

A Dialogue between Global Trade Governance and International Environmental and Tax Policies

Un diálogo entre la gobernanza comercial global y las políticas ambientales y tributarias internacionales*

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Abstract: The starting point of this paper is based on the interrelation between the political and legal elements that make up and sustain the global trade governance, understanding that it is linked to environmental law and tax law. These subjects are linked each other with the international trade and, at the same time, they are interlinked through the international trade. Our purpose is to determine the dialogues that emerge from these relationships.

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Resumen: El punto de partida de este trabajo se basa en la interrelación que existe entre los diferentes elementos políticos y jurídicos que sustentan la gobernanza comercial global, entendiendo que ella está vinculada al Derecho ambiental y al Derecho tributario. Estas áreas están ligadas cada una con el comercio internacional y, a la misma vez, están interconectadas a través del comercio internacional. Nuestro objetivo consiste en determinar los diálogos que emergen de dichas relaciones.

Keywords: global trade governance, international trade, environmental law, tax law

Palabras clave: gobernanza comercial global, comercio internacional, derecho ambiental, derecho tributario

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I. THE INFLUENCE OF POLITICS ON GLOBAL TRADE GOVERNANCE

Not long ago, one of the fundamental questions about public international law was whether it was indeed law and whether it could be the object of scientific research. For example, and to name just two classic works about philosophy of law, Kelsen (1960/2017, 554-558) opens his chapter VII on State and international law of the «Pure Theory of Law» with precisely that question. Similarly, Hart (1994, 212-216) also begins chapter X on the international law of «The Concept of Law» with that question. Back then, perhaps one could note a somewhat defensive attitude that tried to justify the existence of international law.

Currently, however, the question about the existence of international law has lost much of its urgency. For some, the question itself seems to have ceased to be relevant; thus, nowadays some textbooks on international law do not even raise that issue (e.g. Shaw 2017). For others, the topic

seems to arouse more historical and theoretical curiosity than practical interest (e.g. Mégret 2012, 72-81), although exceptions do exist (e.g. Goldsmith & Posner 2005, 3 and 200-203). The background of this evolution seems to be the realization that International Law has a daily application, not only in the interaction between subjects of international law but also because it regulates concrete and everyday aspects of people's lives (Nußberger 2009, 7-9). For example, international law is applied every day when a working permit for aliens is issued, when international business operations are done, etc. In those occasions, people involved applying international law without questioning its existence. Only in extreme cases, especially when international law collides with politics and yields to it, some people question whether it is a law or mere rhetorical tool. However, and for all the above, today it no longer seems necessary to justify that public international law is law.

Feeling sure that international law exists has facilitated (and has probably encouraged) to focus not so much on the core of the discipline, but rather towards its boundaries and limits. We feel confident that it is law, and maybe that is precisely why we are wondering if that answer may be too categorical. Public international law is law. But is it just law? Is it an exclusively legal phenomenon? And taking the previous questions as a starting point: what are the methodological frontiers for researching on international law? Of course, the question of the boundaries between national law and social reality had already been raised systematically at least since Von Savigny. In contrast, for international law, searching for the ontology of the discipline had left those questions open and now we are rediscovering and reflecting again on them.

For instance, let us start with a well-known example from international human rights law. The Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, 391-407) is authenticated in 23 languages, all of them equally authoritative according to article 33 of the Vienna Convention on the Law of Treaties. If we compare a few different versions of its Preamble, we read:

- Dutch: «...die zich bewust is van haar geestelijke en morele erfgoed...»
- English: «Conscious of its spiritual and moral heritage...»
- French: «Consciente de son patrimoine spirituel et moral...»
- Italian: «Consapevole del suo patrimonio spirituale e morale...»
- Portuguese: «Consciente do seu património espiritual e moral...»
- Spanish: «Consciente de su patrimonio espiritual y moral...»

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However, some versions read differently, e.g.:

- German: «In dem Bewusstsein ihres geistig-religiösen und sittlichen Erbes...»
- Polish: «Swiadoma swego duchowo-religijnego i moralnego dziedzictwa...»

Unlike the «Where's Wally?» books, something immediately stands out when comparing those texts. The question is: what do we make out of this divergence regarding the heritage's religious dimension? Another well-known example is the 1951 Convention relating to the Status of Refugees (United Nations Treaty Series, vol. 189, p. 137): in paragraph 4 of its preamble, the English version mentions that a solution «... cannot ... be achieved without international co-operation», whereas the French version reads «...ne saurait ...êtreobtenue sans unesolidaritéinternationale» and the Spanish translation says «...no puede ...lograrse sin solidaridad internacional». If we assume that international law is only law, it will be arduous indeed to make sense of those differences. The Vienna Convention directs us at adopting the meaning which best reconciles the texts, having regard to the object and purpose of the treaty (Article 33.3). But would that be enough? Yet if we understand that international law is more than just law, we might arguably better understand and explain that aspect of the Preamble.

