The interaction of tax systems and tax cultures in an international legal order for taxation[1]

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Background

In the world-business economy, companies are carrying out cross-border transactions at a fast pace around the world. When companies engage in cross-border transactions, the rules of at least two different tax jurisdictions will apply. This simultaneous application of multiple rules creates enormous complexity. In the past countries have tried to prevent double taxation, and tackle tax avoidance by, among other things, concluding bilateral tax conventions and/or introducing unilateral tax rules for international situations.

Governments and organizations such as the Organization for Economic Cooperation and Development (OECD) and the European Union are searching for new answers to the challenging problems caused by the differences in tax systems and the complexity in international taxation. Nowadays, the influence of globalization on companies, markets, capitals, labor, etc. results in companies carrying out more and more complex cross-border transactions. Companies try to decrease their taxes and increase their profits by taking advantage of the differences in taxation that exist among countries. This attempt to "game," or take unintended advantage tax rules by companies which is not tackled entirely by tax avoidance rules, forces rule makers (governments) and organizations to look for new and more complex solutions to the above problems. These new solutions go beyond the traditional concept of tax sovereignty and the application of the principles of source and/or residence in international taxation.

The first aim of this paper is to address the changes in taxation that affect current attempts towards convergence/ harmonization of international taxation and the constitution of an international legal order for taxation. In this context, it is pertinent to examine **the balance between domestic tax systems and international tax rules, ask whether that balance has been disrupted, and if it has, to search for feasible solutions to solve this problem.** In crafting solutions, attention needs to be paid to the tax culture of each country and the way that culture will interface with and influences these changes. Although a definition for tax culture and elements of tax

[1] A preliminary version of this paper was presented at the Law and Society annual meeting Montreal, Quebec 29th May to 1st June 2008.

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Special acknowledgment to Mr. Martin B. Tittle for his valuable comments to this article. The views expressed herein are solely those of the author.

Electronic copy available at: http://ssrn.com/abstract=1550815

culture are difficult to provide[3], the role of the different parties in the process of tax law-making needs to be taken into account. These parties include Legislative, Executive (including tax administration and revenue authorities), Judiciary (including courts with tax competence), taxpayers, and tax advisors. Furthermore, the principles of law that tax law-makers take into account when introducing, or amending tax rules are also of importance. Examples of these principles are certainty, efficiency, equality, neutrality, etc.

The approach in this paper is from a tax law perspective and more specifically deals with direct taxation (leaving outside value added tax issues). In this context, this paper provides an analysis of the current changes in tax law systems at both the domestic tax and international tax levels. This paper also provides a short description of the feasible solutions in international tax law that have been discussed up till now. Second, this paper provides a practical approach in the analysis of the interaction of tax systems and tax cultures in the case of leasing. Finally, this paper aims to propose recommendations for an international legal order for taxation. For this purpose, a specific proposal is presented for a 'consistent behaviour of taxpayers' that focuses on the maxim "*contra venire factum proprium*" that prohibits contradictory behaviour of taxpayers. By means of this proposal taxpayers are required to act consistently at all times and therefore, it is no longer possible for taxpayers to apply different, perhaps self-serving solutions to the same kind of problem.

This paper is divided as follows. First, Section 1 provides an introduction to the balance between domestic tax systems and international tax rules. Next, Section 2 describes the relationship between tax systems and tax cultures. Section 3 briefly examines the interaction of tax systems and tax cultures with respect to leasing. Section 4 presents the proposal for an international legal order for taxation. Finally, Section 5 presents a conclusion and recommendations for further research.

1. Balance between domestic tax systems and international tax

1.1. Globalization influence on taxation

Globalization[4] influences the changes in taxation policy in developing and developed countries.[5] These changes may be voluntarily promoted, or at times even imposed or requested.[6] Changes may be imposed or requested for instance by supranational institutions such as the European Union ("EU") in respect of the introduction and implementation of the EU '*acquis communitaire'*[7] for countries wishing to join the

[3] "Culture is a complex phenomenon, too complex to be easily described or measured" C. Roberts; P. Weetman and P. Gordon, International Financial Accounting, Financial Times and Pitman Publishing, Great Britain, 1998, at 37.

[4] See for definition of economic globalization Snyder, Francis. Economic Globalisation and the Law in the 21st Century in Austin Sarat (ed). The Blackwell Companion to Law and Society. Blackwell Publishing, 2004.

[5] The distinction between developing and developed countries as made by the Organization for Economic Cooperation and Development will be followed in this article.

[6] V. Tanzi, 'Globalization and the Need for Fiscal Reform in Developing Countries', October, 2004 Occasional Paper-SITI-06 at 1.

[7] In order to become a Member State, both countries will have to accept the *acquis* of the Union. The *acquis* is constantly evolving and includes: the content, principles and political objectives of the Treaties on which the Union is founded; legislation and decisions adopted pursuant to the Treaties, and

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EU.[8] Changes may be also requested by other international institutions such as: the International Monetary Fund[9], and the World Bank for developing countries[10] and the Organization for Economic Cooperation and Development for developed countries.[11]

One of the consequences of globalization is an increase in cross-border transactions by both multinational companies and individuals. The general consequence of cross-border transactions is that the rules of at least two different tax jurisdictions will be applicable to the international activities of the taxpayer.

In the past countries aiming to prevent double taxation[12], and to tackle tax avoidance for international situations have been concluding bilateral tax conventions[13] and/or multilateral tax treaties[14], and/or introducing unilateral tax rules[15].

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the case law of the Court of Justice; other acts, legally binding or not, such as inter-institutional agreements, resolutions, statements, recommendations, guidelines; international agreements, etc. Information available at the website of the EU: http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/index_en.htm#4.

[8] Examples of these countries are for instance: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Kosovo, Macedonia, Romania, Serbia and Montenegro, Moldova, Turkey, and Ukraine.

[9] In the past, Colombia was required to take part in the IMF Fund-supported programs. With the aim to raise revenue, as of 1 January 2002, a tax on financial transactions was transplanted voluntarily from Brazil into the Colombian tax system to “make up for revenues lost by lowering the valued-added tax rate”. The use of these IMF programs is mainly by developing countries facing macroeconomic difficulties. The main result of the programs is that these countries given importance to the objective of raising revenue. V. Tanzi, ‘Taxation in Latin America in the Last Decade’, Working Paper 76, Stanford: Center for Research on Economic Development and Policy Reform, Standford University, 2000, at 2. See also M. Stewart, “Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries” in Harvard International Law Journal, Issue 1, Volume 44, Year 2003, at 142.

[10] The International Development Association is the lending arm of the World Bank. This Association provides funding and promotes reforms for countries such as: Tanzania, Armenia, Indonesia and Pakistan. See the website of the World Bank – IDA at http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,menuPK:51235940~pagePK:118644~piPK:51236156~theSitePK:73154,00.html.

[11] The OECD aimed at identifying and eliminating harmful measures and preferential tax regimes in OECD member countries (i.e. developed countries). As a result Luxemburg repealed its 1929 holding company regime, and amended its finance branch. See the OECD project on Harmful Tax Practices at http://www.oecd.org/dataoecd/1/17/37446434.pdf .

