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Taxation of wealth under the Pacific Alliance; ¿a threat to global and regional economic growth or a chance to implement Piketty's "global tax on capital"?

Imposición a la riqueza bajo la Alianza del Pacífico; ¿una amenaza para el crecimiento económico global y regional o una oportunidad para implementar el "impuesto global sobre el capital" de Piketty?

Juan Esteban Sanín Gómez*

Abstract: This essay analyses the practical effects of implementing a wealth tax in the context of a Latin American economic block or trade group such as the Pacific Alliance, as well as its convenience or inconvenience according to the economic growth impact it can have. To this effect, an overview of the current trends of wealth taxation will be made, as well as on the ongoing tensions between the key factors to determine whether or not wealth should be taxed: i.e. economic growth and inequality. Lastly, an analysis on the current state of affairs regarding the treatment of wealth taxation under multilateral and bilateral tax treaties will be undertaken as well as Thomas Piketty's proposal to create a global –or, in this case, a hemispheric or continental- tax on capital in order to reduce inequality.

* Attorney at law from the Universidad de los Andes. Tax Legislation specialist from the Universidad Pontificia Bolivariana (UPB) and International Tax Law specialist from the Universidad Externado de Colombia. Master of Law with emphasis in Taxation from the Universidad Externado de Colombia. Currently undertaking an Executive LLM program at London School of Economics. Partner and director at Ignacio Sanín Bernal & Cía. Abogados S.A.S. Email: <juan.sanin@isanin.com.co>. Fecha de recepción: 06/06/2018. Fecha de aprobación: 29/09/2018.

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Resumen: Este ensayo analiza los efectos prácticos de implementar un impuesto a la riqueza en el contexto de un bloque económico o grupo comercial latinoamericano, como la Alianza del Pacífico, así como su conveniencia o inconveniencia según el impacto del crecimiento económico que pueda tener. A este efecto, se realizará una descripción general de las tendencias actuales de los impuestos a la riqueza, así como también sobre las tensiones en curso entre los factores clave para determinar si la riqueza debe gravarse o no: es decir, crecimiento económico y desigualdad. Por último, se llevará a cabo un análisis sobre el estado actual de las cuestiones relacionadas con el tratamiento de la tributación a la riqueza en virtud de tratados fiscales multilaterales y bilaterales, así como la propuesta de Thomas Piketty de crear un impuesto global- o, en este caso, hemisférico o continental- sobre el capital para reducir la desigualdad.

Palabras clave: riqueza; justicia distributiva; desigualdad; globalización; Pikkety.

I. Introduction

We are currently witnessing the crossroads of two legal systems; the traditional legal system, in which countries sovereignly rule their affairs, and what can be called the transnational legal system, in which a new world order is imposed for countries to follow. This transnational system or *Empire*[1], as Negri and Hardt might call it, is actually ruled by great nations[2], corporations[3] and multilateral world organizations[4] and has a direct effect on all of us. Its effect on internal legal systems is irrigated by the postmodern "*imperial commanders´*"[5] decisions, which may exist in the way of resolutions[6], opinions, agreements, binding commentaries[7], ordinances and, having a direct impact on our lives, are not even incorporated into local legislation by the way of legal transplants[8], thus not being "*accompanied by procedural reforms aimed at their effective enforceability*[9]".

Government's tax discussions have fled from local issues to transnational issues, and are determined by the needs of the world's most powerful players. In this sense, for example, the BEPS[10] ac-

[1] Hardt, Michael & Negri, Antonio, *Empire*, London, Harvard University Press, 2000.

[2] Mainly represented in the G20 countries.

[3] See, for example the impact that companies like Twitter, Facebook, Google, Amazon, among other, have in our daily lives and in the decisions we take.

[4] Such as the UN, NATO, OECD, IMF, World Bank, among others.

[5] Hardt & Negri, *op. cit*., p. 344.

[6] Such as those issued by the United Nations and other Multilateral Organizations.

[7] Such as those issued by the OECD which are binding to their members in the interpretation of their tax treaties.

[8] See Reyes Villamizar, Francisco, *Latin American Company Law. A New Policy Agenda: Reshaping the Closely Held Entity Landscape*, vol. II, Carolina Academic Press, 2013, p. 129

[9] *Ibidem*, p. 129.

[10] The "*Base Erosion and Profit Shifting*" Project was developed to set out policies (or actions) that were to be adopted by governments *"with domestic*

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tion plan, instrumented by the OECD´s MLI[11], will ensure that over 3,000 existing double taxation agreements ("DTA´s") signed under the OCDE Model[12]are automatically updated with the latest policies agreed upon by the OECD member countries.

The rise of this new tax system, in which borders and boundaries become transparent, will be followed by a new way in which tax payers will relate with global and local tax authorities. This might give rise to what Hickey calls a "*hybrid system of administering tax needs to emerge*[13]", which would change the patterns of tax payer conduct that currently exist and our concept of tax law abiding.

II. Globalization and wealth taxation; Status Quo

Today, as McLuhan[14] predicted, the world is truly a global village. And in this global village, international law is the local regulation to

and international instruments to address tax avoidance, ensuring that profits are taxed where economic activities generating the profits are performed and where value is created". Retrieved from: <http://www.oecd.org/tax/beps/beps-actions.htm>.

[11] The Multilateral Convention to Implement Tax Treaty Measures to prevent BEPS was signed by over 100 jurisdictions

[12] OECD Double Taxation Agreement Model Convention.

[13] See Hickey, Loughlin, "Relationships and Boundaries: The Future", *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management*, Judith Freedman (edit.), U.K., Oxford University Center for Business Taxation, 2008. "This hybrid could be: a) a foundation in law. Tax legislation would evolve in collaboration with business but would be directed towards introducing law in areas not adequately covered by existing law rather than having to legislate for every possible nuance of business transactions (…) or b) a standard of collaborative behaviour that tax payers, tax authorities and tax advisers would be able to "sign up to". A common theme in this world is to promote collaborative behaviour rather than use tax legislation to regulate behaviour".

