhobes whose theses, if applied, would provoke authoritarianism and underdevelopment, and 4) put pressure on the officially pro-European parties to be consistent with what they claim to defend ("more Europe").

What we do not see is any European state ready for such a project: Germany (the first European power) is absent, France has too "French" a project for Europe and, moreover, is divided on the subject (Macron/Le Pen), Italy has almost disappeared (although Draghi has given it a certain boost) and Spain is not making its voice heard (it could be more effective if it badgered Italy to be firmer on the idea of supranationalism) and, finally, there is a serious problem in the countries of Eastern Europe: democracies of extremely poor quality, some of which, such as Hungary, are no longer democracies, with a strong tendency towards exclusive nationalism and even xenophobia.

After *Brexit*, less progress has been made than might have been expected (it was always argued that the great obstacle to political integration was the UK): it is as if the EU has not learned its lesson, as the predominance of national interests over the pan-European vision is detrimental to the whole. Strong states have refused to increase EU budgets, which makes it very difficult to progress on research, technology, digital transition, climate crisis, migration, security, and other key issues. Nevertheless, it is true that the approval of extraordinary funds to tackle the pandemic represents a change: 750 billion euros, 45% in non-refundable subsidies and 55% as flexible loans with low interest rates and long repayment periods (Recovery and Resilience Mechanisms, React EU, Sure and others).

In conclusion, one can predict the following: the EU will not disintegrate (as the Europhobes would like) because there are too many shared basic interests (dismantling the single market is unimaginable), but neither will it be transformed into a true federal state in the medium term. We will continue with this hybrid and with this policy of moving forward gradually and sectorally without knowing exactly where we are going. All in all, this process is leading, if only for practical functional reasons, to ever greater supranational integration. There is no automatism (economics determines neither politics nor cultural identity), but the process is helping to move us confusingly towards a scenario that will increasingly resemble federalism.

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Article

Tax obligations arising from the importation of goods into the European Union: Artificial intelligence and environmental protection

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KEYWORDS:

Imports, taxation, customs, algorithms, blockchain, environment

ABSTRACT:

Paper analyses the use of artificial intelligence algorithms in the European Union, as a tool that assists with the traceability of imported goods and helps to ensure their effective taxation.

The validation of a block at the beginning of the importation process, and of each block at the different stages of the operation, can provide a green channel for the entry of goods into the European Union, and can be used to determine the customs value for the application of the Common Customs Tariff and the taxable amount for VAT purposes.

The adoption of an intra-EU consensus algorithm, in a blockchain network, becomes the mechanism that identifies the correct status of the different operations carried out in the importation of a good destined for the European Union.

It is therefore proposed that a green tax-customs channel should be designed for the importation of goods into the European Union, one that can detect and prevent tax and customs fraud, thereby reducing administrative costs, increasing tax collection efficiency, and contributing to the protection of the environment and the appropriate use of natural resources worldwide.

PALABRAS CLAVES:

Importaciones, fiscalidad, aduanas, algoritmos, blockchain, medio ambiente

RESUMEN:

Este trabajo analiza el uso de algoritmos de inteligencia artificial en la Unión Europea, como una herramienta que ayuda a la trazabilidad de los bienes importados y ayuda a asegurar su efectiva tributación.
La validación de un bloque al inicio del proceso de importación, y de cada bloque en las diferentes etapas de This la operación, puede proporcionar un canal verde para la entrada de mercancías en la Unión Europea y puede utilizarse para determinar el valor en aduana para la aplicación del Arancel Aduanero Común y la base imponible a efectos del IVA.
La adopción de un algoritmo de consenso intracomunitario, en una red blockchain, se convierte en el mecanismo que identifica el correcto estado de las diferentes operaciones realizadas en la importación de un bien con destino a la Unión Europea.
Por ello, se propone diseñar un canal fiscal-aduanero verde para la importación de mercancías a la Unión Europea, que pueda detectar y prevenir el fraude fiscal y aduanero, reduciendo así los costes administrativos, aumentando la eficiencia recaudatoria y contribuyendo a la protección del medio ambiente y el uso adecuado de los recursos naturales en todo el mundo.

MOTS CLES :

Imports, fiscalité, douanes, algorithmes, blockchain, environnement

RESUME :

Cet article analyse l'utilisation des algorithmes d'intelligence artificielle dans l'Union européenne, en tant qu'outil d'aide à la traçabilité des marchandises importées et contribue à assurer leur imposition effective.
La validation d'un bloc au début du processus d'importation, et de chaque bloc aux différentes étapes de l'opération, peut fournir une voie verte pour l'entrée des marchandises dans l'Union européenne et peut être utilisée pour déterminer la valeur en douane pour le l'application du tarif douanier commun et la base imposable à la TVA.
L'adoption d'un algorithme de consensus intra-UE, dans un réseau blockchain, devient le mécanisme qui identifie le statut correct des différentes opérations effectuées lors de l'importation d'un bien destiné à l'Union européenne.
Il est donc proposé de concevoir un circuit fiscal-douanier vert pour l'importation de biens dans l'Union européenne, capable de détecter et de prévenir la fraude fiscale et douanière, réduisant ainsi les coûts administratifs, augmentant l'efficacité du recouvrement des impôts et contribuant à la protection de l'environnement et l'utilisation appropriée des ressources naturelles dans le monde.

CONTENTS:

1 ARTIFICIAL INTELLIGENCE

The European Economic and Social Council points out that artificial intelligence (AI) is a catch-all term for a large number of sub(fields) such as: cognitive computing (algorithms that reason and understand at a higher (more human) level), machine learning (algorithms that can teach themselves tasks), augmen ted intelligence (cooperation between human and machine) and AI robotics (AI imbedded in robots). The central aim of AI research and development is, however, to automate intelligent behavior such as reasoning, the gathering of information, planning, learning, communicating, manipulating, detecting, and even creating, dreaming, and perceiving[1].

Nevertheless, it should be stressed that AI systems are more than just the sum of their software components. AI systems also comprise the socio-technical system around them. When considering AI governance and regulation, the focus should thus also be on the ambient social structures around it: the organisations and enterprises, the various professions, and the people and institutions that create, develop, deploy, use, and control AI, and the people that are affected by it, such as citizens in their relations with governments, businesses, consumers, workers, and even society as a whole[2].

In this sense, this paper proposes the automation of intelligent behaviours in the tax-customs field, which would facilitate the use of a green channel for the entry of imported goods into the European Union, within a homogeneous legal framework that guarantees values, rules and fundamental rights for all of the actors involved, by using blockchain technology.

The development of artificial intelligence in the tax-customs field must provide for an adequate response to any possible obstacles related to ethical and legal problems (principles of legality, equality and transparency); internal security issues (a legal, correct, transparent, efficient and reliable algorithm; that is well designed and programmed, resistant to cyber-attacks, etc.); external security issues (reliability of artificial intelligence in unknown, critical or unforeseen conditions; risks associated with the use of self-teaching software, etc.); the transparency, controllability, supervision and accountability of the decision-making process; ensuring that human intervention is necessary or advisable for the implementation automated behaviour; guaranteeing the privacy and protection of the data obtained; the provision of a common data access space; determining possible liability for any actions undertaken; the right to know the decision making logic and criteria employed by the

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[1] Opinion of the European Economic and Social Committee on "Artificial intelligence - The consequences of artificial intelligence on the (digital) single market, production, consumption, employment and society" (own-initiative opinion) (2017/C 288/01), adopted in section: 04/05/2017, adopted at plenary: 31/05/2017, rapporteur: Catelijne Muller, 1.7.

In the Proposal for a Regulation of the European Parliament and of the Council of Europe laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, Brussels, 21.4.202, COM(2021) 206 final, 2021/0106 (COD), it is stated that "artificial intelligence (AI) is a fast evolving family of technologies that can bring a wide array of economic and societal benefits across the entire spectrum of industries and social activities". Explanatory memorandum (1.1); Proposal for a Regulation of the European Parliament and of the Council of Europe laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (3).

Article 3 of this Proposal ("Definitions") defines Artificial Intelligence System as "software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with".

Annex 1 (AI techniques and strategies) referred to in Article 3, point 1, includes the following:

"(a) Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning;

(b) Logic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems;

(c) Statistical approaches, Bayesian estimation, search and optimization methods".

[2] Opinion of the European Economic and Social Committee on "White Paper on artificial intelligence - A European approach to excellence and trust" (COM(2020) 65 final) (2020/C 364/12), 2.7.

software; improvement of the currently available infrastructure; cross-border collaboration and cooperation; etc. In short, it is a pertinent, open and transparent process that aims to provide "understanding and knowledge" of the AI system.

Trade in goods is becoming increasingly interconnected and digitised. Access to data related to the importing of goods into the European Union and the resulting tax obligations require algorithms to be "thought", meaning that they are capable of learning to recognise, classify and select all the data needed to identify patterns and apply them.

In the year 2019, the European Parliament had already called on the Commission to "closely monitor technological developments, including the swift expansion of innovative Fintech business models and the adoption of emerging technologies such as AI, distributed ledger technologies (DLTs), cognitive computing and machine learning, in order to assess technological risks and potential loopholes and boost resilience to cyberattacks or system breakdowns, namely by promoting data protection", encouraging the competent authorities and the Commission to undertake a thorough assessment of the possible systemic risks involving DLT applications[3].

The importance of data for the economy and society has already been highlighted by the European Commission itself, which has also specified the issues at stake (availability of data; imbalances in market power; data interoperability and quality; data governance, data infrastructures and technologies; empowering individuals to exercise their rights; skills and data literacy; cybersecurity; etc.)[4].

In the European Union, within the legal sphere, respect for the rights enshrined in the Charter of Fundamental Rights of the European Union and, in particular, for the principles of data protection, privacy and security is essential[5].

Along the same lines, the 193-member General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), which met in Paris from the 9th to the 24th of November 2021, for its 41st session, has just officially adopted the Draft Text of the Recommendation on the Ethics of Artificial Intelligence, a landmark text that sets out the common values and principles that will guide the construction of the legal infrastructure necessary to ensure the healthy development of Artificial Intelligence[6].

The Recommendation aims to realise the benefits that AI brings to society and reduce the risks it entails, it is structured around data protection, the banning of social

[3] European Parliament resolution of 26 March 2019 on financial crimes, tax evasion and tax avoidance (2018/2121(INI)) (2021/C 108/02), 280.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European strategy for data, Brussels, 19.2.2020, COM (2020) 66 final, pp. 2-12.

[5] The Charter of Fundamental Rights of the European Union (2016/C 202/02) enshrines, in Article 7, respect for private and family life and, in Article 8, the protection of personal data. Furthermore, Article 16 of the Treaty on the Functioning of the European Union (consolidated version: Official Journal Num. C 326 of 26/10/2012 p. 0001 - 0390) states that: "1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union".

Thereby, a high level of data protection must be ensured, one that fully respects Regulation (EU) 2016/679 of the European Parliament and the Council, of 27 April 2016, on the protection of of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), digital rights, fundamental rights and ethical standards.

[6] Item 8.2. "Draft Text of the Recommendation on the Ethics of Artificial Intelligence" from the General Conference of the United Nations Educational, Scientific and Cultural Organization, 41st session, 41 C/73, 22 November 2021, Report of the Social and Human Sciences Commission, p. 6. Draft contained in an Annex to the Report.

bookmarking and mass surveillance, assisting with the task of monitoring and evaluation, and protecting the environment.

Regarding data protection, it states that "it is important that data for AI systems be collected, used, shared, archived and deleted in ways that are consistent with international law and in line with the values and principles set forth in this Recommendation, while respecting relevant national, regional and international legal frameworks.

Adequate data protection frameworks and governance mechanisms should be established in a multi-stakeholder approach at the national or international level, protected by judicial systems, and ensured throughout the life cycle of AI systems. Data protection frameworks and any related mechanisms should take reference from international data protection principles and standards concerning the collection, use and disclosure of personal data and exercise of their rights by data subjects while ensuring a legitimate aim and a valid legal basis for the processing of personal data, including informed consent.

Algorithmic systems require adequate privacy impact assessments, which also include societal and ethical considerations of their use and an innovative use of the privacy by design approach. AI actors need to ensure that they are accountable for the design and implementation of AI systems in such a way as to ensure that personal information is protected throughout the life cycle of the AI system"[7].

Thus, it is proposed, that among other areas of action related to data policy, Member States "should work to develop data governance strategies that ensure the continual evaluation of the quality of training data for AI systems including the adequacy of the data collection and selection processes, proper data security and protection measures, as well as feedback mechanisms to learn from mistakes and share best practices among all AI actors"[8].

Furthermore, Member States "should promote and facilitate the use of quality and robust datasets for training, development and use of AI systems, and exercise vigilance in overseeing their collection and use. This could, if possible and feasible, include investing in the creation of gold standard datasets, including open and trustworthy datasets, which are diverse, constructed on a valid legal basis, including consent of data subjects, when required by law. Standards for annotating datasets should be encouraged, including disaggregating data on gender and other bases, so it can easily be determined how a dataset is gathered and what properties it has"[9].

2 ARTIFICIAL INTELLIGENCE, TAXES, CUSTOMS AND THE ENVIRONMENT

Artificial intelligence is already being used as a tool for data accessibility, interoperability, compilation and communication in the tax-customs field, and in the environment and climate change areas.

In Spain, the Tax Agency (*Agencia Estatal de Administración Tributaria*) already pointed out in 2020 that "at present, information analysis systems are becoming increasingly important. In the coming years, the Tax Agency will take advantage of the potential offered by technology to complete the task of automating the processing of standard forms,

[7] Annex "Draft Text of the recommendation on the ethics of artificial intelligence", UNESCO General Conference, 41st session, 41 C/73, 22 November 2021, Report of the Social and Human Sciences Commission, Chapter III "Values and Principles", Right to Privacy and Data Protection, 32-34.

[8] Annex "Draft Text of the Recommendation on the Ethics of Artificial Intelligence", UNESCO General Conference, 41st session, 41 C/73, 22 November 2021, Report of the Social and Human Sciences Commission, Chapter IV "Areas of policy action", Policy area 3: Data Policy, 71.

[9] Annex "Draft Text of the Recommendation on the Ethics of Artificial Intelligence", UNESCO General Conference, 41st session, 41 C/73, 22 November 2021, Report of the Social and Human Sciences Commission, Chapter IV "Policy Areas", Sphere of action 3: Data Policy, 76.

something that began years ago. This will free up human resources for activities with greater added value, it guarantees uniform treatment for taxpayers, facilitates compliance with their obligations and contributes to eradicating tax fraud. Key to this will be technologies such as natural language processing, advanced data processing and artificial intelligence"[10].

Additionally, in relation to the prevention and suppression of smuggling, drug trafficking and money laundering, in 2021 it declared that "land, maritime and air surveillance is a fundamental pillar in the control of borders and territorial waters, in pursuit of the prevention and prosecution of smuggling crimes, including drug trafficking. Thus the means used to perform these missions, must be adapted to meet the new needs arising from the changes in the modus operandi employed by criminal organisations, incorporating new technological resources and systems to enhance investigations. This field of work will see a boost in the implementation of advanced technologies based on artificial intelligence, "Big Data" and data mining"[11].

On the other hand, the European Commission's White Paper on Artificial intelligence -A European approach to excellence and trust, explicitly states that "AI systems promise to help tackling the most pressing concerns, including climate change and environmental degradation"[12].