[12] Defined as “the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods”. OECD Commentary: Introduction, para. 1. The OECD Model is not only the provisions but also the OECD commentary that intend to “illustrate or interpret” the OECD Model provisions.

[13] By means of bilateral instruments such as tax conventions, both states give up their taxation rights on a reciprocal basis. In this context, several bilateral tax conventions models exist, among them the following:

a) The model of the Organization for Economic Cooperation and Development (“OECD”) that applies to OECD members mostly developed countries;
b) Models developed by countries such as the United States Model (versions 1977, 1981 and 1996) and the Dutch Standard Treaty (1987);
c) The model for developing countries of the United Nations versions of 1980 and 2001.

[14] Examples of these types of treaties are the multilateral tax treaty in the CARICOM region and multilateral tax treaty concluded in the Andean Community Region. The discussion of the CARICOM treaty is provided in the effect of globalization in Suriname and in Latin America.

[15] Unilateral tax rules may also influence double taxation. For instance in the Netherlands, in cases where no double tax treaty has been concluded or where a tax treaty does not include a specific provision (to be applicable to the tax, taxpayer, income, property, estate or gift) the unilateral rules laid down in the Decree on the Avoidance of Double Taxation (*Bvdb*) are applicable.

Companies/individuals are carrying out more complex cross-border transactions. One may argue that one of the reasons for the complexity of taxation in international situations is the result of companies and law-makers (governments) having different objectives. Companies aim to increase their tax return, and their profits by means of using the differences in taxation that exist among the countries. Moreover, companies' aim to reduce tax compliance costs, improve competitiveness in international business, and/or to mitigate their tax liability. These aims may result in companies searching for aggressive tax planning structures.

In contrast, the aim of the law-makers is two fold. On the one hand, and in favor of companies, countries aim to attract investments through favorable tax measures and/or the development of their tax treaty networks. On the other hand, countries also aim to tackle tax avoidance, and to prevent the erosion of the tax base by means of tax limitation measures that might not be so favorable to companies when structuring their businesses. Nowadays, several tax reforms are taking place around the world. The aims of these reforms differ among countries. Thus, while a country aims to introduce favorable tax provisions to attract investors for instance by means of the creation of a favorable tax regime that includes tax incentives and/or tax holidays, and/or the reduction of statutory tax rates, other countries aim to introduce tax measures to tackle tax avoidance.

Tax reforms may also differ according to the differences between developing and developed countries. Thus, one may argue that the main aim of developing countries is to find instruments, such as the introduction of tax incentives (e.g. tax exemptions, tax holidays, favorable tax regime, etc.), to attract foreign direct investment to their countries.[16] Even though developed countries focus on investors, and on tax competition[17], these countries favor reduction of the statutory tax rate over creation of tax incentives. In general terms, developed countries try to prevent tax base erosion by reducing tax incentives and by tackling tax avoidance in sophisticated transactions.

Finally, tax reforms may also differ in respect of the introduction of domestic and/or international tax rules. Some countries are also considering implementing into their tax system methods to eliminate double taxation (e.g. credit, exemption), earning stripping rules to replace thin capitalization, the International Financial Reporting Standards to determine taxable profit, the Controlled Foreign Corporation Rules to tackle tax avoidance, limitation on benefits and beneficial ownership in bilateral tax conventions, most favored nation treatment clause in bilateral tax conventions, etc. In the context of globalization the classical way to tax income (source or residence), and

[16] A. Barreix and L. Villela, 'Taxation and Investment Promotion', Inter-American Development Bank, August 2002. Electronic document available at the website of the Inter-American Development Bank at http://www.iadb.org/int/trade/1_english/2_whatwedo/1d_taxdocuments.htm (last visited May 2008).

[17] According to Avi- Yonah: "Tax competition has several effects on developed and developing countries. In the case of developed countries, tax competition makes it increasingly difficult to finance the social safety net that is part of the role of government in a modern welfare state. This is occurring at a time when the social safety net is coming under increasing pressure from both demographic factors and the side effects of globalization itself. In the case of developing countries, tax competition makes it difficult to maintain stable government revenues, and the loss of revenue is not adequately compensated by benefits flowing from increased foreign investments. Reuven S. Avi-Yonah, 'Globalization, Tax Competition and the Fiscal Crisis of the Welfare State', Working Paper No. 004, Spring, 2000, at 4. A revised version of this working paper: Harvard Law Review, Vol. 113, No. 7. (2000), pp. 1573-1676.

the aims of the governments in taxation are changing. The following paragraphs provide a general overview of the current changes that are taking place at domestic level and at international level.

1.2. Domestic tax changes

Currently, several tax reforms are taking place around the world. Some countries such as the Netherlands[18], Spain[19], Belgium[20] and Luxembourg[21] aim to introduce favorable tax provisions to attract investors for instance by means of the creation of a favorable tax regime for patents (intellectual property) among other measures. Other countries such as Germany are not only considering introducing tax measures to attract investors but are also seeking to tackle tax avoidance by means of the corporate tax reform recently approved by the German legislature.[22] In this reform, the corporate income tax rate was reduced, limitations to the deduction of interest including earning stripping rules were introduced, and some favorable rules for depreciation were abolished. Other countries, such as the United Kingdom, the United States and to some extent Canada are studying the possibility of replacing the credit method with an exemption method for taxation of foreign profits among other changes. [23] If adopted, it is expected that the exemption method would substantially change the domestic tax policy (and to some extent the international) of these countries; including the taxation system for multinationals in those countries.

1.3. International tax changes

At international and European level, several discussions are also taking place. In the European Union, these discussions address for instance the introduction of a Common Consolidated Tax Base for EU companies[24] and the implementation of International Financial Reporting Standards into accounting and/or taxation.[25] At the international level, the current projects of the Organization for Economic Cooperation and

[18] Corporate Income Tax Reform of 2007 "Working on the Profit" including the introduction of a favourable tax regime for patents (royalty box) in effect as of 1 January 2007.

[19] Amendments to the Corporate Income Tax Act that also include a tax allowance for income derived from the licensing of certain intangibles in force as of 1 January 2008.

[20] Introduction of a new tax deduction for patent income in force as of 1 January 2008.

[21] A beneficial tax regime for income from intellectual property rights (the IP regime) has recently been approved by the Luxembourg House of Representatives and is effective from 1 January 2008. F. Muntendam and J. Chiarella, "New Luxembourg Tax Regime for Intellectual Property Income", European Taxation, May 2008, IBFD, Amsterdam, at 223.

[22] The Business Tax Reform was approved by the Lower House of the Parliament (*Bundestag*) on May 2007. This reform will enter into force as of 1 January 2008.

[23] The United Kingdom, the United States and to some extent Canada are studying the possibility to replace the credit method for an exemption method for taxation of foreign profits among other changes. The discussion of these reforms took place at the Conference . Corporation tax: battling with boundaries. 28th and 29th of June 2008. Said Business School – Oxford University Centre for Business Taxation. For further discussion see J. M. Weiner, News Analysis: Exempting Foreign Profits From Taxation in the U.K. *Tax Notes Int'l*, July 16, 2007, p. 214.