[14] McLuhan, Marshall, *The Guterberg Galaxy: The Making of a Typographic Man*, Canada, University of Toronto Press, 1962.

follow. Globalization, understood as "*the increased integration and liberalization of markets around the world*"[15] has led to important legal phenomena such as global governance and harmonization of legal local regimes due to the loss of barriers between nations. This is clearly seen in international tax, whereby regional trade blocks harmonize their internal regimes in order to –either to avoid harmful tax competition among nations[16]- or to state the bases upon which their cooperation in a given matter is to flourish[17]. Because of the "*relaxation of trade barriers*[18]" international tax competition usually occurs in regional trade blocks regarding capital income, but it can also lead to cross-dispute resolution regarding customs and indirect taxes (such as VAT), transfer pricing disputes, and taxation issues regarding wealth.

The European Union is perhaps the best example of how an economic community can give way to a true political union, in which each member country's legal sovereignty is respected but must abide and respect supranational legislation in order to issue

[15] Leviner, Sagit, "The Intricacies of tax and Globalization" *Columbia Journal of Tax Law*, vol. 5, 2014, p. 207.

[16] *Ibidem*, p. 213. "*Broadly stated, tax competition involves a strategic, non-cooperative interaction among nations, with each nation designing its tax system in response to the tax arrangements of other countries to attract and retain productive resources*".

[17] See, for example, the *European Union-United States: Joint Statement on Electronic Commerce* signed on Washington on December 5, 1997 where both parties agree on the guidelines which are to frame their intervention in the development of global electronic commerce. Such guidelines include, among other, the acknowledgement of industry self-regulation, the elimination of unnecessary legal and regulatory boundaries and the prevention of others and the fact that taxes on electronic commerce should be clear, consistent, neutral and non-discriminatory. Retrieved from: < https://goo.gl/jWPdus>.

[18] *Ibidem*, p. 214. "*One commonly invoked example of the strain that globalization places on the dynamics among nations-particularly its inducement of national and international tax competition- concerns the taxation of capital income, or the deficiency thereof. Many consider it to be an axiom of modern globalization that it involves the relaxation of trade barriers, leading to the enhanced mobility of productive resources, especially capital*".

their internal laws. Even in matters in which member countries are absolutely sovereign, such as taxes, there are harmonization guidelines to be followed. In this sense, Directives in indirect taxes[19] currently exist and the project of having a future Directive on a Common Consolidated Corporate Tax Base (CCCTB)[20] is almost a reality.

Wealth tax, although being a subject inherent to each nation, is greatly influenced by the regional treatment it receives from multilateral agreements. This treatment, as will be studied in this essay, can either reduce or enhance regional growth, therefore having a direct impact in wealth contraction or redistribution. This redistribution will ultimately have a direct impact on equality.

A) Distributive justice: The tension between economic growth and inequality

Inequality is a complex concept because –as an economic notion- it can have a profound effect in fiscal policy, and –as a social concept- it can have a profound effect in politics in general. According to the OECD[21], inequality is a matter of such importance that "*it can no longer be treated as an afterthought*"[22] and the widening gap between the rich and the poor "*is hurting individuals, societies and*

[19] Directive 2006/112/EC creates the EU's common system of value added tax (VAT), which "recasts" and "repeals" the original sixth VAT directive, thus clarifying the EU VAT legislation currently in force. Retrieved from: <https://goo.gl/EB6Z9V>

[20] According to the European Commission Fact Sheet, dated 25th of October 2016. "*The Commission has improved and re-launched the (…) CCCTB, which is perhaps the most ambitious corporate tax reform ever proposed in the EU. (…) The CCCTB is a harmonised system to calculate companies' taxable profits in the EU.* (…)".

[21] The Organization for Economic Co-operation and Development

[22] Retrieved from:< http://www.oecd.org/social/inequality.htm>

even economies[23]". The UN[24] considers that economic inequality, which refers as to "*how economic variables are distributed among individuals in a group, among groups in a population, or among countries*[25]" can lead to inequality of opportunities and inequality of outcome[26].

Academics have a divided view on inequality. Whilst Kuznets[27] considers "*inequality as a byproduct of economic growth*[28]" and suggests that "*a relatively rich economy should also be less unequal*[29]", Stiglitz and Piketty strongly disagree. In *The Price of Inequality*[30] Stiglitz argues that inequality is "*self perpetuating*[31]", because the rich "*needing few public services and worried that a strong government might redistribute income, use their political influence to cut taxes and curtail government spending*"[32]. Likewise, Pikkety, in *Capital in the Twenty-First Century,* states that unequal distribution of concentrated wealth, which has been caused because of the greater rate of return on capital that the rate of economic growth or output, is leading to a social and economic emergency. In this sense, his basis thesis is that "*inherited wealth grows faster than income*[33]".

[23] Keeley, B., *Income Inequality: The Gap between Rich and Poor*, Paris, OECD Insights, OECD Publishing, 2015.

[24] United Nations.

[25] Retrieved from: <http://www.un.org/en/development/desa/policy/wess/wess_dev_issues/dsp_policy_01.pdf>

[26] *Idem*.

[27] Lyubimov, Ivan, *Income inequality revisited 60 years later: Pikkety vs. Kuznets*. Russian Journal of Economics 3, 2017, p. 42-53. Retrieved from: <https://www.sciencedirect.com/science/article/pii/S240547391730003X>

[28] *Ibidem*, p. 1.

[29] *Ibidem*, p. 2.

[30] Stiglitz, J. E., *The price of inequality: How today's divided society endangers our future*, New York, W.W. Norton & Co., 2012.

[31] Retrieved from:
<https://en.wikipedia.org/wiki/The_Price_of_Inequality>.

[32] Retrieved from: <https://www.nytimes.com/2012/08/05/books/review/the-price-of-inequality-by-joseph-e-stiglitz.html> .