Along the same lines, in the recent Recommendation on the Ethics of Artificial Intelligence, adopted by UNESCO, it clearly states that "environmental and ecosystem flourishing should be recognized, protected and promoted through the life cycle of AI systems. Furthermore, environment and ecosystems are the existential necessity for humanity and other living beings to be able to enjoy the benefits of advances in AI.

All actors involved in the life cycle of AI systems must comply with applicable international law and domestic legislation, standards and practices, such as precaution, designed for environmental and ecosystem protection and restoration, and sustainable development. They should reduce the environmental impact of AI systems, including but not limited to its carbon footprint, to ensure the minimization of climate change and environmental risk factors, and prevent the unsustainable exploitation, use and transformation of natural resources contributing to the deterioration of the environment and the degradation of ecosystems"[13].

Accordingly, among the possible areas of policy action, it proposes that "Member States should introduce incentives, when needed and appropriate, to ensure the development and adoption of rights-based and ethical AI-powered solutions for disaster risk resilience; the monitoring, protection and regeneration of the environment and ecosystems; and the preservation of the planet. These AI systems should involve the participation of local and indigenous communities throughout the life cycle of AI systems and should support circular economy type approaches and sustainable consumption and production patterns. Some examples include using AI systems, when needed and appropriate, to:

(a) Support the protection, monitoring and management of natural resources.

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[10] Strategic Plan of the Tax Agency 2020-2023, Madrid, 28 January 2020, p. 40.

See also, in the Addendum to the Strategic Plan, the "Big data" project in the individual income tax, and the development of analysis tools based on the data obtained. These applications would be integrated into the Tax Agency's general information environment, so that they can be utilised together with the other information available, to improve fraud prevention and tax control, pp. 11-12.

[11] Resolution issued by the Directorate General of the State Tax Administration Agency, on 19 January 2021, which approves the general guidelines of the Annual Tax and Customs Control Plan for 2021.

[12] European Commission, Brussels, 19.2.2020 COM (2020) 65 final, p. 5.

[13] Annex "Draft Text of the recommendation on the ethics of artificial intelligence", UNESCO General Conference, 41st session, 41 C/73, 22 November 2021, Report of the Social and Human Sciences Commission, chapter III "Values and Principles", Environment and Ecosystem flourishing, 17-18.

(b) Support the prediction, prevention, control and mitigation of climate-related problems.
(c) Support a more efficient and sustainable food ecosystem.
(d) Support the acceleration of access to and mass adoption of sustainable energy.
(e) Enable and promote the mainstreaming of sustainable infrastructure, sustainable business models and sustainable finance for sustainable development.
(f) Detect pollutants or predict levels of pollution and thus help relevant stakeholders identify, plan and put in place targeted interventions to prevent and reduce pollution and exposure"[14].

Ultimately, the European Union must design a method of "responsible and efficient algorithmic environmental governance" within the framework of artificial intelligence.

For example, in Spain, Article 6 (digitalisation for the decarbonisation of the economy) of Law 7/2021, dated the 20th of May, on climate change and energy transition, states that the government will take measures to promote the digitalisation of the economy, which will contribute to achieving the decarbonisation objectives, within the framework of the Digital Spain 2025 strategy. The afore mentioned actions include point c: "using the potential offered by new technologies, such as Artificial Intelligence, to move towards a green economy, including, among other things, the creation of algorithms which are energy-efficient by design".

The development of these data discovery, access, management and exchange infrastructures can help to manage effective and efficient green channels that interlink tax compliance with the implementation of global environmental policies (priority measures related to climate change, the circular economy, zero pollution, biodiversity, deforestation, etc.).

The European Union is taking major steps towards the introduction of artificial intelligence, particularly in relation to the customs area.

Thus, in the European Council conclusions on "Taking the Customs Union to the Next Level: A Plan for Action", dated 21 December 2020[15]:

- The European Commission is invited to elaborate on a detailed description of the tasks, the role, the business model and positioning of the EU Joint Analytics Capabilities in order to further strengthen the efficiency and create an added value to the risk management strategy; and providing a legal and financial assessment including issues of data protection and data security, bearing in mind the respective competencies and resources of the Member States and the Commission in the area of risk management and controls.
- The importance of close cooperation with Member States when developing the EU Joint Analytics Capabilities is underlined.
- The Commission and Member States are encouraged to assess the possible use of certain Passenger Name Record data for specific purposes of customs controls and

[14]Annex "Draft Text of Recommendation on the Ethics of Artificial Intelligence", UNESCO General Conference, 41st session, 41 C/73, 22 November 2021, Report of the Social and Human Sciences Commission, Chapter IV " Areas of Policy Action", Policy area 5: Environment and Ecosystems, 85.

Furthermore, it is also noted that: "When choosing AI methods, given the potential data-intensive or resource-intensive character of some of them and the respective impact on the environment, Member States should ensure that AI actors, in line with the principle of proportionality, favour data, energy and resource-efficient AI methods. Requirements should be developed to ensure that appropriate evidence is available to show that an AI application will have the intended effect, or that safeguards accompanying an AI application can support the justification for its use. If this cannot be done, the precautionary principle must be favoured, and in instances where there are disproportionate negative impacts on the environment, AI should not be used", 86.

[15] Council Conclusions regarding Taking the Customs Union to the Next Level: a Plan for Action, approved through a written procedure completed on 18 December 2020, Brussels, 21 December 2020 (OR. En), 14292/20, UD 402.

related risk analysis, taking into account the work currently carried out within the WCO and ICAO in this area and in respect of fundamental rights and data protection.

- The Commission is encouraged to consider the integration of new technologies, especially artificial intelligence, in data analysis.

Moreover, the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Taking the Customs Union to the Next Level: a Plan for Action, dated 5 March 2021, states that "the EESC recommends immediately exploring the introduction of blockchain technology in the proposed action plan. Furthermore, the technological progress and existing innovative solutions that robotics and artificial intelligence possess could be easily implemented with immediate, relevant results"[16].

Consequently, it is highly foreseeable that in the very near future, the European Union will give priority to the integration of artificial intelligence into the management of potential risks related to the importation of goods[17].

In this regard, in recent years, innovative programmes have already been designed in the European Union to strengthen the customs risk management framework. The new computerised system set up to collect information on all goods entering the EU (Import Control System 2 - ICS2) already gathers data on all the imports that will come into the EU, prior to their arrival. Economic operators must declare safety and security data to ICS2, using the Entry Summary Declaration[18].

The system aims to better protect the European single market and its citizens through new customs security and safety measures, as well as to facilitate the free flow of trade through streamlined, data-driven customs security processes, adapted to global business models.

In short, artificial intelligence is powering a new customs control system in the European Union and in other jurisdictions throughout the global environment.

As an example, in 2018, Peru, Mexico and Costa Rica, under the auspices of the Inter-American Development Bank (IDB) and Microsoft, deployed the CADENA project for common customs management, which facilitates the exchange of data with companies that are certified as Authorised Economic Operators, using blockchain technology (Suominen K, 2020, p.13).

However, the EU should not only consider using AI for the management of potential customs risks associated with the import of goods. It is time to contemplate the creation of a green tax-customs channel, based on AI, allowing for the import of, for example, specified sustainable goods, certain green resources, or particular types of recyclable waste, in a common circular integration data space.

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[16] Customs Union Action Plan, INT/916, Opinion, Section responsible: Single Market, Production and Consumption, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Taking the Customs Union to the next level: a Plan for Action [COM(2020) 581 final], adopted in section: 02/03/2021, adopted at plenary: 24/03/2021, rapporteur: Anastasis Yiapanis, 1.7.

[17] At an internal level, through Council of the European Union Decision 2009/917/JHA, dated 30 November 2009, on the use of information technology for customs purposes (OJ L 323, 10.12.2009, p. 20-30, applicable since May 2011), intended to strengthen cooperation between customs administrations by establishing procedures that enable them to act jointly and to exchange personal and other data concerned with illegal trafficking activities, using new technologies for the management and transmission of that information. To this end, the Customs Information System (CIS) has already been created, consisting of a central database accessible through terminals located in each of the Member States (Article 3).

[18] Visit the European Commission website, *Taxation and Custom Union, Import Control System 2 (ICS2)*, https://ec.europa.eu/taxation_customs/customs-4/customs-security/import-control-system-2-ics2_en#heading_1

Along these same lines, there are already studies that, through data analysis, can forecast certain environmental risks, which can be helpful when designing a green-ecological import channel.

For example, some research studies have found that the risk of importing invasive species is higher in jurisdictions with poor regulation and political instability[19], or that importing goods from sustainable producer countries could reduce the environmental footprint[20].

3 ARTIFICIAL INTELLIGENCE AND THE IMPORTATION OF GOODS: THE COMMON CUSTOMS TARIFF AND VALUE ADDED TAX

Goods entering the territory of the European Union from third countries are subject to a set of duties levied on the importation of goods into the customs territory of the Union (Common Customs Tariff) and to Value Added Tax[21].

The European Union needs a uniform and homogenised legal framework to regulate the use of artificial intelligence in cross-border tax-customs operations, a legal framework that covers the determination of tax obligations, employing artificial intelligence systems developed or modified by public entities, that can help to achieve the implementation of green channels for the importation of goods, whilst always respecting European values and fundamental rights.

Intelligent algorithms that are designed to possess the qualities of intelligibility, transparency, accountability and respect for ethical values, can be used to set up a system for the verification, validation and control of non-exempt imported goods, which may be used to determine the main base for calculating the Common Customs Tariff and the VAT taxable base.

The development and training of this artificial intelligence system would require the availability of large amounts of consensually provided tax data and the configuration of "high quality data", on common platforms that provide security, sustainability, interoperability and scalability (smart connected imported goods).

The algorithm would be created, working from a blueprint of configurations based on the probability of occurrence. It must be energy efficient and be programmed in such a way

[19] Researchers compiled data on all recorded interceptions of invasive species by inspectors at border or pre-border controls (e.g. ships en route to port) in New Zealand, between 2002 and 2011. Although the study is based on imports to New Zealand, the authors note that the results can be applied globally to determine which type of country is most likely to export invasive species, depending on its socio-economic characteristics. "Science for Environment Policy": European Commission DG Environment News Alert Service, edited by SCU, The University of the West of England, Bristol. 30/9/2016, Issue 472. See at: https://ec.europa.eu/environment/integration/research/newsalert/pdf/invasive_species_import_risk_higher_countries_poor_regulation_472na5_en.pdf

[20] A study looks at how to reduce the environmental footprint of EU trade by preferentially importing products from countries that have greener production processes. The study concludes that this policy could considerably reduce the environmental impact of 200 different product groups imported into the EU. For example, the water consumption attributable to these imports could be reduced by 72% and land use by 65%. "Science for Environment Policy": European Commission DG Environment News Alert Service, Issue 553, 11/19/2019. Available at: https://ec.europa.eu/environment/integration/research/newsalert/pdf/invasive_species_import_risk_higher_countries_poor_regulation_472na5_en.pdf

[21] Article 4 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJEU 10.10.2013, L 269/1), defines the dimensions of the customs territory, while Article 56 regulates the Common Customs Tariff.

Articles 5 to 8 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJEU 11.12.2006, L 347/1) define the territorial scope for the application of VAT and Article 30 defines the term Importation of goods, which the law considers a taxable transaction.

In Spain, Article 3 of Law 37/1992, dated 28 December 1992, on Value Added Tax, defines the territorial limits for the application of VAT and Articles 17 to 19 detail the concept of the importation of goods as a taxable transaction, and specify the operations related to the importation of goods.

that it cannot pose any problems in the following areas: legal uncertainty and lack of clarity on legal consequences, violation of data protection and privacy; excessive costs; incompatibility of hardware, software or computer systems in the data selection process; controllability, efficiency and reliability; ethical considerations; socio-economic consequences for the actors involved, etc.

Moreover, in the tax-customs field, the artificial intelligence system must strictly respect the principle of tax equality, and the rights and guarantees afforded to taxpayers (for more information see, Bilbao Estrada, I. 2019; García-Herrera Blanco, C. 2020; Ribes Ribes, A. 2021; Serrano Antón, F. 2021).

Clearly, the correct use of artificial intelligence, would require the tax-customs administration to further guarantee, extend and strengthen the rights of taxpayers.

3.1 USE OF BIG DATA AND DATA MINING IN THE CONFIGURATION OF THE TAX-CUSTOMS ARTIFICIAL INTELLIGENCE SYSTEM: DETERMINATION OF THE CUSTOMS VALUE USED TO CALCULATE THE COMMON CUSTOMS TARIFF AND THE TAXABLE BASE FOR VAT ON IMPORTED GOODS

In order to configure the artificial intelligence system, first of all, each of the pieces of data that are part of, or may be part of, the tax liability, must be identified. A standardised, digital automation process may be set up, based on the "common excellence data collected".

In this respect, the different elements that make up the base used to calculate the Common Customs Tariff and those used to calculate the taxable amount for VAT purposes must be clearly distinguished.

3.1.1 The common customs tariff

The Common Customs Tariff comprises, in accordance with Article 56(2) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, "all of the following":

(a) the Combined Nomenclature of goods as laid down in Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff;
(b) any other nomenclature which is wholly or partly based on the Combined Nomenclature or which provides for further subdivisions to it, and which is established by Union provisions governing specific fields with a view to the application of tariff measures relating to trade in goods;
(c) the conventional or normal autonomous customs duty applicable to goods covered by the Combined Nomenclature;
(d) the preferential tariff measures contained in agreements which the Union has concluded with certain countries or territories outside the customs territory of the Union or groups of such countries or territories;
(e) preferential tariff measures adopted unilaterally by the Union in respect of certain countries or territories outside the customs territory of the Union or groups of such countries or territories;
(a) f) autonomous measures providing for a reduction in, or exemption from, customs duty on certain goods;
(f) favourable tariff treatment specified for certain goods, by reason of their nature or end-use, in the framework of measures referred to under points (c) to (f) or (h);

(g) other tariff measures provided for by agricultural or commercial or other Union legislation[22].

For the application of the Common Customs Tariff, in accordance with Article 57 of Regulation (EU) No 952/2013, tariff classification of goods shall consist in the determination of one of the subheadings or further subdivisions of the Combined Nomenclature under which those goods are to be classified. The subheading or further subdivision determined shall be used for the purpose of applying the measures linked to that subheading[23].

Moreover, for the purposes of applying the Common Customs Tariff, the customs value of goods shall be determined in accordance with Articles 70 and 74 of Regulation (EU) No 952/2013[24].

The primary basis for the customs value of goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the customs territory of the Union, adjusted, where necessary (paragraph 1 of Article 70)[25].

The price actually paid or payable shall be the total payment made or to be made by the buyer to the seller or by the buyer to a third party for the benefit of the seller for the imported goods and include all payments made or to be made as a condition of sale of the imported goods (paragraph 2 of Article 70)[26].

In determining the customs value, none of the elements listed in Article 72 shall be included[27].

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[22] In accordance with paragraph 1 of Article 64 of Regulation (EU) No 952/2013, in order to benefit from the measures referred to in points (d) or (e) above, goods shall comply with the rules on preferential origin referred to in paragraphs 2 to 5 thereof.

[23] In addition, the provisions on the acquisition of origin and proof of origin (Articles 60 and 61 of Regulation (EU) No. 952/2013) are followed to determine the non-preferential origin of goods.