[24] Commission Communication: An Internal Market without company tax obstacles, achievements, ongoing initiatives and remaining challenges, COM(2003) 726 final (24 November 2003) at 17-18.

[25] European Parliament Regulation 1606/02, Application of International Accounting Standards, 2002, O.J.(L 243) 45; European Parliament Regulation 1725/2003, Adopting certain International Accounting Standards in accordance with Regulation 1606/02, 2003, O.J. (L 261).

Development ("OECD")[26] address topics such as the re-definition of the concept of permanent establishment, the allocation of profits to the permanent establishment, transfer pricing and treaty aspects of business restructuring, and the study analyzing the role of the taxpayers, tax revenue authorities and tax intermediaries in international taxation (e.g. tax advisors, law firms, in-house counsels, etc[27]), among other projects. More recently, the OECD has begun discussing the adoption of a new 2008 model tax treaty. In crafting this new model, the following issues amongst others are being analyzed: tax treaty dispute resolution, revised commentary to article 7 business profits, application of non-discrimination article, tax treaty issues related to Real Estate Investment Trusts (REITs) and tax treaty treatment of services.[28]

Nowadays, in international taxation several proposals are being currently discussed or addressed by legal scholars, international organizations and governments. With regard to legal scholars, one of the most recent proposals has been presented by Baker in respect of a cash flow system for taxation.[29] For Baker, this system results in a consumption tax model of source taxation.[30] The main idea is to introduce an income tax on economic rents[31] (cash flow). In this proposal, tax should be levied not where the capital generating these rents has been created (i.e. residence) but where the business activity takes place and locational economic rents are created (i.e. source).[32] For this author, this solution "can be implemented with an expenditure or cash flow tax that could be imposed in two stages: one on corporate rents and the second when those rents are distributed to shareholders. Developed economies should adopt a tax sparing regime that exempts or allows a deemed foreign tax credit for the portion of their resident taxpayers' foreign income that represents locational economic rents".[33]

It is the author's opinion that even though the Baker proposal is of interest, it only aims to provide a territorial tax base for developing countries. The problems faced by developed and developing countries are not only the entitlement to levy taxes by

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[26] For an overview of all projects in taxation the website of the OECD (topic tax) at www.oecd.org

[27] These tax intermediaries are: accounting firms, legal firms, tax firms, in-house tax teams, investment/retail banks, boutiques & promoters (accountants, lawyers), insurance companies. The Organization for Economic Cooperation and Development has carried out a study on the role of tax intermediaries. This study has been set up by the Forum on Tax Administration (FTA) under the Seoul Declaration. Further information available at the website of the OECD www.oecd.org (last visited May 2008).

[28] Draft contents of the 2008 Update to the Model Tax Convention, 21 April to 31 May 2008. Center for Tax Policy and Administration. Organization for Economic Cooperation and Development (OECD).

[29] In the past a proposal for tax on capital flows has been dealt with by H. Zee. This author suggests a measure being "a withholding tax on all private capital inflows, with a credit and refund provision that operates within the administrative framework of the existing domestic tax system to relieve noncapital inflows from the tax". See H. Zee: 'Retarding Short-Term Capital Inflows Through Withholding Tax', March, 2000. IMF Working Paper No. 00/40.

[30] W. B. Barker An International Tax System for Emerging Economies, Tax Sparing, and Development: It Is All About Source!, 29 U. Pa. J. Int'l L. 349-389 (2007).

[31] "Economic rents are the profits left after the normal return on capital is isolated. The tax base permits deductions for all expenditures for goods and services, both current and capital". Ibid. at 382.

[32] According to Baker, some of the advantages of this regime are the following:
(i) Fairness to developing economies: The benefit clearly belongs to the host in the case of locational economic rents; (ii) This regime helps home businesses compete with other countries MNEs worldwide: free movement of capital. Businesses to seek rents where much of business income is exempt from home country tax, and (iii) Tax competition shift from the source country (developing) to the home country (developed). Ibid, at 350.

[33] Ibid. at 349.

developing countries but also the lack by developing countries of a modernized tax administration that reduces the effectiveness in exchange of information and tax compliance. In addition, developing countries are required to change (or update) their tax systems in accordance to international tax law developments. Further actions between developed countries and developing countries that result in a consistent behaviour for taxpayers are needed. The contents of this proposal are provided in Section 4 below. The following section deals with the interaction between tax systems and tax cultures.

2. Tax systems and tax cultures

2.1. Tax systems

In comparative law theory, the classification of legal systems provides "insight to the historical roots of any particular country's system, thereby providing a better understanding of the underlying legal culture".[34] In this context, a classification of legal systems has been provided amongst others by David[35] dividing between romano-germanic (civil law), common law, socialist law, muslim/hindu law, Jewish law and Far East law. Zweigert and Kötz[36] reduced the classification into the following 'Western' legal systems: Romanistic[37], Germanic, common law, and Nordic legal system. More specifically, in cross-country comparisons, a broader classification of tax systems by means of identifying the "basic structural features of the tax laws of countries"[38] has been proposed by Thuronyi. In general terms, this author provides a classification addressing common law tax systems, civil law tax systems, Northern European tax systems among others.[39]

The classification of tax systems may also be addressed in terms of specific criteria such as substance over form, autonomy of tax law from private law, etc. For example, a classification was introduced in the Congress of the International Fiscal Association in 2002.[40] This classification is suggested by the general reporter in respect of the approach towards substance over form limited to the countries that submitted a report to this Congress. The general reporter provided a division between civil law and common law with the following features:

(i) Common law countries: Australia, Canada (except Quebec), India, New Zealand, United Kingdom and United States;
(ii) Civil law countries with a subdivision as follows:

[34] V. Thuronyi, Comparative Tax Law, Kluwer Law International, 2003, at 23.
[35] R. David and J. Brierley, Major legal systems in the world today, 3rd rev.ed., Stevens&Sons, London, 1985, at 22-25.
[36] K.Zweigert and H.Kötz, Introduction to comparative law. 3rd rev.ed. Translated by Tony Weir, Clarendon Press, Oxford, 1998, at 73.
[37] By contrast to the approach of David to one Romano-Germanic family, Zweigert and Kötz proposed a new division between "a Germanic family (Germany, Austria, Switzerland, and a few affiliated systems) and a Romanistic family (France and all the systems which adopted the French Civil Code, along with Spain, Portugal and South America), Ibid., at 68-69.
[38] V. Thuronyi, Comparative Tax Law, Kluwer Law International, 2003, at 25.
[39] Ibid., at 43-44.
[40] F. Zimmer, Form and substance in tax law, *Cahiers de droit Fiscal International.* International Fiscal Association, Volume 87a, SDU Uitgevers, The Netherlands, 2002, at 22.

- German tax law area subgroup: Germany, Austria and Switzerland and to some extent, the Netherlands, Luxembourg and Hungary;
- Southern European/Latin American subgroup: Argentina, Belgium, Brazil, Colombia, Denmark, Finland, France, Hungary, Italy, Japan, Korea, Luxembourg, Mexico, Norway, Spain, Sweden and Uruguay.