[33] Doody, Ryan, *Pikkety on Capital and Inequality*, MIT Handouts, 2015. Retrieved from: <http://www.mit.edu/~rdoody/Economic%20Jus-

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Given these positions, the concept of *distributive justice* takes a fundamental role in the way resources and opportunities are to be distributed in society. While Rawls states that "*social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all*", Nozick[34] –in his entitlement theory– considers that "*whether a distribution is just or not depends entirely on how it came about*[35]". Being that tax law "*is the major tool of redistribution we have*[36]", and given that "*economic regulation is oriented towards maximization of wealth, rather than its distribution*[37]" tax policy debate, and the production of tax legislation is of paramount importance in the rearrangement of "*the results produced my markets that operate to concentrate wealth and opportunity*[38]".

As Professor Van Dun[39] states, according to natural law and the basic considerations of the concept, such as the provisions of public goods, it is nor unlawful to tax wealth in order to redistribute. However, the fact of this being lawful doesn't necessary mean that it is rational and efficient, and can lead to future efficiencies. According to Gamage, governments should make "*use of a number of tax and non-tax policy instruments to raise revenues and to*

tice%20Handouts/EconJusticePIKETTY.pdf>.

[34] Nozick, Robert, *Anarchy, State and Utopia*, Basic Books, 2013, Chapter 7.

[35] Nozick states that justice involves three basic concepts: (i) justice in acquisition, (ii) justice in transfer, and (iii) rectification of injustice. See more at <http://documents.routledge-interactive.s3.amazonaws.com/9781138793934/A2/Political/JusticeRawlsNozick.pdf>.

[36] Sugin, Linda, "Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems", *Fordham Law Review*, vol. 72, 2004. Retrieved from: <https://ssrn.com/abstract=555988>.

[37] *Idem*.

[38] See Kaplow, Louis, "A Fundamental Objection to Tax Equity Norms: A Call for Utilitarism", *48 National Tax Journal*, 1995, p. 497.

[39] Van Dun, Frank, *Is it justified to tax people in order to redistribute?*, Philosophy of Law and Economics. Ghent University, 2001.

promote distributional equity"[40], thus allowing these to raise revenues and promote distributional equity more efficiently. Piketty himself, cited by Broadway *et al*., has said that "*capital taxation is a key and complex issue and should rank highly in the tax debate and research agenda of the coming decades, both from a normative and political economy perspective*[41]".

Current debates on inequality and distribution of income and wealth, linked to the existence of the concept of capitalism, have emerged both in developed and in developing countries. This was not the case decades ago, during the cold war -for example- where addressing these issues would seem as highlighting communist ideals[42]. In countries like Colombia, where the Gini coefficient is 0,51[43] redistribution policies on wealth have a fundamental role in actual political discussions[44]. Unfortunately, this issue has lead economists like Piketty to gear the debate of wealth taxation from

[40] Gamage, David, *How should governments promote distributive justice?: A framework for analysing the optimal choice of tax instruments*, Working Paper Series 14/18, Oxford University Center for Business Taxation, 2014.

[41] Boadway, Robin, et al, *Taxation of Wealth and Wealth Transfers,* 2010, p. 830.

[42] See Guevara, Diego, *El debate de la desigualdad*, El Espectador, 2018. Retrieved from: <https://www.elespectador.com/economia/el-debate-de-la-desigualdad-articulo-793752>

[43] The Gini coefficient is an index or a measure of inequality, based on the income perceived by a State, which was initially conceived by Corrado Gini. The index goes from 0 to 1, 0 being perfect equality and 1 being perfect inequality.

[44] To political economists that defend the minimal state intervention in economic affairs, the concentration of wealth and its impact on inequality are issues of relative importance, given that by the "*drip theory*", all benefits received by the most powerful business leaders will flow down the remaining layers of society, thus benefiting everyone. Therefore tax benefits on the richest are said to help fight inequality on the long run. On the contrary, for those political economists that defend state intervention in the economy, inequality is a priority and strategies like taxing unproductive land or great estates have been seen as a mean to reduce inequality. See supra Guevara

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a political economy perspective to a mere political perspective[45], which endangers the base of their thesis.

These reviewed academic positions will allow us to formulate a proposal on the taxation of wealth mechanisms that should be used in the Pacific Alliance, in order to reach a long lasting and efficient balance between growth and the distribution of resources between member countries.

B) The treatment of wealth taxation under multilateral and bilateral treaties for the avoidance of double taxation

Wealth is usually taxed locally by each sovereign nation, but –for double or triple taxation not to occur- it can be regulated internationally by bilateral DTA´s as well as by Multilateral Tax Agreements. Locally, wealth is usually taxed under three scopes; i) on taxing the transfer of wealth, such as when death duties and gifts taxes are imposed, ii) on taxing the holdings of wealth, such as when annual wealth taxes on individuals or net worth (or net wealth) taxes[46] are imposed, and iii) on taxing the return of wealth, such as when taxes on paid-in dividends, interests and royalties or on the appreciation of capital or wealth, as in capital gains taxes[47] are imposed. Internationally, taxation of wealth -usually referred to in tax treaties as taxation of capital[48]- is regulated both in bilateral DTA's as well as in Multilateral Tax Agreements.

[45] On June 2nd, 2018, Piketty announced its political support to Colombian formal presidential candidate Gustavo Petro.

[46] See Evans, Chris, *Briefing Paper. Wealth Taxes: Problems and practice around the world*, Center on Household Assets and Savings Management, 2013.

[47] Evans, *op. cit*., p. 1.

[48] According to the commentary stated in page 375 of the OECD´s 2017th Model Tax Convention "*Taxes on capital generally constitute complementary taxation of income from capital. Consequently, taxes on a given element of capital can be levied, in principle, only by the State which is entitled to tax the income from this element of capital* (…)". Retrieved from: <https://goo.gl/qLe2iQ>.

DTA's will provide different rules on the parties' jurisdiction to tax[49] wealth depending on the interest that the Model Tax Convention seeks. Multilateral tax treaties, or supranational tax agreements arising from multilateral treaties, usually establish how contracting states will have jurisdiction to tax wealth and capital. This is the case, for example, of the CAN[50] Decision 578/2004, whose article 17 clearly states that "*the patrimony situated in a Contracting State, can only be taxable by that Contracting State*".