[24] For more information, see also, Title II (Factors on the basis of which import or export duty and other measures in respect of trade in goods are applied), Chapter 3 (value of goods for customs purposes), Articles 127 to 146, of European Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for the implementation of certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code.

[25] The transaction value shall apply provided that all conditions outlined in paragraph 3 of Article 70 are fulfilled.

[26] In determining the customs value, the price actually paid or payable for the imported goods shall be supplemented by (paragraph 1 of Article 71): (a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods: (i) commissions and brokerage, except buying commissions; (ii) the cost of containers which are treated as being one, for customs purposes, with the goods in question; and (iii) the cost of packing, whether for labour or materials; (b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable: (i) materials, components, parts and similar items incorporated into the imported goods; (ii) tools, dies, moulds and similar items used in the production of the imported goods; (iii) materials consumed in the production of the imported goods; and (iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Union and necessary for the production of the imported goods; (c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable; (d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller; and (e) the following costs up to the place where goods are brought into the customs territory of the Union: (i) the cost of transport and insurance of the imported goods; and (ii) loading and handling charges associated with the transport of the imported goods.

Additions to the price actually paid or payable shall be only on the basis of objective and quantifiable data (paragraph 2 of Article 71).

In determining the customs value, only the costs provided for in Article 71 may be added to the price actually paid or payable (paragraph 3 of Article 71).

[27] Article 72 contains the following elements: (a) the cost of transport of the imported goods after their entry into the customs territory of the Union; (b) charges for construction, erection, assembly, maintenance or technical assistance, undertaken after the entry into the customs territory of the Union of the imported goods such as industrial plants, machinery or equipment; (c) charges for interest under a financing arrangement entered into by the buyer and relating to the purchase of the imported goods, irrespective of whether the finance is provided by the seller or another person, provided that the financing arrangement has been made in writing and, where required, the buyer can demonstrate that the following conditions are fulfilled: (i) such goods are actually sold at the price declared as the price actually paid or payable; (ii) the claimed rate of interest does not exceed the level for such transactions prevailing in the country where, and at the time when, the finance was provided; (d) charges for the right to reproduce the imported goods in the Union; (e) buying commissions; (f) import duties or other charges payable in the Union by reason of the import or sale of the goods; (g) notwithstanding point (c) of Article 71(1), payments made by the buyer for the right to distribute or resell the imported goods, if such payments are not a condition of the sale for export to the Union of the goods.

Finally, Article 74 sets out the secondary methods of customs valuation.

3.1.2 Value added tax

The taxable amount for calculating VAT on imported goods is regulated by the contents of Articles 85 to 92 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

Thus, the taxable amount applicable to imported goods, in accordance with Article 85 of Directive 2006/112/EC, shall be the value for customs purposes, determined in accordance with the Community provisions in force.

Likewise, in accordance with Article 86 of the said Directive, the taxable amount shall include the following factors, in so far as they are not already included:

(a) taxes, duties, levies and other charges due outside the Member State of importation, and those due by reason of importation, excluding the VAT to be levied;
(b) incidental expenses, such as commission, packing, transport and insurance costs, incurred up to the first place of destination within the territory of the Member State of importation as well as those resulting from transport to another place of destination within the Union, if that other place is known when the chargeable event occurs[28].

Finally, as regards the costs of returnable packing material, Member States may take one of the following measures, in accordance with Article 92 of the above-mentioned Directive:

(a) exclude them from the taxable amount and take the measures necessary to ensure that this amount is adjusted if the packing material is not returned;
(b) include them in the taxable amount and take the measures necessary to ensure that this amount is adjusted if the packing material is in fact returned[29].

3.2 USE OF BIG DATA AND DATA MINING IN THE CONFIGURATION OF THE TAX-CUSTOMS ARTIFICIAL INTELLIGENCE SYSTEM: MOVING TOWARDS A GREEN TAX-CUSTOMS IMPORT CHANNEL

Once the different costs that are factored into the base used for Common Customs Tariff and the taxable base for VAT purposes, have been clearly defined, an AI tool can be developed to expediate the processing of tax obligations arising from the importation of goods and to respond to environmental problems, through the mass analysis of the data obtained and the identification of certain parameters that condition the positive response of the tax administration.

The predictive model that will use algorithms to create green channels for the taxation of goods imported into the European Union, must be based on the essential characteristics that make up a commercial transaction, the tax liability, the factors that determine the tax liability and its purpose as a mode of protection (measures related to environmental protection, sanitary and phytosanitary measures, trade or investment protection, control, competition, financial measures, etc.).

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[28] For the purposes of point (b), 'first place of destination' shall mean the place mentioned on the consignment note or on any other document under which the goods are imported into the Member State of importation. If no such mention is made, the first place of destination shall be deemed to be the place of the first transfer of cargo in the Member State of importation.

In Spain, the taxable amount for VAT purposes, is regulated in Article 83 of the Law 37/1992 on Value Added Tax.

[29] Particularly, in Spain, Article 80(1) of the Law 37/1992 on Value Added Tax allows the taxable amount to be reduced by the following amounts:

1º. The cost of the containers and packaging that can be reused and which have been returned.

2º. Discounts and rebates granted after the transaction has taken place, provided that they are duly documented.

Thus, the consensus algorithms used for creating green channels for tax obligations (Common Customs Tariff and VAT) payable on imported goods, can be modulated on the basis of the identification and collection of characteristic parameters, gathered from the following minimum data (identification of available data, pooling, and subsequent application of the acquired knowledge to new data):

- Origin of the goods: jurisdiction where the good is obtained, produced, processed or transformed; certification and proof of origin; preferential or non-preferential origin of the goods.
- Specifications and registration of the good: concept; substance; material; composition; quantity; certification; origin of materials and parts used in the final product; process of obtaining, producing and post-producing, processing or transformation of the good (a precise record of the well-defined stages in the process: location, methods, and equipment or materials used); quality and treatment; performance (probability of deterioration, durability, hardness, etc.); generic or specific use; source and process control; recognition of good hygiene and good manufacturing practices; intellectual property rights; restricted uses; recognised methods of analysis and sampling; traceability and administrative verification at source of the production, processing and distribution stages; etc.
- Tariff classification of the imported merchandise (subheading or subdivision of the Combined Nomenclature under which it is classified).
- Registration and processing of the import operation: basic steps and documentation; place of export; relevant authorisations, permits and licences; quotas and duration; location of goods; storage; warehousing; permits; packing and packaging; labelling and marking; dispatch, transport and form of distribution; inspections carried out in the exporting jurisdiction; quarantines and restrictions; supervision and monitoring; etc.
- Risks associated with the importation of goods: compliance with EU regulations on the import of plant products, provision of phytosanitary certificates, exemptions from certificates, trade in plants and plant products from non-member countries; the provision of paperwork and information relating to the importing of live animals and animal products into the EU; the rules relating to transit into the EU; health and safety standards; conditions governing the import of foodstuffs; mandatory EU procedures relating to the performance of border inspections on imports of live animals, foodstuffs and animal feed; import controls for food and animal feed products from non-EU countries; approved waste management plans; list of establishments in third country countries; dates of production and certification; use of approved cold stores; approved species; codes identifying the production site; special import conditions; possible public health risks (veterinary drug waste, pesticide residues, food additives, contaminants and genetically modified organisms); etc.
- Goods and/or trading partners, that are the subject of an ongoing investigation relating to possible dumping violations, are involved in the import transaction.
- Reference prices and control over identical or similar goods.
- Exchange rates applicable to the import transaction.
- Existence of related transactions.
- Value of imported goods (customs value of imported goods): transaction value.
    (1) Price actually paid or payable: total payment already made or pending, by the buyer to the seller.
    (2) Commissions and brokerage fees (except for purchase commissions); cost of packaging that is an integral part of the goods; cost of exterior packing, both in terms of labour and materials, insofar as these costs are borne by the buyer and are not included in the price actually paid or payable for the goods.

(3) The duly allocated value of materials, components, parts and similar items that are part of the imported goods; tools, dies, moulds and similar articles used in the production of the imported goods; materials consumed in the production of the imported goods; and engineering, development, artistic and design work, plans and sketches, undertaken outside the Union and that are deemed necessary for the production of the imported goods; when supplied directly or indirectly by the buyer, free of charge or at reduced prices, and used in the production and sale for export of the imported goods, insofar as the said value is not already included in the price actually paid or payable.

(4) Royalties and licence fees relating to the goods being valued which the buyer is obliged to pay, directly or indirectly, as a condition of the sale of said goods, insofar as such royalties and fees are not already included in the price actually paid or payable.

(5) The value of any part of the proceeds obtained from a subsequent resale, transfer or use of the imported goods, which revert directly or indirectly back to the seller.

(6) Transport and insurance costs the imported goods, as well as the loading and handling costs associated with the transport of the imported goods to the first place of destination, where the goods are brought into the customs territory of the Union.

(7) Any cost factor that can be added to the price actually paid or payable.

- Containers and packaging which can be reused and which may be returned.
- Taxes, rights, levies and other charges payable outside the European Union, as well as the charges arising from the importation, with the exception of VAT, provided they are not already factored into the customs value.
- Ancillary costs (such as commissions and packing, transport and insurance costs) incurred up to the time the goods arrive at their first place of destination of the goods within the European Union, if they are not already factored into the customs value.

In short, using this "excellence data" and other data that will have to be added during the process of finetuning the algorithmic models, a green channel will be set up, a fast-track, tax-customs channel for the import of goods.

4 CONCLUSIONS

In the European Union, in an initial phase, a green tax-customs channel can be set up on the basis of the mass analysis of data and the identification of certain parameters that condition the positive response of the tax administration, within a common environmental protection area.

The adoption of an intra-EU consensus algorithm, in a blockchain network, would become the standard mechanism that determines the correct status of the different operations that are carried out in relation to the importation of merchandise into the European Union.

Artificial intelligence enables the detection and prevention of tax and customs fraud, reducing administrative costs, increasing collection efficiency, and contributing to the protection of the environment and the proper use of natural resources worldwide.

The correct validation of each block at the different stages of the import operation (through blockchain technology) facilitates the entry of goods into the European Union and allows for the direct determination of the customs value for the purposes of the Common Customs Tariff and the quantification of the VAT taxable base.

Tracking the origin, provenance, characteristics and value of the imported merchandise, by means of smart verification, allows us to control environmental risk, ensures that the goods are produced in accordance with green practices and employing environmentally friendly procedures, thus enabling the EU to recognise an eco-label used by these goods.

The AI-based green tax-customs channel will open the EU's doors to the importation of selected sustainable goods, certain green resources, or defined types of recyclable waste, in a common circular integration data space.

In a second phase, the aim would be to create "digital twins" of imported goods, so that tax and customs administrations can easily access detailed information about the goods and about the transactions that involved these goods, and anticipate the different customs and tax obligations, inside a circular integration area.

The digital version of the imported good shall mimic, simulate and contrast each step of the import process, undertaken by the physical version of the imported merchandise, in real time.

Ultimately, the creation of a new tax-customs legal framework for the importation of goods can give the European Union a competitive advantage in the global market, by means of a solid, realistic and sustainable strategy that supports a responsible system of control, monitoring and certification of imported goods, through the use of artificial intelligence.

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Miscellanea

Recension by Mario Pires: Urquizu Cavallé, Angel. Tax aspects of trade relations between China and Spain. URV Customs Foundation Chair of Customs Studies University of Rovira i Virgili. Thomson Reuters Aranzadi, Pamplona, 2021, 844 pages. ISBN: 978-84-1391-067-3.

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The work called tax aspects of trade relations between China and Spain develops an exhaustive and rigorous study of the different taxes of the Chinese tax system, based on the assumption that the author himself points out, in that "The Asian giant must be a priority objective of economic investment for Spain, and Spain must try to be the gateway to Europe of Chinese investments".

The aforementioned work also points out that in the context of global uncertainty caused by the COVID-19 pandemic in 2019, which is part of the past, and which currently brings as a consequence that to resume the economic and social reality of the countries, before the appearance of the virus, it is necessary to reconsider China as a priority strategic market for the Spanish business sector.

In this sense, Urquizo Cavallé articulates his study "... as a tool to help in the strategy and planning of Spanish companies in the difficult access to the Chinese market..." and not least, such as "... an indispensable legal document to understand China's tax system and the specific and differentiated particularities of its legal system..." with respect to the Spanish legal system.

Additionally, the author highlights as a fundamental aspect that on May 2, 2021, the Agreement between the Kingdom of Spain and the People's Republic of China to eliminate double taxation in relation to income taxes and prevent tax avoidance and evasion and its

Protocol, made in Madrid, has entered into force. on 28 November 2018 (BOE of 30 March 2021).

Therefore, the work of Urquizu Cavallé contains a descriptive study of the specific tax regulations of each of the taxes of the Chinese tax system, adjusting the legal-tax language of the two countries (China and Spain). In fact, normative research is reinforced throughout the study by explaining the similarities and respecting the existing differences.

It is important to highlight that the work had a large research group in which different university professors and / or professionals from China, Latin America and Europe participated with the will to deepen relations between Spain and China.

Going to the structure of the book, it should be said that it consists of 5 chapters. The first of which is an introduction (pp. 35-41) in which it is clearly and practically pointed out that the study has been divided into two parts that will be identified later as the second and third chapters, respectively.

Next, in the second chapter, the first part called "The tax system of the People's Republic of China" (pp. 43-449) is developed, in which the integrity of the Chinese tax system is highlighted, detailing in detail the different taxes that compose it.

Also in the second chapter, the procedure of tax management and collection is carefully developed; the tax review procedure; crimes that jeopardize tax management and collection; the rights and obligations of taxpayers; systems and mechanisms to combat tax evasion; measures to ensure that non-residents enjoy the benefits existing in the tax treaties signed by China; transfer pricing; and the social credit system in the field of taxation, as a mechanism peculiar to Chinese legal regulations.

As for the third chapter, the second part called "Agreement between the Kingdom of Spain and the People's Republic of China to eliminate double taxation in relation to income taxes and prevent tax avoidance and evasion and its Protocol, done in Madrid, on November 28, 2018 (BOE of March 30, 2021) is developed. " (pp. 461-803), it rigorously analyzes the new Convention to Avoid International Double Taxation between Spain and China, highlighting the benefits generated by the application of the Convention for residents of one or another State and prominently defining possible tax scenarios that facilitate new economic relations between the two countries, as a fundamental objective of the commented work.

With regard to the fourth chapter, "Recapitulations and Final Considerations" (pp. 805-838), the author in a congruent, clear, concise and, by way of summary and closing, highlights 75 transcendental aspects that he was meticulously spinning throughout his work on the Chinese tax system and the Convention between the Kingdom of Spain and the People's Republic of China to eliminate double taxation in relation to income taxes, with the aim of providing a tool to help in the strategy and planning of Spanish companies in the difficult access to the Chinese market, as we initially referred to.

Finally, the fifth chapter (pp. 839-844) details more than 60 bibliographic sources, including previous works by the author himself that demonstrate the extensive and in-depth research carried out to support his work.

In conclusion, the book reviewed is a very complete work of the tax aspects applicable to trade relations between China and Spain and that in the words of the author himself, gives assertive answers "to the existing vacuum in Chinese-Spanish tax matters".