What this all means is that even though generalizations need to be carefully approached especially in respect to the classification of legal systems and tax systems, the main features of one legal system or another may have an influence in the way that the rules are made in one country or another. Moreover, it is submitted that when carrying out comparative studies, the differences in approach between countries in accordance to a country's legal system need to be also identified and addressed. A practical approach to the use of the classification of legal and tax systems is provided in item 4. The following paragraph provides a description of the concept of legal culture.

2.2. Tax cultures

It is submitted that despite the domestic and international measures adopted by countries to prevent double taxation or to tackle tax avoidance, the complexity of international businesses has resulted in countries searching for new solutions to these problems. One may argue that globalization makes also possible an exchange of culture, legal and tax issues, and solutions to the problems that countries may face due to the openness of economies and the complexity of international businesses. As rightly stated by Gerber, globalization "brings laws and legal cultures into more direct, frequent, intimate, and often complicated and stressed contact. It influences what legal professionals…know about foreign law".[41] It is the author's opinion that the interaction among countries and among cultures should be regarded as a positive effect from globalization.

In this paper, the present author argues that in tax reforms, and in the discussion of the normative convergence in the international legal order, attention needs to be provided to the way that the tax culture of the country influences the domestic and international tax changes taking place around the world.

In addition, the approach to culture as tradition has been introduced in research carried out by the World Bank in the field of tax reform. For example, the tax reform on property (immovable assets) in Indonesia was built on "an established tax culture". Without providing a definition of tax culture, reference is made to culture and tradition stating that there is a 'well-established property tax tradition both among the citizens-taxpayers and the tax administration".[42] Although only some reference to tax culture and no definition has been provided by the World Bank, the international status of this institution and the approach towards culture may result in future papers where the tax culture is dealt with more in-depth. In this regard, it is submitted that

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[41] D.J. Gerber, "Globalization and Legal Knowledge: Implications for Comparative Law" in Tulane Law Review*,* 1990, at. 950

[42] R. Kelly Property Taxation in Indonesia: Challenges from Decentralization. 2003. Available at the website of the World Bank:
http://siteresources.worldbank.org/INTPCENG/Resources/Kelly_PropertyTaxationIndonesia_2003.pdf

the development of a concept of tax culture may contribute to the success -through a better understanding of the culture- of future tax reform, harmonization and convergence projects.

For this article, legal culture is defined as the organization, institutional features, operation of a legal system (external factors) and the description of values, beliefs and attitude towards law (internal factors). The search for culture in a legal system results in a description of the "historical, social economic, political, cultural and psychological context which has made a rule or proposition what is".[43] It should be kept in mind that describing and measuring culture is a difficult task and thus from the description of legal culture for recipient countries different conclusions can be drawn in accordance to the elements to describe legal culture. The proposed approach to legal culture takes into account that the differences in institutional features, attitudes and beliefs in a country's legal and tax system require the study of the way that the development of law takes place as 'law in action' and not only the introduction of a concept in the formal law of the country 'law in the books'.[44] Research carried out in the past by this author in the field of leasing[45] shows that the differences in culture provide the local (fine) tuning[46] that makes that for a transplanted concept, thus, the rules are different in the recipient country than the ones in the donor country. The main findings of this study are provided in Section 4 below.

More recently, the author's approach in tax culture was followed in respect of the current discussion of place of effective management in order to determine the tax residence of a legal body. In the analysis of this issue by Burgers, the main conclusion is that the "OECD proposal does not ensure unanimous views". [47] These differences are due to differences in the tax systems of the countries where the place of effective management is being applied (i.e. OECD countries, and non-OECD countries concluding tax treaties based on the OECD Model). The approach towards the developing of case law in a mixed system such as the Netherlands is in contrast to

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[43] The concept of legal culture is used in sociology of law, and in comparative analyses of differences between countries. M. Hoecke van and M. Warrington, "Legal cultures, legal paradigms and legal doctrine: Towards a new model of comparative law" in *International and Comparative Law Quarterly*, Vol. 47, July 1998 at 496.

[44] The discussion in the legal scholarship regarding the relationship between law and society refers to the contextualist approach to the study of law. For this purpose, Ewald has referred that law is not an autonomous discipline, insulated from the surrounding society; rather, if one wishes to study a foreign legal system, one should view the law in its wider context and study its social function. Not law in books, but law in action is the proper object of study for the contextualist". W. Ewald "The Jurisprudential Approach to Comparative Law: A field Guide to Rats" in American Journal of Comparative Law, Vol 46, 1998, at 702.

[45] See Mosquera Valderrama. Leasing and Legal Culture - Towards consistent behaviour in tax treatment in civil law and common law jurisdictions, dissertation, 2007, at 301.

[46] This concept is borrowed from comparative law and it is described by Örücü as follows: "If the old models are abandoned with 'optimismic normativism' while new legal models are looked for, a transplanted legal system not compatible with the culture in the receiving country, without the appropriate transposition and tuning, will create only a virtual reality. In answer to the question, how do legal ideas, institutions and structures find their way from one location to another, it has been aptly put that 'laws do not have wings'. This alone highlights the importance of those who move the law and help in its internalisation, and hence, what I call 'tuning'". E.Örücü, "Law as a transposition" in International and Comparative Law Quarterly, Number 51, 2002, at 208.

[47] Burgers, I.J.J. "Some Thoughts on Further Refinement of the Concept of Place of Effective Management for Tax Treaty Purposes", Intertax Volume 35, Issue 6/7. Kluwer Law International at 378.

civil law countries such as Germany and common law countries such as Australia, Canada and the United Kingdom. Likewise, the differences in fiscal culture were addressed as an obstacle to a common approach towards the place of effective management. [48]

3. Interaction of tax systems and tax cultures: A practical approach

In the world-business economy where selling of products, exchange of information, and technologies takes place across borders; law makers, tax and legal practitioners might be influenced not only by their own legal system but also by other countries' legal culture, legal systems and tax systems. The following paragraphs provide a practical approach to the discussion of the interaction between tax systems and tax cultures in an international legal order. In the past, this author has analyzed the complexities and the solutions presented in international taxation with respect to cross-border leasing.[49] These subject-specific solutions in general, may be also applicable to other problems in international taxation. Therefore, the second aim of this paper is to present the contents of the proposal for a consistent behaviour of taxpayers (Section 4 below).

The first step in this study was to analyze the transplant (borrowing)[50] and development of the legal rules for leasing in four selected countries: a donor country: the United States and three recipient countries: Colombia, France, and the Netherlands.[51] Moreover, the analysis of these rules was provided taking into account the differences in the tax systems and tax culture of the selected countries. A general summary of the main conclusions in this study is provided in the following paragraphs.

3.1. Mismatch between legal and tax systems

The mismatch between the common law legal system of the United States and the civil law legal system of the recipient countries, Colombia, France and to some extent the Netherlands has been confirmed by this research. This mismatch in legal systems was addressed in respect of private law (civil and commercial), financial (banking) law, accounting law and tax law. The main conclusion of the analysis of this

[48] Ibid. .