Treatment on the taxation of transfers of wealth

Most countries have taxes on the transfers of wealth. These taxes can be levied in the form of a capital gains tax or in the form of a gift, inheritance, real estate transfer, endowment, transfer duty or estate tax. Many countries have exemptions to the taxation of the transfer of wealth such as when Trust structures, benefit funds or life insurance policies are established. Also, many times multiple exemptions and reliefs exist, especially in countries were forced succession or heirship rules apply. These taxes, such as is the case in the United States[51] and in OECD member countries[52], usually represent a very minor percentage of the overall government revenue.

Article 13 of the OECD Model addresses the distribution of the signing parties' sovereign right to tax regarding capital gains tax. This provision states that gains derived from the alienation of

[49] See Beale, Joseph H., "Jurisdiction to Tax", *Harvard Law Review*, vol. 32, Nº. 6, Apr. 1919, pp 587-633. "*The power to tax is one of the attributes of sovereignty; and the jurisdiction to exercise the power is coterminous with the bounds of the sovereign´s jurisdiction*".

[50] CAN is the acronym for Andean Community of Nations. Today Colombia, Ecuador, Bolivia and Perú form part of this community.

[51] In the United States, the Estate Tax currently represents only 1.5% of the overall US Revenue. Retrieved from: <https://www.ifs.org.uk/uploads/mirrleesreview/dimensions/wealth_transfers_apps.pdf>

[52] See OECD Revenue Statistics, 2010, where it is stated that the combined tax revenue from annual wealth taxes derived by OECD member countries amounts to no more than 1% of their total tax revenue.

immovable property (or of shares or interests whose value derives in more than 50% directly or indirectly from immovable property) as well as from the alienation of business property related to a permanent establishment, can only be taxed in the source state, whilst gains from the alienation of any other property, shall be taxed in the state of which the alienator is resident.

Treatments on the taxation of returns of wealth

Taxation of dividends, interest and royalties, as well as other forms of returns of wealth[53] are typically taxed in all jurisdictions, having some of these special treatments under DTA's[54]. Special provisions usually apply such as those related to taxation of transactions made between related parties –under transfer pricing provisions- and those related to Controlled Foreign Corporations (or CFC rules) were, under the BEPS philosophy, deemed or presumed dividend provisions apply.

Articles 10 to 12 of the OECD Model deal with the distribution of the jurisdictional rights to tax between the signing parties of the DTA. In this sense it is stated that dividends paid by a company which is resident of a contracting state to a resident of the other contracting state, may be taxed in that other contracting state but if the recipient is the beneficial owner, the charge shall not exceed of 5% to 15%, depending if certain conditions are met[55]. Regarding interests, the OECD Model states that interest arising in a contracting state and paid to a resident of the other contracting state may be taxed in the residence state, but the tax

[53] Like rents, redemption of shares and other gains.

[54] See Isenbergh, Joseph, *International Taxation*, Third Edition, Foundation Press, 2010, p. 250. In this book it is stated that "*Treaties rarely exempt dividends, unlike interest, from taxation entirely in the country of source. Dividends received from one treaty country by residents of another are generally subject to reduced rates of tax by the country of source*".

[55] See OECD *Model Tax Convention*, condensed version as I read on 21st of November 2017, Article 10 section 2 a) and b), p. 35.

so charged shall not exceed 10% of the amount of interest[56]. Regarding royalties, the OECD Model states that royalties, if beneficially owned by a resident of the other contracting state, can only be taxed in the state of residence[57].

Treatments on the taxation of holdings of wealth

Taxation on the holdings of wealth usually takes into consideration the individuals' net worth or net assets. Under certain legislations[58], since corporations are also subject to wealth or patrimonial tax, individuals holding assets in corporations can subtract these from the wealth tax base.

Under article 22 of the OECD DTA Model[59] immovable property, as well as movable assets forming part of the business property of a permanent establishment may be taxed in the Stated where it is situated. All other elements of capital (such as shares or accounts receivables) may only be taxed in the Contracting State of which the person to whom they belong is a resident. With some minor differences, the UN[60] and US[61] Model Tax Convention also follows the same guidelines.

C) Piketty´s proposal for a global tax on capital

In *Capital in the Twenty-First Century*[62], after concluding that economies have returned to what Karl Marx called the "*patrimonial*

[56] *Ibidem*, p. 36.

[57] *Ibidem*, p. 37.

[58] Such is the case in Colombian law under the different wealth taxes that have existed.

[59] OECD´s *Model Tax Convention*.

[60] Retrieved from: <http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf>.

[61] See Vogel, K., *Klaus Vogel on Double Taxation Conventions*, Third Edition, Kluwer Law International, The Netherlands, 2015, p. 1087.

[62] Piketty, Thomas, *El Capital en el Siglo XXI*, México, FCE, 2014.

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capitalism[63]", Piketty recommends adopting a global wealth tax, or a global tax on capital[64], as a method for reducing inequality. This proposal comes at a time when massive global scandals[65] have arisen showing that the world's wealth has, for decades, escaped taxation.

Piketty addresses the global tax on capital as a "*useful utopia*[66]", one which is remote and probably impossible but that –nevertheless– could be "*gradually and progressively*"[67] implemented. He insists on the need of this global tax given the lack of effectiveness of the global exchange of financial information. This last issue, however, has greatly changed since 2013 when Piketty's *magnum opus* was published. Today, the effectiveness of the global exchange of financial information and the implementation of the Common Reporting Standards (CRS) and FATCA, on top of the pressure of governments over banks to force their clients to declare their assets on their residence country, completely replaces the need for a global tax on capital.

[63] Piketty's term for unequal capitalism in the West. Retrieved from: <https://thediplomat.com/2014/05/china-piketty-and-patrimonial-capitalism/>

[64] Retrieved from: <http://isj.org.uk/piketty-and-marx/> According to Tomás Tengely-Evans, Piketty, in *Capital in the Twenty-Fist Century* defines "*national wealth or national capital as the total market value owned by the residents and government of a given country at a given point in time, provided that it can be traded on the market*", 2014, pp. 45-50.

