International tax law today: a view from Colombia[*]

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1.The contents of international tax law – the importance of *soft law* and the remnants of the *relation of power*

Today, in the context of global economy, economic opening and the internationalization of business activities, the regulatory field of *international tax law* is not confined to treaties that relate to *direct taxation* as was the case a few years ago. Instead, this field has expanded and now covers a purposeful fight against tax avoidance practices and the erosion of *income tax* bases and the field of *indirect taxation* – which does so more intently every day. The first of these is based upon the positive action by OECD and the G 20 group, and an acute interest in bringing in every country and especially developing countries to a sort of multilateral commitment that should lead the way to a worldwide notion of tax justice. The second one springs from the general trend of the growing importance of

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indirect taxes, where the adoption of *value added taxes* by the majority of Western countries and the export of this model to Asia and Africa has been fundamental. The making of economic trade blocs, the creation of the Worldwide Trade Organization –WTO –, the repeated making of *free-trade agreements* and the generalized trend of reducing customs duties and making the global and regional exchange of goods and services as easy as possible –all of these are facts and events that add to the importance of VAT–; and so they provide numerous rules and principles that pertain to indirect taxation to nurture the legal framework of worldwide taxation.[3]

It is worth noting that all these trends issue a call for those who study tax law to go back to studying the *tax law relationship*; and this happens at times where the issue of lots of recommendations and guidelines designed to strengthen tax administrations of all countries stands out vividly, seeking to ensure the complete and fair collection of taxes. Once again, rigor requires us to examine the contrast of the *legal relationship* and the *relation of power*, because we must impede that arbitrary and excessive action by the tax authorities is sponsored at the expense of the *fundamental rights* of taxpayers – just in the name of this crusade that seeks to attain international tax justice. Discretionary powers, reckless action and the violation of the principle of good faith, of the presumption of innocence, of personal information rights and of the right of defense and of due process of law were dark passages of history, all of which occurred under the paradigm of the *relation of power* and the exorbitant powers of tax officers. And these events cannot in any way arise again under the new winds of international taxation.

Having set out this quite necessary and timely qualification, we can now proceed to mention the most relevant aspects of current *international tax law*:

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[3] See RAMÓN VALDÉS COSTA, Institutions of Tax Law, Buenos Aires, Editorial Depalma, 1992, pages 34 and 35.

*The commitment of nations – which becomes more evident as each day goes by – to unite efforts against tax evasion and to impede the erosion of taxable bases and the shifting of profits to low or zero tax jurisdictions. All of this has brought about bilateral and multilateral treaties on the exchange of information and the collection of evidence to enforce international tax audit efforts. In this matter, Colombia has been making progress decidedly, by adhering to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters[4], the making of *bilateral information exchange treaties* – of which the one we entered into with the United States[5] is an example –, and the inclusion of stipulations to the effect in double taxation treaties entered into by Colombia to avoid double taxation in point of patrimony and income taxes. These are treaties the country has signed since 2005, the year in which we signed our treaty with the Kingdom of Spain.

*The special interest of the OECD[6] in setting, disseminating and enforcing precise guidelines against the *erosion of taxable bases*, especially in developing countries, so that these guidelines are used as reference points in information exchange and double taxation treaties and also in domestic laws.

*In this context, the adoption, by OECD, in 2013 – with the endorsement of the G 20 group as voiced out at the meetings of 2013 in St. Petersburg, 2014 in Brisbane and 2015 in Antalya[7] –, of a series of

[4] Which was approved in Colombia by Law 1661 of 2013. The treaty was declared to be constitutional by Decision C – 032 of 2014 of the Constitutional Court – with Colombia's adhesion to the convention ensuing.

[5] This treaty – entered into on March 30, 2011, was approved by Law 1666 of 2013 and was declared to be constitutional by Decision C – 225 of 2014

[6] The Organization for Economic Cooperation and Development.

[7] The G-20 group comprises the European Unión, Germany, Canada, United States, France, Italy, Japan, the UK, Russia, Saudi Arabia, Argentina (on behalf of Mercosur), Australia, Brazil, China, South Korea, India, Indonesia, Mexico, South Africa and Turkey. It holds annual meetings to discuss economic and fiscal matters. The top officers of the Treasury and Finance Departments and of the Central Banks of the member countries attend the meetings, with Heads of State attending occasionally.

measures that the states are to adopt to counteract Base Erosion and Profit Shifting – BEPS – practices.[8] This is a continuing effort – a job that is set to end in 2020 and, as noted in the *2015 Report,* seeks to stimulate "a brave movement on the part of politicians that seeks to recover trust in the system and to ensure that the benefits are taxed where the underlying economic operations take place and where value is added". According to that report, because of BEPS practices in the world somewhere between 4% and 10% of the total corporate income tax goes uncollected worldwide (which is, in US dollars, between US$100 million and US$240 billion annually).[9]

*The fact that certain Latin American countries wish to be admitted in the OECD to assume, in this way, the commitments provided for by this organization, and, in particular, those that relate to fighting base erosion practices particularly in point of *income taxes*.[10]

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[8] The immediate precedent of this document is the OCDE report called *Addressing Base Erosion and Profit Shifting*. It has been considered the second great goal of the organization in the field of international tax law. In this regard, see JACQUES MALHERBE, CAROL P. TELLO and MARÍA AMPARO GRAU RUIZ, *The fiscal revolution of 2014* – FATCA, BEPS, OVDP, Bogotá, Instituto Colombiano de Derecho Tributario, 2015. As the authors note, the fundamental goal of BEPS is to procure a sort of *worldwide tax justice* but "without changing the allocation of taxing powers between the source countries and the residence countries". See ibid., page 204.

[9] OCDE and G -20, "Project on Base Erosion and Profit Shifting (BEPS)", October 5, 2015 Report. Explanatory Note – in *Results of the BEPS action plan and its application in Colombia*, a work of several authors coordinated by Myriam Stella Gutiérrez and Natalia Quiñones, Bogotá, Instituto Colombiano de Derecho Tributario, 2016, page 301.

[10] Mexico and Chile are OCDE members today. Colombia aspires to be admitted… and is a current member of the Development Center for OCDE with Argentina, Brazil, Chile, Costa Rica, Mexico, Panama, Peru, Dominican Republic and Uruguay. The central purpose of this body –created in 1996—is to attain the economic and social wellbeing of people around the world, and, from that starting point, to operate as a venue "where the governments can work together to share experiences and seek solutions for common problems and identify good practices that promote better policies for a better life." It addresses the following matters. *Public administration, agriculture and feeding, social matters, migration and health, science and technology, development, rural development, rural, urban and regional development, economy, education, appointment, nuclear energy, finance and investment, taxes, industry and services, environment, trade, energy and transportation.* See www.oecd.org, June 11, 2016 query. For tax matters, the reader may visit www.oecd-library.org/taxation.

*The willingness of many countries to seek to establish domestic regulations that are consistent as a whole in matters particularly important, such as *transfer pricing regulations*, conditions and rules that apply to permanent establishment, *value added taxes* in international relationships and, of course, the adoption and development of action plans against taxable base erosion practices.

All of this has added importance day by day to the many documents, recommendations, guidelines and models that are issued by international organizations that are specialists in these matters. All of these do not actually constitute positive law, but they are particularly relevant for the creation and interpretation of the rules of international tax law. For the importance and adoption of all these texts by the countries concerned it is more than justified to allude to the so-called *soft* or *flexible law* as a legal precinct, not actually regulatory but pre-regulatory, of which all these texts are a part. A source of reference that we must query unavoidably; one which – it is worth noting – has risen today – undoubtedly – to a true context, one that curbs the exercise of taxing powers by the states as quite outstanding scholars who study these matters have pointed out, including, among others, CÉSAR GARCÍA NOVOA and FERNANDO SERRANO ANTÓN.[11]

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[11] See GARCÍA NOVOA. *Current tax law*..., op. cit., Pages 86 to 98. The Santiago de Compostela professor says the following: "... The regulatory force of *soft law* would derive from its ability to turn into an interpretation criterion, and from the fact that the states adopt it based upon a political decision that makes them understand that failure to follow these rules would entail deviating from established lines or a loss of competitiveness in the international context – as opposed from adopting it based on a legal obligation (which is only possible where the very State decided that by an act of assigning sovereignty, such as an act that enables supranational rights to prevail). Ibid. page 95. On the other hand, FERNANDO SERRANO ANTÓN, provides an interesting discussion about the transition from *soft law* to *hard law*; he does so based upon the real and indisputable reach that OECD recommendations have as guides that set limits on the issue of national and international regulations; and he alludes to BEPS actions as actions that pertain to an international trend that seeks to unify or harmonize anti-abuse measures. See FERNANDO SERRANO ANTÓN, *The influence of the BEPS action plan in Spanish taxation: The impact on regulations, increased litigation and the role of courts of law*, in RCyT, the magazine of the Financial Studies Center (CEF for the Spanish initials), Madrid, 2015, pages 77 to 110. Of this professor of the Universidad Complutense we may also mention his work called *The post BEPS era or the execution of its action plan: Multilateral convention v. Unilateral implementation*, in the magazine Quincena Fiscal, number 12, Madrid, 2016, pages 129 to

To cite the most significant examples, this is what happens with the United Nations model double taxation convention, the multilateral and bilateral Latin American model double taxation conventions[12] or the numerous documents that OECD has prepared through its Tax Studies Committee, of which the following stand out:

*The Model Double Taxation Convention and its Commentaries;[13]

*The Guidelines for States on *transfer pricing regulations*[14], which seeks to [promote] compliance with the so-called *arm's length principle*,

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160. In the latter text, SERRANO ANTÓN refers to BEPS Action 15 which relates to the need for a multilateral convention that contains the entire BEPS actions, and that modifies, to the extent pertinent, double taxation treaties.