International law (just as national law) is a social phenomenon. As such, it responds to social reality, including politics. The question is if we jurists have been at least partially forgetting the politic and diplomatic background of international law.

It is interesting that international economic law, and specifically the World Trade Organization (WTO) law, has been a sub-discipline of public international law that has offered many and profound reflections on these issues. The political and diplomatic background of the General Agreement on Tariffs and Trade (GATT) was quite evident, especially in GATT's early days. It is interesting to note that as time went by, and especially since the WTO was created, the historical development of the GATT and the WTO was increasingly understood as an evolution towards less political and more legal structures, regulations and actions (Marceau, 2015, *passim*). Or, as Jackson put it, as a development from «power orientation» to «rule orientation» (Jackson, 1979, pp. 1-21). For instance, GATT panels wrote their dispute settlement reports having the GATT contracting parties in mind; in contrast, the addressee of WTO panels is the WTO Appellate Body (Coisy 2015, 308; Davey 2015, 370; Roessler 2015, 170). It seemed that, in the WTO, the law and lawyers would displace diplomacy and diplomats (Weiler 2001) and that WTO law would finally be «pure».

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However, and more or less simultaneously with the reduction of the political elements, questions about the boundaries with other areas were gaining ground. One of the first and foremost was the boundary between GATT law and WTO law with environmental regulation and, closer in time, with tax regulation and the international goal to combat the unfair fiscal competition. Those environmental questions persist until today and are arguably more important than ever, as well as the frontier relating to tax issues and, even further, the links between the fiscal issues and the environmental protection (as explained in the following sections).

Thus, the question about the disciplinary frontiers of WTO law has been imperative for quite a few years (e.g. the American Journal of International Law's 96 (1) special issue on «Symposium: The Boundaries of the WTO» 2002). Also, in recent years scholars have increasingly explored the methodological frontiers of WTO law (e.g. Strange 2013 or the Journal of International Economic Law's 20(2) special issue on new frontiers in empirical legal research 2017). Interestingly, in recent times scholars have also rediscovered politics within the WTO, even regarding dispute settlement (Howse 2016, 9-77; Cook 2015, 431; Unterhalter 2015, 474). Dispute settlement is especially interesting in this regard, as it probably is the field where creating the WTO generated highest expectations of «pure» law, a WTO law without any remainder of politics.

Let us look at another classic example. Article 14 of the WTO Agreement on Agriculture states the following: «Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures». Probably every lawyer and scholar who has read that article have wondered how to make sense of it: Members shall give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures since it is binding according to Article II.2 and Annex 1 of the Agreement Establishing the World Trade Organization. So what does that article mean? Is it redundant or inutile? Yet if we follow the WTO Appellate Body, it is certainly not:

It is also well to recall that the task of the treaty interpreter is to ascertain and give effect to a legally operative meaning for the terms of the treaty. The applicable fundamental principle of *effet utile* is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility (Canada—Dairy 1999, para. 133, footnote omitted).

But how should we give effect to a legally operative meaning of that treaty? What we contend is that we should not over-legalize WTO dispute settlement and, in general, WTO law. There are no official

records of the preparatory work of the WTO Agreements (Article 32 of the Vienna Convention on the Law of Treaties), yet we should remember and consider the diplomatic background of WTO law. If we do that, we may conclude that the negotiation history of Article 14 of the WTO Agreement on Agriculture arguably advocates for its redundancy (Roessler 2015, 171-172). In other words, international law in general and WTO law, in particular, are the result of diplomatic negotiations and, consequently, they are not legally «pure».

So, when asked if public international law and WTO law are strictly legal phenomena, nowadays we would probably answer «no». Rather, we would arguably emphasize that public international law is a social phenomenon and, as such, is necessarily linked to other expressions of our social nature as human beings. Thus, essential authors like Kelsen and Hart undertook the hard work of international law's ontological delimitation, and today we stand on their shoulders as an «impure» conception of international law seems to be gaining ground. That is to say, an understanding, that the essence of international law is linked to other spheres, and especially to the sphere of international politics and diplomacy. Arguably, we are rediscovering that foundation and that background of international law.

This is a starting point: to recognize the interrelation between the political and legal elements that make up and sustains global governance. This is the context for the following sections relating to international environmental law and international tax law. Each of these subjects is linked with international trade and, at the same time, they are interlinked through international trade; for example, international tax law can protect the environment through taxes and custom duties. In summary, the following sections will explore two of the subjects that most strongly influence the current global governance: international environmental law and international tax law.

II. ENVIRONMENTAL PERSPECTIVE. DIALOGUE BETWEEN INTERNATIONAL TRADE AND INTERNATIONAL ENVIRONMENTAL POLICY

In environmental matters, the Paris Agreement renovates the commitments of the States for a joint action regarding climate change; the policies and measures that should be adopted could be confronted with rules of international trade governance. Avoiding these possible violations will depend on the implementation strategy used by States, and Regional Trade Agreements (RTAs) could be an institutional mechanism to avoid such confrontations.