It is therefore a very well documented and masterfully described work, which shows an impeccable effort of its author in the compilation of sources, as well as in the study and normative analysis of comparative tax law

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Av. Cardenal Herrera Oria, 378–28035 Madrid

Scientific Committee: E. Andrés Aucejo, C. García-Herrera Blanco, M. A. Grau Ruiz and S. Raventós

This 1st International Congress is an activity is carried out in the framework of the EXCELLENCE NETWORK: DER 2017- 90874-REDT (G.O.T.A-INTAXCOOP&GOV): The Global Observatory on Tax Agencies: towards the International Administrative Cooperation and Global Tax Governance (PI: Eva Andrés Aucejo). Coordinators: E. Andrés Aucejo (DER 2015- 68768-P), C. García-Herrera Blanco (IEF), M. A. Grau Ruiz (DER 2015-653704-R), M. A. Martínez Lago and J. M. Almudí Cid (DER 2015-65832-P), M. Nicoli (HCBM Project), V. Montesinos Julve (European Project), A. Olesti Rayo (DER 2015-65003-P),A. M. Pita Grandal (DER 2015-66338-P), J. Ramos Prieto (DER 2011-25520), E. Simón Acosta (DER 2012-39342-C03-01).

CHRONICLE OF THE INTERNATIONAL CONGRESS:

THE GLOBAL TAX ADMINISTRATIONS 'EFFICIENCY: INTERNATIONAL FISCAL COOPERATION AND GOVERNANCE

Eva Andrés Aucejo[1]; Cristina García-Herrera Blanco[2]; Montse Peretó García[3] (Coords.); Mari Cruz Barreiro[4]; Ana María Guembe[5]; Luis Muleiro[6]; María Isabel Poza[7]; Eva Rivera[8]; Carmen Ruiz[9], Ana María Enríquez[10].

On May 30, 31 and June 1, 2018, three separate conferences were held, respectively, at the Headquarters: The Institute of Fiscal Studies of Spain, the Complutense University of Madrid and the School of Public Administration of Barcelona, relating to the International Taxation Congress 2018 under the title: International Tax Administration's Efficiency. Towards the International Fiscal Cooperation and Governance.

The programs related to the aforementioned conferences can be consulted at the following electronic addresses:

Instituto de Estudios Fiscales, 30 mayo de 2018:
https://derecho.ucm.es/data/cont/docs/23-2018-05-28-Programa%20IEF%2030%20mayo%202018%20vdef2505.pdf

[1] Full Professor of Tax Law. University of Barcelona. Researcher and Consulter from the Global Forum on law, Justice and Development of the World Bank on the HCBM, Project 2017. Extraordinary award both in Ph.D. in Law and in Law Degree. Bachelor of Economic Sciences and Business Studies. Director of the Education and Law Review; Principal Investigator of the Excellence Network DER 2017-90874-REDT G.O.T.A.- INTAXCOOP&GOV: "The Global Observatory on Tax Agencies: Towards International Tax Cooperation and Governance"; Principal Investigator of the Der 15-68768-P Project: International Administrative Co-Operation in Tax Matters and ADR of Transnational Tax Disputes and Models for an Institutional Architecture from a European Perspective. Principal Investigator of the "Comparative ADR Systems on tax Law" Project (*Generalitat de Catalunya*). Visiting scholar in Harvard School of Law, European University Institute, *Università di Roma 'La Sapienza', Università degli Studi di Firenze*, International Bureau of Fiscal Documentation (Amsterdam), *Universita degli Studi di Bologna,* London School of Economics and Political Sciences (LSE), University of Leeds (UK), Georgetown University (Washington, DC), World Bank (Washington, DC), among others.

[2] Director of the Spanish "Fiscal Studies Institute" (Institute attached to the Ministry of Finance, through the Spanish Ministry of Finance). Associate Professor of the Complutense University of Madrid (UCM). Director of Research Studies. Associate Professor UCM.

[3] General Director of Planning and Fiscal Studies of the Generalitat de Catalunya, and full professor of Tax Law, Autonomous University of Barcelona (UAB).

[4] Interim Full Professor of Tax Law. University of Vigo. Extraordinary award Law Degree. Doctoral degree with the mention of European Doctor. Ph.D. Thesis award by the University of Vigo and the Institute of Fiscal Studies (Spanish Ministry of the Economy). Researcher in European and International Tax Law at different centers and Universities such as the IBFD, WU Vienna University of Economics and Business, Max Planck Institute of Tax Law and Public Finances (Munich) and the NYU.

[5] Specialist for the General Directorate of Planning and Fiscal Studies of the Generalitat de Catalunya.

[6] Full Professor of Tax Law. University of Vigo. Extraordinary award Law Degree. Doctoral degree with the mention of European Doctor. Ph.D. Thesis award by the University of Vigo. Research stays at different centers and Universities such as the IBFD, Panthéon-Sorbonne University, Aix-Marseille University, Toulouse Capitole University and University of Padova.

[7] Assistant to the General Directorate Planning and Fiscal Studies of the Generalitat de Catalunya.

[8] Advisor to the General Directorate of Planning and Fiscal Studies of the Generalitat de Catalunya, and associate professor of EU Law. University of Girona.

[9] Full Professor of Tax Law. University of Vigo.

[10] University of Barcelona

Universidad Complutense de Madrid, 31 de mayo de 2018:
https://derechofinancieroytributario.files.wordpress.com/2018/05/programaxtax-ucm-31-mayo-2018-vdef2205.pdf

Escuela de Hacienda Pública de Barcelona, 1 de junio de 2018:
https://atc.gencat.cat/web/.content/documents/01_atc/altres/2018-International-Congress-Program-1-June-BCN.PDF

The organization of the three conferences has been carried out by the Excellence Network DER 2017-90874-REDT (G.O.T.A-INTAXCOOP & GOV): The Global Observatory on Tax Agencies: Towards on the International Tax Cooperation and Global Governance, in collaboration with the Institute of Fiscal Studies of Madrid, the Department of Financial and Tax Law of the University and with the Department of the Vice Presidency of Economy and Finance of the "Generalitat de Catalunya".

During these days were presented what are probably today the most significant Global Models on analysis/evaluation of the efficiency of the World Tax Administrations and/or Cooperation/international tax governance, i.e.

- The International Monetary Fund' system: TADAT (financed by the EU, the Tax Agencies of the Netherlands, Japan, the UK, etc), on diagnostic and evaluation of the Tax Agencies worldwide.
- The INTRA-EUROPEAN ORGANISATION OF TAX ADMINISTRAIONS.
- The INTER-AMERICAN CENTER FOR TAX ADMINISTRATION - CIAT (for Latin America)
- The GLOBAL OBSERVATORY ON TAX AGENCIES (G.O.T.A. - DER 2017-90874-REDT INTAXCOOP&GOV): Excellence Network led by the University of Barcelona and focused on the following three issues: A) The efficiency of the Tax Agencies worldwide; B) The international cooperation of the Tax Administrations and C) The Tax Governance worldwide.

In the different Workshops held in the cities of Madrid and Barcelona were presented:

- Panels that dealt with measures and improvements in the area of Cooperation in Direct, Indirect International Taxation and Customs, all top trends in International Taxation of the 21st century;
- Panels that dealt with "Trends and Challenges in International Tax Governance and, of course,
- Panels on proposals to improve the effectiveness and efficiency of the World Tax Administrations.

Panels and Network of Excellence EXCELLENCE NETWORK: DER 2017-90874-REDT (GOTA-INTAXCOOP & GOV), which both Professor Eva Andrés Aucejo and Professor Andreu Olesti Rayo and the rest of the Network of Excellence Coordinators were pleased to open to all the Academy in case it was of interest both the attendance at

any of the different forums, or also the participation as members of the research teams that compose it.

The International Congress on **Global Tax Administrations' Efficiency International Fiscal Cooperation and Governance** is the first activity developed in the frame of the Excellence Networking: DER 2017-90871-REDT (G.O.T.A-INTAXCOOP&GOV)[11]: The Global Observatory on Tax Agencies: towards on International Administrative Cooperation and Global Tax Governance,

whose main researcher is Professor **Eva Andrés Aucejo**. The first session of the Congress took place at the Institute for Fiscal Studies on 30 May 2018 and consisted on three panels.

Professor **García-Herrera Blanco**, Head of the Studies Department of the Institute for Fiscal Studies welcomed the participants and thanked both the initiative and work of the Professor Eva Andrés Aucejo in the organization of this first Congress. She noted that technological developments involve an improvement in the efficiency of tax compliance, as is showed by the OCDE 2017 Report which includes opinions of 57 countries, according to which among 85% and 90% of the total collected amount comes from voluntary tax compliance. Cristina García-Herrera explained that the fields with the highest risk of tax avoidance are the following: (i) big companies, (ii) great estates, (iii) informal economy, and (iv) collaborative economy. This scenario pleads for international fiscal cooperation.

Panel I

Global tax policies and performance to increase the efficiency of the tax administration in the world

This first panel was chaired by Professor **Eva Andrés Aucejo**, who opened the floor by thanking the participation of the Institute for Fiscal Studies, the research group which integrates the Excellence Network, the speakers and the audience. Professor Eva Andres officiated at a conference about the systems toward the Global Tax Administrations' Efficiency, going on International Fiscal Cooperation and Governance. She did special mention about the "tax gap" in comparative tax law, explaining the efficiency should be measured in terms of tax collection but without putting the taxpayers aside. She developed and highlighted both the Dutch tax collection system and the British tax collection system as models to be followed in this regard.

[11] **Scientific Committee:** E. Andrés Aucejo, C. García-Herrera Blanco, M. A. Grau Ruiz and S. Raventós

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The Tax Administration Diagnostic and Assessment Tool (TADAT)

Monica Sionara Schpallir
International Monetary Fund-IMF

Monica Sionara Schpallir, opened this panel with her presentation on the ***Tax Administration Diagnostic and Assesment Tool (TADAT),*** a tool that, as she explained, appeared in 2013 as a proper tool to assess the health state of Tax Administrations, by providing an objective and standardized assessment of the performance of a country's system of tax administration, through the assessment of results, instead of through the assessment of means. TADAT assesses the main taxes in a country (Income Tax, VAT and in some cases, social contributions), excluding customs duties.

She explained the Field Guide, available at the web of TADAT, which contains the 47 measurement dimensions which are taken into account for arriving at the indicator scores (from A to D), as well as the 28 high-level indicators critical to tax administration performance which are linked to the nine Performance Outcome Areas (las POAs), which are present in every single tax administration. Those POAs are integrated among them, not being one of them more important than the other.

She described next the four phases of the TADAT assessment, and explained finally, the executive summary, which includes a description of the strengths and weaknesses of a certain tax administration. She emphasized that it is for tax administration to draw conclusions on the results of the TADAT assessment, since it does not recommend solutions.

The challenges of the Tax Administrations to increase tax revenues and the International Survey on Revenue Administrations (ISORA)

Santiago Díaz Sarralde
Inter-American Center for Tax Administration-CIAT

Santiago Díaz Sarralde, current head of tax research in CIAT and Full Professor of Applied Economy at the Rey Juan Carlos University (Madrid), started his presentation by raising the question of how to increase income without raising taxes. In this regard, he referred to the document "Tax Administrations: Collection, Costs and Personnel Evidence for the CIAT Countries with data of ISORA", which explains that ISORA (International Survey on Revenue Administrations), which emerged as the result of the joint effort of the IMF, IOTA, OECD and CIAT, is a homogeneous survey addressed to the tax administrations of 148 countries which "collects collection data, institutional structure, budget and human resources, segmentation and taxpayer registration, returns filing and payments, taxpayer assistance and tax education, enforced collection of debts, inspection, audit, and investigation of tax fraud and dispute resolution mechanisms". Santiago Díaz highlighted the importance of the communication channels, the *rulings*,

explaining that the survey allows to identify the different use of this tool dependent on the different income level.

The second topic addressed by Santiago Díaz was the tax expenses, in relation to which he referred to the "checklist" style templated developed by the United Nations and the CIAT. This "checklist" style templated provides to the responsible authorities for fiscal policies a tool which allow them to assess the net benefits of tax incentive programs, so that consistency between tax incentives and the underlying tax policy is ensured.

Last but not least, the Professor dealt with the topic of taxation of digital economy, which raises several problems, such as those related with the taxation of international income, the concept of permanent establishment, the inadequacy of the traditional tax connecting factors, the difficulties in determining the destination of consumption, in view to establish countries' tax jurisdiction, or the collaborative economy.

The Intra-European Organization of Tax Administrations

Miguel Silva Pinto
The Intra-European Organization of Tax Administration-IOTA

Miguel Silva Pinto, executive secretary of IOTA, spoke about how the IOTA helps their member countries to face the challenges of their tax administrations. The OECD, the CIAT, the NTO, the General Direction of Taxation and Customs Duties of the European Commission, and the IMF are partnerships of the IOTA, which is integrated by 44 countries. The IOTA aims to search synergies with the abovementioned organizations without duplicate activities. He explained the four objectives of the IOTA (i) deliver effective services and practical solutions catering for the specific needs of the membership; (ii) analysis of the "big data"; (iii) human resources; and (iv) fight against fraud and collecting procedures.

He dealt with the new strategy of the IOTA: Contributing to the progress of European tax administrations by delivering practical solutions, enhancing collaboration and facilitating the sharing of experience. According to Manuel Silva Pinto, the main challenge faced by tax administrations is to be able to consider taxpayers as customers or partners, taking into account that taxpayers wish a tax system as simple and efficient as possible, with tax administrations helping them in each phase of the tax procedure, protecting of big data privacy, one of the greatest responsibilities of tax administrations.

Chair: Professor **Eva Andrés Aucejo** closed this panel, by emphasizing her wish to move towards some efficient models such as the one of the Netherlands, the United States or Australia, highlighting the importance of tax compliance systems as well as the need of the simplification of the tax system.

Panel II

Efficiency models for tax administrations: a comparative approach regarding taxpayers' rights and the tax gap

Eva Andrés Aucejo presented the second panel on **Efficiency models for tax administration: a comparative approach regarding taxpayers' rights and the tax collection.** She explained that this panel departs from the perspective of the taxpayers and recalls that tax administrations are not possible without taxpayers. The panel was chaired by **Stella Raventos**, head of the Fiscal Committee of the *Confederation Fiscale Européenne*, member of the *AEDAF*, & head of *Danbury Lawyers* in Barcelona.

United Kingdom

Tax Collection and Tax Management: gap and compliance

Julius Sen
London School of Economics

Julius Sen, Associate Director and Senior Programme Advisor at London School of Economics Enterprise, the commercial arm of the London School of Economics and Political Science, dealt with the relation between collection and fiscal management, and the subsequent gap in the tax payment compliance. He emphasized that, being the global economy around100 trillion dollars, the 20% of it is illegal or arises from the informal sector (gray zone), equalizing this amount to the economy size of the United States. Bering this in mind, he explained that one of the major challenges for tax administration is to convert the informal in formal. This because, the illegal income are higher than the GNP of the EU. In this context, he noted that the problem of tax evasion can only be faced through transparency and cooperation.

It has not always been the case that narrow connection between the commercial policy of a certain country and its fiscal policy has led to a fair result, showing certain countries, as is the case of India, great social injustices. In this regard, Julius Sen explained how the tax system can help to improve the level of wealth, being *coordination and cooperation between governments* (reinforced by the BEPS project) essential tools in this regard. He referred then to *big data*, by mentioning the "Billion Prices Project", an academic initiative (MIT Sloan and Harvard Business School) which uses prices collected by hundreds of online retailers around the world in order to undertake research in macro economy and international economic.