[12] It is just fair to mention here, in this regard, the hard, uninterrupted, and rigorous work that a group of European and Latin American professors have been carrying out on commission from the Latin American Institute of Tax Law. They are preparing two model double taxation treaties. This group includes Jacques Malherbe (of Belgium), Pasquale Pistone (of Italy), Heleno Taveira Torres (of Brazil), Antonio Hugo Figueroa (of Argentina), Addy Mazz (of Uruguay), Natalia Quiñones Cruz (of Colombia), Edoardo Traversa (of Belgium and Italy) and Cecilia Delgado (of Peru). The work started based upon a position adopted at the XXIII Latin American 2006 Tax Convention carried out in Córdoba, Argentina. The first draft of the model double taxation treaty was submitted in Cartagena, Colombia in 2010 at the XXV Latin American Tax Convention; and the definitive wording of that model treaty was approved in Santiago de Compostela, Spain, on September 6, 2012, at the XXVI Latin American Tax Convention. The first draft of the multilateral model treaty was submitted in Lima, Peru, in 2014, at the XXVII Latin American Tax Convention. These model treaties seek to provide guidelines and strengthen the position of Latin American countries as they negotiate double taxation treaties. They include serious proposals that try to answer to realities and adopt source based taxation but without turning a blind eye to the singular characteristics in the diverse conditions that every country has at the international level. They are clear and precise bodies of law. And specific commentaries have been added on each one of the prohibitions of the model treaties. See, in this regard, LATIN AMERICAN INSTITUTE OF TAX LAW, ILADT, ILADT Double Taxation Model Convention in Latin America. Bogotá, Colombia, Latin American Institute of Tax Law and Colombian Institute of Tax Law, 2010. We should also note that ANTONIO HUGO FIGUEROA, one of the members of the work team that was set up in 2006, has been acutely critical about the position of making a multilateral model treaty. He believes that that was a gross mistake given all that derives from the diverse features of the tax systems and national sensibilities because they entail an excessive limitation of sovereignty. See ANTONIO HUGO FIGUEROA, *International double taxation treaties – Jurisdictional principles – The UN/OECD model treaties – The Argentinian experience*, in Tax law, Volume II, Works by various authors, directed by Ámgel Schindel, Buenos Aires, La Ley, 2015, pages 1158 to 1160.

[13] See OECD, *Model Tax Convention on Income and on Capital, Condensed Version 2014* and *Model Tax Convention on Income and on Capital Full Version 2014.*

according to which all intercompany pricing and related party transaction pricing must be in conformity with market prices and capable of being compared with the prices that *unrelated parties* would agree on;

*The *15 Recommendations* issued to date to prevent taxable base erosion [and profit shifting] (BEPS), and the permanent reports and instructions for the relevant parties to adopt them when signing double taxation treaties and enacting domestic law[15]; or

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[14] The *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* were first published in 1979. See OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2010.

[15] In this regard, it is worth noting the book that was published by the Colombian Institute of Tax Law, under the coordination of Myriam Stella Gutiérrez and Natalia Quiñones Cruz. This book addresses the 15 BEPS actions that are to be carried out and their viability in Colombia. The works, with each one corresponding to each one of the BEPS actions recommended, are the following. (i) Action I: *Addressing the tax challenges of digital economy* by JUAN MANUEL IDROVO CUBIDES. In this text, the author alludes to the insufficient regulations that Colombia has in these matters, and to the urgent need of taking tax policy measures in this regard, always keeping the OECD works as reference material. (ii) Action II: *How to neutralize hybrid structures?* by JOSÉ ANDRÉS ROMERO TARAZONA and DANIELA SÁNCHEZ CARDOZO. In this work, the authors explain clearly the meaning of the so-called "hybrids" in tax matters. They emphasize those companies which are regarded as separate companies in a jurisdiction and in others subject to conduit entity rules; and then they address Colombian transfer pricing regulations, namely that rule that gives powers to the Tax Administration to recharacterize debt transactions as capital contributions and interest payments as dividend distributions. (iii) Action III: *Reinforcement of CFC regulations*, by CAMILO ANTONIO CORTÉS GUARÍN. In this work, the author addresses the matter of international tax transparency (CFC), and the need for the multilateral convention suggested by BEPS Action 15. (iv) Action IV: *Limiting the erosion of taxable bases by way of interest deductions and other financial payments deductions*, by CAMILO FRANCISCO ZARAMA MARTÍNEZ. This writing relates to interests as a means to shifting profits from higher tax jurisdictions to lower tax jurisdictions. (v) Action VI: *Fighting against vicious practices, taking into account transparency and substance*, by CRISTINA STIEFKEN ARBOLEDA. In this text, the author comments upon certain rules of Colombian domestic law that could end up being qualified as the product of vicious tax practices (e.g., exemptions for activities that relate to software, hotel services exemptions or special deductions for investments in science and technology). (vi) Action VI: *Impeding the abusive use of conventions*, by CAROLINA ROZO GUTIÉRREZ. This document seeks to raise awareness about the BEPS goal of fighting against Treaty Shopping, or the abusive use of tax treaties, especially by creating companies in jurisdictions governed by a treaty that provides benefits; in this manner, the setting up of this new legal entity is purely or mainly tax driven, meaning that the constituents seek tax savings derived from application of the Treaty. In this regard, the author makes specific comments about the broad and ambiguous language of the Action she comments upon. Under this action, it would be enough that one of the main causes [driving the creation of the new company] were the tax considerations for the Tax Administration to conclude that there is an abuse here. In like manner, the author addresses the means of control to which Colombia may resort today,

such as a general anti-avoidance rule, the condition of effective beneficiary (or beneficial owner) for the favorable rules of the treaty to apply, or specific anti-avoidance rules in point of capital gains, which are also provided for in double taxation treaties. (vii) Action VII: *Impeding artificial avoidance of permanent establishment rules*, by RICARDO ANDRÉS RUIZ CABRERA. In this work, the author addresses the matter of subordinated and independent agents for a permanent establishment to be deemed to exist; and he emphasizes on the need to examine, on a case-by-case basis, the conditions that govern the contract that ties the agent with the foreign company. Likewise, he elaborates about the practices that seek to break down activities and of contracts that are made to avoid the qualification [of the arrangement or operation] as that of a permanent establishment. (viii) *Action VIII: Considerations about the BEPS action plan*, by MÓNICA INÉS HERNÁNDEZ. In this text, the author examines the matter of intangible property, and its relation to the income derived from this property; and it warns the reader about the risks that these BEPS action entails, because of the legal insecurity implied in giving power for tax administrations to disregard transactions with no clear parameters that guarantee taxpayers rights. (ix) Actions VIII – X: *Ensuring that the results of transfer pricing regulations are in line with the creation of value*, by PEDRO ENRIQUE SARMIENTO PÉREZ and MÓNICA BOLAÑOS CASTRO. In this text, the authors examine the independent price and arm's length principles, and address matters relating to international transactions on intangible property and the allocation of risks and transactions based upon transfer pricing regulations. (x) Action XI: *Evaluation and follow-up on BEPS*, by DIEGO QUIÑONES CRUZ. In this document, the author addresses the obstacles that confront the BEPS Plan in general, and in Colombia in particular, in regard to the pertinent macroeconomic and microeconomic information. (x) Action XII: *Requiring taxpayers to reveal letter aggressive tax planning mechanisms*, by JUAN DAVID VELASCO KERGUELEN. In this text, the author comments upon the strategies that countries are to follow against aggressive tax planning, characterized by the purely tax driven setting up of structures and organizations (*tax shelters*) and the mandatory disclosure of tax planning schemes (or Mandatory Disclosure Rules – MDR). (xi) Action XIII: *Re-examining transfer pricing studies*, by RAFAEL RICARDO PARRA CORREA. In this writing, the author addresses the arm's-length principle and alludes to the documentation and the evidence that must be submitted as supporting documents to prove full compliance with that principle. He emphasizes the so-called transfer pricing studies that are required in Colombia under transfer pricing regulations. (xii) Action XIV: *Making conflict resolution mechanisms more effective*, by NATALIA QUIÑONES CRUZ. In this document, the author addresses the [use of] alternate conflict resolution mechanisms in tax matters, and, in particular, the so-called Mutual Agreement Procedures (MAP) and arbitration; and she does this always from the perspective of the controversies and doubts that may arise when dealing with making domestic legislations more similar and close to each other and when applying treaties. And (xiii) [Action XV]: *Developing a multilateral instrument that will lead to implementing BEPS conventional measures through amending all current bilateral tax conventions*, by JESSICA JIMENA MASSY MARTÍNEZ. In this text, the author addresses the need for a multilateral convention that facilitates the quick adoption of BEPS recommendations, without needing to negotiate bilateral treaties, one by one. This is so because, as specified in the 2015 OECD/G-20 Report, a fundamental goal of the action plan is not only to avoid unilateral and out-of-sync measures taken by domestic legislations, but also to sponsor any amendments or additions that are required in international conventions; and all of this is seeking to have timely, transparent and comparable information. See Colombian Institute of Tax Law, *Results of the BEPS Action Plan and its Application in Colombia*, Directed by Miriam Stella Gutierrez and Natalia Quiñones, Bogotá, 2016. Now, the idea here is not to go into deep elaborations on BEPS matters, because this is not a book on international tax law but on tax law in general. Now, given its implications, and the reactions that it has triggered around the world, *The 2015 guidelines on VAT regulation, taking into account the impact of VAT in international business transactions.[16]

All these documents are the fruit of the constant work of the Tax Studies Committee and combine theory and experience. They are being revised and updated permanently, and stand out as a premium reference work for both OECD member countries and all other countries at large.

Justifiably, some time ago VALDÉS COSTA noted the conceptual poorness and backwardness of those who hold that the purpose of international tax law

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it is worth making a few additional comments, in particular about Action XII that relates to the obligation that taxpayers and promoters have of reporting information on their *aggressive tax planning* schemes to the tax administrations. Let us see. (a) This requirement has a relevant precedent in the United States. In this country, since 1984, tax shelter transaction promoters were required to report to the IRS the strategies that they had designed, from the date on which they had been proposed, and to keep a sort of historical record of these *shelters*. Since 2004, the breadth of this obligation grew, as it required promoters to report to the IRS every reportable transaction that had taken place since October 22 of that year, or else they would be subject to fines commensurate with their revenues. According to Section 6707 of the Internal Revenue Code, *reportable transactions* are those that the IRS requires [to report] on the applicable report forms. Besides, Sections 4965 (C) and 4965 (D) regulate this matter further, requiring *material advisors* to submit periodical reports and to preserve the data of the clients to which they have given advice, and to keep this available for the IRS. *Material advisors* are defined as (i) those that provide material help, assistance or advice in respect of the organization, management, promotion, sale, implementation, insurance or carrying out of any reportable transaction; or (ii) those that derive any gross revenues – directly or indirectly – for their advisory work, to the extent they exceed the relevant statutory thresholds. The information that they must submit includes detailed information on the corresponding transactions, the tax benefits or savings derived there from and any other information required by the IRS. See RACHEL ANNE TOOMA, *Legislating against tax avoidance*, Amsterdam, IBDF, 2008. (b) As far as Latin America is concerned, in Mexico, Article 31-A of the Federal Tax Code provides for a rule that clearly coincides with the Action XII that we comment upon here. Under this rule, "taxpayers must submit information on any transactions that are indicated on the official [report] form that the tax authorities approve for the purpose, within 30 days following the day on which they were carried out." (c) As indicated specifically in the OECD/G 20 Report, "the main objective of mandatory declaration/disclosure rules is to increase the level of transparency, and providing to the pertinent tax administration information in advance about any tax planning structures that are potentially aggressive or abusive, in order to identify the structures promoters and users". See OECD and G 20, *Draft on base erosion and profit shifting – final summaries – 2015,* at www.oecd.org (November 30, 2016 query).