[65] See EY´s. *Wealth under the spotlight 2015; how taxing the wealthy is changing.* Retrieved from <https://goo.gl/XGBW5L> In this article it is stated that the information revealed on April 2013 by the International Consortium of Investigative Journalists (ICIJ) known as the "Panamá Papers", and afterwards, in the leakages known as the "paradise papers" and the "Malta Papers", revealed –straight to the public and not to the authorities (such as was the case in the previous leakage of Swiss and Liechtenstein´s bank employees), that much of the world's wealth had for decades –and perhaps centuries- escaped taxation.

[66] Piketty, *op. cit.*, p. 574.

[67] *Idem.*

III. The Pacific Alliance

The Pacific Alliance is a Latin American economic trade block composed primarily by Colombia, México, Chile and Peru –acting as full members[68]–, which are all Latin American countries that border the Pacific Ocean[69]. Its aim is to form a Latin American in-depth integration area that can jointly widen the existing trade relations with other world economic blocks –especially with Asia– and that can ensure the freedom in the movement of goods, services, capital and people within its borders, as well as to foster "*the mechanisms for cooperation between member countries*"[70]. Ever since its creation –by means of the "*Declaración de Lima*" of April 28 of 2011– the Alliance was envisioned to extend itself as an economic and commercial integration platform that could, as a truly hemispheric trade block, take advantage of the new global commercial architecture of the existing free trade treaties in force.

The current full members of the Pacific Alliance have a joint 225 million population, and a 35% of Latin American Gross Domestic Product[71], and, as a block, it "*will rank as the fourth contributor to the world`s growth in the next five years*".[72] The structuring of the Pacific Alliance will allow its full members to have access to more favourable trade agreements with the Asia-Pacific region that they would be able to have on an individual basis.

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[68] As of today, only Colombia, México, Peru and Chile have the status of full members. The status of associated members has been granted to Canada, Australia, New Zealand and Singapore. Also, it has 42 observer countries such as Spain, Austria, Sweden, Denmark, Belgium, among others. Costa Rica, a current observer member, officially initiated the process of joining the Pacific Alliance as a full member on February 10th, 2014. Retrieved from: <https://repositorio.cepal.org/bitstream/handle/11362/40860/1/S1601207_en.pdf>

[69] Retrieved from: <https://en.wikipedia.org/wiki/Pacific_Alliance>

[70] Retrieved from: <https://goo.gl/GHrhBF>

[71] Retrieved from: <https://elpais.com/internacional/2017/06/29/colombia/1498757603_324130.html>

[72] Retrieved from: <https://goo.gl/GHrhBF>

A) Nature, Structure and Organization

As with other hemispheric integration regimes, such as the European Union –which migrated from the European Economic Community created in 1958 to the largest trade block in the world[73]-, the Pacific Alliance aims to develop from an economic union to a political union, thus consolidating itself as the eighth export powerhouse in the world[74]. Its economic integration has already developed in several areas; such is the case of the consolidation of a Latin American Integrated Stock Market (MILA)[75] which currently operates in the four member countries.

The Pacific Alliance´s founding instrument is the Pacific Alliance Framework Agreement, signed on June 6 of 2012. The Presidents of the four full member countries "*are the highest decision-making body in the Pacific Alliance carrying out those competencies in the Presidential Summits*"[76] and its Counsel of Ministers, formed by each of the Foreign Affairs and Foreign Trade Ministers of the member countries is the principal decision making body of the organization[77].

B) Areas of Integration and Cooperation: A special review of the Capital and Service Areas

Since the global financial crisis of 2008-9 "*capital flows to all of Latin America slowed down*[78]". Other factors such as the corrective

[73] Retrieved from: <https://europa.eu/european-union./about-eu/eu-in-brief_en>

[74] Retrieved from: <https://alianzapacifico.net/que-es-la-alianza/>

[75] Retrieved from: <http://mercadomila.com/en/who-we-are/our-history/>

[76] Retrieved from: <http://www.ey.com/Publication/vwLUAssets/Gu%C3%ADa_de_la_Alianza_Pac%C3%ADfico_2015_2016/$FILE/EY_guia_alianza_pacifico_2015_2016_ingles.pdf>

[77] *Idem*.

[78] Perry, Guillermo, et al., *Financial Integration in the Pacific Alliance*, Inter-American Development Bank Monograph, 2016. Retrieved from: <https://

macroeconomic trends in developed countries, the beginning of "*normalization of US monetary policy*[79]", the uncertainty of caused by Brexit and the "*ongoing process global regulatory reform*[80]" introduced by the implementation of Basel 3 agreements, keep affecting negatively the flows towards emerging markets. According to ECLAC[81] the flows of foreign direct investment ("FDI") of the Pacific Alliance "*represent a high proportion of both inward and outward FDI of all countries of Latin America and the Caribbean (43% and 96% respectively)*"[82].

There is a *de facto* financial integration taking place in the region. Colombian banks and insurance companies are heavily investing in other nations in the hemisphere, as well as Brazilian and Chilean banks and financial institutions. This financial integration will be strongly benefited by the Pacific Alliance and its regulatory harmonization in several areas, such as banking, insurance and capital markets. Also, according to Perry, given that "*differences in the tax treatments of financial products appear to have been a major factor in limiting operations through MILA*", tax harmonization and completing "*the web of bilateral double taxation agreements among the PA member countries, to avoid the double taxation of profits realized in the extended market*[83]" will play a determining role in the consolidation of the Pacific Alliance and in the deepening of its members internal markets.

C) Taxation Agreements Arising from the Pacific Alliance

The high potential to develop a multilateral tax system that can create value for its members is a unique opportunity for the Pa-

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[79] *Idem*.

[80] *Idem*.

[81] The Economic Commission for Latin America and the Caribbean.

[82] Cfr. Durán Lima, *op. cit*.