In relation with the abovementioned ideas, Julius Sen explained the case of United Kingdom, where the Bank of England has developed a role in the promotion of employment and growth, by improving the conditions of fairness and by reducing social tension. This led, as he explained, to a relevant intuitional shift of power from the Government (Minister of Finance) to the Bank of England, having being showed that the austerity policy undertaken by the Government did fail in achieving economic growth and fairness.

Spain

Instantaneous supply of information, Renta web and detection of tax risks

Rosa M. Prieto
Directora del SEPRI, Agencia Tributaria

Rosa M. Prieto, explained the Immediate Supply of Information on VAT (SII, *Suministro Inmediato de Información*), in forced since 1st July 2017, which means a change in the current VAT management system, by setting a new system of upkeeping registration books through the online site of Spanish Tax Administration Agency. The system is founded on the almost immediate supply of the billing records, allowing to bring the moment of billing recording/accounting and the effective performance of the underlying economic operation together. Rosa M. Prieto explains that the goal of the SII is to improve the tax control and taxpayer assistance.

After describing other aspects of the functioning of the SII, Rosa M. Prieto explained that, aimed to facilitate help to the taxpayers, the Spanish Tax Agency has published a web site on the SII, which started with the use of artificial intelligence for virtual assistance. She described a new VAT help service as well: the Goods delivery locator, which helps to determine the place in which operations are deemed to be made for VAT purposes, and HERMES: a new program for the information management which, beyond than systematize, allows to use it with a view to fight against tax fraud. She finally referred to the novelties in the implementation of the web system of Income Tax.

United Kingdom

Taxpayers' rights, electronic and efficient Administrations

Philip Baker
QC, Field Court Tax Chambers, Oxford University

Philip Baker started by explaining that attention to taxpayer's rights has been increased during the last years. The three main areas as regards this matter are the following: (i) data protection and right to intimacy (ii) individual request of information (iii) standards and best practices for the effective protection of taxpayers' rights in the ambit of tax relationships.

As regards the first topic, Professor Baker highlighted that data protection and right to intimacy are object of the greatest protection in Europe, having *big data* a specific protection. In this regard, he explained the legal framework of the matter, reviewing the CJEU jurisprudence in both fields of data protection and request of information, second topic of his presentation. As regards, the third topic, he mentioned the creation by the of the Obervatory for the Protection of Taypayer's rights Obervatory for the Protection of Taxpayers' rights to identify minimum standards and best practices for the effective protection of taxpayers' rights in the ambit of tax relationships.

Stella Raventós closed the panel by emphasizing the need of the "human factor" in the relationships between tax administrations and taxpayers, in fields such as voluntary tax compliance, and she mentioned the British tax administration, where companies are allowed to ask for an Inspector to settle of their problems, as a good example of tax administration where the "human factor" develops an important role in the collection of taxes.

Netherlands

The new challenges on Administrative cooperation in the tax collection adopted by the Central Liasion Office of Netherlands

Paul Van Smitte
Central Liason Office, The Netherlands

Paul Van Smitte, first highlighted the important role played by the concept of "paymentthinking", involving the taxpayer from the very first moment of the tax collection procedure, as an alternative to the traditional collecting procedure, in the tax collection, taking into account the complex structures used by taxpayer to place their actives in countries with which there is no doublet tax treaty. Paul Van Smitte described his professional experience as tax collector in The Netherlands, by explaining that, living many taxpayers live abroad, national cooperation between different organizations is essential, and in this regard, he highlighted the good relationship between the tax administration and the Dutch Police, when facing tax collection procedures. He also emphasized the need to use any kind of techniques to stimulate the payment of taxes, and the need to offer them proper assistance. This was the approach adopted by The Netherlands, which counts with specialized teams that do not hesitate to travel to New Zeeland to communicate face to face with taxpayers, grant deferral of the tax payment for fifteen years, or in case that they refuse to collaborate, to hold their car during a year. The success of this initiative was in 2016 of 98'4%.

Panel III

Experiences on international tax cooperation and governance

Panel 3 was held in the afternoon, under the title "Experiences on international tax cooperation and governance".

Marco Nicoli

Visiting Professor at the George Washington University School of Law and Director of the World Bank Project "Global Forum on Law, Justice and Development"

The first speaker was Mr. Marco Nicoli, His intervention dealt about the Fiscal Partnership and Sustainable Development Goals promoted by the United Nations and the

World Bank, through different projects. The framework of the project is to strengthen international tax cooperation, promoting alliances among States, to achieve a high standard of transparency, and provide advice on fiscal policy to the G20, and become a platform to help countries face the changes of international taxation.

Ana Bravo
Central Liaison Office, Spain

Later, Ms. Ana Bravo as representative of the Central Liaison Office in Spain, referred to the application of the rules of cooperation of the European Union, the OECD and the United Nations in Spain, and how there has been legislative changes in this matter both in the General Tax Law, and in the General Collection Regulation.

Legislative changes have not only occurred in Spain, but in all countries of the European Union, since Directive 2010/24 / EU revealed the asymmetries in mutual assistance that existed between the Member States, which caused inefficiency.

In addition, Spain will enact various mutual assistance agreements with third countries through the Model United Nations Convention.

Ana María Pita Grandal
Tax Law Professor University of Vigo

PhD Ana María Pita Grandal proposed the need to make changes in draft tax law to apply it in a society that has nothing to do with that of 20 years ago. She pointed out that, although the Declaration of Granada reflected on aspects of Tax Law that the Government had to take into account for the future, there are important issues of concern to the States, such as the erosion of the Tax Base, the translation of benefits business, double taxation, among others, and that were not addressed in the Declaration of Granada.

Attending to these questions, she proposed to return to the criterion of pure source to the detriment of the criterion of residence, and reflect on the role of direct taxes, since the taxation on income does not respond to the principles of tax justice.

Closure

Finally, the closure was the responsibility of **Mr. Jose Alberto Plaza,** General Director of the Institute of Fiscal Studies, who thanked the Scientific Committee and all the speakers, and wished that the session the following day was a success.

Program

Wednesday,
30 May 2018

09.45-10.00 **WELCOME**

CRISTINA GARCÍA-HERRERA BLANCO

Director of Research Studies, Institute for Fiscal Studies

10.00-11.30 **PANEL 1**

GLOBAL TAX POLICIES AND PERFORMANCE TO INCREASE THE EFFICIENCY OF THE TAX ADMINISTRATIONS IN THE WORLD

The Tax Administration Diagnostic and Assessment Tool

(TADAT)MONICA SIONARA SCHPALLIR

International Monetary Fund-IMF

The challenges of the Tax Administrations to increase tax revenues and the InternationalSurvey on Revenue Administrations (ISORA)

SANTIAGO DÍAZ DE SARRALDE
Inter-American Center for Tax Administration-CIAT

The intra-european organisation of tax

administrationsMIGUEL SILVA PINTO

Intra-European Organisation Of Tax Administration-IOTA

Chair:

EVA ANDRÉS AUCEJO
The Global Observatory on Tax Agencies Model: towards on the International Tax Cooperation and Governance

11.30-12.00 **Coffee break**

12.00-14.00 **PANEL 2**

EFFICIENCY MODELS FOR TAX ADMINISTRATIONS: A COMPARATIVE APPROACH REGARDING TAXPAYERS' RIGHTS AND THE TAX GAP

UNITED KINGDOM

Taxpayers' rights, electronic and efficient AdministrationsPHILIP BAKER

QC, Field Court Tax Chambers, Oxford University

NETHERLANDS

The new challenges on Administrative cooperation in the tax collection adopted by theCentral Liaison Office of Netherlands

PAUL VAN SMITTE

Belastingdienst/Central Liaison Office, The Netherlands

UNITED KINGDOM

Tax Collection and Tax Management: gap and complianceJULIUS SEN

London School of Economics and Political Sciences

SPAIN

Instantaneous supply of information, Renta web and detection of tax risksROSA M. PRIETO

Director SEPRI, State Agency for Tax Administration

Chair:

STELLA RAVENTOS
Confédération Fiscale Européenne. Member of the AEDAF. Danbury Lawyers

16.00-17.00 **PANEL 3**

EXPERIENCES ON INTERNATIONAL TAX COOPERATION AND GOVERNANCE

Tax Collaboration and Sustainable Development Goals

MARCO NICOLI

Visiting Scholar George Washington University - Law School and Former World Bank Sr. Project Manager -

Global Forum on Law, Justice and Development

Application of the EU, OCDE and UN rules for administrative cooperation in SpainANA BRAVO

Central Liaison Office, Spain

ANA PITA

Full Professor. University of Vigo. Coordinator member of the EXCELLENCE NETWORK: DER 2017-90874- REDT (G.O.T.A-INTAXCOOP&GOV): The Global Observatory on Tax Agencies: towards the International Administrative Cooperation and Global Tax Governance

Chair:

AMPARO GRAU

Complutense University of Madrid

17:00-17.15 **CLOSING SPEECH**

JOSÉ ALBERTO PLAZA TEJERA

General director, Institute for Fiscal Studies. Madrid. Spain

	EXCELLENCE NETWORKING DER 2017-90874-REDT	CONTACT
G.O.T.A Global Observatory Tax Agencies	**Committee Advisor of The Global Observatory on Tax Agencies: towards on International Administrative Cooperation and Global Tax Governance** (G.O.T.A-INTAXCOOP&GOV)	**DIRS.:** J. Martín Queralt J. Lasarte Álvarez E. Simón Acosta

	EXCELLENCE NETWORKING DER 2017-90874-REDT	CONTACT
G.O.T.A Global Observatory Tax Agencies	**The Global Observatory on Tax Agencies: towards on International Administrative Cooperation and Global Tax Governance** (G.O.T.A-INTAXCOOP&GOV)	*Principal Investigator:* **Eva Andrés Aucejo**

UNIVERSITY	COMPETITIVE PROJECTS AND INSTITUTIONAL SUPPORT ENTITIES DER 2017-90874-REDT (G.O.T.A-INTAXCOOP&GOV)	Coordinators
Universitat de Barcelona	*Project: DER2015-68768-P. International Administrative Co-Operation in Tax Matters and ADR of Transnational Tax Disputes and Models for an Institutional Architecture from a European Perspective.*	E. Andrés Aucejo
Instituto de Estudios Fiscales	*Instituto de Estudios Fiscales*	C. García-Herrera Blanco
Universidad Complutense Madrid	*Universidad Complutense de Madrid,* *CertificaRSE Project* (DER 2015-653704-R, MINECO-FEDER) https://www.ucm.es/proyecto-certificarse/	M. A. Grau Ruiz
Universidad Complutense Madrid	*DER2015-65832-P. Título: La protección de las libertades fundamentales y los derechos fundamentales en el Ordenamiento Financiero y Tributario (DER2015-65832-P).*	M.A. Martínez Lago J.M. Almudí Cid
Vniversitat de València	*European Project funding by the UE*	V. Montestinos Julve
LJD Law, Justice and Development **World Bank- 2017**	*Human Centered Business Model Project* http://www.globalforumljd.org/cops/human-centered-business-model	M. Nicoli
Universitat de Barcelona	*DER2015-65003-P (1/01/2016/31/12/2018). El control democrático y la tutela de los derechos en la Unión Económica y Monetaria.*	A. Olesti Rayo
Universidade de Vigo	*DER 2015-66338-P. El ordenamiento financiero y tributario de puertos y zonas francas en España: implicaciones de la Unión Europea y de la liberalización del Comercio internacional*	A. Pita Grandal

	*Proyecto I+D+i DER2011-25520 "Competencia fiscal y sistema tributario: un análisis multinivel" (Proyecto COMFISTAM).*	J. Ramos Prieto
	*Projecto DER2012-39342-C03-01 UNIVERSIDAD DE NAVARRA CIF: R3168001J Centro: Facultad de Derecho.*	Isaac Merino Jara E. Simón Acosta
	*Committee of other expert members attached to the* **Global Observatory on Tax Agencies: towards on International Administrative Cooperation and Global Tax Governance** (G.O.T.A-INTAXCOOP&GOV)	Coord.: Joaquín Álvarez

REPORT

International Congress

Global Tax Administrations' Efficiency International Fiscal Cooperation and Governance

Thursday, 31 May 2018

Lugar: **UNIVERSIDAD COMPLUTENSE DE MADRID**

Salón de Grados, Facultad de Derecho, Av. Complutense, s/n - 28040 Madrid

Comité Científico: M. A. Martínez Lago, E. Andrés Aucejo, J. M. Almudí Cid and M. A. Grau Ruiz

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THE GLOBAL TAX ADMINISTRATIONS 'EFFICIENCY: INTERNATIONAL FISCAL COOPERATION AND GOVERNANCE

Eva Andrés Aucejo[1]; Cristina García-Herrera Blanco[2]; Montse Peretó García[3] (Coords.); Mari Cruz Barreiro[4]; Ana María Guembe[5]; Luis Muleiro[6]; María Isabel Poza[7]; Eva Rivera[8]; Carmen Ruiz[9], Ana María Enríquez[10].

On May 31, 2018, the International Congress "Global Tax Administrations' Efficiency, International Fiscal Cooperation and Governance", was held at the Faculty of Law of the Complutense University of Madrid. The day was organized based on three panels that had a large participation of professors of the discipline of Financial and Tax Law of the Spanish Universities. The format of interventions on problems and specific issues by the panelists gave rise to a series of interesting contributions, specifically calling for reflection and debate on the subject.

The welcome in the Board Room of the Centre was carried out by the Dean of the UCM, Professor Ricardo Alonso García and Professor **Miguel Ángel Martínez Lago**. Mr. Dean was particularly pleased with the possible reception of the outstanding participation of such important specialists in Financial and Tax Law, transferring certain activities within the framework of the internationalization of the faculty. Professor Martínez Lago expressed his pride in welcoming the Congress and introduced the speakers of the first part of the morning.

[1] Full Professor of Tax Law. University of Barcelona. Researcher and Consulter from the Global Forum on law, Justice and Development of the World Bank on the HCBM, Project 2017. Extraordinary award both Law Degree and PHD in Law. Bachelor of Economic Sciences and Business Studies. Director of the Education and Law Review; Principal Investigator of the Excellence Network DER 2017-90874-REDT G.O.T.A.- INTAXCOOP&GOV: "The Global Observatory on Tax Agencies: Towards to the International Tax Cooperation and Governance"; Principal Investigator of the Der 2015-68768-P Project: International Administrative Co-Operation in Tax Matters and ADR of Transnational Tax Disputes and Models for an Institutional Architecture from a European Perspective. Principal Investigator of the "Comparative ADR Systems on tax Law" Project (Generalitat de Catalunya). Visiting scholar in Harvard School of Law, European University Institute, Università di Roma 'La Sapienza', Università degli Studi di Firenze, International Bureau of Fiscal Documentation (Amsterdam), Universita degli Studi di Bologna, LSE of London, University of Leeds (UK), Georgetown University (Washington, DC), World Bank (Washington, DC).

[2] Director of the Spanish "Fiscal Studies Institute" (Institute attached to the Ministry of Finance, through the Spanish Ministry of Finance). Associate Professor of the Complutense University of Madrid (UCM). Director of Research Studies. Associate Professor UCM.