[16] See OECD, International VAT/GST Guidelines, November 2015, at www.oecd.org (Query made on June 13, 2016). Document that seeks to promote the harmonization of the country's domestic laws and regulations, and to impede that taxes are made to impact production and not consumption. See also OECD, *Consumption Tax Trends*, 2014.

confines to avoiding double taxation. No. Its objectives are far more ambitious; and, as noted by the Uruguayan professor, they transcend purely fiscal or tax matters, and encompass economic and political ends. In point of tax matters, its core purposes are to counteract double taxation and prevent tax evasion; in the field of the economy, to promote economic development through tax regimes that stimulate capital and technology transfers and sponsor economic integration through regional and subregional customs duties exemptions and through the making of customs duties unions in the framework of trade blocs; and in point of politics, it seeks to establish means of defense for taxpayers at international level.

Hence all these rules that make up this subfield of the law that we comment upon here originate in multilateral treaties, double taxation treaties, international trade agreements, domestic laws and laws and regulations established by supranational organizations with regional or subregional jurisdiction. And all of this must be addressed in light of the so-called *soft law*, the characteristics and magnitude of which were set forth above.[17]

[17] It is worth noting that by decision C-690 of 2003, the Constitutional Court of Colombia declared articles 260-6 and 260-9 of the Colombian Tax Code to be unconstitutional. According to these rules, respectively, (i) "those jurisdictions indicated by the Organization for Cooperation and Economic Development – OECD" can be qualified as low tax jurisdictions; and (ii) to interpret the rules set out in the chapter of transfer pricing regulations, "the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations approved by the OECD Council will apply, to the extent the same are consistent with the Tax Code." In respect of the reference made by the code to indications by OECD about low tax jurisdictions, the Court considered that this was contrary to the autonomy of the Colombian state; and declared that the making of these lists in these matters may have an acute political content that works against not taking into account national circumstances and to resort to what an international organization provides; but this is not an obstacle, however, for the law to provide that the regulations may keep by way of reference the indications of OECD when making the list. In the view of the Court, the unacceptable thing is to make this reference in a manner that makes it directly binding, in matters which are not susceptible of an exclusively technical determination and which compromise the foreign-policy of the State." About the interpretation of transfer pricing regulations according to OECD guidelines, the Court declared as well that this rule was unconstitutional because it purported to provide these guidelines with binding force, which is inadmissible if we take into account that Colombia is not a member of OECD, and that these guidelines are not rules that have been incorporated into the domestic legal system. All in all, the Court held the following: "this does not mean that such guidelines are not valuable as an interpretation tool in a complex and changing matter such as that of transfer pricing regulations; but it does mean that they cannot be binding in Colombia, and that any restriction or tax burden that derive from the transfer pricing regulations introduced in Chapter XI of the Tax Code must originate in the law. It is worth noting that the Atty. Gen. of the nation, in his opinion about the grounds of unconstitutionality, he concluded that making a reference to OECD determinations did not really violate the Constitution; instead, he said,

But in addition to this complex set of sources of *international tax law*, the globalized world requires us to develop insights of *comparative law,* to a greater extent every day. This is so precisely because the fact is that tax laws and regulations occur today at the international, supranational, national and subnational levels; and hence our specialty, as has been the case of other fields of the law, has become extremely complex and imposes upon us a permanent calling to study and do research. It has been said – and rightly so – that in the current times of the history of law, and, with it, of the history of *tax law*, the fundamental objective has to be striving for the closeness and similarities of the laws of the countries, either from the point of view of supranational guidelines or bases [principles?], or from the point of view of the effectiveness of the frequently signed *free trade agreements* either bilateral or multilateral. For as long as there are relevant differences between domestic laws, the tendency to shifting taxable income from high tax jurisdictions to low or zero tax jurisdictions will be commonplace – which happens in a context of perverse competition against which we must struggle purposefully and relentlessly.[18] Therefore, the recurring information exchange treaties and international cooperation agreements of today are not enough [to wage this war] against tax fraud and tax evasion, and transfer pricing regulations are not enough either.

Thus we have provided the above grounds. Now we can proceed to examine *international tax law* in the light of the traditional classification of *direct and indirect taxes*; and after that we will comment upon the rules that are

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these are determinations of eminently technical and administrative aspects that fall beyond the functional field of competence of the legislature. He added the following in this regard: "it would not be possible for a body of law that is called to be permanent to provide for phenomena that are so dynamic and changing and that arise from global market economy; accordingly, requiring that the legislature regulate these aspects directly is in contradiction with the very nature of transfer pricing regulations." As one can see, this constitutional controversy sheds a light on the importance that *soft law* has today and on how important it can be for Colombia, even if it is not recognized as true law, to the extent pertinent.

[18] See, in this regard, AUGUSTO FANTOZZI, "*Evoluzione, problemi attuali e prospettive del diritto tributario internazionale nell'ottica italiana*" in From Fiscal Law to Tax Law, a work prepared as a tribute to Andrea Amattuci, by various authors, under the scientific coordination of Mauricio A Plazas Vega, Bogotá and Nápoles, Editorial Temis, Universidad Federico II and Jovenes Editores, 2011 pages 7 to 24.

enshrined in the Colombian Constitution on this matter.[19] To this end, we need to address certain rules that have been proposed by the authors and which have been adopted in double taxation treaties – to a greater or lesser degree, and refer to the free-trade agreements, information exchange agreements and double taxation treaties that are binding upon Colombia. And this – as stated earlier – we do without confining the mentioned subfield of the law to those matters.

2.International tax law from the perspective of direct taxes in general and the patrimony tax and the income tax in particular

1. *General aspects – The causes of double taxation – The meaning of double taxation – Double taxation model treaties and double taxation treaties entered into by Colombia*

Traditionally, international double or multiple taxation treaties have been made to hinge on the income tax given the concurring and opposite perspectives of taxing income based upon the territorial sourcing of it (the *territorialitatisoder quellenprinzip* or *principle of the source* or *the territory)* or based upon the nationality of the person that owns the income (*worldwide income* or *principle of the taxpayer's residence*)*.* The first perspective – called the *European criterion* by the authors – is responsive to the interests of those countries that import capital whereas the second one – called the *Anglo-Saxon criterion* – is responsive to the interests of the exporting countries.[20]

[19] It is worth noting and recommending, in this regard, the presentation made by Mr. LUIS MIGUEL GÓMEZ SJÖBERG at the XXVIII Colombian Convention of Tax Law, called International Taxation, Colombia, a scenario to be explored. See the memoir of the XXVIII Convention, Medellin, Colombian Institute of tax law, 1994. Mr. Gomez S.'s work was awarded the José Ignacio de Márquez prize in economic law in Colombia in 1994. This work addresses the subject of international tax law from the perspective of direct and indirect taxes.

[20] Curiously enough, both conceptions, that of the territorial source of income and that of the nationality of the taxpayer (also known as of "worldwide income"), have been disseminated from the perspective of equity. Those who defend the "source theory" note that those who draw a benefit from a country must pay taxes to that jurisdiction; and those who defend worldwide income taxation, note that it is not fair or equitable that those who realize the income only in their country must pay taxes on their total income while those who realize part of their income abroad only pay taxes on their national source income. On the other hand, those who defend source-based taxation allude to other merits of the system: "It

As ÁLVARO ARANGO MEJÍA noted many years ago when he made a presentation on the *Tax Treatment of Foreign Investment in Colombia*, source country taxation has been recommended as a principle repeatedly at several Latin American Tax Law Conventions. The reader will find this in the discussions and recommendations of the First Convention (held in Montevideo in 1956) and those of the Seventh Convention (held in Caracas in 1975).[21]

In practice, neither the Anglo-Saxon nor the European systems take place in pure form. This is so because the reasonable approach is that of a system which takes into account the two mechanisms as the "fair middle way", in which the notion of "permanent establishment" is the core benchmark of it. Nonetheless, the truth is that concerns that relate to the limits of *national sovereignty* underlie these two systems, as well as the economic implications that any ensuing conflict between the [relevant, involved]

makes double taxation treaties unnecessary", which is relative, because there may be different approaches about income sources; "works as a disincentive of using tax havens for taxpayers to settle therein as tax residents", which is true but only where there are no measures that counteract payments made to companies based in tax havens; and "it makes the efficient co-relation between fiscal revenue and public spending easier, because it gives incentives for investments that are made in countries that provide better infrastructure conditions for the investors", which really does not depend upon the tax system applied to localize the income in the source jurisdiction. On the other hand, those who defend the "worldwide income" principle, allude, as support of their principle, to the "efficiency" that it promotes because it makes exports of capital, as opposed to imports of capital, neutral, which is in contrast with the fact that it is not fair that the country in which income is generated facilitate the investment and insure the investor without receiving any tax. They also allude to the psychological aspect "which represents, for national persons, the fact that any foreign source income is also taxable, which may induce them to repatriate capitals". See, about the merits and inconveniences of these two principles, GABRIEL GOTLIB and FERNANDO M. VAQUERO, *International aspects of Argentinian taxation*, Buenos Aires, La Ley, 2005, pages 9 to 16. Definitely, as is noted here, based upon the analysis of the methods that are used to avoid double taxation in which have been conceived by the authors and have been adopted by treaties and model treaties, the reasonable approach is that of a mixed regime that comprises guidelines and rules that pertain to both systems; and it must also have an open criterion in respect of international business transactions and globalization, that is consistent with the evolution of laws and regulations and the thinking of the authors regarding the notion of "permanent establishment" – all of which seeks the "middle way" in international tax law.

[21] See ÁLVARO ARANGO MEJÍA, *Tax treatment of foreign investment in Colombia*, presentation for the XII Colombian Convention of Tax Law, Memoirs, Bogotá, Colombia and Institute of tax law, 1988, pages 515 to 519.

countries may bring about. Both double or multiple taxation and a situation of *negative* conflict – instead of *positive* conflict – where none of the involved countries collects any tax on the relevant transaction or transactions – may be equally harmful. This latter phenomenon generates an unacceptable benefit for the taxpayer which has been rightfully labeled as *tax countrylessness* (*apatridia tributaria* in Spanish) by NIBOYET.[22]

At the international level, double taxation occurs where two tax systems or jurisdictions concur to tax the same event or transaction. As stated by ALEGRÍA BORRÁS:

"International *double taxation* is that situation in which the same item of income or the same piece of property ends up being taxed by two or more countries – either the whole or a part of its value, during the same taxable period (in the case of periodical taxes) and for the same cause."[23]

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[22] Which is far more appropriate, undoubtedly, than the expression "double non-taxation". As noted by RAMÓN FALCÓN Y TELLA and ELVIRA PULIDO GUERRA, "non-taxation does not admit any multipliers, because if zero becomes a factor in the multiplication, the result is always zero. See FALCÓN Y TELLA and PULIDO GUERRA, *International tax law*, Madrid, Marcial Pons, 2013, page 115. In a similar sense, the reader can also review the work of the Peruvian professor JORGE BRAVO CUCCI called *(Double) non-taxation*, in Studies on constitutional and international tax law, a Latin American tribute to Victor Uckmar, the work of several authors, coordinated by Pasquale Pistone and Heleno Taveira Torres, Buenos Aires, Edit. Ábaco, 2005, pages 539 to 549. In their view, instead of "double non-taxation", it will be more correct grammatically to allude to "nil taxation" simply, or "non-taxation" simply, because, it follows clearly from these expressions that the relevant event" is not subject to any tax". See ibid. page 542.