II.1. Highlights of the Paris Agreement

The Paris Agreement¹, approved in 2016 and open to ratification and adherence to all the Parties, had a promising start, making it the multilateral environmental agreement with the fastest entry into force of the last decades (in less than five months), which occurred on November 2016. A success that is repeated with the number of participants, 185 parties of the 197 that signed the Climate Framework Convention.

The Parties to the Agreement are promoting efforts to limit the increase in temperature in preference to 1.5 degrees Celsius and agreed to keep the global temperature rise below 2 degrees Celsius. Thus, climate stabilization requires that net emissions of Greenhouse Gases (GHG) eventually decrease significantly, which are long-term objectives for the States. However, climate action must be undertaken now and there is a positive evolution of the Parties to rapidly steer domestic efforts by lining them up with the commitments of the Paris Agreement; mitigation and adaptation measures are being undertaken by the States.

A remarkable advance of the Agreement is that it also obliges all the Parties to submit their Nationally Determined Contributions (NDCs); these contributions will represent an advance on the obligations assumed by that Party. That is, they must include more intense and ambitious measures adopted within the framework of the previous obligations set by that State Party. These commitments will allow States to monitor their emissions and record their progress, which should be focused on reducing GHG emissions.

Other highlights of the Paris Agreement², is that it recognizes multiple levels to deal with the problem: dimensions at the local, subnational, national, regional and international levels (Article 7). This recognition of multilevel governance at the vertical level is also completed to avoid the fragmentation of climate change with other international regimes, such as international trade.

Definitely, the Paris Agreement presents holistic strategies to face global climate change, with commitments for developed countries and developing countries³.

Regional integration is necessary to jointly face challenges of such magnitude as climate change. These agreements allow the harmonization of disciplines of its Members that include the achievement

1 A version of the Paris Agreement in different languages could be found in http://unfccc.int/paris_agreement/items/9444.php (28/04/2019).

2 For a general vision of the Paris Agreement we recommend Viñuales, 2017, pp. 11-45.

3 Bodansky explains «...it abandons the static, annex-based approach to differentiation in the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, in favor a more flexible, calibrated approach, which takes into account changes in a country's circumstances and capacities and is operationalized differently for different elements of the regime.» (Bodansky 2016, 290).

of non-economic political objectives, for example, the protection of the environment and the fight against climate change.

II.2. How to combine climate change and regional trade agreements?

The greater the trade, the greater the emission of Greenhouse Gases⁴; therefore, the fact that these emissions add to global warming needs to be assumed by Regional Trade Agreements.

Together with the externalities caused by trade itself, extreme events that climate change itself is generating will have direct consequences on the infrastructure such as ports, roads, railways and bridges, as well as on sea routes, which will affect transportation costs. Among the specific dangers for trade, we have the relocation of industries to countries without measures that imply responses to climate change and carbon leakage, which is also threatening in this context

The proposals that RTAs can fight climate change, should be based on four pillars: adaptation actions, mitigation measures, technology transfer and financing. Here we include a summary of the measures that, within the framework of the four pillars, Regional Trade Agreements could include:

- I. Voluntary fixation of GHG emission restrictions by the block and by the parties, establishing mitigation priorities for the most carbonized activities or most exportable sectors.
 - Differentiating areas and sectors to reduce GHG, identifying the most sensitive sectors and industries and their respective responsible parties. Including the private sector is a priority in this process.
 - Reinforcing programs that increase the use of more environmentally friendly energies, that allow reducing the use of energy generated by fossil fuels.
 - Developing mechanisms in RTAs to measure, monitor and control GHG emissions, which will comply with national systems for estimating emissions by sources and absorption of sinks. This will be essential to be able to organize trade in emissions.
 - Empowering the Clean Development Mechanism (CDM) or the mechanism that replaces this mechanism in the future conforms the new Paris Agreement, with regional and national projects

4 As Stern explains «Climate Change is an externality that is global in both causes and consequences (...) The impacts are likely to have a significant effect on the global economy if action is not taken to prevent climate change...» (Stern 2007, 28). The increase in GHG is presented as a negative externality that must be internalized in the costs of trade in goods and services.

that promote green investments that mean funds and technology transfer.

- Search for international financing to promote the development of clean technologies, with the improvement of the capacities of the Member States.
- Creating financing funds and subsidies in RTAs for the reconversion of sensitive sectors, to encourage the use of clean technologies and low GHG emissions.
- Applying emission trading systems (ETS), such as the European Union ETS.
- Developing information and awareness plans for communities about the scope of climate change, energy-saving and the carbon footprint for consumers.

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II.3. Keys to climate governance in the light of the Paris Agreement in trade contexts

To close this part of our thoughts, we think that the international regime on environmental protection is an area that has been included to varying degrees in the governance of international trade, and especially regarding climate change there is a trend since 2009 to address the issue.

There is a dialogue between the regional facet of the governance of international trade and the international regime of climate change⁵.

