PRE-PRINT VERSION MOSQUERA VALDERRAMA I.J. Colombia. The History of Double Taxation Conventions in the Pre-BEPS Era. M. Lang and E. Reimer (eds.) Vol. 20 WU Institute for Austrian and International Tax Law – Tax Law and Policy Series (book chapter)

THE HISTORY OF DOUBLE TAX CONVENTIONS

NATIONAL REPORT COLOMBIA

Dr. Irma Johanna Mosquera Valderrama

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Dr. Irma Johanna Mosquera Valderrama[1]

Background

In 1990, Colombia started a process of liberalization through which the traditional scheme of "production towards domestic necessities" was left behind. In consequence, reforms in the tax, financial, foreign trade and constitutional systems took place.[2] These reforms aimed at removing obstacles for investment and reinforcing the capital market influencing the domestic and international tax policy in Colombia. Up till recently (2005), Colombia did not conclude double taxation conventions ("DTCs"). The only treaties signed by Colombia prior to 2005, were for instance international tax agreements with regard to air and maritime transportation. Bilateral agreements have also been signed with Argentina (Law 15 of 1970), Brazil (Law 71 of 1993), Chile (Law 21 of 1972), France (Law 16 of 1988), Germany (Law 16 of 1970), Italy (Law 14 of 1981), the United States (Law 24 of 1961 and Law 4 of 1988), and Venezuela (Law 16 of 1976) for air and/or maritime transportation. Venezuela and Colombia have also signed a bilateral agreement regarding taxation of state investment and the taxation of international transportation companies.

Up till 2005, in bilateral and multilateral relations, the reference to tax provisions was left to provisions in regional trade agreements. In Colombia, in the context of the Latin American process of integration, taxation is influenced by the regional agreements of which Colombia is member.[3] According to Art 227 of the Constitution, Colombia can become a member of international organizations that are empowered to introduce mandatory provisions for the country members. For this purpose, the following agreements in the context of integration on trade with tax provisions have been concluded by Colombia:

- Andean Community ("*CAN*"): A multilateral agreement with Andean Community countries (Colombia, Bolivia, Ecuador and Peru) is currently in force. The purpose of this agreement is the economic and social integration towards a Common Market.[4] As a

[1] Assistant Professor, Centre for Taxation and Public Governance. Utrecht University, the Netherlands. The views expressed herein are those of the author and should not be attributed to the Utrecht University,

[2] For instance, the introduction of a Constitutional Chart, the draft of new principles in order to promote exports and imports and the creation of new institutions in financial and foreign trade sector.

[3] The relationship between tax and trade was presented by this author in the Colombian National Report prepared for the 2004 Annual EU High Scientific Committee Conference, entitled "the WTO and Direct Taxation", in Rust, Austria, July 2004. This author as the Colombian reporter is indebted to the Vienna University of Economics and Business Administration and the European Commission, High-Level Scientific Conferences for their support. See for further opinions of this author in this regard, the Colombian report for WTO and Direct Taxation. I.J. Mosquera, Valderrama Colombia in WTO and Direct Taxation. Lang, M. et al (eds). Linde Verlag Austria and Kluwer Law International, 2005.

[4] Stated by the Andean Council of 27 May 1999.

result, more attention has been directed towards double taxation and tax harmonization mainly with regard to indirect taxes. In matters of international taxation, a multilateral agreement was introduced through the Decision 40 of 1971. This agreement contains two Annexes being (i) a double taxation convention ("DTC") model to be applied within the Andean Community and (ii) a DTC model applicable to treaties concluded with third parties. This Decision 40 provides for a source based approach based on the territoriality principle. Most recently, Annex 1 of this Decision 40 has been amended through Decision 578 of 2004 (May 4).[5] Furthermore, through Decision 292 of 1991 a special tax regime has been introduced for multinational enterprises with domicile in the Andean Community (Art 1).

- MERCOSUR[6]-CAN Agreement in effect as of 1 July 2004. It aims to create a free-trade area through the reduction of trade tariffs and non-trade tariffs insofar as they affect trade. With regard to double taxation it refers in Art 31 to the possibility to conclude new DTCs.

I. The National Experience

1. Early Tax Treaties

1.1.When did your country conclude a Double Tax Convention (DTC) for the first time?

In general terms, Colombia follows capital import neutrality.[7] In addition, the territoriality principle applicable in Colombia provides for a source based approach, that is, income is taxed where it is earned. As mentioned above, the first international tax agreements concluded by Colombia aimed to avoid double taxation with regard to air and maritime transportation. Until recently (2005) Colombia was reluctant to conclude or negotiate bilateral tax treaties. Various reasons might be given for this situation, among them the application of the source based approach, the lack of certainty with regard to the cost versus benefit for the existence of tax treaties and the importance to collect revenue for instance through several tax reforms that have taken place in the past.[8]

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[5] This Decision will enter into force as of the first day of the next tax year following the year of publication (Official Gazette 1063 of 2004). In Colombia, the tax year, for instance, goes from January to December, thus, the date of entry into force will be 1 January 2005.

[6] Argentina, Brasil, Paraguay, and Uruguay. Associate members are Bolivia, Chile, Peru and Mexico.

[7] According to the General Reporter on Source and Residence: New configuration of their principles capital import neutrality "means that capital funds invested in various countries should be equally taxed, regardless of the investor's domicile. The exclusive application of source-based taxation requires that foreign income be exempt from residence country taxation. Thus, the source principle is best suited to meet CIN since it applies the same tax rate whether income is derived by a resident or a non-resident of such country". *Cahiers de droit Fiscal International.* International Fiscal Association, Volume 90a, SDU Uitgevers, The Netherlands, 2005, at 35.

[8] In this regard Jaime Vargas Cifuentes argued that: "Colombian companies, Colombian national residents and foreign individuals that have lived in Colombia for four complete years are subject to Colombian income tax on their worldwide income. Foreign companies with no presence in Colombia, branches of foreign companies and foreign individuals that have not remained in Colombia for more than four years are taxed only on their Colombian-source income. As a general rule inside Colombia, or from the transfer of any kind of assets that are located inside the country at the time the transfer takes place, or from the exploitation of assets located inside the country. Perhaps due to the fact that at least until very recently Colombia was not a capital exporter it does not have a sophisticated foreign tax credit mechanism or a significant double taxation treaty network". National reporter: Colombia in Trends in company/shareholder taxation: single or double taxation? *Cahiers de droit fiscal*

The first DTC concluded by Colombia was with Spain on 31 March 2005.[9] This treaty was recently ratified (July 2006) and the review of constitutionality is being carried out by the Constitutional Court.

In addition, Colombia as a member of the Andean Community ratified the Decision 40 of 1971 (amended by Decision 578 of 2004) and Decision 292 of 1991 of the Andean Community which are applicable in matters of double taxation. As mentioned above, the Decision 40 (and Decision 578) provides for two Annexes that provide a DTC model for Andean Community members and a DTC Model applicable to treaties concluded with third parties. Both DTC Andean Community models differ from the OECD/UN Model Conventions[10] granting to the country of source almost entirely the right to taxation. It is submitted that these DTC Andean Community models have not yet been followed in the negotiations of the tax treaties by Colombia. The reasoning is provided in Section III (2) below.

1.2.What were the reasons for it? What was the economic background?

The recent change of approach in Colombia towards the negotiation of DTCs was the result of several factors being: the objectives of promotion of Colombian products and the promotion of foreign investment included in the two National Plans of Development for Colombia (2003-2006 and 2006-2010). These objectives resulted in the negotiation of DTCs and in the negotiation of bilateral investment treaties (*acuerdo de promoción y protección recíproca de inversiones*). At the time of writing (April 2008), Colombia has concluded DTCs with Spain, Chile, and Switzerland. DTC negotiations have been concluded with Canada. Bilateral investment treaties have been concluded with Peru, Spain and Switzerland.[11]

In general terms the Colombian Constitution promotes the negotiation of agreements by the Colombian government in accordance to the principles stated in Art 9[12], Art 226[13] and Art 227[14] of the Constitution. In this legal framework, the National Plan of Development of 2003-

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Cahiers de droit Fiscal International. International Fiscal Association, Volume 88a, SDU Uitgevers, The Netherlands, 2003, at 293.