[23] ALEGRÍA BORRÁS, *Double taxation: international legal problems*, page 36. With his characteristic clarity, the São Paulo professor, ALBERTO XAVIER, on the other hand, notes that double taxation presupposes two basic conditions: (i) identity of the event; and (ii) the plurality of rules of law. The identity of the event implies the rules of the four identities (of object, of subject, of taxable period and of tax). If there is no identity of subject, there may occur economic double taxation, but not legal double taxation. On the other hand, the plurality of rules of law may occur between rules at the international level, on one side, or national and subnational, on the other side. See ALBERTO XAVIER, *Direito tributário internacional do Brasil,* Rio de Janeiro, Editora Forense, 2010, pages 21 to 30. The OECD model alludes to international double multiple taxation as the "the result of the demand of a similar tax by two or more states, from the same taxpayer, upon the same taxable matter and for the same period". For HECTOR VILLEGAS, for double taxation to occur it is a primary condition the fact that the "legal tax addressee" be taxed by two or more subjects with taxing powers and in respect of the same taxable event. On the other hand, ALFREDO LEWIN FIGUEROA and JAIME GONZÁLEZ BENDICKSEN address this matter based upon the economic aspects

This definition comes close to the conditions that must concur for "international double taxation" to occur according to KLAUS VOGEL, namely the following: (i) collection of comparable taxes; (ii) in two or more states; (iii) upon the same taxable object; (iv) during the same term or period.[24]

Confronted by these events, the international community needs to resort to rules and principles that are able to avoid this type of conflicts eliminating the noxious impact of the reiterated accrual of taxes payable to the countries with some connection to the taxable activity. In its work called

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that frame the same. On the reasoning of Villegas, see his *Course on finance, finance and tax law*, vol I, Buenos Aires, Depalma, 1984, page 378. And on the reasoning of Lewin Figueroa and González B., C their work called *International tax law* as part of the work Tax law, of the Colombian Institute of Tax Law, Santa Fe de Bogotá, 1991, pages 412 and 413. On the other hand, MICHAEL LANG emphasizes the distinction that authors make between economic double taxation and legal double taxation. As he says, the first one occurs in respect of transactions between related parties that are residents of different states where the values assigned to the transactions for tax purposes do not match; here, double taxation occurs through the incidence of the tax on the greater value. The second occurs where "the same subject is taxed on the same revenue (or income) in two or more states". See MICHAEL LANG, *The law of double taxation treaties*, translated by Diego Quiñones, Bogotá, Temis, 2014, pages 5 and 6. In the same sense, and following the Commentaries on the OECD model double taxation treaty, FERNANDO SERRANO ANTÓN alludes to the fourfold identity that is required for international legal double taxation to occur: "*objective identity*: comparable taxes; *subjective identity*: the same taxpayer; *material identity*: the same income; and *temporal identity*: identical tax period". See FERNANDO SERRANO ANTÓN, *The basic principles of international taxation and international double taxation treaties: History, types, purposes, structure and application*, in International taxation, directed by the same FERNANDO SERRANO ANTÓN, vol I, Chapter 8, Madrid, Center of Financial Studies, CEF, 2015, pages 287 to 290. On the other hand, EDOARDO TRAVERSA, of the Universidad Católica de Lovaina, as he addresses the much-hoped-for principle that prohibits double taxation between European Union countries, says the following: "one must draw a line between *legal double taxation* – which may be defined as the application of identical or similar taxes in two (or more) states upon the same subject and in respect of the same income or patrimony or event – and *economic double taxation* – which happens when the same item of income or the same economic transaction is subjected to the same type of tax (direct or indirect) but upon one or more taxpayers. A classic example in point of income taxes is that of dividend distributions, which are taxed, at a first level, upon the company that distributes them, and, at the second level, upon the member receiving them". See *The prohibition of double taxation*, translated by Fernando Fernandez Martín, in *The European principles of tax law*, a compilation of works by various authors coordinated by Adriano di Pietro and Thomas Tassani, Barcelona, Atelier, pages 248 and 249. In respect of the taxpayer, the same TRAVERSA clarifies that double taxation "make occur upon the same taxpayer, or, to the contrary, it may affect two or more taxpayers, generally related economically" (ibid., page 248).

[24] See KLAUS VOGEL, *International tax law*, op. cit., pages 722 and 723.

Studies of international tax law, VALDÉS COSTA underscores the following: that the interests that pertain to the degree of development of the relevant countries have prevailed in the models adopted by the international organizations to counter-effect multiple taxation. Thus, the OECD model is in accord with the interests of capital exporting countries, whereas the so-called Alalc model adopts sourced-based taxation unrestrictedly – for the benefit of capital importing countries clearly.[25]

The studies and the works that seek to avoid conflict between the various sovereign countries and to shed light upon the conditions of international taxation date back to the 19th century, but only became fundamentally important after World War II – with the quite active participation of OECD.[26] With respect to the Andean countries, Decision 40 of the Andean Community Commission provided for a model to avoid double taxation that was put into force in Colombia by Decree 1551 of 1978.[27] The truth of the matter is that this model was never applied in practice given its illusory, extreme adoption of sourced-based income taxation to establish which country was vested with the power to collect the tax.

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[25] See RAMÓN VALDÉS COSTA, *Studies on international tax law*, Montevideo, Rosgal, S. A., 1978.

[26] As noted by Bruno GANGEMI, a group of experts -- writing at the request of the committee of the United Nations -- prepared four draft bilateral treaties namely: tax treaty to avoid double taxation on direct taxes, tax treaty to avoid double taxation on inheritances, treaty for administrative assistance at international level and treaty for mutual cooperation for tax collection. The Council of the OECD – formerly called in English Organization for European Economic Cooperation – OEEC – and Organization for Economic Cooperation and Development – OECD –, approved two double taxation treaties, one in 1963 and one in 1977. At the supranational and regional levels, treaties and rules of law have been approved as well that seek the same goals, as is the case of the *Nordic Treaty* of 1972. See BRUNO GANGEMI, general presentation on International mutual assistance through exchange of information", in *Cahiers de droit fiscal International*, vol. LXXX b, of the International Fiscal Association (IFA), 1990, pages 143 to 182.

[27] See LUIS MIGUEL GÓMEZ S., *International taxation*, op. cit., page 19. In this regard, the Andean Community has promoted revision work based upon the important work made to this effect by the Colombian tax lawyer ALFREDO LEWIN FIGUEROA, in which, among other changes of interests, the author proposes to adopt the "permanent establishment" criterion to localize income and the application of "transfer pricing regulations".

But this Andean model deserves two additional comments. In the first place, ever since the late 1990s the Andean community has been working with purposeful intent in revising and updating this model treaty; it is doing so based upon criteria that answer to international realities. In the second place, they have a so-called *Schedule* amended by Andean Community Commission Decision 578 which regulates the conditions to avoid double taxation in intra-Andean community transactions and investments, and this schedule has direct effect and application today.

On the other hand, double taxation treaties usually work in tandem with supplementary mutual cooperation agreements signed by the treaty party countries to regulate assistance for the assessment and/or collection of taxes. In these, the exchange of information and the war against tax evasion play a fundamental role. The OECD 1963 and 1977 model treaties and the United nation model treaty with the applicable stipulations for treaties between industrialized and developing countries[28] stand out among the most widely known – and at the same time questioned – model treaties. The OECD model has undergone significant revisions and updates in 1998, 2000, 2003, 2010 and 2014; on the other hand, the UN model dates back to 1980 and has been revised in 1999, 2001 and 2011.[29]

Using as a starting point the treaty that it entered into with Spain and signed in Bogotá, Colombia on March 31, 2005, Colombia has been entering into double taxation treaties, reciprocal investment promotion and protection agreements and free-trade agreements. Based in these, one notes a tendency that is in conformity with the international dimension of law in general and tax law in particular today. The following tables show these three types of agreements (noting again that we still have a long way to go in these matters):

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[28] See ibid., pages 145 through 160.

[29] There are more than 3000 double taxation treaties that apply worldwide.