[49] Mosquera Valderrama, Irma J. Leasing and Legal Culture - Towards consistent behaviour in tax treatment in civil law and common law jurisdictions, dissertation, 2007.

[50] Leasing is a legal concept that was first developed in the United States in the 1950's and transplanted in the 1960's in West Europe and in the 1970's in Asian and Latin American countries. The internationalization of business practice and the globalization of the economy resulted in legal practitioners, tax advisors and banks establishments amongst others influencing the transplant of leasing into their legal systems, for example, by means of performing leasing transactions or setting up leasing companies. Ibid., at 18.

[51] In Colombia, France and the Netherlands leasing appeared as a commercial phenomenon without specific statutory support. The first leasing company was incorporated in Colombia in 1975, in France in 1962 and in the Netherlands in 1963. Ibid.

mismatch is that the legal rules for leasing do not always follow the general, civil law/common law classification of the selected countries.

Legal Systems

For example, the doctrine of freedom of contract may result in a stronger role for the judiciary. This feature of common law legal systems has thus been transplanted to civil law recipient countries. Another example is the distinction between common law as a case-law-based legal system and the civil law as a codified legal system. In this study, I have demonstrated that these characteristics are only general in nature, and therefore, deviations occur. An example that may illustrate the differences in approach is the existence of the doctrine of binding precedent (*stare decisis*)[52], a feature of common law, in the Netherlands. Tax law in the Netherlands concerning determination of profits provides for a system of consensus with open norms, e.g., economic ownership and sound business practice that are developed dynamically through case law. In the Netherlands, economic ownership – a provision without statutory definition – is of importance in setting out the boundaries between operating leases and finance leases.[53] Due to the lack of a statutory definition, legal scholars, lessors, lessees, etc. studied case law in order to find the approach that the courts would probably take towards the interpretation of economic ownership in leasing transactions. In Colombia and France on the other hand, although case law has been developed, the existence of statutory law and the lack of the principle of binding precedent have reduced the importance of case law.

Tax Systems

In the United States, France, Colombia, and the Netherlands, the type and contents of the tax rules deviates from country to country in accordance to the specific features of the tax system of each country. The two main elements of the tax systems analyzed in my study are firstly the civil law feature of schedular, that is, separate categories of taxes and the common law feature of global, that is, all types of income falling in one

[52] According to Zweigert and Kötz, the doctrine of binding precedent means that courts are bound by their own previous decisions. In order to avoid following a previous decision which is unsatisfactory, "English judges have devised various ways and means which enable them to 'distinguish a precedent'…a previous decision is binding only where the basic reason underlying the decision, the so-called 'ratio decidendi', covers the instant dispute". K.Zweigert and H.Kötz, Introduction to comparative law. 3rd rev.ed. Translated by Tony Weir, Clarendon Press, Oxford, 1998, at 259-260.

[53] In this study, the differences between operating leases and finance leases were addressed. For the purpose of this study operating lease was defined as "a lease where the lessor is regarded as the owner for tax purposes" and finance lease was defined as the lease agreement "where the lessee is regarded as the owner for tax purposes". In other words, in the case of an operating lease the lessee has no interest in the ownership but in the use of the asset while in the case of a finance lease, the lessee intents to acquire the ownership of the asset at the end of the lease period by means of for instance, the exercise of an option to purchase. For the definitions of operating and finance lease, the criteria of ownership is used, as provided in the study, detailing the tax treatment of cross-border leasing, conducted by the International Fiscal Association in 1990. G. Lindecrona and S. Tolstoy, General Report in Taxation of Cross-Border Leasing, *Cahiers de droit Fiscal International.* International Fiscal Association, Volume 75 a, Kluwer, The Netherlands, 1990, at 25.

category. In this study, schedular was found only in the Netherlands whereas Colombia, France and the United States followed the global approach to income.

Secondly, the public nature of tax law in the recipient countries is also a factor. One consequence of this public nature is that in Colombia and France the tax administration is not authorized to conclude an agreement on tax liability with the taxpayer whereas in the Netherlands it is possible for the tax administration to conclude these agreements. The public nature of tax law results in limitations to the autonomy of the parties to conclude tax law agreement. In the Netherlands, the association of leasing companies and the tax authorities agreed that more transparency and certainty in the tax treatment of leasing was desirable. Thus, in order to fill out the concept of economic ownership four tax arrangements (*leaseregelingen*) containing safe harbor rules for leasing practice were concluded between the tax administration and the taxpayer. Since 1999, the fourth leasing arrangement has been codified in statutory law (i.e. the Decree) in force since January 2000.

The common law feature of separation of legal title and use in the definition of leasing is not recognized in civil law countries. In order to attempt to make sense of this separation, the recipient civil law countries introduced certain criteria to classify leasing that varies from one recipient country to another. Examples of these criteria are title, equity, purchase option and type of asset. [54]

Finally, the autonomy or not of tax law as a feature of the legal system has an influence in the way that leasing was regulated. The use in tax law of other branches of law such as private law, accountancy law or financial (banking) law provisions resulted for instance in different types of rules, more strength or flexible regulations for leasing, differences in terms, definitions and classifications of leasing.

3.2. Mismatch between legal and tax cultures

Although the definition and elements of legal culture are difficult to set forth; the concept of legal culture is useful in identifying the role of the different parties (institutions) in the adoption of and development of legal rules for leasing. For this study, the study of the legal culture in the recipient countries is provided in respect of the organization, institutional features and operation of a legal system (external factors) leaving outside the description of values, beliefs, and attitude towards law (internal factors). For leasing, the role of Legislative, Executive, Judiciary, lessee, lessor and leasing associations in this study referred to as legal culture, deviates from country to country.

The differences in legal cultures have an influence on the adoption and development of legal rules for leasing. In this study, I referred to legal culture in respect of the role played by the different parties (institutions), that is, Legislative, Executive, Judiciary,

[54] One of the main findings in this study is that the criteria to differentiate operating and finance lease differ among countries. In Colombia, the Netherlands and the United States this difference was recognized for private law, tax law and accounting law purposes. In France, three different meanings to the word leasing resulted in a different classification of leases, to wit: rental without purchase option (*location simple*) and rental with purchase option for professional goods (*crédit-bail*) or for consumer goods (*location avec option d'achat).* Irma J. Leasing and Legal Culture - Towards consistent behaviour in tax treatment in civil law and common law jurisdictions, dissertation, 2007, at 260.

lessee, lessor and leasing associations. One example of legal culture is the different solutions countries chose in solving the problem of tax structures where lessor and lessors aimed at obtaining tax benefits. The role of lessors and lessees is a common feature found in all four countries researched. In order to prevent abuse of tax benefits, the countries researched provided different solutions. The result has been more statutory law and/or administrative pronouncements of the tax administration, and/or case law to prevent undue tax benefits. Another example is the role of lessees in the countries researched. In France, the Netherlands and the United States the law maker decided to introduce more strict, detailed or protective rules for consumer or public bodies when acting as lessees in leasing transactions. In Colombia, public bodies did not seek for leasing constructions. Moreover, neither consumers nor public bodies were subject to strict or protective rules when acting as lessees in Colombia.