We agree with Condon and Sinha (2013, 228) when they analyzed the role of climate change in global economic governance regarding two central themes: technology diffusion and unilateral response to multilateral negotiation failure. One of the responses could come from regional policy.

The post-agreement context of Paris is propitious for States, in this case within the framework of trade agreements, to strive to clarify the international standards and commitments to face global warming, and to be better prepared to continue the process of implementation the measures.

From climate governance, we argue that it is possible to reconcile the synergies and resort to all actions, from different levels of government, vertical (national, regional and international) and horizontal (state actors, organizations, individuals), aimed at the construction of an

⁵ Cordonier Segger (2016, 233) writes: «Trade, investment, and financial instruments can support action on climate change, including action on mitigation, adaptation, and clean technology. Parties are seeking ways to harness international economic law to foster more efficient responses to climate change, and sustainable low carbon development pathways through negotiations in the World Trade Organization under its international treaties (the WTO Agreements)».

environmental order⁶. Regional trade agreements can do much for climate governance, prepare States for climate change and reconcile trade and sustainable development. We hope that regional blocs advance in this way, in a manner compatible with multilateral governance. Dialogue is possible.

III. TAX PERSPECTIVE. DIALOGUE BETWEEN INTERNATIONAL TRADE AND INTER/NATIONAL TAX POLICY: GENERAL CONCLUSIONS BASED ON THE ARGENTINIAN CASE

III.1. Introduction

The dialogue we propose at this point leads us to analyze the coordination between the goals of the WTO treaties to facilitate international trade and the goals of the OECD treaties to combat harmful tax competition. Although it is not a strictly environmental issue, it has a close relationship with international trade and its conclusions will finally affect those measures that seek to protect the environment, as we will see later.

One of the main current international concerns is to avoid unfair fiscal competition promoted by non-cooperative jurisdictions that ignore rules on transparency and effective exchange of tax information. A proof of this is the latest research on the «Panama papers» in April 2016, with Panamanian companies, and the «Paradise Papers» in November 2017, with Bahamian companies.

To attract foreign capitals many countries offer important tax benefits to those who settle totally or partially in their territory (Vallejo Chamorro 2005, 148). This special tax treatment generates a fiscal competition between countries and affects the conditions of individual commercial competition.

This tax competition could be fair or not. We talk about fair fiscal competition when countries decide to resign all or part of their tax collection to benefit an investment or economic activity developed within their territory. Unfair fiscal competition means that resignation has no relationship with the territory. Thus, one State obtains an economic benefit at the expense of other State, whose taxable bases are emptied when there is no economic relationship to its territory.

This generates two consequences: 1) sophisticated international tax planning by taxpayers, to reduce their burden tax; and 2) the reaction

⁶ In terms of The Hague Institute for Global Governance this climate governance has to be multi-level and multi-stakeholder, and to be effective, climate governance needs to include the macro-level (intergovernmental and international), the meso level (regional, national, and subnational), and the micro-level (municipal, local, and community) (Huntjens and Zhang 2016, 18).

of the Administrations, to counteract unfair competition. This reaction was originally expressed through internal measures and then through international measures (Salassa Boix 2014, 151-152). The main international reaction came from the OECD when in 2000 it created the Global Forum on Transparency and Exchange Information for Tax Purposes (Forum) for eliminating unfair fiscal competition (Weiner 1998, 606-607).

But what is the relationship between these efforts and the purposes of the WTO?

The WTO is an organism for free, fair and undistorted competition. The rules on non-discrimination are precisely designed to secure fair conditions of trade. But this kind of competition cannot exist if we don't avoid both unfair protectionism and unfair tax competition. Considering that both are essential for developing current international trade, it is necessary to promote a dialogue between the governance of international trade and international tax policy.

Although these two measures are complementary, they can also collide with each other and impede the purpose of achieving a free and fair commercial competition, since, with the intention to avoid the unfair tax competition, countries adopt discriminatory tax regulations that could affect the spirit of the WTO. This situation was discussed in the WTO case «Argentina – Measures Relating to Trade in Goods and Services» (WT/DS453) when Panama requested consultations with Argentina with respect to certain measures that affected trade in goods and services because Argentina considered Panama a non-cooperative jurisdiction.

The purpose of this section is to analyze the compatibility between Argentinian tax regulations to avoid unfair fiscal competition and WTO regulations to avoid unfair protectionism on services because for achieving a free, fair and undistorted competition we need to harmonize the two regulations. The analysis is focused on services and current regulations, although the conclusions are useful for goods too and I will also mention the proposed national tax reform.

The analysis of this section is focused on Argentinian tax regulations because it was precisely the one that motivated Panama's complaint in the WTO in 2012, becoming the first (and only so far) case where WTO and OECD principles were in tension. So, although we will analyze the Argentinian legal system, the conclusions can be transferred to the regulations of any country facing similar legal conflicts. In addition, as we will see later, the conclusions arrived here will be essential if we pretend to protect the environment through international tax measures.