TABLE I

Treaties entered into by Colombia to avoid double taxation

Income taxes and patrimony taxes

COMPREHENSIVE TREATIES TO AVOID DOUBLE TAXATION IN INCOME TAXES AND PATRIMONY TAXES								
Name of Treaty	**Date signed**	**Parties: Republic of Colombia and**	**In force**	**Approving Law**	**Constitutionality Decision**	**Promulgation Decree**	**Came into force on**	**Effects**
TREATY BETWEEN THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA AND THE GOVERNMENT OF ITALY TO ELIMINATE DOUBLE TAXATION AND TO PREVENT TAX EVASION AND AVOIDANCE	26/01/2018	ITALY	No	PENDING	PENDING	PENDING	PENDING	PENDING
TREATY BETWEEN THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA AND THE GOVERNMENT OF THE UNITED ARAB EMIRATES TO ELIMINATE DOUBLE TAXATION IN RESPECT OF INCOME TAXES AND TO PREVENT TAX EVASION AND AVOIDANCE	11/12/2017	UNITED ARAB EMIRATES	No	PENDING	PENDING	PENDING	PENDING	PENDING
TREATY BETWEEN THE REPUBLIC OF COLOMBIA AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND TO AVOID DOUBLE TAXATION IN RESPECT OF INCOME TAXES AND CAPITAL GAINS TAXES AND TO PREVENT TAX EVASION AND AVOIDANCE	11/02/16	UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND	No	PENDING	PENDING	PENDING	PENDING	PENDING
TREATY BETWEEN THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA AND THE GOVERNMENT OF THE FRENCH REPUBLIC TO AVOID DOUBLE TAXATION AND PREVENT TAX EVASION AND AVOIDANCE IN RESPECT OF INCOME TAXES AND PATRIMONY TAXES AND ITS PROTOCOL	25/06/2015	FRANCE	No	PENDING	PENDING	PENDING	PENDING	PENDING
TREATY BETWEEN THE REPUBLIC OF COLOMBIA AND THE CZECH REPUBLIC TO AVOID DOUBLE TAXATION AND PREVENT TAX EVASION IN RESPECT OF INCOME TAXES	22/03/12	CZECH REPUBLIC	Yes	1690/2013	C – 049/2015	334/2016	06/05/2015	Since 01/01/2016
TREATY BETWEEN THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA AND THE REPUBLIC OF INDIA TO AVOID DOUBLE TAXATION AND PREVENT TAX EVASION IN RESPECT OF INCOME TAXES	13/05/2011	INDIA	Yes	1668/2013	C – 238/2014	1215/2015	07/07/2014	Since 01/01/2015
TREATY BETWEEN THE PORTUGUESE REPUBLIC AND THE REPUBLIC OF COLOMBIA TO AVOID DOUBLE TAXATION AND PREVENT TAX EVASION IN RESPECT OF INCOME TAXES AND ITS PROTOCOL	30/08/2010	PORTUGAL	Yes	1692/2013	C – 667/2014	331/2016	30/01/2015	Since 01/01/2016
TREATY BETWEEN THE REPUBLIC OF KOREA AND THE REPUBLIC OF COLOMBIA TO AVOID DOUBLE TAXATION AND PREVENT TAX EVASION IN RESPECT OF INCOME TAXES	27/07/2010	REPUBLIC OF KOREA	Yes	1667/2013	C – 260/2014	342/2015	03/07/2014	Since 01/01/2015
TREATY BETWEEN THE REPUBLIC OF COLOMBIA AND THE UNITED MEXICAN STATES TO AVOID DOUBLE TAXATION AND PREVENT TAX EVASION IN RESPECT OF INCOME TAXES AND PATRIMONY TAXES AND ITS PROTOCOL	13/08/2009	MEXICO	Yes	1568/2012	C-221/2013	1168/2013	11/07/2013	**Income tax:** Since 01/01/2014 **Patrimony tax:** Since 11/07/2013
TREATY BETWEEN THE REPUBLIC OF COLOMBIA AND THE SWISS CONFEDERATION TO AVOID DOUBLE TAXATION IN RESPECT OF INCOME TAXES AND PATRIMONY TAXES AND ITS PROTOCOL	26/10/2007	SWITZERLAND	Yes	1344/2009	C – 460/2010	0469/2012	01/01/2012	Since 01/01/2013
TREATY BETWEEN THE REPUBLIC OF COLOMBIA AND THE REPUBLIC OF CHILE TO AVOID DOUBLE TAXATION AND PREVENT TAX EVASION IN RESPECT OF INCOME TAXES AND PATRIMONY TAXES AND ITS PROTOCOL	19/04/2007	CHILE	Yes	1261/2008	C – 577/2010	586/2010	22/12/2009	**Income tax:** Since 01/01/2010 **Patrimony tax:** Since 22/12/2009
TREATY BETWEEN THE REPUBLIC OF COLOMBIA AND THE KINGDOM OF SPAIN TO AVOID DOUBLE TAXATION AND PREVENT TAX EVASION IN RESPECT OF INCOME TAXES AND PATRIMONY TAXES AND ITS PROTOCOL	31/03/2005	SPAIN	Yes	1082/2006	C – 383/2008	4299/2008	21/10/2008	Since 01/01/2009

Table taken from the *National 2018 Tax Regime,* Colombian Institute of Tax Law – Colombian Institute of Customs Law, Bogotá, Colombia, 2018, pages 1371 and 1372. Basic preparation by MATEO VARGAS PINZÓN, with updates by PAOLA ANDREA MESA GALINDO.

2. *Methods to avoid double taxation as provided for in the framework of international tax law*

The following are the systems that the authors have proposed to eliminate or attenuate double taxation.[30] The *tax exemption* system (where foreign source income is tax exempt), the *tax credit* system (where a credit is given for taxes paid abroad), the *tax sparing* system (where a credit is given for taxes exonerated) and the foreign investment credit system. There is a fifth mechanism, where the [income] tax of the taxpayer's home country is deferred until the relevant profits are repatriated; this is the so-called *tax deferral* system; and it does not eliminate but entails double taxation unless the underlying income is reinvested in the country where the taxpayer obtains it.

It is worth noting that these criteria do not exclude each other necessarily, save for the "exoneration of foreign source income" and the *tax deferral* which suppose zero taxation or taxation on foreign income respectively; and which, as such, are compatible with neither the *tax credit* system nor the *tax sparing* system.

[30] See HORACIO GARCÍA BELSUNCE, *Topics of tax law*, Buenos Aires, Abeledo- Perrot, 1982, pages 176 through 182. By the same author, see, also, his presentation at the VI Latin American Convention on Tax Law in Punta del Este, submitted in 1970. For these comments, the work of MIGUEL DE POMAR CHIROTA has been also useful as reference. His work is called *Tax law and international tax law*, published in magazine 22 of the Peruvian Institute of Tax Law, Lima, June 19 any two, pages 71 to 86.

On the other hand, the criterion for localization or sourcing of the income in the source country – that is to say, the territory in which the original property is exploited or in which the original service is provided – has evolved to the point where it is no longer enough that the relevant or underlying event takes place in the relevant jurisdiction; it is required also that the person or party owning the income *has a permanent establishment in that jurisdiction*. The [bare] "source" criterion – without the extra condition of the establishment – is accepted in certain cases only, such as in the sales of real property located in the jurisdiction, income derived from real property located in it and others that we need not mention here.

This tendency becomes particularly important if we consider the current outlook for global economy and e-commerce. In respect of these, the dynamic and multi-form provision of services – many of which one cannot possibly localize by applying any secure and indisputable criterion – force us to resort to the "permanent establishment" as the visible sign of territorial identification [connection].

All in all, the problems and controversies that arise today are usually about the meaning of *permanent establishment* and about the breadth and the ramifications of the definition. Industrialized countries – and the OECD models following them – seek to apply restricted definitions. On the other hand, developing countries seek to apply ample definitions – definitions which extend as such the source criterion to cases and hypotheses that capital exporting countries find very difficult to accept – because of their conditions. For example, think about the so-called *electronic offices and virtual establishment*s, which e-commerce provides and enables.

Anyway, any treaties or conventions that are entered into to avoid international double taxation must be based upon the recognition that cross-border commerce and transactions involve countries that have attained different levels of development – countries which interests in point of the scope of income sourcing rules are usually different. Industrialized countries must keep in mind how the markets of developing countries are important for the growth of their big companies. On the other hand, developing countries must keep in mind how important is for them the large capital investments that may come from industrialized countries. Accordingly, both would miss the point if they attempt to impose the criteria that benefits them alone without considering that the agreements that we touch upon here entail individual sacrifices for the common benefit of the parties – as is the case of any [contractual] negotiation.

Finally, given the development of *community tax law* and of the so-called *community freedoms* –the winds of which evidently blow in Europe and are blowing more and more in America every day–, supranational community member states may not disregard their commitments towards integration and the setting up of common markets for the making of treaties that seek to avoid international double taxation. In this environment, it is indispensable that we are all fully aware of the relationship between *international tax law* and *community tax law*; and it is also indispensable that the people of supranational communities strive to establish model conventions the reaches of which are viable and in conformity with international trade realities.[31]

[31] In this regard, the reader may query the work of Italian professor PASQUALE PISTONE, called *The impact of community law on tax treaties – Issues and solutions*, London,Kluwer Law International, Eucotax, 2002. In this work, the author addresses the relationship between international tax law and community tax law from the perspective of direct taxes,

The most equitable criteria to eliminate double taxation is that of the source. But not the old source perspective – that of a place in which a service is provided or an item of income is realized – which is ideal for developing countries but hard to accept by industrialized countries –, but rather a more current perspective, closer to reality, one which takes into account at the same time the location of the income source and the existence of a permanent establishment [of] the person [the taxpayer] earning the income. In each case, what we need to do is to arrive at basic agreements about the meaning of *permanent establishment*, so that the restricted definitions that tend to favor industrialized countries are disregarded, and a list of specific cases is made where the mere localization of the income source is enough to apply source-based taxation despite that the person or party creating the income has no permanent establishment there. On the other hand, the effective collection of taxes where the income source comprises more than one country and the uninterrupted development of e-commerce require that [the parties that make] international treaties in these matters adopt multinational withholding tax collection rules therein, and, as the case may be, the prorated allocation of the taxes so collected. All these matters must addressed in every international taxation treaty; and this must be coupled with the requisite transfer pricing regulations that allow the parties to verify the reality of the prices set on all cross-border transactions that are carried out between controlling and controlled companies and between related parties; and also with information exchange

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and, in particular, of the income tax. In Pistone's work, chapter V stands out especially. Here, the author resorts to his graduation work, submitted at the University of Genova, to propose an EC model convention on direct taxes. This model is based upon the OECD model, with the additional support of interesting elaborations on the principles of community tax law as set in court precedents of the European Court of Justice and in the doctrine of the authors, which the publishing house notes quite well in describing the text.

agreements made to counteract tax evasion, and with measures on tax havens as well.

Based upon the above, and reiterating, once again, that all these matters are the stuff of discussions and negotiations that pertain to international treaties and conventions, let us now see the criteria and rules made to avoid double taxation as they are discussed by the authors:

A) *The exemption of foreign source income*

Here, the country exporting the investment exempts the taxpayer from paying income taxes on the income that it realizes abroad; in this manner, the *country receiving the investment* is the taxing country – the country entitled to collect the corresponding taxes according to its domestic law.

As one may suppose, this system is especially appealing for *developing countries*, because their usual position is that of countries receiving *foreign investment*; and it is questionable for *industrialized countries*, which stand out for their active position – instead of passive – in international investments. On the other hand, this system has been criticized from the perspective of the *fundamental principle of justice* – the essential postulate of which is that for any tax to be commensurate with the taxpayer's taxpaying capacity, it must impact those who are equal equally, and those who are unequal unequally; and it is impossible to ascertain this fact if the relevant taxpayer’s income is subject to diverse and unpredictable tax rules depending on which the *source country* is.

However, as GARCÍA BELSUNCE notes, the truth is that this is not the case where the *principle of taxpaying capacity* is being negated; instead, it is a case of application of the rule of equality taking into account the country where the income is sourced. On the other hand, it may well happen that developing countries may show strong tendencies to invest capital abroad and therefore to generate foreign source income, which they may do as a consequence of the current global economy international policy, or as a strategic instrument to alleviate their tax burden – either with or with no grounds on the law.

These circumstances have led the authors to advocate for the system where *the income is exonerated in the country from where the investment originates*, but not merely by virtue of domestic law, rather as a consequence of bilateral treaties. Enacting this system in a unilateral way – with no international treaties or bilateral agreements – seems not only unadvisable but also unlikely or impossible, given the contrasting interests that usually occur as between industrialized and developing countries. Naturally, it is easier to establish agreements between countries with similar levels of development.[32]

In any way, this system has operated within the framework of two types of trends:

In the first place, those countries that exemp foreign source income establish restrictions; they do this by limiting the exemption to certain types of income, or by setting the condition that the corresponding items of income must have been taxed at a certain minimum tax rate.