[83] *Ibidem*, p. 15.

cific Alliance. As of today, three[84] of its four members are official OECD member countries and only Peru, not being as of yet an OECD member country has fully committed on collaborating with the OECD in multiple projects[85]. Given the latter, the new modifications to the OCDE Model Convention Treaty, approved on the 21st of November 2017[86], especially those relating to residency rules, permanent establishment, dividends, capital gains, and limitation of benefits shall be taken into consideration by the OECD members in the interpretation of its "DTA" treaties.

As of February 2015, the four members of the Pacific Alliance had signed a total of 98[87] treaties to avoid double taxation or double taxation agreements ("DTA´s"), including many of these amongst themselves[88] and also including the regional Andean Nations Community Agreement ("CAN") which is a Regional Integration Treaty of which Peru and Colombia take part[89] and which has its own supranational derivative legislation in order to prevent double taxation in income tax[90] as well as a Decision harmonizing[91] sales or VAT taxes.

Being that foreign direct investment is a key feature of the Pacific Alliance, and that harmonization is the only way to maintain permanent investment in the region, an instrument to harmonize

[84] Colombia, México and Chile are OECD Member Countries.

[85] According to the OECD, Peru has adhered to two important OECD instruments: the Anti-Bribery Convention and the Convention on Mutual Administrative Assistance in Tax Matters. Also, Peru "*is among the first countries to engage with the OECD through an OECD Country Programme*". Retrieved from: <http://www.oecd.org/latin-america/countries/peru/#d.en.346184>.

[86] Cabrera Cabrera, Omar, "Principales cambios del MOCDE sobre la renta y patrimonio 2017", *Revista de Orientación Tributaria-Impuestos*, LEGIS, mayo-junio 2018, p. 22.

[87] EY, *Wealth Under*, *op. cit*.

[88] In this sense, for example, Colombia has signed DTA's with México and Chile, which are also full members of the Pacific Alliance.

[89] The current members of the CAN are Colombia, Peru, Bolivia and Ecuador.

[90] CAN, Decision 578 of 2004.

[91] CAN, Decision 599 of 2004.

wealth taxation in the Pacific Alliance in order to prevent double or triple taxation is a key priority.

D) Taxation conflicts and expropriatory claims that might arise from a wrongful approach on wealth taxation

The notion of expropriation has greatly varied during the last couple of centuries. This notion has shifted from the traditional concept of expropriation conceived by Locke and Hume[92], according to which the title of property is to be acquired justly by those who "*mix their labour with the soil*[93]" to the "disputes on direct expropriation –mainly related to nationalisation that marked the 70's and 80's-[94] to the disputes related to the concept of "*indirect*" or "*creeping*" expropriation. This change in the notion of the term explains why Weston[95] has indicated that direct or indirect expropriation, even under the clear understanding that it requires compensation, amounts to a "*wealth deprivation*".

A common form of indirect expropriation is currently seen by the way of a *non-compensable regulatory governmental measure*. Some criteria has been set out by jurisprudence[96] to distin-

[92] See Wiley, James, *Theory and Practice in the Philosophy of David Hume*, Palgrave MacMillan, 2012, where Hume´s famous quote is referred to: "there is no property in durable objects, such as lands or houses, when carefully examined in passing from hand to hand, but must, in some period, have been founded on fraud and injustice".

[93] Retrieved from: <https://www.jacobinmag.com/2015/06/locke-treatise-slavery-private-property/>.

[94] OECD, *Indirect Expropriation* and the *Right to Regulate* in International Investment Law, OECD Working Papers on International Investment, OECD Publishing, 2004.

[95] See Weston, B., "Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation", *Virginia Journal of International Law*, Volume 16, 1975, p. 103-175.

[96] OCDE, *Indirect Expropriation*, *op*. *cit*., p. 22. This criteria includes "i) the degree of interference with the property right, ii) the character of governmental

guish when a measure of this type amounts to an expropriation or when it simply amounts to a sovereign decision that does not generate the obligation to compensate. These regulatory governmental measures, when related to taxation[97], could amount to an expropriation[98] under bilateral or multilateral investment treaties. According to Rodríguez[99] an "*unexpected, non-transparent tax measure (in a broad sense) adopted by a signatory party can result in an indirect expropriation*".

The tax harmonization required by the Pacific Alliance should include provisions –enacted by its Council of Ministers- or multilateral mechanisms confirmed by each of their members national legislation, aimed at avoiding the indirect expropriation of invest-

measures, i.e. the purpose and the context of the governmental measure, and iii) the interference of the measure with reasonable and investment-backed expectations (…)".

[97] There have been multiple judicial decisions that appoint sovereign tax measures as expropriatory. See, for example, the award rendered by the London Court of International Arbitration in the case brought by *Occidental Exploration and Production Company v. Ecuador*, where the non-granting by Ecuador of a VAT refund led to an investment dispute on the grounds of expropriation. See also the 2002 ICSID decision of *Marvin Feldman v. México*, where the refusal to rebate excises taxes applied to cigarettes was claimed to constitute a breach of México´s obligations under NAFTA. See also Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova, UNCITRAL (UNCITRAL (1976)) Final Award Apr. 18, 2002 and EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, UNCITRAL (formerly EnCana Corporation v. Government of the Republic of Ecuador), Award Feb 3, 2006.

[98] See RosInvestCo UK Ltd. v. Russian Federation, SCC, Final Award, Sep 12, 2010. In this case, a minority shareholder of the Russian company YUKOS, alleged that the Russian government had expropriated the company via a series of charges alleging tax fraud and tax evasion, which ultimately made the company dispose of all its assets. The Tribunal concluded that these persecutions had not been a bona fide procedure, and therefore it amounted to an expropriation.

[99] Rodríguez, Adrián, *International Arbitration Claims against Domestic Tax Measures Deemed Expropriatory or Unfair and the Inequitable*, INTAL-ITD, 2006.

ments via double (or multiple) taxation of wealth.