[3] General Director of Planning and Fiscal Studies of the Generalitat de Catalunya, and full professor of Tax Law, Autonomous University of Barcelona (UAB).

[4] Interim Full Professor of Tax Law. University of Vigo. Extraordinary award Law Degree. Doctoral degree with the mention of European Doctor. Ph.D. Thesis award by the University of Vigo and the Institute of Fiscal Studies (Spanish Ministry of the Economy). Researcher in European and International Tax Law at different centers and Universities such as the IBFD, WU Vienna University of Economics and Business, Max Planck Institute of Tax Law and Public Finances (Munich) and the NYU.

[5] Specialist for the General Directorate of Planning and Fiscal Studies of the Generalitat de Catalunya.

[6] Full Professor of Tax Law. University of Vigo. Extraordinary award Law Degree. Doctoral degree with the mention of European Doctor. Ph.D. Thesis award by the University of Vigo. Research stays at different centers and Universities such as the IBFD, Panthéon-Sorbonne University, Aix-Marseille University, Toulouse Capitole University and University of Padova.

[7] Assistant to the General Directorate Planning and Fiscal Studies of the Generalitat de Catalunya.

[8] Advisor to the General Directorate of Planning and Fiscal Studies of the Generalitat de Catalunya, and associate professor of EU Law. University of Girona.

[9] Full Professor of Tax Law. University of Vigo.

[10] Technical intern at the Education and Law Review. Ph.D. student. University of Barcelona.

PANEL 1

CURRENT CHALLENGES FOR THE SPANISH TAX ADMINISTRATION

The Spanish Tax Administration: shadows and lights, RAMÓN FALCÓN Y TELLA, Professor of Tax Law at the Complutense University of Madrid

Tax offence, nowadays, in Spain. JUAN MARTÍN QUERALT, Professor of Tax Law at the University of Valencia

The necessary coordination between the sub central levels of government, EUGENIO SIMÓN ACOSTA, Professor of Tax Law at the University of Navarra

Tax collection as centre of an efficient and sustainable Administration. JOAQUÍN ÁLVAREZ MARTÍNEZ, Professor of Tax Law at the University of Zaragoza

Moderator: ISAAC MERINO JARA, Professor of Tax Law at the University of the Basque Country

The purpose of the initial panel was to analyze the "Current Challenges for the Spanish Tax Administration", being moderated by Professor **Isaac Merino Jara**. ProfessorRamón Falcón y Tella who took care to raise the shadows and lights of the current situation of the Spanish Tax Administration gave the first presentation. Professor Falcóny Tella highlighted the criticism of abandonment and disregard for the law that has characterized especially the tax inspection in recent times. He mentioned as examples theexercise of his powers within the framework of incentives for events of special interest and the controversy of VAT with respect to public television. In addition, he took advantage of the occasion to highlight the risk of collapse of the TEAs and theircriticisable statistics in some areas. Dr. Falcón pointed out possible measures in order notto generate unnecessary costs to and by the Administration.

Professor **Juan Martín Queralt** raised a problem in the fiscal offense, around the generalization of the practice of prior diligences by the Prosecutor's Office, which is transferred not respecting sometimes, the guarantees of the right of defending. He also proposed the configuration of the optional nature of the economic-administrative path. Finally, in relation to the authorship of the fiscal offense, he reflected on the imputation of the tax advisors as necessary co-operators.

Professor **Eugenio Simón Acosta** highlighted the necessary coordination between the sub central levels of the government, from the perspective of the Navarre's Agreement, although it can be predicted as much with respect to other Autonomous Communities as it is for the Basque Concert. In the previous phase of coordination based on the connection points, the three different existing regulations erect residence as a connection point regulated variously based on antinomies that cause important problems. The heterogeneous norms related to the inheritance and donation tax (in state and provincial regulations) and even to the company tax (in the provincial regulations) suggest another possible scenario, taking into account, for example, the residence and the volume of operations. For this, it would be desirable for the state norm to resolve this situation.

Professor **Joaquín Álvarez Martínez** addressed the possibility of collecting in a more efficient manner based on possible reforms related to the tax administration, the tax procedure and the proper treatment of the debtors themselves. It would also be desirable

to improve computer programs to facilitate the transition between the voluntary period and the executive. In particular, the collection procedure can be excessively extensive, with very long incidents, and it is possible to reduce the time limits of the enforcement procedure, in order to increase collection efficiency. The Administration should favour the compliance of the debtors: broader possibilities of deferral could be established in other taxes such as the IS, the surcharge of the executive period of 5% could be reduced by 25% in cases of early payment and it is possible to cover improvements in deferrals and instalments of payment.

In the debate, Professor **Merino Jara**, in line with the interventions, raised the reflection on two topics: the current configuration of the economic-administrative path and the duration of the tax procedures.

PANEL 2

TRENDS IN MATTERS OF INTERNATIONAL FISCAL GOVERNANCE

Transfer pricing and anti-avoidance rules of the new international good practice standard of the OECD BEPS Plan. ANA PITA GRANDAL, Professor of Tax Law at the University of Vigo

Taxpayer rights and tax administration: right to due process within the framework of European regulations. CLEMENTE CHECA GONZÁLEZ, Professor of Tax Law at the University of Extremadura

The FATF and the red lists of tax havens: countermeasures to protect financial systems from the risks of money laundering. ANDRÉS OLESTI RAYO, Professor of International Public Law and International Relations at the University of Barcelona.

The Harmonization of Corporate Tax Base. *ISABEL GARCÍA-OVIES SARANDESES, Professor of Tax Law at the University of Oviedo*

Moderator: JOAN FRANCESC PONT CLEMENTE, Professor of Tax Law at the University of Barcelona

The second panel focused on the analysis of: "Trends in international tax governance" and was moderated by Professor **Joan Francesc Pont Clemente**.

First, Professor **Ana María Pita Grandal** carried out an account of the current situation of the new forecasts of Transfer Pricing in the Guidelines approved last year by the OECD following the actions of BEPS. The articulation of the principle of free competition, the new guidelines in the analysis and the comparability factors place the companies in an area of certain legal uncertainty or technical discretion not always sufficiently regulated. The States must adequately control this scenario but also the jurists instead of simply assuming that "soft law" must begin to analyze and dissect the subject, so that it is not in the hands of large firms that can negotiate such prices.

Professor **Clemente Checa González** transferred the community legal bases of the right to due procedure within the framework of European regulations. Based on the Treaties and community jurisprudence, an Administrative Law of the EU could be reached. The Brexit can possibly contribute to the creation of the common administrative procedure.

There are certain principles that should have a preferential and prominent place such as the right to due process. In the due procedure, the principle of contradiction is established as fundamental and the causes of inadmissibility should be established with rigorous caution; the substantive law must prevail over the formal law. Finally, a fundamental closing element is that the resolutions or sentences must be sufficiently motivated.

Professor **Andreu Olesti Rayo** took care to convey to the attendees a complete and current view of the Financial Action Task Force (FATF). Within the framework of soft law, its recommendations have evolved, defining a conceptual framework that requires legal and regulatory implementation in each member country to adapt its regulatory framework to international standards. The initial mission of the FATF was to focus on the prevention of the use of the banking system and other financial institutions for money laundering derived from drug trafficking, later they included money laundering, financing of terrorism, as well as the financing of proliferation of weapons of mass destruction. In the latest modifications, the fiscal offense was incorporated as a predicate offense of money laundering. The latest FATF report regarding our country can be valued positively. Finally, he stressed that the EU began in 2016 a review to determine other broad lists based on different criteria such as lack of transparency, a criterion of balanced taxation, the existence of preferential tax regimes and respect for the OECD criteria against tax optimization.

Professor **Isabel García-Ovies Sarandeses** analyzed the last two proposals of the EU Directives regarding the Common Consolidated Corporate Tax Base (BICIS and CCCTB). In particular, it focused on certain aspects, such as, for example, the legal basis of the directives linked to circumvention practices, because they restrict the freedoms protected in the Treaties. With regard to the 2011 BICCIS project, the new proposals are more realistic, such as the extension of the concept of permanent establishment, or the departure from the harmonized base with respect to the accounting result. With regard to income and expenses, the legislation initially projected was advanced. The transposition of future directives may be complicated and the modification of the tax procedure system, since it is also optional.

PANEL III

PROPOSAL TO IMPROVE TAX EFFECTIVENESS AND FINANCIAL EFFICIENCY

Towards efficient external control of the Administration. MIGUEL ÁNGEL MARTÍNEZ LAGO, Professor of Tax Law at the Complutense University of Madrid

Proposals for fiscal policy measures in order to improve the efficiency of the tax administration and in favour of the reduction of litigation. JOSÉ MARÍA LAGO MONTERO, Professor of Tax Law at the University of Salamanca

The harmonization of financial information of governments, as a prerequisite for international tax comparability. VICENTE MONTESINOS JULVE, Professor of Financial Economics and Accounting at the University of Valencia

Efficiency and responsibility in the control of public spending. GERMÁN ORÓN MORATAL, Professor of Tax Law at the University Jaume I

Proposed progress towards an integrated Administration within the framework of the reform of territorial financing in Spain. JESÚS RAMOS PRIETO, Professor of Tax Law at the Pablo Olavide University of Seville

Moderator: MONTSERRAT PERETÓ GARCÍA, Tax Law Professor at the Autonomous University of Barcelona. Director of Fiscal Planning and Fiscal Studies at the Generalitat of Catalonia

In the third panel, different proposals were made to improve tax efficiency and financial efficiency, with moderation being carried out by Professor **Montserrat Peretó García**. Professor **Miguel Ángel Martínez Lago** began by demonstrating how efficiency and economics tend to force to yield and cuts in public spending during the crisis transfer the true relevance of the principle of equitable allocation. In the criticism of the efficiency of the Administration on the basis of external control, it took as a basis two reports from the Court of Audit, which included a series of recommendations addressed to the AEAT and the DGT, and the appropriate bodies were urged to prepare a legal concept of fiscal benefit, and that the establishment of fiscal benefits is accompanied by a delimitation of the social or economic policy objectives that they intend to follow.

Professor **José María Lago Montero** deepened the analysis of possible tax remedies against the current situation and litigation in the tax field. The situation is not easy to counteract based on elements such as regulatory complexity, increasing tax pressure for some, the bad tricks of the Administration to measure economic capacity, poor motivations or constraints ... The remedies go through a better education fiscal of the citizenship. In addition, it would be advisable to reform the regional economic and administrative courts. Likewise, it proposes to simplify the tax system where there are certain special regimes that may no longer be fairly justified. Finally, he defended the viability of agreements between the parties in all procedures for facts, valuations and indeterminate legal concepts.

Professor **Vicente Montesinos Julve** analyzed the question of the harmonization of financial information of governments, as a prerequisite for international tax comparability. In this regard, he questioned the true meaning of financial information as a point of transparency of the States and to be able to carry out interstate comparisons. First, good governance and transparency as a starting point to gain the trust of the taxpayer. It also revealed the different existing information systems and the limitations of budget information based on the cash criterion by not showing financial risk. For this reason, in recent times at European level accrual financial statements have been considered taking into account, although not exclusively, IPSAS (International Accounting Standards for the Public Sector). The EPSAS are planned for 2020 requiring more adjustments that are reasonable.

Professor **Germán Orón Moratal** focused on the efficiency and responsibility of the internal control of public spending. In view of the decreasing existence of reports, a permanent financial control can be contrasted by the IGE, which gradually decreases. Regarding the General State Account, it can be contrasted that the opinion of the audit report is always positive and very improvable from the formal point of view. In the AEAT the Internal Audit Service (SAI) controls administrative irregularities but does not enter into efficiency. The suggestions and recommendations in recent years of the Ombudsman have not been sufficiently addressed. Finally, the reality is that the Treasury does not really facilitate the payment of debts and, no doubt, there is a real collection efficiency.

Professor **Jesus Ramos Prieto** analyzed the possibilities of an integrated Tax Administration and its difficulties in the current controversial situation. Based on the shared finance model there are certain advantages in a non-shared Administration, linked

to aspects such as: simplification and reduction of costs, efficiency, centralization of tax information, more homogeneous regulatory interpretation criteria or more fiscal co- responsibility. However, there are also drawbacks derived from autonomic self-organization and financial autonomy. In this controversial framework and in view of thelatest reports, we must stop to study the meaning and possible justification of an integratedtax administration. Certainly, in the Report of the Committee of Experts of 2017 for the revision of the Autonomous Financing Model, it was considered that the maximum levelof integration could be reached with the constitution of a single tax administration, of mixed ownership of the State and of the Autonomous Communities.

CLOSING

EVA ANDRÉS AUCEJO. IP Network of Excellence DER 2017-90874-REDT(G.O.T.A-INTAXCOOP & GOV)

JOSÉ MANUEL ALMUDÍ CID Vice-Dean for Postgraduate Studies and own titlesat the Complutense University of Madrid

CRISTINA GARCÍA-HERRERA BLANCO Director of Studies at the Institute ofFiscal Studies (Madrid. Spain).

Closure

Eva Andrés Aucejo closed the congress with a speech about the goals, methodology, participant teams phases and results of the Excellence Network DER 2017-90874-REDT (G.O.T.A-INTAXCOOP&GOV): *The Global Observatory on Tax Agencies: Towards the International Tax Cooperation and Global Governance.*

In the closing act, Professor Eva Andrés thanked all the speakers for their brilliant contributions and the assistance of all the researchers and administration personnel gathered there. She made an excerpt of the different workshops that were presented at the conference and recalled its openness to other possible collaborations within the Project that was born from the research developed in the World Bank and the International Monetary Fund and that has the privilege that the Institute of Fiscal Studiesof Spain and the World Bank participate as outstanding observatories.

Professor **CristinaGarcía-Herrera Blanco** closed this scientific event by congratulating the speakers as well as the organization on the possibility of carrying out the sharing on the subject, giving thanks for the collaboration from the Fiscal Institutes Studies of the Spanish Minister.