[9] This international treaty was ratified by means of the Law 1082 of 31 July 2006.

[10] The model of the Organization for Economic Cooperation and Development ("OECD") that applies to OECD members mostly developed countries ("OECD Model") or the model for developing countries of the United Nations versions of 1980 and 2001. One of the differences between the OECD Model and the UN Model is that the "the UN Model Treaty imposes fewer restrictions on the tax jurisdiction of the source country. For example, the UN Model Treaty does not contain specific limitations on the withholding tax rates on dividends, interest, and royalties imposed by the source country; instead, the withholding rate levels are left to bilateral negotiations of the Contracting States". B.J.Arnold and M. J. McIntyre, International Tax Primer, Kluwer Law International, 1995, at 99.

[11] Information at the website of the Ministry of Commerce and Foreign Trade: www. mincomercio.gov.co

[12] *Las relaciones exteriores del Estado se fundamentan en la soberanía nacional, en el respeto a la autodeterminación de los pueblos y en el reconocimiento de los principios del derecho internacional aceptados por Colombia. De igual manera, la política exterior de Colombia se orientará hacia la integración latinoamericana y del Caribe*.

[13] *El Estado promoverá la internacionalización de las relaciones políticas, económicas, sociales y ecológicas sobre bases de equidad, reciprocidad y conveniencia nacional*.

[14] *El Estado promoverá la integración económica, social y política con las demás naciones y especialmente, con los países de América Latina y del Caribe mediante la celebración de tratados que sobre bases de equidad, igualdad y reciprocidad, creen organismos supranacionales, inclusive para conformar una comunidad*

2006[15] and the current National Plan 2006-2010 introduced the promotion of Colombia in order to achieve commercial growth. The National Plan of Development of 2003-2006 introduced as main objectives in the framework of external relations, the promotion of commercial and economic investments in order to increase exports[16]. In the same direction, the current National Plan 2006-2010 provides for the promotion of regional investment in the Andean Community and more specifically in the Andean Community and in the South American Community of Nations (*Comunidad Sudaméricana de Naciones CASA*). In addition new commercial agreements will be promoted with Central American countries such as Guatemala, Honduras and Salvador, Costa Rica, Panama and Canada. The main aim of these commercial agreements is to create a group of Latin American countries in the Pacific region.[17]

It is submitted, that although in both National Plans for Development no specific reference to the negotiation of DTCs was made. The Colombian government aims that by means of DTCs also the promotion of foreign investment takes place. One of the main reasons for this approach is that in order to attract foreign investment Colombia needs to create more mechanisms that result in increase of Colombia's competitiveness. Thus, the government aims to create a consistent policy that creates certainty and incentives for the foreign investor. The initial measure was the creation of the Law of Stability for foreign investors enacted on 2003 (Law 963)[18] and the several changes to the Statute for Foreign Investment of 1991 (*Estatuto de Inversiones Internacionales*) that made possible to simplify the requirements for foreign investment in Colombia.[19]

In addition to these national measures and to the policy of concluding trade Agreements[20], Colombia decided to go one step further and to start the negotiation of agreements for the protection of investment.[21] In this context, is that the first bilateral investment treaty between Colombia and Spain for the promotion and protection of investments dated 31 March 2005 was concluded.[22]

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latinoamericana de naciones. La ley podrá establecer elecciones directas para la constitución del Parlamento Andino y del Parlamento Latinoamericano.

[15] National Development Plan 2003-2006. Law 812 of 2003 (26 June). Official Gazette 45.231 of 27 June 2003.

[16] Section 7 National Development Plan 2003-2006.

[17] Chapter 7: National Development Plan 2006-2010. This Plan has not yet been approved by the Legislative. Available at the website of the National Planning Department (Spanish) at http://www.dnp.gov.co/paginas_detalle.aspx?idp=906 (last visited April 2008)

[18] This Law of Stability is discussed in Section I (4.7) below.

[19] For details on the Statute see website of the Central Bank (Spanish) at http://www.banrep.gov.co/regimen/resoluciones/res51.pdf (last visited April 2008)

[20] Examples of these trade agreements are:

- Economic complementation agreement with Chile, Cuba, Nicaragua, Mexico and Venezuela. As member of the Andean Pact (CAN) with Argentina, Brazil and Mercosur;
- Partial scope agreements with Costa Rica, El Salvador, Guatemala, Honduras, Panama;
- Preferential agreements with CARICOM;
- Free Trade Agreement with the United States: Negotiation concluded;
- Political Dialogue and Cooperation Agreement: Andean Community and European Union.

Information available at the Ministry of Commerce at www.mincomercio.gov.co (Spanish) and at the Foreign Trade Information System SICE www.sice.org

[21] Intervention of the Ministry of Foreign Affairs in Judgment of the Constitutional Court C-309/07. Case Number LAT-291.

[22] Law 1069 of 2006 of 31 July 2006. Official Gazette 46346 of 31 July 2006.

Furthermore, the Colombian government decided to negotiate the first DTC with Spain. This DTC was signed on 31 March 2005. During the presentation to the Legislative of the proposal for approval of the DTC Colombia -Spain, the government mentioned that in the context of globalization, the following problems could be tackled by mean of the negotiation of DTCs:

The first problem is originated by tax competition where countries introduce new rules to attract portfolio and direct investment. The Colombian Government realized that in the process of globalization taking place around the world, changes to a country's international trade and international tax policy need to take place.[23] As a result, one may argue that the current willingness to negotiate tax treaties by the Colombian government is a positive step in the international tax policy in order to make the necessary changes to attract and promote investment. However, it is submitted that several changes need to take place in Colombia if the government wants to achieve a sound and consistent international tax policy in accordance to the current international tax law developments.

The second problem to be tackled by means of DTCs is the removal of obstacles to trade. However, it is important to mention that Colombia needs to take into account the protection of its own revenue. Thus, DTCs should provide benefits not only for foreign investors, but also benefits for Colombia's revenue.

The final problem is the lack of certainty to the foreign investor that has not been able to be solved by the bilateral protection investment agreements. Thus, the Colombian government also aims to negotiate DTC in order to provide certainty to the foreign investor.[24] The analysis and further recommendations for Colombia in respect of DTCs will be provided in the final conclusions to this report.

1.3. With which countries have the first DTCs been concluded? Why with these countries?

Up till the time of writing, Colombia has concluded the following DTCs:

Treaties concluded and presented to the Legislative for ratification:

- Colombia- Spain (31 March 2005): Approved by the Legislative by means of Law 1082 of 2006.[25] Due to procedural issues the Constitutional Court retuned the Law 1082 to the Legislative for rectification (13 June 2007[26]). The rectification took place and the Law 1082 was published on the Official Gazette on 29 October 2007.[27] The Constitutional Court is analyzing once more the compatibility of this Law with the Constitution. A decision is expected in a short term.

[23] Legislative proposal 70 of 2005 for discussion at the Senate. Dated 2 November 2005. Senate Gazette number 796 of 2005.
[24] All of these objectives have been mentioned in the General background to the Legislative proposal 70 of 2005 for discussion at the Senate. Dated 2 November 2005. Senate Gazette number 796 of 2005.
[25] Official Gazette Number 46346 of 31 July 2006.
[26] Auto number A-145-07 of 13 June of 2007.
[27] Official Gazette Number 46.796 of 29 October 2007.

- Colombia- Chile (19 April 2007): Presented to the Legislative and the first discussion has taken place in the Legislative on 5 December 2007. [28] Additional discussions within the Legislative are expected.

- Colombia -Switzerland (26 October 2007). Presented to the Legislative for approval on 15 April 2008. No discussions have taken place up till the time of writing (April 2008).

Treaty negotiations concluded

Colombia – Canada: The negotiations started in September 2007 and they concluded on April 2008. The signature of the document is expected shortly.

From the four countries mentioned, the following bilateral investment treaties have been also concluded

- Colombia and Spain (dated 31 March of 2005) introduced by means of Law 1069 of 2006 (31 July).[29]

- Colombia-Switzerland (dated 17 May 2006) which has not yet been ratified by the Legislative up till the time of writing.

1.4.What was the procedure?