E) Past and present experiences on wealth taxation from other regional integration agreements

Taxation of wealth has been problematic in certain regional integration agreements, such as in the Andean Community Agreement. As mentioned before, Decision 578/2004 created a source State taxation mechanism whereby it eliminated –without any conditions– the possibility of patrimony of one member country being taxed in other member countries. Multiple cases arose[100], whereby –legitimately- a company of one member state (i.e. Colombia, or the residence state), having equity or assets in another member state (i.e. Peru, or the source state), did not account these assets for the purpose of calculating and paying wealth tax the first member country. Given these cases, and the fact that the Colombian Courts had to start applying the supranational law, the Tribunal of Justice of the Andean Community issued a pre-judicial interpretation[101] stating that, given that Decision 578/2004 aimed at the avoidance of double taxation, and not on the creation of double-non taxation situations, only if there was a patrimonial tax in both (residence and source) member states, would the provision apply. On the contrary, if there was no patrimonial or wealth tax in the source member state, then the residence member state had to account these assets in order to calculate its patrimonial or wealth tax.

These situations have led investors to decline on further investing on the region, due to the fact that what is stated in Decision

[100] See among many others, for example, Consejo de Estado de Colombia, Case No. 2011-0000015-01(19293) of 25th November 2014. Plaintiff: Yazaki Ciemel Ftz LTDA, and Consejo de Estado de Colombia, Case No. 2010-00097-01 (18884) of the 21st of August 2014. Plaintiff: Schering Colombiana S.A.-Absorbed by Bayer S.A.

[101] See Pre-judicial Intepretation on Case 19195 (Rayovac-Varta S.A.) issued on the 14th of June 2016th. Tribunal de Justicia de la Comunidad Andina.

578/2004 is not applicable, or at least is not being applied. This has been compared, in certain situations, with an indirect expropriation because of the fact that the investment is taxed twice. This is to be noted by the Pacific Alliance regulators in order to avoid falling in the same erroneous interpretation of what constitutes a double taxation convention.

IV. Piketty vs. Economic growth: A suggested approach to the taxation of wealth under the Pacific Alliance

Pikettys´ approach to the reduction of inequality through the redistribution –via taxation– of wealth comes in a time of great turmoil in Latin America. The political tensions in countries like México and Colombia, given the approach taken by some socialist presidential candidates whose views on wealth, property and taxation might be interpreted as a threat to free market initiative and foreign investment, must not prohibit the discussion on which is the correct model to adopt in order to enhance economic growth in the region[102].

Regardless of any type of government that might rise to power, anyone will agree that a key element for regional progress is the strengthening of the business environment. And for a strong business environment to exist, foreign direct investment protection and the respect for private property must be an unquestionable premise. According to Reyes "*economic growth can be evaluated through the measurement of capital market development and the creation of new enterprises*[103]". As mentioned before, a threat to fo-

[102] The International Monetary Fund, in its Regional Economic Outlook for the Western Hemisphere stated that "Economic growth in Latin America and the Caribbean in 2016 was the third-lowest in 30 years-contracting by 1 percent after stagnating in 2015. (…)".

[103] See *Supra*, Reyes..., p. 93

reign direct investment and private property is the excessive[104] or confiscatory tax levying on assets and returns of capital.

Tax harmonization in the Pacific Alliance, although playing a crucial role, has not been given –as of yet- the attention deserved. The CEAP[105] has advised the member countries to carry out actions in order to activate the services market, among which was to undertake any regulatory and tax reforms needed in order to enhance trade facilitation.[106] Also, as announced by the Colombian Ministry of Finance,[107] the members of the Pacific Alliance have signed a multilateral convention for the harmonization of the tax treatment and prevention of double taxation for existing pension funds in these countries. With the signing of this convention, and with the internal adoption made by each member country in its own legislation, pension funds will be treated as fiscal residents[108], and therefore will be granted the existing rights under the double taxation agreements signed between them.

Apart from the previously mentioned tax aspects, harmonization of key institutions has had an utmost importance in the Pacific Alliance. Issues such as the proposal made to the CEAP by

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[104] No one expects to enter into a double-non taxation scenario whilst investing in another jurisdiction, but double or triple taxation in an investment can lead to the disappearance of the assets value itself.

[105] CEAP stands for "Consejo Empresarial de la Alianza del Pacífico".

[106] Durán Lima, José, *The Pacific Alliance and its economic impact on regional trade and investment; evaluation and perspectives*, International Trade Series ECLAC, United Nations, 2016. Retrieved from: <https://repositorio.cepal.org/bitstream/handle/11362/40860/1/S1601207_en.pdf>

[107] This announcement was made through Bulletin Nº. 132 dated June 29, 2017.

[108] This measure is aimed in granting pension funds in other member countries of the Pacific Alliance the same treatment as to the Colombian pension funds. In this sense, pension funds from other member countries can invest in the Colombian market and not be levied, over their income, at the rate of 14% which is the applicable rate for international investors. Retrieved from: <http://www.minhacienda.gov.co/HomeMinhacienda/ShowProperty?nodeId=%2FOCS%2FP_MHCP_WCC-079128%2F%2FidcPrimaryFile&revision=latestreleased>

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Colombia[109] to adopt a unified regime of closed-held stock corporations, in order to facilitate cross-border equity transactions and foreign direct investment between member countries and the proposals made by Colombian academics[110] in order to harmonize[111] the treatment of money laundering in the countries of the Pacific Alliance, have greatly helped in this sense.

V. Conclusions

Piketty´s *Capital in the Twenty-First Century* in undoubtedly a great contribution to *academia* and social sciences, but it cannot be taken as a solution for today's wealth distribution justice problem. The authors main conclusion, which is that capital has a greater rate of return than that of economic growth or economic output (r > g), cannot be seen as realistic in today's world[112]. The global wealth trends show that the world today is not like that of the past, and that –also- the future will not look like the past;

[109] This proposal was presented to the CEAP in June 29th 2016 in Frutillar, Chile, by Dr. Francisco Reyes Villamizar, who is currently the Colombian Superintendent of Corporations and also the current President of UNCITRAL.

[110] See Vargas Mendoza, Ligia María, *Armonización del delito de lavado de activos en los países de la Alianza del Pacífico*, Universidad de los Andes, 2018, p. 131., and Tarapués Sandino, Diego, *El narcotráfico y el lavado de activos dentro de la agenda de la Alianza del Pacífic*, Pastrana Buelvas, Eduardo & Gehring, Hubert (edits.) *Alianza del Pacífico, mitos y realidades.* Fundación Konrad Adenauer, Universidad Javeriana, Universidad Santiago de Cali, Cali, 2014. p. 585.