Programa

Jueves, 31 de mayo de 2018

09.15-09.30 **BIENVENIDA**

RICARDO ALONSO GARCÍA
Decano de la Facultad de Derecho de la Universidad Complutense de Madrid

MIGUEL ÁNGEL MARTÍNEZ LAGO
Catedrático de Derecho Financiero y Tributario de la UCM

09.30-11.00 **PANEL 1**
RETOS ACTUALES PARA LA ADMINISTRACIÓN TRIBUTARIA ESPAÑOLA

La Administración Tributaria española: sombras y luces

RAMÓN FALCÓN Y TELLA
Catedrático de Derecho Financiero y Tributario de la Universidad Complutense de Madrid

El delito fiscal, hoy, en España

JUAN MARTÍN QUERALT
Catedrático de Derecho Financiero y Tributario de la Universidad de Valencia

La necesaria coordinación entre los niveles subcentrales de gobierno

EUGENIO SIMÓN ACOSTA
Catedrático de Derecho Financiero y Tributario de la Universidad de Navarra

La recaudación tributaria como punto neurálgico de una Administración eficiente y sostenible

JOAQUÍN ÁLVAREZ MARTÍNEZ
Catedrático de Derecho Financiero y Tributario de la Universidad de Zaragoza

Modera:
ISAAC MERINO JARA
Catedrático de Derecho Financiero y Tributario de la Universidad del País Vasco

11.00-11.30 **Café**

11.30-13.00 **PANEL 2**
TENDENCIAS EN MATERIA DE GOBERNANZA FISCAL INTERNACIONAL

Precios de transferencia y normas anti-elusivas del nuevo estándar de buenas prácticas internacional del Plan BEPS de OCDE

ANA PITA GRANDAL
Catedrática de Derecho Financiero y Tributario de la Universidad de Vigo

Derechos de los contribuyentes y Administración tributaria: derecho al procedimiento debido en el marco de la normativa europea

CLEMENTE CHECA GONZÁLEZ
Catedrático de Derecho Financiero y Tributario de la Universidad de Extremadura

El GAFI y las listas rojas de paraísos fiscales: contramedidas para proteger los sistemas financieros de los riesgos de lavado de dinero

ANDRÉS OLESTI RAYO

Catedrático de Derecho Internacional Público y Relaciones Internacionales de la Universidad de Barcelona

La armonización de la Base Imponible del Impuesto sobre Sociedades

ISABEL GARCÍA-OVIES SARANDESES

Catedrática de Derecho Financiero y Tributario de la Universidad de Oviedo

Modera:

JOAN FRANCESC PONT CLEMENTE

Catedrático de Derecho Financiero y Tributario de la Universidad de Barcelona

13.00-14.30 **PANEL 3**
PROPUESTA PARA MEJORAR LA EFICACIA TRIBUTARIA Y LA EFICIENCIA FINANCIERA

Hacia un control externo eficiente de la Administración

MIGUEL ÁNGEL MARTÍNEZ LAGO

Catedrático de Derecho Financiero y Tributario de la UCM

Propuestas de medidas de política fiscal en aras de la mejora de la eficacia de la Administración tributaria y en pro de la disminución de litigios

JOSÉ MARÍA LAGO MONTERO

Catedrático de Derecho Financiero y Tributario de la Universidad de Salamanca

La armonización de la información financiera de los gobiernos, como prerrequisito para la comparabilidad fiscal internacional

VICENTE MONTESINOS JULVE

Catedrático de Economía Financiera y Contabilidad de la Universidad de Valencia

Eficiencia y responsabilidad en el control del gasto público

GERMÁN ORÓN MORATAL

Catedrático de Derecho Financiero y Tributario de la UCM

Propuesta de avance hacia una Administración integrada en el marco de la reforma de la financiación territorial en España

JESÚS RAMOS PRIETO

Catedrático de Derecho Financiero y Tributario de la Universidad Pablo Olavide de Sevilla

Modera:

MONTSERRAT PERETÓ GARCÍA

Profesora Titular de la Universidad Autónoma de Barcelona. Directora de Planificación Fiscal y Estudios Fiscales en la Generalitat de Cataluña

14.30-15.00 **CLAUSURA**

EVA ANDRÉS AUCEJO

IP de la Red de excelencia DER 2017-90874-REDT (G.O.T.A-INTAXCOOP&GOV)

JOSÉ MANUEL ALMUDÍ CID

Vicedecano de Estudios de Postgrado y títulos propios de la UCM

CRISTINA GARCÍA-HERRERA BLANCO

Directora de Estudios del Instituto de Estudios Fiscales

	EXCELLENCE NETWORKING DER 2017-90874-REDT	CONTACT
GLOBAL OBSERVATORY TAX AGENCIES	**Committee Advisor of The Global Observatory on Tax Agencies: towards on International Administrative Cooperation and Global Tax Governance** (G.O.T.A-INTAXCOOP&GOV)	**DIRS.:** J. Martín Queralt J. Lasarte Álvarez E. Simón Acosta

	EXCELLENCE NETWORKING DER 2017-90874-REDT	CONTACT
GLOBAL OBSERVATORY TAX AGENCIES	**The Global Observatory on Tax Agencies: towards on International AdministrativeCooperation and Global Tax Governance** (G.O.T.A-INTAXCOOP&GOV)	*Principal Investigator:* **Eva Andrés Aucejo**

UNIVERSITY	COMPETITIVE PROJECTS AND INSTITUTIONAL SUPPORT ENTITIES DER 2017-90874-REDT (G.O.T.A-INTAXCOOP&GOV)	CONTACTS PRINCIPAL INVESTIGATORS
UNIVERSITAT DE BARCELONA	*Project: DER2015-68768-P. International Administrative Co-Operation in Tax Matters and ADR of Transnational Tax Disputes and Models for an Institutional Architecture from a European Perspective.*	E. Andrés Aucejo
Instituto de Estudios Fiscales	*Instituto de Estudios Fiscales*	C. García-HerreraBlanco
UNIVERSIDAD COMPLUTENSE MADRID	*Universidad Complutense de Madrid,* *CertificaRSE Project* (DER 2015-653704-R, MINECO-FEDER) https://www.ucm.es/proyecto-certificarse/	M. A. Grau Ruiz
UNIVERSIDAD COMPLUTENSE MADRID	*DER2015-65832-P. Título: La protección de las libertades fundamentales y los derechos fundamentales en el Ordenamiento Financiero y Tributario (DER2015-65832-P).*	M.A. Martínez Lago J.M. Almudí Cid
VNIVERSITAT DE VALÈNCIA	*European Project funding by the UE*	V. Montestinos Julve
LJD LAW, JUSTICE and DEVELOPMENT **World Bank-2017**	*Human Centered Business Model Project* http://www.globalforumljd.org/cops/human-centered-business-model	M. Nicoli
UNIVERSITAT DE BARCELONA	*DER2015-65003-P (1/01/2016/31/12/2018). El control democrático y la tutela de los derechos en la Unión Económica y Monetaria.*	A. Olesti Rayo

Members of the Excellence Network: DER 2017-90874-REDT (G.O.T.A-INTAXCOOP&GOV)

	*DER 2015-66338-P. El ordenamiento financiero y tributario de puertos y zonas francas en España: implicaciones de la Unión Europea y de la liberalización delComercio internacional*	A. Pita Grandal
	*Proyecto I+D+i DER2011-25520 "Competencia fiscal y sistema tributario: un análisismultinivel" (Proyecto COMFISTAM).*	J. Ramos Prieto
	*Projecto DER2012-39342-C03-01 UNIVERSIDAD DE NAVARRA CIF: R3168001J Centro: Facultad de Derecho.*	Isaac Merino Jara E. Simón Acosta
	*Committee of other expert members attached to the* **Global Observatory on Tax Agencies: towards on International Administrative Cooperation and Global TaxGovernance** (G.O.T.A-INTAXCOOP&GOV)	Coord.: Joaquín Álvarez

Con la participación de representantes de las siguientes instituciones:

International Monetary Fund

Intra European Organisation of Tax Administrations

Inter-American Center of Tax Administrations

Confédération Fiscale Européenne

Central Liaison Office, The Netherlands

George Washington University

University of Oxford

London School of Economics and Political Science

Asociación Española de Asesores Fiscales

Asociación Española de Derecho Financiero

INTERNATIONAL CONGRESS

GLOBAL TAX ADMINISTRATIONS' EFFICIENCY: International Fiscal Cooperation and Governance

GENERAL INFO:

This 1st International Congress is an activity is carried out in the framework of the EXCELLENCE NETWORK: DER 2017- 90874-REDT (G.O.T.A-INTAXCOOP&GOV): The Global Observatory on Tax Agencies: towards the International Administrative Cooperation and Global Tax Governance (PI: Eva Andrés Aucejo).

Coordinators: E. Andrés Aucejo (DER 2015- 68768-P), C. García-Herrera Blanco (IEF), M. A. Grau Ruiz (DER 2015-653704-R), M. A. Martínez Lago and J. M. Almudí Cid (DER 2015-65832-P), M. Nicoli (HCBM Project), V. Montesinos Julve (European Project), A. Olesti Rayo (DER 2015-65003-P),A. M. Pita Grandal (DER 2015-66338-P), J. Ramos Prieto (DER 2011-25520), E. Simón Acosta (DER 2012-39342-C03-01).

SCIENTIFIC COMMITTE:

M. A. Martínez Lago, E. Andrés Aucejo, J. M. Almudí Cid and M. A. Grau Ruiz

Generalitat de Catalunya
Departament de la Vicepresidència i d'Economia i Hisenda
Secretaria d'Hisenda

— CONGRESS CHRONICLE —

Friday 1 June 2018

Venue: EAPC (Public Administrative School of Catalonia)

Girona St, 20, Barcelona

UNIVERSITAT DE BARCELONA

GOBIERNO DE ESPAÑA MINISTERIO DE ECONOMÍA, INDUSTRIA Y COMPETITIVIDAD

GOBIERNO DE ESPAÑA MINISTERIO DE HACIENDA Y FUNCIÓN PÚBLICA

Instituto de Estudios Fiscales

INTERNATIONAL CONGRESS REPORT

THE EFFICIENCY OF TAX ADMINISTRATIONS, INTERNATIONAL FISCAL COOPERATION AND GOVERNANCE

Eva Andrés Aucejo[1]; Cristina García-Herrera Blanco[2]; Montse Peretó García[3] (Coords.); Mari Cruz Barreiro[4]; Ana María Guembe[5]; Luis Muleiro[6]; María Isabel Poza[7]; Eva Rivera[8]; Carmen Ruiz[9], Ana María Enríquez[10].

On **1 June 2018,** an **International Congress** took place, entitled: **The Efficiency of Tax Administrations, International Fiscal Cooperation and Governance,** which derived from the Network of Excellence project DER 2017-90874-REDT (G.O.T.A-INTAXCOOP&GOV): The Global Observatory on Tax Administrations (PR: Eva Andrés). This event was organised by the General Directorate of Planning and Fiscal Studies of the Generalitat de Catalunya together with the University of Barcelona, and was held at the Public Administration School of Catalonia (EAPC).

[1] Full Professor of Tax Law. University of Barcelona. Researcher and Consulter from the Global Forum on law, Justice and Development of the World Bank on the HCBM, Project 2017. Extraordinary award both Law Degree and PHD in Law. Bachelor of Economic Sciences and Business Studies. Director of the Education and Law Review; Principal Investigator of the Excellence Network DER 2017-90874-REDT G.O.T.A.- INTAXCOOP&GOV: "The Global Observatory on Tax Agencies: Towards to the International Tax Cooperation and Governance"; Principal Investigator of the Der 2015-68768-P Project: International Administrative Co-Operation in Tax Matters and ADR of Transnational Tax Disputes and Models for an Institutional Architecture from a European Perspective. Principal Investigator of the "Comparative ADR Systems on tax Law" Project (Generalitat de Catalunya). Visiting scholar in Harvard School of Law, European University Institute, Università di Roma 'La Sapienza', Università degli Studi di Firenze, International Bureau of Fiscal Documentation (Amsterdam), Universita degli Studi di Bologna, LSE of London, University of Leeds (UK), Georgetown University (Washington, DC), World Bank (Washington, DC).

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[7] Assistant to the General Directorate Planning and Fiscal Studies of the Generalitat de Catalunya.

[8] Advisor to the General Directorate of Planning and Fiscal Studies of the Generalitat de Catalunya, and associate professor of EU Law. University of Girona.

[9] Full Professor of Tax Law. University of Vigo.

[10] University of Barcelona

The talks given by leading international figures in tax law were split into the following sessions:

- ***Official Opening***. Welcome and Congress opening speech given by Montse Peretó, General Director of Planning and Fiscal Studies, Isidre Sala, General Director of Multilateral Affairs for the Generalitat de Catalunya, Piergiorgio Valente, Chairman of the European Confederation of Tax Advisers (CFE), and Albert Castellanos, Treasury Secretary for the Generalitat de Catalunya.

- ***Panel I*** (9:50-12:30). **Multilevel tax administration**. Moderated by Stella Raventós Calvo, a renowned expert in the field of international taxation, member of the *Confédération Fiscale Européenne* and partner of the law firm ECIJA. The panel was comprised of Monica Sionara Schpallir Calijuri, Paul Van der Smitte, Julius Sen and Eugenio Simón Acosta.

- ***Panel II*** (13:00-15:00). **Trends and issues in international cooperation on indirect taxation (customs and excises duties) and the costs of the automatic exchange of information (CRS) on direct and indirect taxation.** Moderated by Santiago Ibañez, professor at the University of Valencia. The panel was comprised of Caroline Edery, Alex Ortega, Alessandro Turina and Santiago Ibañez.

The talks given by the expert speakers dealt with the main trends in international cooperation and global tax governance. They also analysed the global models on the analysis/assessment of the efficiency of the world's tax administrations and made proposals to improve the efficiency and effectiveness of the Tax Administrations of Spain and the rest of the World.

The Congress was run under the direction of Eva Andrés Aucejo, qualified as a Professor at the University of Barcelona.

OFFICIAL OPENING

Firstly, the General Director of Planning and Fiscal Studies of the Generalitat de Catalunya, Montse Peretó, welcomed the guests and speakers to the International Congress, thanking the collaborators for their contributions and indicating that the Congress is carried out under the framework of the Network of Excellence DER 2017-90874-REDT (G.O.T.A-INTAXCOOP&GOV): The Global Observatory on Tax Agencies: towards the International Administrative Cooperation and Global Tax Governance (PR: Eva Andrés), having been made possible thanks to the collaboration of the Generalitat de Catalunya (Treasury Department) and the University of Barcelona.

Next, the General Director of Multilateral Affairs for the Generalitat de Catalunya, Isidre Sala, opened the congress by reaffirming the need to strengthen international cooperation between the different bodies and multilevel systems in the tax field, given that there are shared mutual objectives. He recalled that, in a globalised world, tax administrations face challenges that go beyond the borders of any country and that the common objective of all tax administrations is to better serve the public. Therefore, there is a need for international cooperation between the different administrations and to seek coordination mechanisms geared towards facilitating the achievement of these objectives. In short, he supports the holding of this congress as a way to contribute to progress being made in the commitment to international cooperation to achieve different shared mutual objectives, learn from best international practices, share lessons learned and explore partnerships providing a mutual benefit.

Next, Piergiorgio Valente (Chairman of the Confédération Fiscale Européene) gave a presentation on the challenges faced by international taxation. He stressed that digitalisation and the global scenario are our present and future reality, and that Tax Administrations therefore need to unite to meet the needs of taxpayers, given the challenges imposed by the digital economy. He argued for the need to move away from the traditional model towards a model that facilitates the exchange of information, reduces uncertainty and where transparency is proportional to the rights of taxpayers, expanding networks to help tax advisers to effectively intervene in international taxation.

Finally, the Treasury Secretary for the Generalitat de Catalunya, Albert Castellanos, highlighted the role played by events such as this one, especially for learning about international methodologies to assess the efficiency of Tax Administrations. He also took stock of the management of taxes by the Catalan Administration, the results achieved and the challenges faced by Catalonia's Tax Agency in matters of cooperation and the fight against tax fraud.

PANEL 1

Stella Raventós Calvo, member of the Spanish Association of Tax Advisers (AEDEF) and current Chair of the European Confederation of Tax Adviser's Tax Committee, was the moderator for this panel. Before the talks started, she apologised on behalf of Eugenio Simon Acosta who was absent due to personal problems, then emphasised that the panel topics were very interesting and gave a brief introduction to the TADAT Secretariat, an organisation created by the IMF, and without further delay gave the floor to the first speaker, Monica Sionara Schpallir Calijuri.