In general international tax treaties concluded by the Colombian government need to be ratified by the Legislative before entering into force. In Colombia, DTCs have the status of an international tax treaty and as such DTCs will be ratified by the Legislative by means of Laws. Once the Legislative has ratified, the review of constitutionality of the Law containing the DTC is carried out by the Constitutional Court.

In general terms, the Constitutional Court in Colombia provides case law upon constitutional review, that is, review against compatibility with the Constitution of the provisions enacted by the Legislative and Executive. This constitutional review takes place six days after enactment of the Legislative or Executive provision (Art 241(10) Constitution).[30] The review of constitutionality will address not only the contents of the Law (substantial) but also the procedure of the Legislative when adopting such Law (formal). Up till the time of writing (April 2008), only the DTC Colombia - Spain has been ratified by the Legislative and the Law has been subject to constitutional review (and pending for approval) by the Constitutional Court. The DTC concluded between Colombia and Chile has been presented for the first parliamentary discussion on 16 November 2007. It is expected subsequent parliamentary discussions to take place in the short term. The DTC between Colombia and Switzerland has been presented to the Legislative for approval on 15 April 2008.

[28] Information available at the Senate. www.secretariasenado.gov.co/proyectoley.asp (Last visited April 2008).
[29] Law 1069 of 2006 of 31 July 2006 Official Gazette Number 46.346 of 31 July of 2006.
[30] The Constitutional Court was created in the Constitution of 1991. The exercise of the constitutional review is not an exclusive power of the Constitutional Court. The Council of State may also perform the task of constitutional review with regard to administrative Decrees which review have not been assigned to the Constitutional Court. D. Younes-Moreno, *Derecho Constitucional Colombiano*, Legis. 1997 at 343.

In Colombia, due to the ratification and subsequent review of constitutionality, one may argue that once the treaty has been concluded, it may take at least 1-2 years to be ratified by the Legislative and once it has been ratified, the investors will be also depending on the review of constitutionality. This review of constitutionality might also take at least one year. It is submitted that this is the consequence of the importance of the Constitutional Court in Colombia and the review of constitutionality that takes place after enactment of the Law.[31] For illustration purposes, the DTC concluded by Colombia with Spain on 31 March 2005, was ratified by means of Law of 1082 of 31 July of 2006. The Constitutional review took place on 13 June of 2007. [32] Due to a formal mistake in approval of the Law of 1082 it was returned to the Legislative, which corrected it. This Law of 1082 with corrections have been published in the Official Gazette of 29 October 2007.[33] What this all means is that since 31 March 2005, the date that the DTC was signed up till 29 October 2007, there is a period of 2 ½ years approximately, and the DTC has not yet been entered into force. Given that the objections of the Constitutional Court were only in respect of the procedure, it could be safely argued that the Constitutional Court review this Law 1082 with corrections should be expected in a short term.

1.5. Did the DTC negotiators follow any other DTCs or model conventions? Or were they inspired by national law?

The DTC concluded with Spain and with Chile followed the OECD Model.[34] The Colombian government has mentioned in the presentation of the DTCs with Spain and with Chile to the Legislative that the Colombian DTC Model is based in the OECD Model with specific adjustments made in accordance to the Colombian tax system. Further reference to model conventions is made in Section III (2) below.

1.6. Who took the initiative? The government, public servants, politicians, trade associations…? Which groups influenced the negotiations?

Nowadays, the objectives in trade and tax policy are set up by the objectives of the Advisory Council of Foreign Trade (*Consejo Superior de Comercio Exterior*)[35]. This Advisory Council of Foreign Trade ("Council") has been created by the President in 1992. The functions of this Council have been broadened since its creation. Currently, some of the main tasks of this Council are:

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[31] In contrast to other countries such as France and the Netherlands. In France the constitutional review is limited by the review of the Constitutional Court provided prior to enactment of Legislative provisions. Hence, once a Legislative provision is enacted the Constitutional Court does not play a role in France. In the Netherlands, there is in principle no constitutional review but the Council of State provides advice in respect of the Legislative provisions enacted by the Parliament. In the past, this author carried out research in the tax systems of Colombia, France, the Netherlands and the United States. I.Mosquera Valderrama. Leasing and Legal Culture - Towards consistent behaviour in tax treatment in civil law and common law jurisdictions, dissertation, 2007.

[32] Judgment of 13 June of 2007 Constitutional Court. Case Number LAT-298.

[33] Law 1082 of 2006 (31 July). Official Gazette Number 46796 of 29 October of 2007.

[34] For Spain: Legislative proposal 70 of 2005 for discussion at the Senate. Dated 2 November 2005. Senate Gazette number 796 of 2005.
For Chile: Legislative proposal 198 of 2007 for discussion at the Senate. Dated 5 December 2007. Senate Gazette number 631 of 2007.

[35] Art 27 (1) and (2) Decree 2553 of 1999 (23 December). Prior to this Decree, this Advisory Council has among its functions are the study and recommendation of the plan for exports and promotion of Colombian products. This Council proposes the Program for Trade Negotiations in the country and it gives the priorities to such program. Decree 0574 of 1992 (April 3). Official Gazette, number 40.411 (8 April 1992).

- to advise the Government about trade policy for goods, technology and services; foreign investment and competitiveness in accordance to the National Development Plans in Colombia;
- to provide evaluation for the Ministry of Foreign Affairs of the negotiation of free trade agreements and to provide recommendations to the Government of the participation of Colombia in those agreements.

Even though no specific reference is made to the negotiation of DTCs and the decision to negotiate with one or another country, the Advisory Council published a common agenda for negotiation of bilateral investment treaties and DTCs on 27 March 2007.[36] Prior to the publication of this Agenda of the Council, the initiative to negotiate DTCs was from the Ministry of Finance including the tax administration and the Ministry of Foreign Affairs. As a result of this Agenda and the role of the Advisory Council it may safely argued that currently the objectives of the Colombian government in foreign relations are the negotiation of bilateral investment treaties and DTCs. In accordance to such agenda, it is that the Government promotes nowadays the negotiation of such treaties with countries from which the foreign investment flows, such as Mexico, the United Kingdom, Canada, France and the Netherlands. In this Agenda, the following negotiations of DTCs are planned:

- 2007: Chile, Switzerland, Venezuela, the United Kingdom and Canada
- 2008: the Netherlands, Andean Community, Germany and Mexico
- 2009: the United States, France, Japan, and Italy
- 2010: China, Belgium, Sweden, and Denmark.

It is submitted that from the arguments made by the Colombian government for approval of DTCs to the Legislative, it seems that the government follows the recommendations of this Advisory Council also in respect of DTCs. If one example may illustrate this situation is the reference by the government in the Legislative Proposal to approve the DTC between Colombia and Chile. In this proposal the government states that the Agenda of the Council published on 27 March 2007, provides for the negotiation of bilateral investment treaties and DTCs. The government further states that in this framework is that the negotiations with Chile were concluded and also that the negotiations with Switzerland were (at that time) taking place. [37]

1.7. How did the first DTCs look like? Which provisions were the primary focus? Which taxes were covered?

[36] *Agenda Conjunta de Negociación tanto de los Acuerdos Internacionales de Inversión* – AII. Dated 27 March 2007. Information available at the website of the Ministry of Commerce at *http://www.mincomercio.gov.co/econtent/Documentos/intervenciones/2007/Sesion81.pdf (last visited April 2008)*

[37] "*Esta Agenda promueve la negociación de los dos instrumentos con los mismos países, coordinadamente en el tiempo y según los intereses de Colombia procurando que los países con los que se negocie sean aquellos donde se genere mayor inversión extranjera hacia Colombia, tales como México, Reino Unido, Canadá, Francia, Países Bajos, entre otros. En este sentido, luego de varias rondas de negociación se llegó a la suscripción del Convenio con la República de Chile, el cual en esta oportunidad es sometido a consideración del honorable Congreso de la República. De igual manera, en el presente año se culminaron las negociaciones con la Federación* Suiza. Legislative proposal 198 of 2007 for discussion at the Senate. Dated 5 December 2007. Senate Gazette number 631 of 2007.