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III.2. Argentinian regulation to avoid unfair tax competition

Current Argentinian tax measures to avoid unfair tax competition were mostly implemented in 2003 but we will also analyze new tax measures in force since 2018, specifically Tax Reform Law (27430) that modifies almost all national taxes.

a) Presumption of unjustified increase in wealth

Article 18ter of the Tax Procedure Law (11683) establishes a rebuttable presumption of unjustified increase in wealth to any entry of funds from non-cooperative countries. The amount of such presumed unjustified increases in wealth represents net gains during the financial year regarding income tax and implies an increase in the tax base and therefore the tax burden.

b) The valuation method based on transfer pricing for transactions

The Income Tax Law determines that the valuation of the transaction shall be based on the value agreed upon between the parties unless the parties are related, in which case the transfer pricing regime applies. But Articles 8 and 15 of the Income Tax Law (20628) order to apply valuation methods based on transfer pricing for transactions between Argentinian taxpayers and persons of non-cooperative jurisdictions or countries with no or low taxes, even if the parties are not related. Using this method, the tax base, and the tax burden will probably increase. The Tax Reform Law (27430) also included non-cooperative jurisdictions.

c) Rule on the allocation of expenditure (payment received rule)

The last paragraph of Article 18 of the Income Tax Law (20628) impedes to use the accrual rule for the expenditure for transactions between Argentinian taxpayer and persons from non-cooperative jurisdictions or countries with no or low taxes. In this case, the expenditures must be always allocated to the fiscal year in which payment for the transaction has been executed (payment received rule). This will normally imply a higher tax base and therefore a higher tax burden. The Tax Reform Law (27430) also included non-cooperative jurisdictions.

d) Withholding tax on payments of interest or remuneration

Article 93(c) of the Income Tax Law (20628) establishes an irrefutable presumption that payments made by Argentinian consumers to creditors located in countries with no or low taxes represent a net gain of 100% to determine the tax base for Income Tax. Since it considers the whole payment, the tax base will be higher and therefore the burden tax, because no payment deduction is allowed. It is surprising that, unlike the previous cases, it has not added non-cooperative jurisdictions.

e) Impossibility to use the exemption for results generated by shares

Article 90quinquies of the Income Tax Law (20628), incorporated by the Tax Reform Law (27430), determines that those who reside in non-cooperative jurisdictions and receive their income in Argentina will have a more burdensome tax treatment to settle the Income Tax derived from the sale of shares, representative securities, certificates of deposit of shares and other values. This Article seems to recognize an irrefutable presumption that put these kinds of taxpayers in a worse tax situation compared to others that do not reside in non-cooperative jurisdictions. In the case of cooperative jurisdictions, taxpayers could apply several deductions that reduce the profit derived from the aforementioned sales and, in consequence, the tax burden.

f) Partial limitation of the deduction of foreign taxes payments

Article 133(f) (4) of the Income Tax Law (20628) establishes an irrefutable presumption that the Income Tax paid by subjects of non-cooperative jurisdictions or countries with no or low taxes is less than 75% of the Income Tax that the same subject would pay according to the Income Tax Law. This implies the partial limitation of reducing the tax base by deducting the foreign taxes payments and therefore a higher tax to pay.

The Tax Reform Law (27430) did not modify the essence of these measures but, on the one hand, non-cooperative jurisdictions besides the countries with no or low taxes were added in points b) and c) and, and on the other, both kinds of jurisdictions were defined. According to the new Article 15ter of the Income Tax Law (20628), modified by the aforementioned Law, the first ones are those countries that have not signed with Argentina any exchange tax information agreement or double taxation convention with broad information exchange clauses or that, having an agreement in force, do not effectively comply with the tax information exchange. Considering the new Article 15quater of the Income Tax Law (20628), also modified by the Tax Reform Law, the second ones are those jurisdictions where the tax rate of Corporate Income Tax is less than 30% (for 2018 and 2019) or 25% (from 2020 onwards).

The key for applying all these harmful tax measures or not is to determine if we are dealing with a cooperative jurisdiction or not and for that, until January 1, 2018, when the Tax Reform Law (27430) began to be applied, we must resort to Decree 589/2013. Its Article 1 determined that a cooperative country must: i) sign with Argentina an agreement on tax information exchange or a double taxation convention with broad information exchange clauses, provided that there is an effective exchange of information, or (ii) initiate with Argentina the negotiations for concluding such an agreement or convention. Article 2 of the

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mentioned Decree authorized the Tax Administration (AFIP) to draw up an annual «white» list of cooperative jurisdictions.

But according to Articles 15bis and 15quarter of the Income Tax Law (20628) and Article 7 of Decree 279/2018, that regulates that Law, only the second Article of the Decree 589 of 2013 is still in force. As a result, the exclusion of territories of the «white» list no longer depends on the requirements of its first article, but on the two requirements mentioned in the Income Tax Law. The most important difference lies in the fact that those territories that have simply started negotiations with Argentina to sign a tax exchange information agreement or double taxation convention are no longer considered cooperative jurisdictions.