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[32] See, in this regard, JOSÉ MARÍA MARTÍN, *General tax law*, Buenos Aires, Edic. Depalma, 1986, pages 86 and 87.

And in the second place, the system may be one of *full exemption* or one of *progressive exemption*. In the first place, the exemption is granted regardless of the taxes that the taxpayer must pay in his home country – the country of residence –; in this manner, the state of the taxpayer's residence gives up in full manner its taxing powers in respect of the income obtained by the taxpayer in the source state, with no effects in the total tax liability of the taxpayer as resident. And in the second place, the starting point is to estimate the average tax rate at which the taxpayer [will pay his combined tax liability] taking into account the foreign income only for purposes of defining the tax rate that applies on his national source income.

The *progressive exemption* system seeks to respect the principle of *horizontal equity*, in such a manner that taxpayers pay at the same tax rates regardless of the national or foreign origin of their incomes. In that context, the most interesting issue to be defined relates to the losses that the taxpayer may incur abroad; this is, to establish whether any negative results may give way to the taxpayer's ability to deduct the losses to calculate the applicable tax rate as he would otherwise add any positive results to the corresponding income seeking the same ends – which is what the countries that have adopted this methodology have usually done (Germany, Austria, Luxembourg and the Netherlands).[33]

In South America, Bolivia, Ecuador and Uruguay have general rules which provide for the exemption of foreign income; Ecuador, for his

[33] JOSÉ MANUEL CALDERÓN CARRERO explains this clearly in *International double taxation and methods to eliminate it*, in International taxation, directed by Fernando Serrano Antón, Chapter X Madrid, Centro de Estudios Financieros, CEF, 2015, pages 397 to 400. In this regard, see also HELENO TAVEIRA TORRES, *A pluritributaçao internacional e as medidas unilaterais de controle*, In Course on international tax law, directed by Victor Uckmar, vol I, Bogotá, Colombia, Edit. Temis, 2003, pages 198 and 199.

own part, has set the condition that the foreign income must have been subject to taxation in the source country.

Chile has in turn established the exemption method but only in the exceptional case of companies that operate as investment platforms.[34]

B) *The foreign tax credit*

In this system, the country exporting investment grants the taxpayer a tax credit that is equal to the taxes that he pays abroad on the income that he has realized abroad. As the authors have noted unanimously, this system does not at all favor foreign investment for the benefit of developing countries; this is so because, even if the system avoids double taxation, it eliminates the benefits or exemptions that may be provided eventually by the law of the *countries receiving the investment*. To the extent the income tax of the countries receiving the investment is lower, then the collection of income tax in the exporting country is greater conversely; and this, as noted by the authors, is undoubtedly harmful for the interests of *developing countries*.[35]

This system may contemplate two modalities as follows: the "absolute tax credit" or "comprehensive tax credit", and the "regular tax credit". Under the first, the taxpayer's home country (or taxpayer's residence country) grants a *foreign tax credit* for the total

[34] In this regard, see ÁLVARO VILLEGAS ALDAZOSA, *Methods to avoid double taxation in Latin America*, General Convention Summary submitted at the Eighth Regional Latin American Encounter of the International Fiscal Association (IFA), in Peru, 2016.

[35] See, for example, HÉCTOR VILLEGAS, op. cit., pages 382 and 383.

amount of the tax paid abroad. And under the second, the foreign tax credit granted is capped – so that it may not exceed the limit of the tax accruing in the home country on the same foreign income.

In turn, the "regular tax credit" system may comprise two possible forms: the "limited regular tax credit" and the "prorated regular tax credit". Under the first modality, the foreign tax credit is simply limited taking into account the tax to which the corresponding [foreign] income will be subject in the home country, according to the initial "regular" system notion. And in the second one, the limit would be established by calculating the proportion that the foreign income would represent in respect of the total national and foreign income realized by the taxpayer.[36]

From the point of view of the amount to be credited – whether the farthest or the closest amount –, the authors refer to the indirect tax credit or the direct tax credit respectively. The tax credit that is calculated based upon the tax that was levied upon the corporate profits that originated the dividends in the countries in which those profits were realized is the indirect tax credit; and the tax credit that corresponds to the tax levied upon the dividends paid out from those profits is the direct tax credit. Neither Bolivia, Brazil, Ecuador, Peru nor Paraguay grant the indirect tax credit (also called the *credit for underlying imputed tax*); Argentina, Chile and Mexico grant this

[36] See TAVEIRA TORRES, *A pluritributaçao internacional*..., op. cit., pages 201 a 203. See also KEES VAN RAAD, *Introduction to international tax law*, August 2003, pages 7 a 10, *Materials used in the LLM International Tax Programme*, University of Leiden; *Materials on international & EC tax law*, vol. I, third edition (Leiden International Tax Center, Leiden, 2003), pages 39 and ss. *OECD Model and Commentaries*; and BRIAN J. ARNOLD and MICHAEL J. MCINTYRE, *International tax primer*, second edition (The Hague: Kluwer Law International, 2002), pages 27 and ss.

credit, but as a two-level credit.[37] On the other hand, in Latin America Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, Peru, Uruguay and Venezuela grant the direct tax credit.[38]

Finally, international treaties or domestic law may establish other types of limitations based upon the use of baskets of income or the classification of income into different types, in case these are going to be subjected to different rules.

C) *Credit for exonerated taxes (or tax sparing)*

Here, the taxpayer that obtains foreign income that is exempt in the source country receives a benefit in his home country by way of a tax credit equal to the tax that he did not pay as a consequence of the tax benefit. This is why it is called a "credit for exonerated taxes". In other words, for the taxes that he would otherwise be required to pay in the country in which he realized the income but which he must not pay in the end because of a tax benefit established by the law.

Even if he pays taxes in his home country on the income obtained in it and on the foreign income, he may subtract the tax that he was exonerated from paying in the source country as a tax credit from gross tax payable.

The majority of those who criticize this system claim that the *principle of equality* must be asserted in the country from where the investment originated (the *exporting country*) and not in the country

[37] See ÁLVARO VILLEGAS ALDAZOSA, *Methods to avoid double taxation in Latin America*, Op. cit. In Colombia, the indirect tax credit is admissible at all levels, as discussed below in this same chapter of this work.

[38] See ibid.

where the income is realized (the *source country*). Based in this, they hold that this principle is being violated because the system favors those who obtain their income abroad; and they add that on the other hand the taxing power of the exporting country is being altered because the rate that ultimately applies is the rate of the *source country* (or *importing country*). In like manner, they note that this system makes it easier to adopt "tax mechanisms" that work as incentives to attract investment to the importing country at the expense of the exporting country, to the extent that the former may increase the tax rates and subsequently create exemptions, thus affecting the effective incidence of the tax in the exporting country. And they add further that given that this entails a definitive guarantee that the income in the exporting country will not be taxable, this works as a disincentive for the reinvestment of profits.

However, we may give the following response to the objection raised in respect of the principle of equality. That the most objective and fair taxation criterion is that of the source country because making a judgment about equal treatment is only viable in respect of identical or truly comparable situations. On the other hand, as GARCÍA BELSUNCE notes[39], adopting the criterion of the source country to define the applicable income tax regime has become necessary. This is so given the *depersonalization* of the income tax – of which the growing importance of withholding tax collection and taxation based upon companies and corporate entities instead of the shareholders or members are shining examples – and the guiding principles of the territorial application of the law.

We may also give the following response to the objection raised about the alteration of the sovereignty of the investor's country or exporting

[39] See GARCÍA BELSUNCE, Topics of tax law, op. cit., pages 180 and 181.

country. That defining taxation on the basis of the source country is a well-grounded approach indubitably; and we may say that the opposite alternative, that of giving an exemption in the receiving or importing country contradicts indeed the sovereignty of the source country to the extent that it impedes the country to exert its taxing powers upon events that take place in its territory.

And we may offer the following responses about the possible unfair competition mechanisms between states that use them to attract investments or that there is a disincentive for the reinvestment of profits. In the first case, we may say that it is really uncertain that the receiving state has a real possibility of manipulating investments with tax mechanisms; and that this possibility may be counteracted if the system is not indiscriminate and if it is not established by domestic law unilaterally but rather by operation of bilateral agreements between the states concerned.[40] And in the second case, we may say that the decision to reinvest or not reinvest profits is not a purely tax-driven decision.[41]

The above considerations – among others – have led the authors to suggest that the ideal system is one that combines the tax sparing and the tax credit systems harmoniously.

[40] Ibid., pages 182 and 183.

[41] In this regard, the following considerations of Colombian professor PAUL CAHN-SPEYER WELLS are worth noting: "To the extent that tax sparing stipulations are agreed upon specifically to stimulate investment in developing countries, that is to say, seeking nontax driven purposes clearly, as proposed in the OECD commentaries, the fact that they are incorporated in a treaty cannot be challenged as harmful or discriminating tax competency. That is not the case when the resident country (or home country) gives its taxpayer a tax credit that is greater than the tax that he pays or is exonerated from paying in the source country. In the latter case, the excess may be considered prohibited tax assistance, one that is arbitrarily discriminating against other third-party states or noncovered enterprises". See CAHN-SPEYER WELLS, *Critical law: A tax perspective*, Bogotá. Temis, 2016, page 256.

The only thing still unsaid here is that the tax sparing method must be distinguished from the so-called *matching credit* method. This second method also requires that the exporting country gives a tax credit to the investor that exceeds the tax that he pays in the country receiving the investment. While the tax sparing method seeks to respect the tax incentives granted by the source country in the home country, the matching credit method merely implies the exporting or home country's partial waiver of its right to collect the tax.[42]

D) *Credit for investments made abroad*

By this system, the exporting country grants tax credits in the manner of percentages on investments made abroad. But the investor is still taxed in his home country and in the receiving country. In this manner, double taxation is not eliminated only by adopting this method, it is also necessary that one or more of the methods discussed above be used together with this one. Indeed, this

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42 See, in this regard, FERNANDO SERRANO ANTÓN, *Basic principles of international taxation*..., Op. cit., pages 295 and 296. As noted by the Madrid professor, on several occasions developed countries have agreed to tax sparing stipulations with developing countries – who receive investments – in exchange for significant relinquishments by the source countries, in the framework of negotiations of double taxation treaties. For example, Spain has provided for these in treaties entered into with Argentina, Philippines and Mexico. See SERRANO ANTON, op. cit., page 295. The author recalls, in this regard, that in March 1998 the OECD Tax Committee issued a pronouncement against *tax sparing* and *matching credit* clauses; and it proposed alternate formulae. Ibid. On the tax sparing clause of the agreements entered into by Spain, it is noted that in the beginning it was the very Spain, as developing country, which tried to secure the benefit of this stipulation; and at a later point, it changed its position to that of the country granting the benefit. In this regard see JOAN HORTALÀ I VALLVÉ, *Tax sparing and matching credit clauses – Tax incentives to investments in developing countries through international double taxation treaties*. Published in the School of Law bulletin of the Remote Education National University – UNED for the Spanish initials –, numbers 8-9, 1995, pages 461 to 470. As noted by HORTALÁ, State Finance Inspector, Spain agreed-upon tax sparing clauses with Argentina, China, Philippines, India, Morocco and Mexico. Ibid. page 467.

method of credit for investments made abroad must be the fruit of international treaties that seek to stimulate economic development in the receiving countries and promote industrial growth of capitalists in the exporting countries.