The taxes covered by the DTC's differ in accordance to the tax system of Spain, Colombia, Chile and Switzerland. Thus, for instance in federal countries such as Spain and Switzerland, the local and federal taxes are also included in the DTCs. For Colombia the taxes covered are the income tax including the net worth tax (*impuesto sobre el patrimonio*)[38], capital gains, and the remittance tax (*impuesto complementario de remesas*).[39]

For illustration purposes, from the three DTCs concluded by Colombia the following taxes are covered in Art 2(3) of each DTC:

- Colombia- Spain: Income tax for residents and non-residents, corporate income tax, gains tax, and local taxes on wealth;
- Colombia - Chile: Income Tax;
- Colombia - Switzerland: Federal, cantonal and municipal tax on income and taxes on wealth.

1.8.Did the DTCs contain any trade specific provisions? For which sectors?

The DTCs concluded up till now by Colombia contain a Most Favoured Nation Clause provision ('hereinafter MFN'). The MFN-type provision states that if Colombia concludes a DTC with another (third) country where Colombia has granted a reduced percentage, or an exemption; such a percentage or exemption will be applicable automatically to the DTC concluded by Colombia.[40] It is submitted that Colombia does not use explicitly the term MFN in the text of the treaty nor in the protocol, but the consequences of this clause are the same as the ones for MFN clause. [41]

At the time of writing (April 2008), this MFN- type provision has been introduced in the Protocol and for the following articles:

- Colombia- Switzerland and Colombia – Spain in the Protocol to the article of interest and royalties and
- Colombia- Chile in the Protocol to the article of royalties.[42]

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[38] "A net worth tax (*impuesto al patrimonio*) is payable during 2007 to 2010 by residents. The tax is imposed if the taxpayer's wealth is equal to or exceeds COP 3 billion on 1 January 2007. The taxpayer's net wealth includes both wealth located in Colombia and net wealth located abroad". Latin American supplement: Colombia. International Bureau of Fiscal Documentation. 2008.

[39] Before 2007, a remittance tax was charged on the transfer abroad of income and windfall profits earned in Colombia. All profits earned by the Colombian branch of a foreign company were regarded as remitted and, therefore, were subject to remittance tax. Remittance tax rates vary, depending on the origin of funds remitted abroad. The most common rate is 7%. As of 2007: "dividends paid to foreign companies or entities not domiciled in Colombia are subject to a remittance surtax of 0% if the profits out of which the dividends are paid have already been taxed at the corporate level. Otherwise, income tax is imposed at the rate of 33%". IBFD Colombia. Latin American supplement: Colombia. International Bureau of Fiscal Documentation. 2008.

[40] "*En el caso que se acuerde una exención o una alícuota menor en dicho Convenio tal exención o alículota menor se aplicará automáticamente a este Convenio".* Protocol ad article 12 (DCT Colombia- Chile).

[41] Bilateral tax treaties may include the Most Favoured Nation (MFN) clause. By this means, the application of the favourable tax treaty can be extended to other tax treaty signed by the country of the taxpayer. In the United States, the description of the application of MFN has been addressed by Brauner. This author provides one example of the MFN found in the US-Canada bilateral tax treaty. This treaty includes a MFN-type provision under the non-discrimination article (Art 25). Y. Brauner. "International Trade and Tax Agreements may be coordinated, but not reconciled". Virginia Tax Review, Issue 25, Summer 2005, at 267.

[42] Another approach to MFN clause may be found in the bilateral tax treaties concluded by France but not in the US. In this context, some bilateral tax treaties (Estonia, Latvia, Mexico, India and Kazakhstan) concluded by

1.9.How was the relationship between residence and source principle?

In principle, the source principle is followed in DTC's concluded by Colombia. Thus, for instance for dividends, interest and royalties a withholding tax at source has been introduced. In respect of dividends there are certain exemptions given that 0% withholding tax at source has been introduced in case of a shareholding of more: than 25% (DTC Chile-Colombia); 20% (DTC Switzerland-Colombia and DTC Spain-Colombia).

In addition, in respect of the definition for permanent establishment, Colombia has followed the UN Model approach in respect of building site, a construction assembly or installation project or supervisory activities in connection therewith that are being carried out in the source country. In case that these activities have been performed for a period longer than six months, it is considered that a permanent establishment exists in the source country. In the OECD Model the term for the above activities is for a period longer than 12 months (Art 5(3) OECD Model). Likewise, Colombia has introduced the article regulating independent personal services of the UN Model (Art 14). This article has been removed from the OECD Model in 2002.

2. Periods/Stages and Goals of Tax Treaty Policies

2.1.Considering the time period from the conclusion of the first DTCs till this day: when were most of the DTCs concluded? Why?

The three DTCs have been concluded in the last 3 years due to the change in policy of the Colombian Government to promote investment by means of trade agreements, DTC's and bilateral investment treaties. See Section I (1) above.

2.2.Taking the content of the DTCs into account, which periods can be differentiated? What were the reasons for major changes regarding the content? When was there any stagnation? Why?

Given the recent period where DTCs started to be concluded by Colombia this comparison in periods and contents of DTCs cannot be made at this time.

2.3.Which ideas did your country pursue during the negotiations?

Negotiations and documents dealt with negotiations are not known to the public. However, the document elaborated by the Government to present the DTC to the Legislative for ratification (i.e. Legislative proposal) gives a broad illustration of what the governments aim

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France contain in the protocol to the article of royalties, a MFN-type provision. The provision states that if the party that concludes the tax treaty with France also concludes a double tax treaty with another country (OECD Member) where a reduced percentage, a restricted definition of royalties and/or scope of application, the percentage, or definition will be applicable automatically to the double tax treaty concluded by France. In other words, by means of the MFN type-provisions, the application of a percentage or definition introduced by France in the bilateral tax treaty with Latvia can be applied to another bilateral tax treaty concluded by France with for instance the Netherlands (OECD Member). The scope of application of MFN is limited to OECD countries. Finally, it is submitted that as in the US, France does neither use explicitly the term MFN in the text of the treaty nor in the protocol.

with DTCs. Up till now, from the two documents elaborated by the Government for Spain and Chile,[43] the arguments have not been different for one or another DTC, that is to attract foreign investment.

2.4. Was there a national model convention for the conclusion of DTCs? Is this model publicly available? In this regards is there any public discussion? Since when do such model conventions exist?

The Colombian government argued that the Colombian DTC Model is based in the OECD Model with specific adjustments made in accordance to the Colombian tax system. This Colombian DTC Model has not been made available to the public. For the Colombian government, this DTC Model is the main model followed for tax treaty negotiations.
In principle, the Colombian government has mentioned that the 1992 OECD Model was used by Colombia for the DTCs with Spain and with Chile. However, one may argue that also the provisions of the 1977 OECD Model were taking into account for instance in respect of the characterization of leasing income as royalties. Accordingly, the DTCs with Spain and Chile contain the initial approach to categorization of leasing income as royalties (Art 12) in the OECD Model of 1963 and 1977. The wording used in this regard, is leasing income as royalties in respect of "the use of, or the right to use, industrial, commercial, or scientific equipment". [44] Even though in the 1992 OECD Model, leasing income was categorized as business profits (Art 7)[45]; this change has not been adopted in the DTCs with Spain and Chile, and therefore, the approach of the 1977 OECD Model in respect of royalties is still followed.

2.5. How did your country´s DTC policy change over the years? What stimulating factors explain these changes? Why? What was the economic background for changes in your country´s DTC policy?

Given the recent period where DTCs started to be concluded by Colombia this comparison in periods and contents of DTCs cannot be made at this time.