This change was extremely positive, as it avoids the arbitrariness that the previous legislation suffered when evaluating jurisdictions. It should be noted that Panama is in the list for the year 2018 so that it would currently be exempt from the most burdensome tax regime that applies to non-cooperating territories.

III.3. Coordination between tax measures with the non-discrimination principle of the GATS

At this section we will analyze if:

- Services and their suppliers provided to or from a non-cooperative jurisdiction are similar than provided to or from a cooperative one (Articles I & XVII, GATS);
- The application of the analyzed tax measures implies a less favorable treatment to suppliers from non-cooperative jurisdictions in comparison with the treatment to suppliers from cooperative ones or Argentina (Articles I & XVII);
- These measures could be included within the general exceptions of the GATS (Article XVI, c).

a) «Likeness» of services and their suppliers

Scope

The concept of «likeness» is extremely broad, since it applies to both the GATT and the GATS (Appellate Body Report, Japan – Taxes on Alcoholic Beverage II, WT/DS8) and, within the latter, to both services and their suppliers (Appellate Body Report [ABR], Bananas III, WT/DS27). In turn, a product or service (or its suppliers) are similar when they share several identical or similar characteristics (ABR, EC – Asbestos, WT/DS135). But what degree or extent of similarity is required for services to be considered «like»?

The likeness of services and their suppliers can only be determined on a case-by-case analysis (ABR, EC – Asbestos, WT/DS135) considering the (i) properties, nature, and quality of the services; (ii) their purposes; (iii) the consumers' tastes and habits or perceptions; and (iv) the tariff classification (Ruíz Euler 2012, 10).

Burden of proof

The rule is that the «likeness» of services must be alleged and proved by the claimant unless the claimant alleges and proves that the discriminatory treatment is based exclusively on the origin of services and their suppliers (exception). It is the so-called «presumption approach» (ABR, Argentina — Import Measures, WT/DS438) and implies the automatic reversal of the burden of proof, and it is the responding WTO member who must rebut the presumption (ABR; China — Publications and Audiovisual Products, WT/DS363).

In the case of the Argentinian tax measures, the key is to determine if only by invoking the Decree 589/2013, which distinguishes between non-cooperative and cooperative jurisdictions, it is enough to activate that presumption and reverse the burden of proof. In our opinion, this is not possible.

The fact that the analyzed tax measures are applied to all services from non-cooperative jurisdictions because they come from their territory does not mean that this distinction is based exclusively on the origin of the services. This distinction is based on the degree of fiscal transparency and tax information exchange of jurisdictions which the services come from. We can accept that the analyzed measures are applied exclusively considering the origin of services, but the application of these measures is directly linked to Decree 589, which does not depend on the origin of services but on the degree of fiscal transparency of the jurisdictions where they come from.

b) Non-discrimination: no less favorable treatment

The analyzed tax measures imply a higher tax burden for taxpayers from non-cooperative jurisdictions or countries with no or low taxes: increasing the tax base (higher income); limiting the possibility of reducing it (lower expenses) and eliminating the possibility to not pay the tax (exemptions). Thus, this situation necessarily implies a less favorable treatment for the taxpayer from those jurisdictions in comparison with the taxpayer from cooperative ones (Article II, GATS) or Argentina (Article XVII, GATS).

But could this less favorable treatment be explained by the lack of fiscal transparency and tax information exchange and the limited tax burden of the non-cooperative jurisdictions arguing that this situation could affect

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the normal conditions of commercial competition and implies a previous less favorable tax treatment for Argentinian investors? The *ratio legis* of the analyzed measures is the need to rebalance the unfair commercial situation that Argentinian services and their suppliers suffer.

But the Appeal Body, interpreting footnote 10 of Article XVII, argues that the discriminatory tax treatment is not justified because there are previous regulatory aspects that affect the competition of the country that establishes that kind of measures. This does not convert a «less favorable treatment» into a «no less favorable treatment» (ABR, Argentina — Import Measures, WT/DS438 and ABR, EC - Seal Products, WT/DS401).

Although this conclusion sounds unreasonable, since it seems to validate the unfair behavior of non-cooperative jurisdictions, we must remember that the evaluation of the less favorable treatment is subsequent to the evaluation of the «likeness» of services. Services won't be similar if the discrimination is not exclusively based on their origin, but there is another determining factor. In the case of Argentina, this factor is the lack of fiscal transparency and tax information exchange.

b) Exceptions

Introduction

Despite the «likeness» of services and the treatment of tax measures, we could evaluate if these measures are included within the general exceptions of Article XVI.c) GATS. For this, it is necessary to verify that those measures: 1) are designed to secure compliance with the Argentinian regulations (compliance); 2) are necessary to secure compliance with Argentina's tax regulations (necessity), and 3) that are not arbitrary (reasonableness) (ABR, Argentina - Measures).