At this point too, we may also share the thoughts of GARCÍA BELSUNCE in objecting to the criticism raised by Prof. VALDÉS COSTA. According to the latter, if tax credits are granted for investments made abroad this could harm sovereignty and the taxing power of developing countries to the same degree in which, by this mechanism, industrialized countries would set incentives policies that should otherwise be the competence of receiving countries. In reality, as the Argentinian author notes, both the countries that import the investment and those which export it have the same rights; and, on the other hand, the former and the latter, unified by treaty, must have the ability to agree to incentives that bring about mutual benefit.[43]

3.International tax law from the perspective of indirect taxation

Indirect taxation has become fundamentally important, especially since the second half of the 20th century. The authors and the courts of law, acting in conformity with this trend, now address with greater objectivity the true advantages and disadvantages of direct and indirect taxes in an attempt to establish real conditions of justice in tax systems. Tax evasion is reported as a dead weight that perverts the objectives of fair taxation established by theory on the basis of *taxpaying capacity* – as is the case of the income tax –, and it brings along with it fraud multiplying factors for the concealment of taxable bases in regard to other taxes because of the underreporting of

[43] GARCÍA BELSUNCE alludes to the work of Prof. VALDES COSTA, called *Tax problems between developed and developing countries* included in the book *Studies on international tax law*. See GARCÍA BELSUNCE, op. cit., page 189.

income or revenue. Instead, mechanisms that are fit to make indirect taxation progressive have been suggested and adopted.

In the international order, other objectives have been added to the above fundamental objectives that follow the ideal of justice. These include the objectives of ensuring swift commerce – one that avoids nationalists privileges and makes the expansion of markets viable and accordingly of the possibilities of development of economies. All in all, this tendency of going beyond the narrow confinement of national borders has not derived in the creation of a large *international community* comprising all the continents; instead, it has created supranational macro markets that participate of the worldwide trade that is directed by economic blocs. Along these lines of thinking, the goals of integration that call for free-trade zones, customs unions, regional and subregional common markets, and even the aspiration for supranational political unions add to the objective of fairness and equity that underlies the exciting field of taxation – to give way to a much more expansive and demanding dynamics. This is the perspective which frames *international tax law* in point of indirect taxation; and this perspective, we should note, has an impact as well on direct taxation, primarily in respect of the regulations for capital investments that originate in foreign countries of the regional or subregional bloc.

The equal treatment of national and regional products; the free circulation of people in the territory of the supranational community; and the absence of discrimination for or against capitals that originate in the member countries make up the set of what we could call *integrationist freedoms*. And, coupled with this, we need urgently to harmonize the tax laws and regulations of the member countries of all integration blocs, so that consumption and investment decisions are not distorted because of the differences in domestic legal systems. Below we refer briefly to economic blocs in the context of international trade, in the first place; and then we refer to free-trade agreements in the second place.

1) *International trade and global economy. Economic blocs*

Commerce between nations goes back to the origins of history. However, its importance today is indisputable in the contents of the so-called "global economy". We may trace its origin back to the so-called Bretton Woods agreement of 1944 (United States), or the allies agreed to create supranational financial institutions such as the *International Monetary Fund* or the *Banco Interamericano de Reconstrucción y Fomento* (*Inter-American Bank for Reconstruction and Promotion)*. This they did in an attempt to make postwar reconstruction feasible and to develop the Marshall plan through a certain economic order that was based upon *free-trade*.

Naturally, these new perspective of the economy as well as the crisis of nationalisms gave way to the making of trade blocs for political, commercial, general economic and geographical reasons. Of these trade blocs we can mention the following. Comecon (*Council for Mutual Economic Assistance*), which was created in 1949 and was extremely important at the peak of Soviet socialism thriving around the USSR. The *European Economic Community*, which is the *European Union* today, and which had the French-German Common Market as precedent. The *Free Trade Latin American Association* (or ALALC for the Spanish initials) created in Latin America in 1960. The *Common Central American Market*, dating back to 1960 as well. The

Association of South East Asian Countries (ASEAN for the Spanish initials), created in 1967. And the *Andean Community*, of 1969.

The 3 most important economic blocs of today are the following. The European Union, made up of 28 countries. The North American trade bloc, made up by the United States, Canada and Mexico. And the Eastern Asia bloc which groups the dominant countries of the Pacific Basin (with the People's Republic of China excluded) such as Japan, South Korea, Taiwan, Hong Kong, Indonesia, Malaysia and Singapore.[44]

2) *Free-trade agreements*

JARACH divides taxes into *objective* and *subjective* taxes depending upon whether or not the taxable event bears upon with special emphasis on the taxpayer. There are certain taxes or levies where the *taxable matter* prevails to such an extent that the taxpayer is not even mentioned; and, with conspicuous lack of technique, the regulations mention the taxable property or matter to indicate that it pays certain tax.[45]

[44] See FRANCISCO RESTREPO G*.,* *Macroeconomic aspects of international trade*, in the work called *The law of international business transactions*, Universidad Externado de Colombia, 1991, pages 10 and 11. RESTREPO notes that the most important trade blocs for Latin America are the following, in descending order: the European Community, with $960 million worth of imports; the North American trade block, with $530 million; and Japan, with $150 million. In this work of RESTREPO his comparative table stands out, which deals with the evolution of the United States position as lead role in concomitant manner with changes in prevailing technologies, based upon the works of SCHUMPETER and KONDRATIEFF This table describes the cycles of prosperity and depression cycles of capitalism, and refers to the cycles of prominence – in order – of England, Germany, United States and Japan.

[45] See SERGIO FRANCISCO DE LA GARZA, *Mexican financial law*, Mexico, Porrúa, 1986, page 281. See also DINO JARACH, *Public finance and tax law*, Buenos Aires, Abeledo-Perrot, 1996.

In this type of taxes, the lawmakers' concern for the conditions of the legal debtor – the taxpayer – is minimal, if we bear in mind that in this case the law merely makes the person who carries out the relevant act responsible for carrying out the tax obligation. Thus in these cases no requirements are set such as a corporate organization of the taxpayer or the condition that the act must be recurring [to be taxable]. The close connection of the triggering event with the taxable matter allows for the fact that in the majority of cases the consideration of the legal debtor is implicit [in the pertinent regulations]. This is what happens with *international trade taxes*.

The matter of international trade is especially important for tax law, and it has deep economic and political foundations; this is so, and to such an extent, that the structure of the so-called *foreign trade tax system [cross-border tax system]* changes according to the prevailing ideologies.

For various reasons, it has become necessary that countries sign bilateral or multilateral agreements to regulate foreign trade taxation; or that, even without such agreements, that those states to which foreign products are shipped issue special regulations because of merchandise origin.

The big changes in economic and foreign trade policies – characterized for a tendency to openness – have occurred in conformity with the proliferation of free-trade and integration agreements. Such is the case of the G 3 (*Grupo de los tres* in Spanish), made up of Venezuela, Mexico and Colombia, although limited, in the most recent years, to Mexico and Colombia under orders of the Government of Venezuela. This trade group has a gradual customs duties liberation program which [takes] into account, under its sub regional context, the ambitious idea of establishing a *hemisphere free-trade agreement*. It was natural that Venezuelan and Colombian industrial businessmen showed some distrust for the Mexican advantages[46] – advantages that Mexico materialized because of its ample experience, which it had secured through the *North American Free Trade Agreement* – NAFTA. We have today an agreement in respect of which some envision a big future – this is the so-called Pacific Alliance, subscribed by Chile, Mexico, Peru and Colombia on June 6, 2012, approved by our Congress by Law 1721 of 2014 and constitutionally endorsed by the Constitutional Court by Decision C-165 of 2015.

In any way, the questionable thing to do is to resort to agreements with third-party countries or with other economic blocs acting in isolated fashion instead of acting from within the realm of the Andean Community. Unfortunately, this practice has become the usual thing to do in Andean countries; and this is seen in the numerous free-trade agreements that Colombia has scribed over the last decade. All of this is in sharp contrast with what we see in the European Union; within that realm, any agreements on that matter are made between the Union and the pertinent country or trade bloc.

On the other hand, the proliferation of regional, subregional and bilateral free-trade agreements has been questioned by several important authors. In their view, all these agreements harm seriously the objectives of free-trade, nondiscrimination and equal treatment, and they stimulate a sort of polarization around the big powers – the big powers that are interested in securing [benefits and advantages]

[46] All in all, on those days when the publication of this volume was about to finish, the free trade agreement between the United States and Colombia was also about to be signed, in the context of interests, debates and criticism promoted by various sectors of Colombia.

in that manner, something that they cannot secure from the perspective of the World Trade Organization.[47]

With regard to the levels of its foreign trade taxation, Colombia has an average customs duty of 12.5%, after having had an average customs duty of 38.6% in June 1991. Also, its tendency to openness and modernization has been occurring at the same time as numerous changes that reflect that tendency have been introduced in the legal system: the phase-out of subsidies to exporters and the reduction of special export tax certificates (called CERT for the Spanish initials) to the necessary levels so that the certificates compensate the exporter only for the indirect taxes that he paid; the amplification of the coverage of the free-trade zone legal system; the simplification of foreign investment rules; the labor reform; and, among other many measures, the foreign-exchange reform.

However, integrationist efforts face diverse obstacles that seem to be unsurmountable at times; and we must overcome this with an open attitude, thinking well beyond our frontiers, in respect of macro and micro economic matters which are very interesting undoubtedly – as follows. The differences in foreign-exchange rates and domestic currency devaluation rates; the different inflation rates; the difficulties of transportation; and, primarily, the different sales tax treatments and the noxious effects of the so-called "customs duties perforation" which is accomplished through free-trade agreements or customs duties advantages given by one of the treaty members to outside third parties. Among others, these are barriers that the countries must try to overcome.

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[47] In this regard, the reader is recommended to review the work of the Colombian professor GABRIEL IBARRA PARDO, called *The great controversies of multilateralism – The crisis of the principle of most-favored-nation, distortions of competition and environmental matters*, Bogotá, Editorial Legis and Universidad Javeriana, 2018.