Furthermore, I analyzed the tax culture with a main focus on tax-law makers, courts with tax competence, taxpayers, tax administration and tax advisors in the development of tax rules for leasing. For instance, in respect of the role and interest of tax law-makers the main conclusion is that the legal culture deviated among the countries researched. In the Netherlands and the United States, tax rules aim to introduce tax benefits for leasing and to set out limitations to claim those benefits. Further enlightenment of the tax treatment of leasing was left to the Judiciary and/or the tax administration. In Colombia and France, tax-law makers aimed not only to regulate tax benefits for leasing but also to enlighten the tax treatment of leasing.

The main conclusion of the historical comparative study is that the legal rules for leasing deviate from country to country and among the branches of law addressed in this study. The different branches of law addressed in this study are private law (civil and commercial), financial (banking) law, accounting law and tax law. In this study I proved that the differences in legal rules for leasing have been and still are difficult to be reconciled among countries. Finally, the present author argued that the difficulties to reconcile the different approaches among these branches of law need to be taken into account in processes of transplantation, harmonization and/or convergence. The findings of this study and the acknowledgment of these differences contribute to the current discussions of harmonization and/or convergence in leasing mainly from a tax law, accounting law, and private law perspective. The following paragraph discusses the harmonization and/or convergence to reduce tax distortions in cross-border leasing transactions.

3.3. Harmonization and/or convergence to reduce tax distortions

The differences in characterization and qualification of a lease contract (e.g. operating lease and finance lease) in the selected countries have an effect on the tax treatment of leasing. Moreover, in this study it was concluded that the differences between tax systems and tax cultures are difficult to harmonize. These differences cause tax distortions in the treatment of leases at domestic level and at cross-border level with lessor and lessee being tax residents of two different countries.

In the light of the principle of neutrality[55] in international taxation -providing for the disregard of tax considerations by the parties in their decisions to conclude cross-border leasing transactions- the different approaches to tax treatment of leasing [56] may influence the decision of which tax jurisdiction will be used in a cross-border leasing transaction[57]. In this context, the second step in this study was to analyze the feasibility of the proposals in international taxation to reduce the differences in leasing. The proposals addressed were bilateral tax conventions, a common agreement for one single tax treatment, the use of International Financial Reporting Standards for taxation, and/or, application of anti-avoidance doctrines.

The main findings of the study that I carried regarding the role of the bilateral tax conventions and their feasibility to solve the problems originated in for cross-border leasing transactions are provided herein below. These findings are also of importance for the current discussion of a 2008 OECD Model. In this study, the role of bilateral conventions as instruments for convergence is analyzed and questioned. This analysis takes into account the differences among countries, and the differences in approach toward international taxation.

In principle, it could be argued that bilateral tax conventions provide common trends in cross-border transactions. Thus, in principle, the use of the OECD Model and the OECD Commentary contribute towards convergence of taxation of income in cross-border leasing transactions. However, in practice, bilateral tax conventions are far from providing one single approach. In this context, the most significant reasons for the differences in approach are:

- bilateral tax conventions are limited by the willingness of adopting countries to give up a portion of their tax sovereignty;
- negotiation takes time, and that makes it difficult to introduce changes of the OECD Model to a bilateral tax convention;
- countries have different principles that they apply in trying to prevent double taxation: capital import neutrality or capital export neutrality;
- the override doctrine applicable to bilateral tax conventions for instance in the United States results in a bilateral tax convention having equal force as domestic law and thus the most recent prevails. The result is that a conflict between a bilateral tax convention and a domestic law is solved by applying the provision

[55] According to Messere, tax neutrality is the situation in which tax considerations do not affect or hardly affect economic or social decisions. K.C. Messere, Tax Policy in OECD Countries: Choices and Conflicts, International Bureau of Fiscal Documentation, Amsterdam, 1993, at 451.

[56] Differences in the tax treatment of leasing of the countries involved in a cross-border leasing transaction may result in double dips (claim of tax benefits in two countries) in the field of depreciation and investment allowances. These double dips result if the lessee is considered as economic owner and resident of a tax jurisdiction that recognizes the economic ownership approach to leasing and may claim tax benefits while the lessor as legal owner and resident of a tax jurisdiction that recognizes legal ownership is also entitled to claim tax benefits. For example, a lessor who is tax resident in France (legal owner) concludes a contract with a lessee resident of the Netherlands (economic owner). In this case, both lessor and lessee are entitled to claim tax benefits in France and the Netherlands respectively.

[57] This decision is influenced for instance by a favorable tax scheme to claim accelerated depreciation available in country X whereas in country Y such scheme does not exist. The choice of investor may be to use the tax benefits provided by country X and therefore to conclude the lease contract in country X.

introduced later on time.[58] In contrast, in other countries such as the Netherlands, France and Colombia, the bilateral tax conventions have priority over domestic legislation.

- the legal culture varies among the countries. These differences in legal culture result in differences in the role of the institutions negotiating the bilateral tax conventions with a strong role and more expertise (e.g. the Netherlands) or less strong and without expertise (e.g. Colombia). Moreover, the differing preferences of developing countries like Colombia for the application of source rules and developed countries like the Netherlands and France for residence rules may result in problems in the negotiation of bilateral tax conventions. These problems may be resolved with a bilateral tax convention based on the OECD Model but with a protocol that changes some of the model's provisions;
- the different approaches towards the use of the commentary of the OECD Model. The dynamic approach results in the application of the Commentary as it reads at the time that the bilateral tax convention is applied whereas the static approach results in the application of the version of the Commentary that existed at the time that the bilateral tax convention was concluded.
- the relationship of tax law with other branches of law such as private law and accounting law, that is, whether it is autonomous from or dependent on them may result in the interpretation of the tax treaty being influenced by private law concepts (dependency) or tax law concepts (autonomy).

The limitations to the application of bilateral tax conventions and the different approaches in the international tax policy from the selected countries described shows that a single approach through bilateral tax conventions is not possible. Neither bilateral tax conventions nor protocols to bilateral tax convention are feasible solutions to solve the problems in cross-border leasing transactions. This conclusion can be also applicable to other issues currently dealt with in international taxation such as the initial steps towards negotiation of tax treaties by developing countries with the aim to attract investment and the issues dealt with in these negotiations[59]. For developed countries, the above findings can be applicable in respect of the changes to the concept of permanent establishment in respect of services, the discussion of the place of effective management, amongst others. These issues have been discussed in Section 1.3. above.

The conclusions of the study of the legal transplant of leasing shows that the differences in the legal rules have been and still are difficult to be reconciled among countries. Finally, in this study, the recommendation for a consistent behaviour of taxpayers is analyzed as a feasible solution to reduce or eliminate tax distortions in leasing. This proposal may be of use for other issues than leasing in international taxation. The contents of this proposal are described in the following paragraph.

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[58] Article 6, Section 2 United States Constitution. See Mc. Daniel, Paul et al. Introduction to United States International Taxation, Aspen Publishers, New York, 2005. at 178

[59] For this decision, it is important to take into account that most of developed countries and also developing countries negotiating with OECD countries have been following the OECD Model. For example, in Colombia a developing country, that in principle, should follow the UN model, the current tax treaties negotiated with Spain, Chile and Switzerland have been following the OECD Model. See I.J.Mosquera Valderrama: National Report Colombia', to be presented in the Conference 'History of Double Tax Treaties', in Rust, Austria,3-5 July 2008.