[111] Vargas, *op. cit.*, p. 131.

[112] See Worstall, Tim, *Why Thomas Piketty´s Global Wealth Tax Won't Work*. Forbes Magazine, March 30, 2014. "*Given that we're going through a period of intense technological change, what with this internet, mobile telecoms and digital technology thing the idea that economic growth is going to be slow in the future just vibes with observable reality*" Retrieved from: <https://www.forbes.com/sites/timworstall/2014/03/30/why-thomas-pikettys-global-wealth-tax-wont-work/#49693011272e>.

today's highest net worth individuals have obtained their wealth through work, investment and global expansion rather than through inheritance[113].

Academic studies, that have evaluated data of 20 OECD countries during the last 20 years, have concluded that taxes on wealth "*dampen economic growth*"[114]. Also, studies in the United States have shown that a wealth tax in that country (i) "*would reduce investment, wages, employment, incomes and output*[115]", (ii) "[*all income groups*] *would be worse off under a wealth tax due to decreased economic activity*[116]", (iii) "[*Piketty´s basic tax*] *would depress the capital stock by 13.3 percent, decrease wages by 4.2 percent, eliminate 886,400 jobs, and reduce GDP by 4.9 or about $800 billion, all for a revenue gain of less than $20 billion*[117]". Similarly, a 2008 study called *The Economic Consequences of the French Wealth Tax* by Professor Eric Pichet of Kedge Business School concluded that "*France loses around 5 billion Euros in tax revenue a year because of people leaving to avoid the wealth tax*"[118].

The OECD, in its latest report[119] concludes that there are no reasons for imposing a net wealth tax if a country has "*broad-based personal capital taxes and well-designed inheritance and gift taxes*[120]". However, in the absence of the later, a net wealth tax is recommended.

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[113] Retrieved from: <https://www.economist.com/the-economist-explains/2014/05/04/thomas-pikettys-capital-summarised-in-four-paragraphs>.

[114] See Hansson, Asa, "Is the Wealth Tax Harmful to Economic Growth?", *World Tax Journal*, February 2010, p. 33.

[115] See Schuyler, Michael, "The Impact of Piketty's Wealth Tax on the Poor, the Rich and the Middle Class", *Tax Foundation Special Report*, Nº. 225, October 2014.

[116] *Idem*.

[117] *Idem*.

[118] Retrieved from: <https://hsf.org.za/publications/hsf-briefs/wealth-taxes-iii-problems>.

[119] OECD, *The Role and Design of Net Wealth Taxes in the OECD*. OECD Tax Policy Studies, N. 26, OECD Publishing, Paris, 2018.

[120] *Ibidem*, p. 98-99.

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Governments that wish to adopt solid tax redistribution policies aiming to reach rational and efficient redistribution of wealth should look to the classical lessons of economies founding fathers such as Adam Smith[121], Thomas Malthus[122] and David Ricardo[123].

Harmonization regarding wealth tax in the Pacific Alliance can be achieved through the agreements reached[124] by the Council of Ministers of the member countries. Such as is the case with the European Union, these agreements set the aims and goals to which the regulation aspires, without imposing mechanisms or

[121] In his book *The Theory of Moral Sentiments*, Adam Smith introduced its idea of the invisible hand, as a metaphor for the self-regulation of free markets according to "*competition, supply and demand and self-interest*". Also, in his book *An Inquiry Into the Nature and Causes of the Wealth of Nations* (1776), Adam Smith argued that the division of labour and specialization produced prosperity, he insisted that the wealth of countries should be measured by the levels of production and commerce, rather than by "the value of their gold and silver deposits", and advocated for a least governmental intervention possible in the economy (*Laissez faire-Laisser passer*).

[122] Although his book *An Essay on the Principle of Population* (1798) has been widely criticized because of his views on the famine and misery that the excess growth of population (compared to the growth of food production) would have in the world, several elements have helped to form economic science as such. Among these, Malthus has always defended long term economic stability over short term economic stability, has advocated for the reduction of inequality among social classes through the rise of agricultural production (which he considers would lead to social happiness), and the rise of the middle class. Retrieved from: <https://es.wikipedia.org/wiki/Thomas_Malthus>

[123] In his book *Principles of Political Economy* (1817), David Ricardo states that a country must specialize in those goods and assets is can more efficiently produce, and acquire from other countries those services and assets it cannot so efficiently produce. Also, the *Ricardian Equivalency* theory states that if a country wishes to finance its growth with the proceeds of taxation, this will inevitably lead to an increase in future taxes, thus making tax payers (and entrepreneurs) shift from investing their resources in income generating activities and shift to savings, in order to ensure themselves a safe future. Retrieved from: <https://es.wikipedia.org/wiki/David_Ricardo>

[124] Article 5 of the Pacific Alliance Master Agreement states that "the decisions of the Council of Ministers and other agreements are to be reached by consensus".

rules by which the should be carried out, leaving this task to each member country in order for it to enact its own legislation[125].

Without needing much economic reasoning, it is an unquestionable premise that for wealth inequality to be reduced, economic growth is needed. And for economic growth to exist, investor trust is required. And for investor trust to exist, rules on the prevention of double taxation of wealth, under all its scopes, are to be established and respected by the authorities. The formal existence of rules preventing double taxation of wealth, without its authorities really respecting this (such as is the case in the Andean Community), will only lead to disinvestment and project abandonment.

The idea of a global wealth tax, as Piketty himself says, is not only "*utopical and impossible*" but also unnecessary. In a transparent world, were banks and governments leave no room for tax or financial opaqueness, there is no need for implementing such a tax. The revenue flows that are expected with the latter can be achieved by nations and regional alliances through the implementation of policies which protect investments against indirect expropriation and grant fairness, among others, through double or multiple taxation.

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Análisis de legislación

Analysis of legislation