However, it is important to mention that Colombia as member of the Andean Community is part of a tax treaty multilateral agreement introduced through the Decision 40 of 1971 (amended through Decision 578 of 2004). In the Andean Community two DTCs models are currently in place: one with a DTC model for countries of the Andean Community and another one with a DTC model for treaties concluded with third parties. In this context, t is submitted that in the current negotiations and DTCs concluded by Colombia, no reference has

[43] It is expected that in a short future, the Government will present the DTC concluded by Colombia with Switzerland for ratification to the Legislative.
[44] Accordingly under the definition of royalties in the 1963 and 1977 versions of the OECD Model it was included "or for the use of, or the right to use, industrial, commercial, or scientific equipment". The same wording has been followed by the United Nations Model Treaty for developing countries (2001 version). By contrast, this wording is not found in the United States Model does not follow the same approach (1996 version).
[45] This change was suggested in the OECD report on the Taxation of Income derived from the Leasing of Industrial, Commercial or Scientific Equipment of 1983 ("1983 report").In 1983, the OECD published two reports regarding the taxation of Leasing of Industrial, Commercial or Scientific Equipment ("1983 report") and the Leasing of Containers ("1983 second report"). In both reports the problems arising from the inclusion of leasing income as royalties in the 1977 OECD DTC Model were described. For this description only the 1983 report is described given that provides enlightenment to the categorization of leasing income of movable assets as royalties or business profits whereas the 1983 second report leaves the profits from the leasing of containers to the tax rules to profits from the operation of ships or aircraft in international traffic (Art 8 OECD Model).

been made to the multilateral tax treaty model of the Andean Community nor the DTC Model for negotiations between Andean Community countries and third states such as Spain and Switzerland. Chile is an associate member of the Andean Community[46] and no reference has been made to one of these two models in the DTC concluded by Colombia and Chile.

3. The Background: Economic Implications

3.1. Within the scheme of multilevel systems (federal state, state level, provinces, counties…) to which level do the limitations of DTCs apply?

The feature of Colombia as a civil law country results in the Legislative having the competence in law-making (Art 114 Constitution). Examples of Legislative provisions are Legislative provisions (*Leyes*)[47]; and Codes (*Códigos*). [48] In Colombia, the power to tax is centralized, that is, in Colombia the exclusive power to levy tax is of the national authorities. By contrast, local authorities (departmental, municipal, or regional) cannot levy taxes. In this context, one may argue that the limitations of DTCs apply to Colombia without any distinction between federal, state, provinces and/or counties.

3.2. Who negotiates the DTCs in your country?

The formal negotiation of tax treaties is carried out by the President and its representatives: the Minister of Commerce and Foreign Trade and/or the Minister of Finance and/or the Ministry of External Relations. In principle, it is the President the one authorized in the Constitution to conclude international treaties (Art 189(2) Constitution).[49] In practice, the negotiation is carried out by a team of tax treaty negotiations of the tax administration and/or the Ministry of Finance and/or the Ministry of Foreign Trade. The Minister will sign the treaty on behalf of the President and the President will approve its contents before submitting the treaty to the Legislative for approval and ratification.[50]

3.3. Which institutions have to agree in your state in order to conclude a DTC? What are the decisive forces?

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[46] By means of Decision 645 of 2006 (20 September), Chile received the status of associate member to the Andean Pact.

[47] Constitution arts. 114, 150 (19), 151, 152.

[48] Colombian law is largely stated in Codes. For instance the Tax Code, the Civil Code, the Code of Civil Procedure, the Code of Commerce, the Financial System Code, the Code of Criminal procedure, and the Criminal Code. The Constitutional Court held in 1985 that the Legislative has exclusive competence to enact Codes. Thus, no special powers cannot be given to the Executive to enact Codes. Constitutional Court, C-129/95, 30 March 1995.

[49] "*Corresponde al Presidente de la República como Jefe de Estado, Jefe del Gobierno y Suprema Autoridad Administrativa: Dirigir las relaciones internacionales… celebrar con otros Estados y entidades de derecho internacional tratados o convenios que se someterán a la aprobación del Congreso*". Art 189(2) Constitution

[50] The authority of the Ministers as representatives (*ius repraesentationis*) of the Government to sign treaties on behalf of the President has been mentioned by the Constitutional Court. However, all activities of the Ministers are subject to confirmation by the President and therefore, any international treaty should be approved by the President before submitting it to the Legislative for ratification. Decision rendered in respect of the international treaty concluded between Colombia and Jamaica on maritime delimitation.
See Judgment C045/94. 10 February of 1994. Available at:
http://web.minjusticia.gov.co/jurisprudencia/CorteConstitucional/1994/Constitucionalidad/C-045-94.htm

International tax treaties concluded by the Colombian government need to be ratified by the Legislative (i.e. Senate and Chamber of Representatives) before entering into force (Art 150(16) Constitution.[51] Once the Legislative has ratified, the review of constitutionality of the Law containing the DTC's by the Constitutional Court is also requested. Thus, both the Legislative and the Constitutional Court need to approve the DTC in Colombia. The description of this procedure has been provided in paragraph 1.4. procedure above.

3.4. Are the authorities responsible for the mutual agreement procedure identical to the DTC negotiators? Is there any coordination in this respect? Is there any coordination between the local tax offices and the DTC- negotiators?

It is submitted that to a certain extent the same authorities carrying out the DTC negotiations are the same for the mutual agreement given that the mutual agreement procedure will be in principle dealt by the Minister of Finance and the tax administration. It might be possible that within the tax administration different tax officials are responsible for the procedure and others for the negotiation of tax treaties.

3.5. In which respect do politics influence the content of DTCs in your country? Which matters are reserved for civil servants exclusively (and not for politicians)? To what extent do trade associations, chambers of commerce, trade unions… influence your country´s DTC policy? To which extent do there notions have to be taken into consideration? Which influence do they have?

As mentioned above, the current DTCs have been negotiated by the Colombian government and more specifically by the tax administration. The treaty negotiations are secret and therefore, it is not possible to know the contents or participants in such negotiations. In principle, one may safely argue that trade associations, or chamber of commerce have not been involved in these negotiations. If one example may illustrate this statement is the fact that at the time of writing there are not studies published in respect of DTCs and Colombia or any description of activities in respect of DTC by important associations and/or think tanks such as the Association of Financial Institutions (ANIF)[52], and the Foundation for Superior Education and Development (FEDESARROLLO[53]). In the past, these two associations have provided enlightenment to the tax reforms and the changes in the tax system, and therefore,

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[51] *Corresponde al Congreso de la República: Aprobar o improbar los tratados que el Gobierno celebre con otros Estados o con entidades de derecho internacional. Por medio de dichos tratados podrá el Estado, sobre bases de equidad, reciprocidad y conveniencia nacional, transferir parcialmente determinadas atribuciones a organismos internacionales, que tengan por objeto promover o consolidar la integración económica con otros Estados*. Art 150 (16) Constitution.

[52] Since it's foundation in 1974, Anif has played a leading role in the defense of private economy and good political economy in Colombia. Due to it's researches, analytic capacity and technical soundness Anif has acquired a reputation for independence, analytical rigor and credibility. The institution's credibility has gained influence over public opinion and leading sectors of the economy. Information available at the NIRA's world directory of think tanks: http://www.nira.go.jp/ice/nwdtt/2005/DAT/1450.html and www.anif.org

[53] FEDESARROLLO is a nonprofit policy research center based in Santafé de Bogota, Colombia, that was created in order to undertake reliable and independent technical studies, required for the continuous improvement of social and economic policies in Colombia. It has acquired a reputation for independence and analytical rigor. The institution's credibility has enhanced its impact and influence over the design of policies in Colombia. Information available at the NIRA's world directory of think tanks. http://www.nira.go.jp/ice/nwdtt/2005/DAT/1074.html and www.fedesarollo.org

their opinion it is of importance in Colombia. This leading role has not taken place in respect of DTCs negotiations.

3.6.How are the priorities of negotiating partners determined?

Unfortunately, Colombia does not have a clear and consistent international tax policy. As mentioned at the beginning of this report, reference is made to the promotion of foreign investment and the countries to which Colombia wants to negotiate (see agenda Advisory Council on Foreign Trade described above). The arguments by the government to the Legislative for the DTCs concluded with Spain and Chile have been the same, that is, globalization, foreign investment and the agenda of the Advisory Council. Short reference has been made to the articles negotiated in the DTCs, and the arguments for the decisions taken in respect of percentages, definitions, etc. For instance, the Government has mentioned that even though Colombia does not have a concept of permanent establishment it is important to follow the definition of the OECD Model (except for 6 months-period of the UN Model for construction activities), and that the definition will then provide enlightenment to Colombia to know what it does not constitute permanent establishment.[54]

One may argue that the approach towards fast negotiation of tax treaties (e.g. Canada started negotiations in September and were concluded in April 2008), and the negotiation under the OECD Model with few changes in accordance to the UN Model (construction activities, and article for independent personal services), the introduction of a MFN-type provision shows that more training for treaty negotiators is required. The aim should be to negotiate a DTC that provides to Colombia certain revenue and not that a DTC that only provides concessions. The fear will be that once the treaty has been concluded it will be difficult to amend such a DTC and therefore, the conditions agreed by Colombia at this time will be in the future also applicable. Further research is recommended in respect of the conditions of Colombia and the provisions to negotiate in DTCs and the impact of tax treaties for business in Colombia. In addition, it is submitted that the advice from international tax experts and the expertise by the think tanks mentioned above should be also searched by the Colombian government.