4. An international legal order for taxation: A proposal

This proposal focuses on the maxim "*contra venire factum proprium*" that prohibits contradictory behaviour of taxpayers[60]. This maxim is derived of the international law principle of abuse of rights as proposed by Matteotti.[61] The focus of this recommendation is on the application of the maxim "*contra venire factum proprium*"in cross-border leasing transactions. The English translation of this maxim is 'no one should be allowed to set himself in contradiction to his own previous behaviour'. Taxpayers are required to act consistently at all times. The following examples may illustrate the application of this maxim in cross-border leasing transactions:

At domestic level, the lessor claims for accounting purposes ownership of the leased asset and therefore he registers the leased asset on his balance sheet. In respect of the same transaction for tax purposes the lessee instead of the lessor claims ownership of the leased asset and therefore the lessee is entitled to claim the tax benefits available for leasing. In this case, a contradiction in a single domestic lease transaction takes place, that is, ownership of the lessor for accounting purposes and ownership of the lessee for tax purposes. On the basis of the maxim "*contra venire factum proprium*" the judiciary and/or tax administration when deciding for instance on the tax benefits for the lessee may deny these tax benefits. The reason will be that the taxpayers (both lessor and lessee) need to act consistently in a lease transaction, that is, a single approach to ownership by lessor or by lessee.

In addition, it is worth to point out that the characterization of the lease transaction by the tax administration and/or judiciary will only take place from a tax perspective. In this regard, it is submitted that the approach towards the consistent behaviour does not influence the relationship of autonomy or dependency of tax law from private law and/or accounting law. The reference by the tax judge to other branches of law aims at finding out the characterization of leasing in private law and/or accounting law and no more than that. Moreover, the use of instruments such as private law contracts and accounting balance sheets may provide tools to the tax judge to find out the characterization of a lease transaction and the intent of the parties. Summarizing, at

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[60] According to Matteotti, the use of abuse of rights as a principle of international law in tax issues and the derived maxim of *contra venire factum proprium* are the key to combat tax avoidance and to solve the problems of abuse of rights in international taxation. This author rightly argues the difficulties to provide with a definition of abuse of rights in international law. R. Matteotti, "Interpretation of Tax Treaties and Domestic General Anti-Avoidance Rules – A sceptical Look at the 2003 Update to the OECD Commentary" in *Intertax*, Volume 33, Issue 8/9, Kluwer Law International, 2005, at 344.

[61] For Matteotti, the "abuse of rights doctrine is derived from the principles of good faith and equity". The different definitions of scholars have been summarized by Matteotti. In general terms, abuse of rights exists in the following behaviours:

- when the action is pursued in a manner contrary to the purpose for which it has been allowed;
- exercise of a lawful right involves the sacrificed of a individual or community right;
- causing injury to another;
- fictious exercise of a right to evade for instance a contractual obligation.

Ibid., at 342-343.

See for different definitions of the doctrine abuse of rights. R. Venables, Abuse of rights in EC law, Tax Adviser, October 2003, at 16-19; K. Engsig Sørensen, Abuse of rights in Community Law: A principle of Substance or Merely Rethoric. Common Law Market Review, Issue 43, 2006, at 423; M. Byers, Abuse of rights: An Old Principle, A New Age in McGill Law Journal, Issue 47, 2002, at 389.

domestic level, the relationship of autonomy or dependency of tax law from accounting law in a legal system influences the tax and accounting treatment of taxpayers (lessor and lessee) in respect of a lease transaction. The following question may be posed: How to solve the problem that for accounting purposes the lessor claims ownership whereas for tax purposes the lessee claims ownership? The framework for the maxim "*contra venire factum proprium*" answers this problem by requiring from taxpayers to act consistently at all times. Hence, the claim of ownership for tax purposes can be denied by tax authorities and/or tax administrations if such ownership contradicts the claim of ownership made for accounting purposes.

At cross-border level, it is possible to claim tax benefits in two countries in the field of depreciation and investment allowances ("double dips") given the differences in the tax treatment of domestic leasing. One of these differences is the approach towards legal ownership or economic ownership of the countries researched. In these transactions, it could be possible for the tax benefits for ownership to be claimed in both countries, that is, in one country by the lessor (legal owner) and in the other country by the lessee (economic owner). These differences in approach may influence the decision of which tax jurisdiction will be used in cross-border leasing transactions. The result is that in respect of a cross-border leasing transaction the lessor claims tax ownership in country X whereas the lessee claims tax ownership in country Y. Thus, in both countries the tax benefits for ownership are claimed by both parties. It is submitted that in the light of the principle of neutrality[62] in international taxation, the taxpayers should disregard tax considerations in their decisions to conclude cross-border leasing transactions.[63] The different approaches to tax treatment of leasing may influence the decision of which tax jurisdiction will be used in a cross-border leasing transaction.

The application of a consistent behaviour by taxpayers may result in the tax administration and/or judiciary of country X or Y to search for contradictions in the claims by taxpayers and to deny the tax benefits in one country. As a result, only one country will be given the tax benefits of ownership. The aim is to prevent that leasing parties design by means of aggressive tax planning, a cross-border lease transaction in order to obtain undue tax benefits. Finally, in order to solve differences of interpretation, application of the maxim for instance in case that no benefits can be claimed given that both countries involved denied tax ownership, a set of guidelines is recommended. The contents of these guidelines are described below.

[62] According to Messere, tax neutrality is the situation in which tax considerations do not affect or hardly affect economic or social decisions. K.C. Messere, Tax Policy in OECD Countries: Choices and Conflicts, International Bureau of Fiscal Documentation, Amsterdam, 1993, at 451.

[63] As rightly argued by Sasseville "both international double taxation and international double non-taxation are undesirable on neutrality and fairness grounds". J. Sasseville, "The Role of Tax Treaties in the 21st Century" in Appendix: Background Notes, Tax Treaty Monitor, Bulletin, International Bureau of Fiscal Documentation, June 2002, at 246. The discussion of double non-taxation took also place at the IFA 2004 Congress. The main conclusion by the general reporter is that the prevention of double non-taxation by means of bilateral tax conventions is "pursued very reservedly worldwide". In other words, bilateral tax conventions cannot be seen as serving the objective of preventing double non-taxation but double taxation. The shifting to the credit method may be sufficient to prevent double non-taxation. M. Lang, General Report in double non-taxation, *Cahiers de droit Fiscal International.* International Fiscal Association, Volume 89 a, Kluwer, The Netherlands, 2004, at 118.