With respect to the sales tax, the problems that arise are twofold. In the first place, for the impact that the sales tax has in the demand of goods and services in border areas where there is the free circulation of same for the nationals of the bordering countries; in this case, which is obvious, the demand will be greater for the goods and services that anyone can acquire in the country in which they are not taxed. In the second place, if any specific good is VAT exempt in the importing country, then no VAT accrues upon the import. But this position, seemingly neutral, if one compares the rules that apply to the imported product with the rules that apply to the product made in Colombia, is not really neutral given the actual exoneration system that applies in Colombia. Indeed, our system opted for the VAT exempt system instead of the VAT zero-rated system. Because of this, the producer who pays the VAT on taxable inputs cannot obtain a reimbursement of the tax; and because of this, his only alternative is to add the VAT paid to the cost of the goods that he produces. In this way, if in the country of origin of the same type of goods the exporter is given the right to a VAT reimbursement for the export of the goods – which is the usual thing –, then the foreign products enjoy a privileged position with respect to national products.

The international community must examine this type of inconveniences in special detail, especially when entering into cross-border agreements. The point is not just to establish commitments and guidelines that seek to attain free trade; instead, primarily, it is indispensable that these agreements operate in sync with WTO's objectives; and they must keep in mind that domestic law must be in conformity with the purposes of integration.

On top of all of that, we must mention other inconveniences that affect openly the neutrality of international trade such as the following. The diversity of domestic rules about the territoriality of services. The stark backwardness of numerous legislations that have not established rules for exports and imports of services, despite the ambitious breadth of the relevant final agreements of the GATT Uruguay Rounds, including the creation of the World Trade Agreement (WTO), and despite that there are important sub regional agreements such as the G 3 agreement. The deficient action and abuses by tax administrations in point of the reimbursement of the VAT paid by exporters. All in all, we may say that international foreign trade agreements have turned a blind eye towards the conspicuous incidence of VAT in international transactions involving goods and services; and that this same omission happens in domestic laws which reveal an inexplicable localized conception that is contrary to current trade trends. This was one of the most important matters of reflection at the XIX Latin American Tax Law Convention that took place in October 1995 income in Cartagena, Colombia.[48]

In any event, it is worth noting that the countries are more and more concerned every day about the need to define agreements that allow for the most expeditious cross-border circulation of goods and services – to the greatest extent possible. In this regard, it is worth recalling the interest of the authors and the Bretton Woods agreements in establishing an *exchange system* at the international level that sets clear rules to establish relative parity between the different world currencies. In the same manner, the tendency for monetary unification and the creation of *currency units* have been especially important; about the latter, these are not currency proper

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[48] The author of this book prepared the *general convention summary* of the topic on VAT and international business transactions. In the work we emphasized the problems noted and their possible solutions, always drawing support from the national presentations. See in this regard the memoirs of the Latin American Institute of Tax Law and the Colombian Institute of Tax Law, Santa Fe de Bogotá, 1995, vol. I, pages 435 a 595.

but units of value; and the former translate into fixed parity agreements. Specific examples of currency units are the European Currency Unit (ECU) and the Special Draft Rights (SDR) of the International Monetary Fund.[49] And the European Union euro is an example of monetary unification.

The following table shows the *free-trade agreements and investment protection agreements* signed by Colombia.

[49] See JAMES OTIS RODNER, *Elements of international finance*, Caracas, Sucre, 1988, pages 177 a 199.

TABLE II

Agreements for the Reciprocal Promotion and Protection of Investments (ARPPI) and Free-Trade Agreements (FTA) entered into by Colombia.[50]

TREATIES FOR THE PROTECTION OF INVESTMENTS							
Name of Treaty	**Date signed**	**Parties: Republic of Colombia and**	**In force**	**Approving Law**	**Constitutionality Decision**	**Promulgation Decree**	**Came into force on**
BILATERAL AGREEMENT ON THE PROMOTION AND PROTECTION OF INVESTMENTS BETWEEN THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA AND THE GOVERNMENT OF THE UNITED ARAB EMIRATES	11/12/2017	UNITED ARAB EMIRATES	No	PENDING	PENDING	PENDING	PENDING
AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SINGAPORE AND THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA ON PROMOTION AND PROTECTION OF INVESTMENTS	16/07/2013	SINGAPORE	No	BILL # 93 SUBMITTED TO CONGRESS 18/09/2013	PENDING	PENDING	PENDING
AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA AND THE GOVERNMENT OF THE FRENCH REPUBLIC ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS	07/10/2014	FRANCE	No	1840/2017	PENDING	PENDING	PENDING
AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA AND THE GOVERNMENT OF THE REPUBLIC OF TURKEY ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS	28/07/2014	TURKEY	No	N/A	PENDING	PENDING	PENDING
AGREMENT FOR THE COOPERATION AND FACILITATION OF INVESTMENTS BETWEEN THE REPUBLIC OF COLOMBIA AND THE FEDERAL REPUBLIC OF BRAZIL	10/09/2015	BRAZIL	No	N/A	PENDING	PENDING	PENDING
FREE-TRADE AGREEMENT BETWEEN THE REPUBLIC OF COLOMBIA AND THE STATE OF ISRAEL **(CHAPTER 10)**	30/09/2013	ISRAEL	No	1841/2017	PENDING	PENDING	PENDING
FREE-TRADE AGREEMENT BETWEEN THE REPUBLIC OF COLOMBIA AND THE REPUBLIC OF PANAMA **(CHAPTER 14)**	20/09/2013	PANAMA	No	N/A	PENDING	PENDING	PENDING
FREE-TRADE AGREEMENT BETWEEN THE REPUBLIC OF COLOMBIA AND THE REPUBLIC OF COSTA RICA **(CHAPTER 12)**	22/05/2013	COSTA RICA	Yes	1763/2015	C – 157/2016	1623/2017	08/01/2016
FREE-TRADE AGREEMENT BETWEEN THE REPUBLIC OF COLOMBIA AND THE REPUBLIC OF KOREA **(CHAPTER 8)**	21/02/2013	REPUBLIC OF KOREA	Yes	1747/2014	C - 184	1621/2017	15/07/16
TRADE AGREEMENT BETWEEN COLOMBIA AND PERU, AS ONE PARTY, AND THE EUROPEAN UNION AND ITS MEMBER STATES, AS THE OTHER PARTY	26/06/2012	EUROPEAN UNION	Yes	1669/2013	C – 335/2014	1513/2013	08/01/2013
AGREEMENT BETWEEN THE REPUBLIC OF COLOMBIA AND JAPAN FOR THE LIBERALIZATION, PROMOTION AND PROTECTION OF INVESTMENTS	09/12/2011	JAPAN	Yes	1720/2014	C – 286/2015	[No info]	11/09/2015
PROTOCOL OF AMENDMENT OF THE FREE TRADE AGREEMENT BETWEEN THE UNITED MEXICAN STATES, THE REPUBLIC OF COLOMBIA AND THE REPUBLIC OF VENEZUELA (CHAPTER XVII)	13/06/1994 and 11/6/2010	MEXICO	Yes	172/1994 and 1457/2011	C – 178/1995 and C – 051/2012	2901/1994; 2676/2011 and 2677/2011	01/01/1995
BILATERAL AGREEMENT FOR THE PROMOTION AND PROTECTION OF INVESTMENTS BETWEEN THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND	17/03/2010	UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND	Yes	1464/2012	C – 169/2012	1217/2015	10/10/2014
AGREEMENT FOR THE PROMOTION AND PROTECTION OF INVESTMENTS BETWEEN THE REPUBLIC OF COLOMBIA AND THE REPUBLIC OF INDIA	11/10/2009	INDIA	Yes	1449/2011	C – 123/2014	1437/2012	07/02/2012
FREE-TRADE AGREEMENT BETWEEN THE REPUBLIC OF COLOMBIA AND THE EFTA STATES **(CHAPTER 5)**	25/11/2008	EUROPEAN FREE TRADE ASSOCIATION - EFTA	Yes	1372/2010	C – 941/2010	1440/2012	07/01/2012
BILATERAL AGREEMENT FOR THE PROMOTION AND PROTECTION OF INVESTMENTS BETWEEN THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA	22/11/2008	PEOPLE'S REPUBLIC OF CHINA	Yes	1462/2011	C – 199/2012	1436/2012	0207/12

50 Table taken from the National 2018 Tax Regime, Colombian Institute of Tax Law – Colombian Institute of Customs Law, Bogotá, Colombia, 2018, pages 1374 through 1376. Basic preparation by MATEO VARGAS PINZÓN, with updates by PAOLA ANDREA MESA GALINDO.

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA AND THE GOVERNMENT OF THE REPUBLIC OF PERU ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS	12/11/2007	PERU	Yes	1342/2009	C – 377/2010	[No info]	30/12/2010
FREE-TRADE AGREEMENT BETWEEN THE REPUBLIC OF COLOMBIA AND THE REPUBLIC OF CHILE – NINTH ADDITIONAL PROTOCOL TO THE SUPPLEMENTARY ECONOMIC AGREEMENT FOR THE ESTABLISHMENT OF AN ENLARGED ECONOMIC SPACE BETWEEN COLOMBIA AND CHILE (ACE 24) OF DECEMBER 6, 1993 **(CHAPTER 9)**	27/11/2006	CHILE	Yes	1189/2008	C – 031/2009	2142/2009	05/08/2009
TRADE PROMOTION AGREEMENT – FTA – BETWEEN THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND ITS PROTOCOL **(CHAPTER 10)**	22/11/2006	UNITED STATES OF AMERICA	Yes	1143/2007 and 1166/2007	C – 750/2008 and C – 751/2008	993/2012	15/05/12
AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA AND THE SWISS CONFEDERATION ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS AND ITS PROTOCOL	17/05/2006	SWITZERLAND	Yes	1198/2008	C – 150/2009	4309/2009	10/06/2009
AGREEMENT BETWEEN THE REPUBLIC OF COLOMBIA AND THE KINGDOM OF SPAIN FOR THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS	31/03/2005	SPAIN	Yes	1069/2006	C – 309/2007	383/2008	22/09/07
FREE-TRADE AGREEMENT BETWEEN THE REPUBLIC OF COLOMBIA AND THE REPUBLICS OF EL SALVADOR, GUATEMALA AND HONDURAS **(CHAPTER 12)**	08/09/2007	SALVADOR, GUATEMALA AND HONDURAS	Yes	1241/2008	C – 446/2009	589/2010	Nov 2009: Guate-mala; Feb 2010: El Salvador; Mar 2010: Honduras
MERCOSUR	18/10/2004	ARGENTINA, BRAZIL, URUGUAY AND PARAGUAY	Yes	1000/2005	C – 864/2005	141/2005	Feb 2005: Argentina, Brazil and Uruguay; April 2005: Paraguay
ANDEAN COMMUNITY (CAN, for the Spanish initials)	18/10/2004	BOLIVIA, ECUADOR AND PERU	Yes	323/1996	C – 231/1997	N/A	16/10/1969
PACIFIC ALLIANCE	06/06/2012	CHILE, MEXICO AND PERU	Yes	1721/2014	C – 165/2015	326/2016 and 1625/2017	20/07/2015

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