3.7.Is there any informal coordination between trade associations and trade unions prior to the beginning of DTC negotiations? Is there any coordination in-between the rounds of negotiation?

No, see response to item 3.5 above.

3.8.Are there any legal assessment procedures? Which impact does such a procedure have?

The main assessment that takes place is the constitutional review on the procedure for ratification of the DTC by the Legislative and the compatibility of the contents of the DTC with the Constitution. See item 3.3. and item 1.4 above.

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[54] "*Para la comprensión clara se define explícitamente qué se entiende por ¿establecimiento permanente¿ (E.P.), figura que aun cuando no existe en nuestra legislación, la enriquece y delimita la aplicación del Convenio cuando se señala qué no se entiende por establecimiento permanente, las actividades que en esencia son de carácter auxiliar o preparatorio*". Legislative proposal 198 of 2007 for discussion at the Senate. Dated 5 December 2007. Senate Gazette number 631 of 2007.

3.9.Is the parliament or its committees competent to discuss DTCs? Are there any examples? Which DTCs were concerned and what were the subject-matters?

The Legislative is required to ratify the DTC and for that purpose, a legislative procedure for approval takes place. See item 3.3. and item 1.4 above.

3.10.How did the interest change over time on a national level? What was decisive for that?

Given the recent period where DTCs started to be concluded by Colombia this comparison in periods and contents of DTCs cannot be made at this time.

3.11.Which impact do business conditions have on your country's policy on DTCs?

As mentioned before from the two documents elaborated by the Government for Spain and Chile, the arguments have not been different for one or another DTC. The main aim is to promote and to attract foreign investment especially with countries that bring along investment flows into Colombia such as Spain, Chile, the United States, the United Kingdom and Canada.[55]

3.12.How has this impact changed over the years?

Given the recent period where DTCs started to be concluded by Colombia this comparison in periods and contents of DTCs cannot be made at this time.

3.13.Which provisions do provide evidence to be essentially borne out by a specific economic-political starting position?

It is the author's opinion that the economical l starting position has not been the one imposed by Colombia but by the other countries with which Colombia has concluded DTCs: Chile, Spain, Switzerland and Canada. The only issue where Colombia may have presented a strong position is on the reduction of the term for existence of a permanent establishment for construction activities from 12 months (OECD Model) to 6 months. Examples of the strong position of other countries are the DTC provisions that provide for the 0% withholding tax on dividends on substantial shareholding (20% or 25%), the MFN-type provision for interest and royalties, and the introduction of limitation on benefits clause.

Surprisingly enough the 0% withholding tax rate on dividends have been also made applicable to tax holidays that are currently existing in Colombia (see Protocol to article 10 dividends in DTC concluded by Colombia with Spain and with Chile). Accordingly, dividends paid to

[55] The document of the Government for the DTC with Chile provides more insight in this regard stating that: "*El Gobierno Nacional dentro de su política de Estado dando prevalencia al criterio de interés nacional, ha orientado la política fiscal internacional hacia la negociación y suscripción de tratados para evitar la doble imposición internacional, en el entendido que, como ya se señaló, una de las variables que interesa a los inversionistas y que evalúan a la hora de invertir, es el componente fiscal; esta política pretende superar el relativo avance logrado debido a la timidez con que hasta hace muy poco tiempo se abordó la negociación de estos acuerdos y especialmente frente a aquellas economías que representan un importante flujo de inversión para el país, tales como España, Chile, Estados Unidos, Reino Unido y Canadá, entre otros*". Legislative proposal 198 of 2007 for discussion at the Senate. Dated 5 December 2007. Senate Gazette number 631 of 2007.

foreign companies or entities not domiciled in Colombia are subject to the 0% withholding tax rate when the dividends have been exempted of Colombian income tax and that such dividends are reinvested in Colombia for a minimum period of 3 years.[56]

3.14. To what extent does your country try to take changing business conditions into account when concluding new DTCs? To what extent do changing business conditions lead to revisions of existing DTCs?

Given the recent period where DTCs started to be concluded by Colombia this comparison in periods and contents of DTCs cannot be made at this time.

3.15. Does your country focus on concluding new DTCs rather than amending existing treaties?

Nowadays, the focus is on negotiating tax treaties in accordance to the Agenda published by the Advisory Council for negotiation of bilateral investment treaties and DTCs on 27 March 2007.[57] Negotiations of DTCs are planned with Chile, Switzerland, Venezuela, the United Kingdom, Canada, the Netherlands, Andean Community, Germany, Mexico, the United States, France, Japan, Italy and China, Belgium, Sweden, and Denmark.

4. Unilateral Measures for the Avoidance of Double Taxation

4.1. In your country is there any possibility to avoid double taxation without the conclusion of a DTC? Which are the unilateral measures used in this context? What are the prerequisites?

Before the first DTCs were concluded the only measure in Colombia to avoid double taxation was to grant a tax credit (*descuento tributario*) for the amount of taxes paid abroad (Art 254 Tax Code). However, the amount of taxes on income earned abroad for which a foreign tax credit (FTC) can be claimed cannot exceed the amount of taxes that the taxpayer should pay in Colombia for such income. The tax credit is subject to specific requirements: "it is necessary that: (i) the taxpayer is a company resident in Colombia; (ii) the taxpayer's foreign income be taxable in Colombia; and (iii) the income taxes paid abroad do not exceed the Colombian tax attributable to said income".[58] Art 254 also regulates dividends received from foreign companies. In respect of such dividends, the Colombian resident taxpayer may "credit against their Colombian tax not only the foreign withholding tax paid on the dividends but also the amount of the underlying foreign income tax paid by the foreign company on the profits from which the dividends were paid. The FTC is limited to the Colombian tax

[56] "*La parte correspondiente al 35 por cierto mencionado… se verá reducida según el apartado 2.b) del artículo 10 cuando los dividendos y utilidades repartidos a no residentes en Colombia procedan de utilidades exentas del impuesto sobre la renta en cabeza de la sociedad y siempre que dicha parte se invierta en la misma actividad productora en Colombia durante un término no inferior a tres años*". Protocol ad Art 10. DTC Colombia-Spain.
[57] *Agenda Conjunta de Negociación tanto de los Acuerdos Internacionales de Inversión – AII of 27 March 2007*. Information available at the website of the Ministry of Commerce at *http://www.mincomercio.gov.co/econtent/Documentos/intervenciones/2007/Sesion81.pdf (last visited April 2008)*
[58] IBFD Colombia. Latin American supplement: Colombia. International Bureau of Fiscal Documentation. 2008.

attributable to the foreign-source dividends, had they been derived from domestic sources" [59] (changes introduced by means of Art 15 Law 1111 of 2006).

4.2. Describe the relationship between unilateral measures for the avoidance of double taxation and DTCs. If these measures exist why does your country conclude DTCs?

Up till the time of writing, no information has been given by the Government in respect of the foreign tax credit and its relationship with DTCs. The arguments for approval to the Legislative of the DTC concluded by Colombia with Chile and Spain have not made reference to the foreign tax credit. However, one may argue that the foreign tax credit mentioned above applies only to Colombian taxpayers, and that for foreign companies, the domestic income tax provisions are applicable. In case that no tax holiday or tax exemption was given under the Colombian tax system, it could be possible to argue that the foreign investors did not have so many incentives to carry out operations in Colombia. In light of the objectives to promote foreign investment and to promote commercial growth mentioned in item I (1) above, it could be argued that the relationship between unilateral measures and DTCs have not been of interest for Colombia.

4.3. How did the relationship between unilateral measures and DTCs change over the years? What were the decisive factors for these changes?

Given the recent period where DTCs started to be concluded by Colombia this comparison in periods and contents of DTCs cannot be made at this time.