Compliance

The analyzed tax measures are designed to secure compliance with Articles 46, 47 and 48 of the Tax Procedure Law (11683), which punish minor tax evasion behavior, and Articles 1, 2 and 6 of the Tax Criminal Law (24769), which punish tax evasion higher than 23.000 U\$S, and in this way to prevent such behaviors. It is important to remember that laws and regulations of a WTO Member are always considered compatible with the agreements of that Organization unless another country proves otherwise («Argentina – Measures Relating to Trade in Goods and Services» (WT/DS453)).

Necessity

The analyzed tax measures are necessary to secure compliance with regulations that punish tax evasion and, therefore, protect tax collection.

In the absence of such measures, it would be much easier to carry out evasive activities through the use of non-cooperative jurisdictions or countries with no or low taxes due to their lack of fiscal transparency and tax information exchange.

Reasonableness

The analyzed tax measures appeared to be arbitrary according to Article 1 (ii) of the Decree 589/2013 because States were considered as cooperative jurisdictions, and therefore outside the application of the analyzed tax measures, if they had initiated negotiations for concluding a tax information exchange agreement or convention with Argentina. In other words, even certain jurisdictions that are not effectively exchanging tax information may be unfairly considered cooperative. These criteria run counter the purpose of establishing a different tax treatment for those jurisdictions which ignore the rule on fiscal transparency and effective exchange of tax information. But nowadays, after the Tax Reform Law (27430) and the Decree 129/2018, the arbitrariness of the last regulations has disappeared. Considering that, the harmful tax treatment is not based on the origin of the services but on the level of tax cooperation of the jurisdictions where they came from.

Despite this, it seems still questionable that the list of cooperative jurisdictions is made annually since in a year a country can sign agreements for tax information exchange but it must wait until the following year to enter into that list.

According to this, whether the Argentinian regulation was modified to allow the possibility to review the cooperation level of countries throughout the year, without waiting for the annual revision, its tax measures to combat unfair tax competition could be fully compatible and complementary with the provisions of the WTO to avoid unfair discrimination and guarantee a free and fair commercial competition.

The Argentinian provisions were analyzed in order to understand the scope of the dispute «Argentina – Measures Relating to Trade in Goods and Services» (WT/DS453) in which the possible conflict between the goals of the OECD to combat harmful tax competition, and the objective of the WTO to combat discrimination, was first raised. The analysis of national Argentinian provisions regarding the request of consultation of Panama allowed us to determine when there is such a conflict of goals and when there is not.

As we will see in the following section, having this in mind is indispensable when environmental custom duties are implemented, since, with the purpose of protecting the environment by discouraging the importation of certain polluting products, a country may violate the principle of

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non-discrimination recognized in the GATT. So, the dialogue in this regard is necessary.

IV. MIXED PERSPECTIVE. DIALOGUE BETWEEN INTERNATIONAL TRADE AND ENVIRONMENTAL TAXATION

IV.1. Introduction

The environmental and tax perspectives previously analyzed force us to focus on the dialogue and eventual links between international trade and the environmental protection.

International law is the most appropriate area to solve global problems such as environmental protection, whose consequences affect the entire planet. This is generally executed through different international treaties in which the countries commit to adopt specific environmental measures, some of which may have a direct relationship with tax law.

Within the broad spectrum of alternatives that States have to combat environmental pollution, tax measures have been gaining increasing prominence. OECD reports show that in the last 25 years the vast majority of its Members, with the Nordic countries in the lead, have implemented an environmental tax reform process (OECD 2016). All this has empirically verified what was already proposed as a theory: Environmental Taxation is an effective legal mechanism to protect the environment (Barde 1994; Schlegelmilch and Joas 2015). The Economic Commission for Latin America and the Caribbean (ECLAC) reports show that in recent years Latin American countries have adopted environmental tax measures, with Chile and Mexico in the lead (CEPAL/ECLAC 2017), yet there is still a long regulatory way to go (Salassa Boix 2018, 175-179).

When we talk about «environmental tax measures», we mainly refer to taxes or custom duties that seek to discourage polluting activities or goods because their raised tax burden implies a higher economic cost for the taxpayers. This type of measures has generated a new legal interdisciplinary sub-specialization where it is not absolutely clear whether we are talking about tax law or environmental law.

IV.2. Main obstacles and challenges for environmental taxes and custom duties

In this sense, States could enact a global environmental tax that levies certain polluting activities (e.g. greenhouse gas emissions) or implement custom duties to discourage, in the short term, the consumption of polluting goods (e.g. highly hazardous pesticides) and, in the long

term, to discourage even its production. Custom duties enjoy a very important role in current tax systems, especially with the proliferation of international trade due to the globalization.

The first option -global environmental taxes- is the most environmentally efficient (Montes Nebreda 2019, 42), but today it is too ambitious and difficult to implement (Padilla Rosa and Roca Jusmet 2003, 8). Let us remember that there is no international treaty, not even in the European Union⁷, according to which countries transfer to a supranational body their powers to enact taxes and control their collection. By virtue of this a possible solution, although not simple, would be that all countries agree to establish the same environmental tax in their local legal system with the same tax burden (Padilla Rosa and Roca Jusmet 2003, 7), taking as reference a unique currency (e.g. US dollar). But it is also almost impossible for all countries to overcome the political obstacles involved in enacting a tax like this and, if the implementation is not widespread, it would no longer be a global tax and would lose its justification. In addition, strong market distortions would be generated (Romero, Álvarez-Espinosa, Calderón and Ordóñez 2018, 166).