- **Monica Sionara Schpallir Calijuri** (representative of the IMF), "*The TAX Administration Diagnostic and Assessment Tool (TADAT)*": She has collaborated with various tax administrations in South American countries and is currently an expert adviser to TADAT Secretariat, an organisation created by the International Monetary Fund (financed by the EU, the tax agencies of the Netherlands, Japan, UK and others). Monica was responsible for explaining to the attendees the functioning of the TADAT global tool for assessing the efficiency of tax administrations, which provides an objective view of the health of the tax administration being assessed. Given that the challenges faced by tax administrations are very similar on all levels, she mentioned that a standardised tool has been designed that assesses 47 dimensions based on the results obtained by the tax administration, comparing good international tax practices with the results obtained by the tax administration in 9 areas considered to be the key ones for the efficiency of a tax administration, using the indicators and evidence provided by it.

The general view obtained, shared by all stakeholders and highlighting the strengths and weaknesses of the tax administration system, is a baseline for possible reforms to the procedures of that tax administration. Next, there was a review of the assessments carried out by the TADAT Secretariat, and attention was paid to the lessons learned during the diagnoses and assessments carried out, as well as the future challenges faced by tax administrations when it comes to improving their efficiency.

- **Julius Sen,** *"Brexit and implications for Tax Policy Coordination"*: he is a renowned researcher and professor from the London School of Economics and Political Sciences in the United Kingdom, and brilliantly addressed the tax implications of Brexit. In order to be able to make the necessary investments (in education, health, etc.) to ensure that a model based on the domestic economy can grow, the entire system must be reassessed to obtain new income and find solutions to achieve this growth target. Therefore, a solution must be found between creating money, borrowing or creating new taxes (taxes on transactions, improving the tax compliance system, etc.). He emphasised the fact that the British customs system needs to improve in the fight against smuggling and controls on imports of Chinese goods, and there are no resources to do this. If the UK

also designs an attractive tax system, the EU would interpret it as a violation of the rules on state aid, generating discontent among its neighbours, always remembering that the USA does not consider the UK to be at all important in its trade strategy. Given all of this, the speaker ended his speech with criticism of the UK government for not being adequately prepared to address all these challenges arising from the new Brexit situation.

- **Paul Van der Smitte** (IBFD professor), *"The Central Liaison Office of the Netherlands Tax and Custom Administration as an efficient Tax Collection Office Model"*: he has worked as an inspector, auditor and lecturer at various universities, also collaborating with the Dutch tax administration as a legal and strategic advisor for the international collection of tax debts (Central Liaison Office of the Netherlands Tax and Customs Administration). Van der Smitte's talk was fundamentally based on presenting the successful Dutch collection system based on being proactive in the search for new and imaginative solutions, which bases its operations on a combination of processes and creating specialised multi-sector teams containing experts in international taxation.

He pointed out the need for each tax administration to equip itself with experts who have the skills and abilities to deal with issues anywhere in the world, to thus minimise the legal uncertainty generated by differences between the legal systems of the different countries. Next, he highlighted some good practices and instruments in the Dutch taxation system. Finally, he emphasised the fact that each tax administration must seek and design its own solutions and measures that help to ensure that the collection phase of the tax process is completely efficient and effective.

PANEL 2

The event resumed after the lunch break. Santiago Ibañez, professor at the University of Valencia and Chairman of the Jean Monnet Chair "EU Customs law", was moderator of this second session. The panel was comprised by Caroline Edery, Alessandro Turina, Alex Ortega and Santiago Ibañez himself, who also participated as a speaker. This panel addressed the cooperation trends and improvements for indirect international taxation and customs, the costs of the automatic exchange of information in direct and indirect taxation, and other aspects of global tax governance.

- **Caroline Edery** (head of the Tax Administration and fight against Tax fraud- DG TAXUD Unit, European Commission), "*International Cooperation on Indirect taxation within the European Union":* the representative from the European Commission presented the latest initiatives launched in the area of administrative cooperation in indirect taxation at a community level. She stressed that it was necessary to address the issue of mass tax fraud, the evasion of taxes and aggressive tax planning in its international dimension in order to avoid the loss of income and to do this, effective international administrative cooperation in tax matters among the 27 member states was essential. She also pointed out that the "VAT gap" is five times greater than the annual budget of the 27 tax administrations, as shown in the reports published on VAT. In order to fight VAT fraud, the European Commission has drawn up an action plan on VAT that points to an ambitious reform of the EU VAT system to make it simpler and facilitate cross-border e-commerce transactions. She reviewed the mechanisms and measures that will update the VAT regulations.

- **Alessandro Turina** (postdoctoral researcher at IBFD and professor at the University of Lausana, Switzerland), "*The OECD common reporting standard for the exchange of information and its costs. Who pays the costs of automatic exchange of information?":* Professor Turina referred to the issue of the assignment and distribution of the costs generated during the exchange of information as one of the pillars in the sustainability of the architecture of international administrative cooperation. He analysed some of the main problems with the international exchange of tax information: what are the costs involved in the process and what types of cost exist, distinguishing between ordinary costs, paid by each state that receives the cooperation request, and extraordinary costs, those that are very difficult to allocate and that tend to be paid by the applicant. He explained that currently the main area of exchange is financial information, which is considered to be of an extraordinary nature, and the cost is incurred more in collecting the information than in the exchange itself. The regulations applicable in the field of cooperation are quite outdated and investment is required to define what information must be obtained and stored. Although the good faith and diligence of the financial institutions

is presumed when obtaining, processing and providing information, he proposes the creation of a central governmental body to carry out this function.

- **Santiago Ibañez, (**professor at the University of Valencia and Chairman of the Jean Monnet Chair "EU Customs law") "*International Administrative Cooperation in Customs matters"*: Firstly, he spoke about the background and evolution of the international system of common customs rules, which allow imported/exported products to be classified in the same way in all countries. Next, he analysed the different international rules on the exchange of tax information, highlighting the main international treaties and agreements: he examined the role played by the Nairobi International Convention on mutual administrative assistance when investigating customs violations, which allows the exchange of relevant tax information; the Johannesburg Convention; the SAFE regulatory framework of the World Customs Organisation that deals with security; the export regulations aimed at reducing risks, the coordination mechanisms and collaboration agreements promoted by the U.S. Government between customs and multinational companies, which offer security advantages; and finally, the system promoted by the EU regarding the concept of authorised economic operators. Finally, he proposed being more active in the exchange of information between countries, for our mutual benefit.

- **Alex Ortega** (PhD in tax law and a lawyer), *"Administrative Cooperation in the field of Excise Duties within the European Union"*. His talk examined why administrative cooperation in the field of special taxes within the European Union works, with such mutual assistance between member states being essential for the proper functioning of the internal market. In the EU, administrative cooperation in indirect taxation works because it belongs to an effective and efficient system that protects the member states and prohibits tax evasion (MCS). He mentioned the existence of Directive 2011/16/EU of the Council, of 15 February 2011, on administrative cooperation in the field of taxation, which repeals Directive 77/799/EEC. On a community level, this protects member states and prohibits tax evasion. However, he stressed that efficiency and effectiveness in the fight against tax fraud does not depend solely on administrative cooperation, but also on the legal framework existing in each country at all times.

CLOSING SESSION

The closing speech of the Congress was given by Eduard Vilà, director of the Tax Agency of Catalonia (ATC), who congratulated the speakers for the quality of their talks, for the great variety of perspectives shared throughout the day, and made a series of final reflections on the topics discussed at the Congress. He stressed that in a globalised world, collaboration between tax administrations is essential, but so is collaboration with intermediaries and tax advisers, and that in any case, the exchange of information must always be made whilst respecting the protection of data. From the ATC's perspective, he insisted that there is a willingness to collaborate with other tax administrations in order to address all of the challenges. He highlighted a report on the tax gap for the taxes managed by the ATC (26% tax gap), the major problem being with undeclared assets located abroad. It is necessary to improve access to this information, and to do this, mutual assistance between countries and tax administrations is essential.

Finally, Eva Andrés expressed her gratitude to Isidre Sala, Montse Peretó and Albert Castellanos for their help in organising the International Congress, and thanked all of the international organisations (IMF, IBFD, European Commission, etc.), representatives of universities and associations, and other speakers who had taken part in the sessions of the Congress in one way or another. She then gave a presentation on the Network of Excellence: The Global Observatory on Tax Administrations, where she pointed out that universities and researchers from all over the world are members of this Network. She explained that a study is being conducted focused on analysing the efficiency of Tax Administrations, the cooperation between tax administrations and international tax governance. This was the first international Congress to be held and she hoped it would not be the last.

UNIVERSITAT DE BARCELONA

Generalitat de Catalunya
Government of Catalonia

Program

Friday, 1 june 2018

08.45-09.00 **REGISTRATION**

09.00-09.30 **WELCOME**

ISIDRE SALA I QUERALT
General Director for Multirateral and European affairs

MONTSERRAT PERETÓ I GARCIA
General Director of Tax Studies and Tax Planning

PIERGIORGIO VALENTE
President of the CEF Tax Advisers Europe-Confédération Fiscale Européenne

09.30-09.50 **OPENING SPEECH**

ALBERT CASTELLANOS I MADUELL
Secretary of Finance. Government of Catalonia

09.50-12.00 **PANEL 1. MULTILEVEL TAX ADMINISTRATION SYSTEMS**

The Tax Administration Diagnostic and Assessment Tool (TADAT)
MÔNICA SIONARA SCHPALLIR
International Monetary Fund. Washington. U.S.A.

Brexit and implications for Tax Policy Coordination
JULIUS SEN
London School Economics and Political Sciences. United Kingdom

The Central Liaison Office of Netherlands Tax and Custom Administration as an efficient Tax collect Office Model
PAUL VAN SMITTE
Belastingdienst/Central Liaison Office. Netherlands

Coordination of the Financial Administration sub-central levels: the "Foral" Administration of Navarre and de Basque Provinces
EUGENIO SIMÓN ACOSTA
Professor of Finance and Tax Law. Navarre University. Spain

Chair:

STELLA RAVENTÓS
Conféderation Fiscale Européene. Spain

12.00-13.00 **LUNCH**

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13.00-15.00 PANEL 2. TRENDS AND ISSUES OF INTERNATIONAL COOPERATION ON INDIRECT TAXATION (CUSTOMS AND EXDISES DUTIES) AMD THE COSTS OF THE AUTOMATIC EXCHANGE OF INFORMATION (CRS) ON DIRECT AND INDIRECT TAXATION

International Cooperation on Indirect taxation within the European Union

CAROLINE EDERY

European Commission

International Administrative Cooperation in Customs matter

SANTIAGO IBÁNEZ

Professor of the University of Valencia

Administrative Cooperation in the field of Excise Duties within the European Union

ALEX ORTEGA

PhD on Tax law and lawyer

The Common Reporting Standard (CRS) of exchange of information (OECD) and its costs. Who pays the automatic exchange of information costs?

ALESSANDRO TURINA

Researcher- University of Lausanne, Adjunct Post-doctoral Fellow-IBFD, Lecturer- Bocconi University

Chair: **Representative of the AEDAF**

15.00-15.30 CLOSING SPEECH

EDUARD VILÀ I MARHUENDA

Director of the Catalan Tax Agency

XAVIER PONS I RAFOLS

Dean of the Faculty of Law. University of Barcelona

EVA ANDRÉS AUCEJO

Full professor of Tax Law of the University of Barcelona. P.I.: EXCELLENCE NETWORKING: DER 2017-90874-REDT (G.O.T.AINTAXCOOP&GOV) and P.I.: DER2015-68768-P. International Administrative Cooperation in Tax Matters and ADR of Transnational Tax Disputes and Models for an Institutional Architecture from a European Perspective.

	EXCELLENCE NETWORKING DER 2017-90874-REDT	CONTACT
GLOBAL OBSERVATORY TAX AGENCIES	**Committee Advisor of The Global Observatory on Tax Agencies: towards on International Administrative Cooperation and Global Tax Governance** (G.O.T.A-INTAXCOOP&GOV)	**DIRS.:** J. Martín Queralt J. Lasarte Álvarez E. Simón Acosta

	EXCELLENCE NETWORKING DER 2017-90874-REDT	CONTACT
GLOBAL OBSERVATORY TAX AGENCIES	**The Global Observatory on Tax Agencies: towards on International Administrative Cooperation and Global Tax Governance** (G.O.T.A-INTAXCOOP&GOV)	*Principal Investigator:* **Eva Andrés Aucejo**

UNIVERSITY	COMPETITIVE PROJECTS AND INSTITUTIONAL SUPPORT ENTITIES DER 2017-90874-REDT (G.O.T.A-INTAXCOOP&GOV)	CONTACTS PRINCIPAL INVESTIGATORS
UNIVERSITAT DE BARCELONA	*Project: DER2015-68768-P. International Administrative Co-Operation in Tax Matters and ADR of Transnational Tax Disputes and Models for an Institutional Architecture from a European Perspective.*	E. Andrés Aucejo
Instituto de Estudios Fiscales	*Instituto de Estudios Fiscales*	C. García-Herrera Blanco
UNIVERSIDAD COMPLUTENSE MADRID	*Universidad Complutense de Madrid,* *CertificaRSE Project* (DER 2015-653704-R, MINECO-FEDER) https://www.ucm.es/proyecto-certificarse/	M. A. Grau Ruiz
UNIVERSIDAD COMPLUTENSE MADRID	*DER2015-65832-P. Título: La protección de las libertades fundamentales y los derechos fundamentales en el Ordenamiento Financiero y Tributario (DER2015-65832-P).*	M.A. Martínez Lago J.M. Almudí Cid
VNIVERSITAT DE VALÈNCIA	*European Project funding by the UE*	V. Montestinos Julve
LJD LAW, JUSTICE and DEVELOPMENT **World Bank- 2017**	*Human Centered Business Model Project* http://www.globalforumljd.org/cops/human-centered-business-model	M. Nicoli
UNIVERSITAT DE BARCELONA	*DER2015-65003-P (1/01/2016/31/12/2018). El control democrático y la tutela de los derechos en la Unión Económica y Monetaria.*	A. Olesti Rayo

Members of the Excellence Network: DER 2017-90874-REDT (G.O.T.A-INTAXCOOP&GOV)

UNIVERSIDADE DE VIGO	*DER 2015-66338-P. El ordenamiento financiero y tributario de puertos y zonas francas en España: implicaciones de la Unión Europea y de la liberalización del Comercio internacional*	A. Pita Grandal
UNIVERSIDAD PABLO DE OLAVIDE	*Proyecto I+D+i DER2011-25520 "Competencia fiscal y sistema tributario: un análisis multinivel" (Proyecto COMFISTAM).*	J. Ramos Prieto
Universidad de Navarra	*Projecto DER2012-39342-C03-01 UNIVERSIDAD DE NAVARRA CIF: R3168001J Centro: Facultad de Derecho.*	Isaac Merino Jara E. Simón Acosta
GOTA Global Observatory Tax Agencies	*Committee of other expert members attached to the* **Global Observatory on Tax Agencies: towards on International Administrative Cooperation and Global Tax Governance** (G.O.T.A-INTAXCOOP&GOV)	Coord.: Joaquín Álvarez

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International Monetary Fund

Intra European Organisation of Tax Administrations

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Confédération Fiscale Européenne

Central Liaison Office, The Netherlands

Spanish Tax Agency

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Institute for Fiscal Studies

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Asociación Española de Derecho Financiero