II. Inter-Country Influence

1. To what extent do the negotiators achieve to implement your country's policy on DTCs?

The negotiation of DTCs in Colombia is a recent development in the international tax policy in Colombia. The international tax law provisions are scarce in the Colombian tax code for instance there is no definition of permanent establishment. The tax code does not contain anti-abuse provisions that may be applicable in domestic and cross-border situations. The introduction of the transfer pricing rules in 2003 (in force as of 1 January 2004) resulted on the increase of interest by the government to introduce more rules in accordance to international tax law developments such as rules amending the free trade zones regime, repeal of remittance tax, and deduction of expenses incurred abroad to obtain Colombian-source income. However, one may argue that these rules are scarce and that these rules do not reflect a consistent international tax policy by Colombia.

Colombia continues with the approach to provide tax incentives: tax exemptions and tax holidays for several economic activities and certain regions.[60] The number of these incentives

[59] IBFD Colombia. Latin American supplement: Colombia. International Bureau of Fiscal Documentation. 2008.
[60] "Colombia also has numerous incentives that are not export-related. Decree 2755 of 2003 provides tax holidays for approved projects or for desired outcomes in many industries including software development; electric energy sales generated from wind resources, biomass, or agricultural waste; forestry use of new plantations, investment in sawmills related to such plantations, and planting of wood-use trees; hydrocarbon seismic services; infrastructure and sale of properties dedicated to the public interest; pharmaceutical exploitation of new medicinal products; public utilities, water, electricity, local telecommunications, natural gas;

has increased throughout the years and some of them have been included in the protocol to up till now the three DTC's concluded with Spain, Chile and Switzerland. See 0% dividend withholding tax rate description in item 3.13 above. Finally, it is submitted that the lack of training for tax treaty negotiators in international tax law and in tax treaties is shown in the DTCs concluded by Colombia where some articles are being taken from the 1977 OECD Model, 1992 OECD Model and the UN Model without any specific reasoning for adopting one or another model.

2. To what extent are the conceptions of other countries complied with? In which fields is your country willing to compromise? In which fields does your country not make any concessions? Which provisions has your country adopted from double tax policies of other (member) states? Why have these provisions been adopted?

It is the author's opinion that given the lack of training of treaty negotiators, the current DTCs concluded by Colombia could be regarded as adopting other countries' concepts than the result of a Colombia' established international tax concepts. For example, the type MFN-provision, the limitation on benefits provisions, beneficial ownership provision for passive income, and the concept of permanent establishment, are examples of concepts that did not exist in Colombia but that in the DCTs they have been included.

3. In this respect does your country draw distinctions between different countries?

Few differences are regarded in the current DTCs concluded by Colombia. The introduction of the limitation on benefits ownership provision (Art 26 DTC Colombia- Chile), and the differences in the percentage of shareholding for the 0% rate of dividend withholding tax (20% DTCs Colombia-Spain and Colombia -Switzerland and 25% DTC Colombia- Chile) are the best examples of these differences.

4. To what extent have foreign conceptions influenced your country's DTC policy? How has this influence changed over the time? What were the reasons behind these changes?

Until recently, the traditional approach of the Constitutional Court was illustrated in Decision of 2005 that declared incompatible with the Constitution a provision regulating low or tax haven jurisdictions introduced by means of Law 788 of 2002. This Law introduced the transfer pricing regulations in Colombia. Accordingly, entities carrying out transactions affecting transfer pricing in low-tax or tax haven jurisdictions are deemed to have carried out their transaction regardless of the arm's length principles.[61] In order to define these jurisdictions reference was made by the Legislative in the Law 788 of 2002 to the areas considered as such by the OECD. The Constitutional Court held (at that time) the incompatibility of this provision with the Constitution given that Colombia is not a member of the OECD and therefore its provisions cannot be applicable in Colombia.[62] The main conclusion is the traditional approach and the empowerment of the Constitutional Court to

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tourism services in new hotels built between 2003 and 2018; and shallow draft river transportation". Information available at the Investment climate: U.S. State Department http://www.state.gov/e/eeb/ifd/2008/100836.htm (last visited April 2008).

[61] For the explanation of the provisions for Transfer Pricing see I.J. Mosquera Valderrama. International: What the Colombian Tax Reform Means. International Tax Review. September 2003.

[62] Constitutional Court Judgment c-690 of 12 August 2003.

review of constitutionality of Legislative provisions. Therefore the risk may exist for foreign investors to have Legislative provisions that may be only valid for one year or less until the Constitutional Court declares them unconstitutional.

Even though in principle, the Constitutional Court did not accept the OECD provisions (i.e. list of low or tax haven countries), the approach changed once DTCs started to be negotiatied. Thus, for the first DTC concluded by Colombia with Spain which was based to a great extent on the OECD Model provisions, the Constitutional Court approved in the constitutional review this DTC without any objections to the OECD model provisions.[63] Nowadays, one may argue that the changes towards acceptance of the OECD by the Constitutional Court may be regarded as a very important step in the design of the international tax policy in Colombia.

Finally and prior to the negotiation of DTCs, Colombia introduced an invariability clause in the investment contracts. This clause exists also in Chile under an investment contract and regulated on the Foreign Investment Statute.[64] In Colombia, this clause was introduced in the Law of Stability for foreign investors enacted on 2005 (Law 963). However, by contrast to Chile, this is not a Statute to regulate all foreign investment. The scope of this Law is to regulate investment contracts to be concluded with the foreign investor and Colombia to promote investment. The invariability clause in an investment contract results in the tax provisions in force at the time that the contract is concluded to be applicable to the foreign investor.[65] The Constitutional Court held in Decision of April 2006[66] that the invariability clause is compatible with the Constitution.[67] The Court also held that the investors have the judiciary proceedings if they want to claim compensation for changes in the tax provisions upon which the investment contract was subject to.[68]

[63] Judgment of 13 June 2007.

[64] In Chile, the Foreign Investment Statute ("Statute") was introduced by means of Decree Law 600 of 1974, amended on 16 December 1993. Under the terms of this Statute, foreign investors conclude a contract (*contrato de inversión*) with Chile, which authorizes and protects the transfer of capital for the investment. This contract is indefinite in duration and can be modified with the consent of both parties. Finally, another important feature of this Statute is the choice for foreign investors to opt for a system of invariable direct taxation (Art 7). This system consists of the application of the provisions for direct taxation at the time the contract is concluded. Once the choice is made, the foreign investor may only once, waive it, so domestic tax laws at the time of application of the contract will be made applicable. The invariable system of taxation is applicable for a maximum period of ten years.

[65] "The rate of the income tax and the tax on occasional earnings payable by investors opting for this regime is two percentage points higher than the tax rate applying at the time of conducting the contract. In return, the state guarantees that such provisions, regardless of any amendments, will be applied to investors for a specified period". Information available at the Investment climate: U.S. State Department http://www.state.gov/e/eeb/ifd/2008/100836.htm (last visited April 2008).

[66] Constitutional Court Judgment C-320 of 24 April 2006.

[67] This review of Laws takes place against compatibility with the Constitution by the Constitutional Court in accordance to Art 241(7) Constitution.

[68] "*Es posible que se presente la eventual modificación del régimen de inversiones tenido en cuenta en un contrato de estabilidad jurídica. Pero su ocurrencia, si bien no impide su eficacia, trae como consecuencia que los inversionistas puedan acudir a las acciones judiciales que estimen convenientes*" Constitutional Court Judgment C-320 of 24 April 2006.

III. Impact on and of International Institutions and Organisations

1. The Influence of Bilateral Tax Treaties on Model Tax Conventions

1.1. To what extent did your country's DTCs influence model tax conventions? Which international organisations provide the influenced model tax conventions (e.g. OECD, UN, etc.)?

Given the recent period where DTCs started to be concluded by Colombia the comparison in periods and contents of DTCs cannot be made at this time. Nonetheless, it can be safely argued that the tax treaty policy of Colombia has not been followed by other Latin American countries up till the time of writing.

1.2. Which concrete provisions, found in earlier DTCs concluded by your country were adopted into model tax conventions? Why have these provisions been adopted? Which background led to the transfer of these provisions?

Given the recent period where DTCs started to be concluded by Colombia this comparison in periods and contents of DTCs cannot be made at this time.