The second option -custom duties- is less environmentally effective, but easier to apply. This option can be implemented through common tariff policies (UNEP 2001, 83-90) for countries that are economically integrated (European Union, Mercosur, Andean Community, etc.), or through Double Taxation Conventions (DTC), since although they were initially planned to avoid double taxation, their goals are much broader today. In addition, although they used to be bilateral agreements, their content is determined by consensus in the OECD through its Double Taxation Convention Model, which is then followed by most countries when drafting their DTC. The risk of applying custom duties is that they could violate the principle of non-discrimination recognized in GATT and GATS. So, as we saw in the dispute «Argentina – Measures Relating to Trade in Goods and Services» (WT/DS453), its implementation must be exclusively linked to the polluting features of goods and not to the country where they come from.

Environmental protection is one of several protectionist purposes that these measures may promote, but this purpose must be embodied within the frame imposed by WTO covered agreements. The idea is to avoid that under the justification of the environmental protection such tax measures discriminate against certain countries.

7 The closest option would be to adopt environmental policies in the frame of the European Union that affect tax regimes, but «European Union provisions require that these decisions must be accepted unanimously, so that any decision on ecological taxation can be blocked even by only a single country member of the Union» (Padilla Rosa and Roca Jusmet 2003, 7).

If this confrontation remains unresolved, it will get rid of environmental customs measures, to the detriment of the environment, or it will violate international treaties in pursuit of another environmental international treaty, to the detriment of international free trade and undistorted competition. Neither of these options is legally sustainable and we understand that both goals can be preserved simultaneously.

In short, custom duties are tax measures useful for protecting the environment, since it is possible to discourage the importation of polluting goods or to encourage the importation of less polluting goods levying cross-border consumption of goods. In this way, there is a close and inevitable dialogue between these fiscal measures and international trade. This forces us to assess the application of custom duties in light of the standards that regulate international trade, among which we highlight the principle of non-discrimination. Custom duties cannot violate this principle even for environmental purposes. As a consequence, these fiscal measures must be applied equally to polluting goods from any country, without discriminating according to their origin.

V. CONCLUSIONS

The evolution of WTO law, as a particular area within international economic law and under general rules of international law, has allowed WTO members to build a global trade governance to try to strengthen international trade and environmental protection. But, as expressed, the search for better governance does not exclude that politics continues to have a relevant weight in decision-making, even when seeking to resolve disputes between States.

As a result of the advancement and improvement of WTO law, aspects that decades ago were not taken into account as environmental and tax issues, are gaining importance. It is imperative to recognize the interrelation between the political and legal elements, including those in environmental and tax law, that make up and sustain the global trade governance.

The interrelation between international commitments of States is increasingly common. This implies that they must adopt obligations in various areas. Being bound by the rules of the WTO and other international agreements such as the Paris Agreement on climate change, States are required to harmonize their obligations. For example, this means developing free trade policies, but with the commitment to respect environmental standards and agreements to reduce climate change. The increasingly evident effects of climate change are leading to a consensus in favor of multilateralism and concerted actions to fight climate change. Thus, negotiations aimed at establishing a harmonious

relationship between trade and the environment are important. A successful outcome of these negotiations will reinforce the relationship between the two legal regimes.

In this sense, more and more States must be aware that their economic development depends on sustainable policies. In other words, environmental law is linked with global trade governance.

But in addition to environmental aspects, tax issues in the context of trade rules imply challenges for governments not to apply protectionist measures that place limits on global development processes, even if they are intended to protect the environment. We argue that unfair competition through protectionism by harmful tax policies is incompatible with the global trade governance.

The dispute «Argentina – Measures Relating to Trade in Goods and Services» (WT/DS453), referred to the Argentinian provisions relating to «non-cooperative countries for tax purposes», demonstrates the difficulties and challenges that States face in seeking better compatibility of their national law with the global trade governance to avoid unfair competition from others States, and the obligations of those States under WTO law. By now it should be obvious that international tax law is linked with international trade.

Finally, we also explored the possibility to protect the environment through environmental taxation. In this regard, considering the complications of implementing a global environmental tax, we understand nowadays the most feasible option is coordinating custom duties between States, through supranational or international treaties, to discourage the importation and, ultimately, the production of certain polluting goods.

However, its implementation should not lead us to violate other international standards, such as the principle of non-discrimination recognized in WTO law. Its implementation must be exclusively linked to the polluting features of goods and not to the country where they come from. This way, we will be able to protect the environment and, at the same time, to guarantee international free trade and undistorted competition. To sum it up, the international tax law and international environmental law are interlinked through global trade governance.

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