Specific guidelines for the application of the maxim of "*contra venire factum propium*" to lease transactions

In general terms, the proposal is to introduce guidelines for the judiciary and/or tax administration when deciding on requesting to taxpayers a consistent behaviour as a result of the application of the maxim of "*contra venire factum propium*". Given that the application of this maxim influences not only domestic lease transactions but also cross-border lease transactions with an effect on the tax revenue and tax sovereignty of two (or more) countries, it is recommended that a set of guidelines is promoted by the OECD[64]. These guidelines should establish the requirements under which the consistent behaviour of taxpayers is required and should indicate in which way differences of interpretation between judiciaries of two countries and/or tax administrations are going to be solved. More specifically for leasing, these differences in interpretation are for instance the characterization of the leasing transactions and the different definitions and criteria to determine the owner of the leased asset, to wit: economic owner or legal owner. The OECD Guidelines should intend to solve the differences of interpretation in respect of whether a contradiction of taxpayer exists for instance by means of mutual agreement or arbitration procedure.

In general terms, the contents of the OECD Guidelines for the application of a consistent behaviour by taxpayers (leasing parties) derived of the maxim of "*contra venire factum propium*" in respect of cross-border leasing are described as follows. For the purpose of describing the way that the issues in the Guidelines should be addressed, it is suggested to follow as starting point the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.[65] Thus, in the same direction, the proposed OECD Guidelines for cross-border leasing should contain the definition of what should be considered a consistent behaviour of taxpayer as described in Section 10.4.2 above. The Guidelines should contain the features that if existent in a cross-border lease may result in a contradictory behaviour of the taxpayers. The Guidelines should help both tax administration and judiciary in order to find a satisfactory solution in a cross-border lease transaction without affecting the tax sovereignty of each country. For example, if the tax administration in country X does not agree with the approach of the tax administration in country Y, the mutual agreement procedure, arbitration or any other procedure to deal with these differences should be included in the Guidelines. Finally, in order to solve the disputes between tax administrations and/or judiciaries, the current OECD proposal regarding the use of

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[64] This organization can be the OECD that currently exists for developed countries. The extension of the scope of application of OECD recommendations to developing countries might be a feasible solution for the creation of an international tax organization. If a new organization is created that it is not the OECD, the risk will exist that the experience of the OECD during the last three decades to provide solutions to international tax issues will not be considered. In addition, the role of the OECD to contribute to the development of international tax rules has been discussed by Sasseville. J. Sasseville, "The Role of Tax Treaties in the 21st Century" in Appendix: Background Notes, Tax Treaty Monitor, Bulletin, International Bureau of Fiscal Documentation, June 2002, at 233-274. See also Brauner in the creation of an international tax organization. This author rightly argues that "such an organization will serve, at the least, as a global policy forum with some interpretation authority". Y. Brauner. "International Trade and Tax Agreements may be coordinated, but not reconciled". Virginia Tax Review, Issue 25, Summer 2005, at 254.

[65] OECD. Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. OECD Publishing. June 2001.

mutual agreement and arbitration as mechanisms for the resolution of tax treaty disputes is valuable to set out the rules to solve the differences in interpretation.[66]

5. *Summary and conclusions*

The main consequence of globalization is tax competition and complexity of international tax and businesses. Countries, and international organizations are facing new challenges to regulate cross-border transactions while at the same time promoting investment. The influence of globalization in taxation, and the changes that are taking place at the domestic and at the international level have been discussed in this article. In taxation, these changes are not only the result of the current discussion of harmonization of direct taxation in the European Union, the judgments by the European Court of Justice influencing direct taxation, and the international projects developed by the OECD among others but these changes are also the result of the governments desire to attract investments to their countries while at the same time to prevent erosion of their tax base. Finally, these changes may be influenced by the differences in approach from developing countries that aim to attract investments and developed countries that aim to promote investment while at the same time to prevent the erosion of the tax base. In general terms, developing countries may search for new tax incentives while developed countries search for a reduction on the statutory tax rate and the introduction of anti-abuse provisions.

Despite the domestic and international measures adopted by countries to prevent double taxation or to tackle tax avoidance, avoidance schemes by multinational companies have resulted in countries searching for new solutions to these problems. In this context, globalization makes also possible an exchange of culture, legal and tax issues, and solutions to the problems that countries may be confronted with when searching for balance in an international legal order for taxation. In this context, is that one may argue that international tax organizations and tax-law makers need to take into account the differences in approach between countries in accordance to its legal system and legal culture. These differences need to be also identified and addressed in processes of harmonization and/or convergence.

In my study (section 3 above) I was confronted with the differences in legal systems, legal cultures, and the problems that these differences created in the taxation of cross-border transactions. The conflict between the use by law-makers of leasing as an instrument to promote investment and the rules introduced by the same law-makers to prevent tax avoidance is a good example of the complexity of business taxation. In the world-business economy leasing has not only been regarded as an instrument to

[66] This OECD proposal in mutual agreement and arbitration also addresses the situation where a country denies access to the mutual agreement procedure in case of abuse of tax treaty. In this OECD draft for the resolution of tax treaty disputes, in paragraph 25 of this draft, reference is made to the denial of access to the mutual agreement procedure in case that the transactions are regarded as abusive in the sense of improper use of the tax treaty. In case a penalty has been imposed on the taxpayer there is an indication that abuse of tax treaty has taken place. If the penalty indicating abuse exists the country may deny to the taxpayer the ability to initiate the mutual agreement procedure under the provision of the treaty. OECD discussion draft in respect of the proposals for improving mechanisms for the resolution of tax treaty disputes. These proposals are at the time of writing still under discussion. February 2006, Draft available at the OECD website at http://www.oecd.org/dataoecd/5/20/36054823.pdf (last visited May 2008).

finance companies' economic activities, but it has also been used as an instrument to reduce the tax burden in cross-border transactions. Cross-border leasing transactions have been structured with the goal of taking advantage of tax incentives, and/or of the differences in qualification of leasing transactions among countries. It has proven to be possible to claim tax benefits in two countries in the field of depreciation and investment allowances ("double dips") given the differences in the tax treatment of domestic leasing. The differences in characterization and qualification of a lease contract in the selected countries have an effect on the tax treatment of leasing. Moreover, the differences between tax systems and tax cultures are difficult to harmonize. These differences cause tax distortions in the treatment of leases at domestic level and at cross-border level with lessor and lessee being tax residents of two different countries. These distortions cannot be solved by bilateral tax treaties, nor can they be solved by unilateral rules (anti-avoidance measures).

As the legal transplant of leasing shows, the differences in the legal rules have been and still are difficult to be reconciled among countries. A consistent behaviour of taxpayers could be a feasible solution to reduce or eliminate tax distortions in leasing, and it could be of use for other issues than leasing in international taxation. In general terms, the proposal is to introduce guidelines for the judiciary and/or tax administration when deciding on requesting to taxpayers a consistent behaviour as a result of the application of the maxim of "*contra venire factum propium*". Given that the application of this maxim influences not only domestic lease transactions but also cross-border lease transactions with an effect on the tax revenue and tax sovereignty of two (or more) countries, it is recommended that a set of guidelines is promoted by the OECD. These guidelines should establish the requirements under which the consistent behaviour of taxpayers is required and should indicate in which way differences of interpretation between judiciaries of two countries and/or tax administrations are going to be solved. Finally, the OECD Guidelines should intend to solve the differences of interpretation in respect of whether a contradiction of taxpayer exists for instance by means of mutual agreement or arbitration procedure.