1.3. Which concrete political objectives of your country's double tax policies have influenced model tax conventions?

Given the recent period where DTCs started to be concluded by Colombia this comparison in periods and contents of DTCs cannot be made at this time.

2. The Influence of Model Tax Conventions on Bilateral Tax Treaties

2.1. To what extent do existing model tax conventions influence your country's double tax treaty policy?

As mentioned above the OECD Model has been followed to a great extent in the current three DTCs concluded by Colombia with Spain, Chile and Switzerland. Given this approach, it could be expected that future DTCs will also follow the OECD Model. Specific reference to UN Model provisions are being found in the DTCs concluded by Colombia in respect of permanent establishment for construction activities carried out in the source country for a period longer than 6 months, and the article of income from independent services. No reference has been made to the Andean Community model for negotiations between Andean Countries or between Andean countries and third states.

2.2. Which provisions do you adopt from different model tax conventions, and why? Which provisions show discrepancies?

Even though in general terms, the Colombian government has presented the DTCs as following the OECD Model two specific provisions are found which follow the UN Model. The first one is in respect of the permanent establishment definition stated in the UN Model. The UN Model approach has been followed in respect of building site, a construction assembly or installation project or supervisory activities in connection therewith that are being carried out in the source country. In case that these activities have been performed for a period

longer than six months, it is considered that a permanent establishment exists in the source country.

Second is the adoption of the UN approach (Art14) for a separate article of income from independent services is followed in DTCs with Spain and Chile concluded by Colombia. This provision has not been introduced in the DTC concluded with Switzerland. This article does not longer exists in the OECD Model given that the income derived from professional services or other activities of an independent character is now dealt with under Article 7 OECD Model as business profits.[69] The change of approach from the 2002 OECD Model from a separate article to the article of business profits have not been followed by the DTCs concluded by Colombia. The intention of the Government using article 14 in the DTC's concluded by Colombia is to remove the limitation of the source country to only have the right to tax income from independent personal services if derived from a permanent establishment.[70]

2.3.Has anything changed in this connection over the timeline?

The DTCs concluded between Colombia and Chile contains the limitation on benefits provisions. This provision is mostly introduced in US DTCs conventions that started with the 1981 US Model.[71] The reasoning of why this provision has been included has not been given by the Colombian government up till now.

2.4.Which provisions of model tax conventions were adopted into bilateral double tax policy in the past but are not adopted anymore?

In contrast to the DTCs concluded with Spain and Chile, the current DTC concluded by Colombia with Switzerland does not contain the article 14 of the UN Model: Income from independent personal services.

2.5.Are there cases were this happened the other way around? What was decisive for the changes in double tax treaty policy?

Given the recent period where DTCs started to be concluded by Colombia this comparison in periods and contents of DTCs cannot be made at this time.

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[69] OECD Commentary and the preliminary remarks to Art 7 OECD Model states that the distinction between business profits and income from independent personal services was the use of fixed base rather than permanent establishment "since it had originally been thought that the latter concept should be reserved to commercial and industrial activities… The elimination of article 14 on 2000 reflected the fact that there were no intended differences between the concepts of permanent establishment as used in Article 7, and a fixed base, as used in Article 14, or between how profits were computed and tax was calculated according to which of Article 7 or 14 applied". OECD Commentary Preliminary remarks (3). *Teksten Internationaal & EG belastingrecht*. 2007-2008. Kluwer Law International, at 1007.

[70] Legislative proposal 198 of 2007 for discussion at the Senate. Dated 5 December 2007. Senate Gazette number 631 of 2007.

[71] Limitation on benefits "generally provide a "safe haven" test based on share ownership by treaty country residents coupled with restrictions to insure that the corporation has not reduced its tax base in the residence country through deductible payments". P. McDaniel; H.J. Ault and J. Repetti, Introduction to United States International Taxation, 5th rev.ed., Kluwer Law International, 2005, at 183.

Conclusions and recommendations

The main consequence of globalization is tax competition among countries where countries such as Colombia searching for foreign investment are not longer able to isolate itself, its tax or trade system. On the one hand, countries want to attract investment by means of measures such as tax incentives, foreign investment rules with certainty to the foreign investors, and the negotiation of international tax and trade agreements. On the other hand, countries- tax law makers but also tax administrations are confronted with new challenges in order to prevent tax erosion or flights of capital income.

In order to attract investors, Colombia is required to have a consistent international and domestic tax policy. From an international tax law perspective, the following issues need to be taking into account in Colombia:

- Colombia needs to increase its tax treaty network. However, the faster pace of negotiations taken place at this time and the goal to have at least 10 DTCs concluded by 2010 (agenda Advisory Council on Foreign Trade) should not be the only objective by the Colombian government. Negotiation of DTCs takes time (mostly years), and therefore, one may argue that it is difficult to introduce changes of the OECD Model and/or UN model to a DTC once such DTC has been concluded. Negotiation of DTCs requires time and patience to discuss all important issues that are of importance for one country or another. Treaty negotiators need to consider carefully what are the important issues for Colombia and as such Colombia should be willing to negotiate upon these issues. In general, a tax treaty negotiation can take at least two years. This has not been the rule in the DTCs concluded by Colombia. Four DTCs have been negotiated since 2005, it means thus, that one DTC is being concluded per year by the same treaty negotiators.

- 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 without expertise (e.g. Colombia). Moreover, the interest of the parties for the application of source rules by developing countries like Colombia or residence rules by developed countries like the Chile, Switzerland and Spain may result in problems in the negotiation of bilateral tax treaties. These differences might result in a bilateral tax treaty concluded based on the OECD Model but with a protocol that changes the provisions in accordance to the negotiations by the countries. Therefore, in order to design and to negotiate with other countries, the tax treaty negotiators should have specific training in negotiation of tax treaties, and on the issues that play a role in international taxation[72] which can be also of importance for Colombia, e.g. the current discussion on permanent establishment, non-discrimination, and the use of most favoured nation clause for interest, royalties, etc. In this context, it is submitted that from the current DTC's concluded by Colombia: the application of the most favoured nation (MFN-type) provision to the percentages of withholding for interest and royalties and the application of the 0% dividends that have

[72] For illustration purposes, the current OECD proposed model version of 2008 has as main issues amongst other, the following: Tax treaty dispute resolution, revised commentary to article 7 business profits, application of non-discrimination article, tax treaty issues related to REITS and tax treaty treatment of services. The UN Model is currently discussing the issues on the exchange of information among countries.

been also exempted for domestic purposes in Colombia are issues that need to be revisited in new DTCs. The fear is that once the concessions have been made, the possibility to change such concessions is very limited.

- The negotiation of DCTs should be the result of a consistent approach of tax treaty negotiators towards provisions that are also favourable to Colombia. For this purpose, Colombia should have a tax treaty model based on the OECD or UN Model or a combination of both where the main issues for Colombia have been set up including for instance, the exploitation of natural resources, the tax treatment of passive income (dividends, interest, royalties and managements fees) and the definition of business income and permanent establishment. At the same time, the domestic tax law needs to be reformed in order to cope with the new international concepts that the DTCs are introduced such as: permanent establishment, beneficial ownership, limitation on benefits, etc.

- Up till the time of writing (April 2008), the Andean Community model has not been followed by Colombia. Colombia needs to revisit its position within the Andean Community in respect of the DTCs up till now concluded by Colombia and how the DTCs are consistent with the objectives of the Latin American process of integration that includes the development of the Andean Community. It seems that for tax treaties there is no role of the Andean Community in this regard, and that Colombia is unilaterally taking its own decisions. One of the problems is the application of the MFN-type provision in the protocol of interest and/or royalties articles in the bilateral DTCs. It could be possible that such favoured treatment can be also requested by any country member of the Andean Community.

Nowadays, one may argue that the current negotiations for DTCs can be regarded as steps towards the development of an international tax policy in Colombia. Nonetheless, it is the author's opinion that Colombia needs to increase the knowledge of the tax administration to negotiate bilateral tax treaties, to improve the English websites in Colombia for investors, and the traditional approach of law-makers to introduce tax holidays, tax exemptions for specific issues without making changes in their tax policy. All of the above should change the focus by law-makers, tax administration, legal scholars, amongst others in order to promote a more consistent international tax policy in Colombia.