TAXATION AND DEVELOPMENT
Case study: Venezuela(§)

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Summary

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Dedicated to the memory of Emilio J. Roche

I. INTRODUCTION. INTERNATIONAL TAX REGIME IN FORCE IN VENEZUELA

The principal institutions of the tax international regime now in force in Venezuela are found –for the most part– in the Income Tax Law[1], which provides in its Article 1 the essential foundations on which that *regime*[2] is built.

An outline of said Law will be provided in this work, following the guidelines set by the general reporter on the topic, from the viewpoint of the tax regime and its regulated institutions, which are of particular interest and efficacy from the perspective of international tax law.

The purpose of this research is to describe and comment on the Venezuelan international tax regime with its strengths and weaknesses and facilitate gaining an insight as to how it works, the tendency, benefits and principal regulations it presents, and its utility in developing the country provided it supplies incentives to attract foreign investment and, in that case, on what terms it does so or otherwise creates economic distortions and favors investors directly and their countries of residence indirectly[3].

Notwithstanding the above, it can be said that –given the present reality of the country– there are other aspects (such as political, fiscal, regulatory and economic measures) not always advantageous to the conduct or setting up of business[4] by foreign investors and which, in the end, affect the free operation of companies, entrepreneurs, and individuals.

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(1) Official Gazette of the Republic of Venezuela No. 38.628, February 16, 2007.

(2) An explanation of the difference between tax *system* and tax *regime* seems appropriate here as it will prove useful later on in this report. A tax *system* is understood as the integrated and coordinated set of taxes (imposts, fees and special contributions) forming part of the laws and regulations and ruled by the constitutional principles of taxation, becoming a rational and reasonable whole. Meanwhile, a tax *regime* refers to a group of overimposed taxes that do not constitute an organized, logical and integrated set and do not abide by the constitutional principles of taxation as a fundamental piece of a country's tax order. In this respect, *vid.* ABACHE CARVAJAL, Serviliano and BURGOS-IRAZÁBAL, Ramón, «Parafiscalidad, sistema tributario y Libertad», in HERRERA ORELLANA, Luis Alfonso (Coord.), *Enfoques actuales sobre Derecho y Libertad en Venezuela*, Academy of Political and Social Sciences, Caracas, 2013, pp. 275-280.

(3) Cf. BAZÓ PISANI, Andrés E., «Incentivos fiscales y otras políticas tributarias ofrecidas por países en desarrollo. ¿Atraen inversión extranjera o desestabilizan la economía?», in DUPOUY M., Elvira and DE VALERA, Irene (Coord.), *Temas de actualidad tributaria. Homenaje a Jaime Parra Pérez*, Academy of Political and Social Sciences -Venezuelan Association of Tax Law, Caracas, 2009, p. 155.

(4) Cf. *Ibid.*, p. 153.

In sum, a review will be made of, on the one hand, the Venezuelan tax regime institutions which are most relevant from the viewpoint of international tax law and, on the other hand, the domestic regulations, policies and measures, –both tax as well as administrative– describing the scenario of rules currently in force, so that the reader can reach his own conclusions on whether they are in the nature of incentives or non-incentives to attract foreign investment into a developing country such as Venezuela.

1. Worldwide and/or Territorial Income

In direct taxation and, as part of it, specifically in regard to income tax, it is acknowledged that there are two taxation systems: (i) the territorial income-based system, or principle of territorial source, which follows objective relationship criteria, and (ii) the worldwide income-based, or principle of domicile or residence and principle of nationality, which follows subjective criteria[5].

These systems are being applied jointly in many States. On one part, the territorial income system is applied, by which the domestic-source income of residents or non-residents in the country is taxed (objective criterion), with many of those States concurrently applying the worldwide or global income system to tax foreign-source income produced by their residents (subjective criterion)[6].

This last situation is precisely the case of Venezuela. From its first Income Tax Law, which dates back to year 1942[7], Venezuela adopted the territorial income system –with some exceptions[8]– until in year 1999 when, following an integral reform of income tax legislation[9], the Venezuelan regime additionally adopted, together with the territorial system, the worldwide income system in order to tax foreign-source revenues produced and obtained by residents or domiciled persons in Venezuela.

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(5) Cf. EVANS MÁRQUEZ, Ronald, *Régimen jurídico de la doble tributación internacional*, McGraw-Hill, Caracas, 1999, p. 6.

(6) Cf. *Ibid.*, p. 8.

(7) Official Gazette of the Republic of Venezuela No. 20.851, July 17, 1942.

(8) On these exceptions, *vid.* CARMONA BORJAS, Juan Cristóbal, «Principios de la renta mundial y de la renta territorial», in DE VALERA, Irene (Organizer), *Comentarios a la Ley de Impuesto sobre la Renta*, Academy of Political and Social Sciences-Venezuelan Association of Tax Law, Caracas, 2000, pp. 23-29; and CARMONA BORJAS, Juan Cristóbal, «Factores de conexión en la legislación venezolana en materia de impuesto sobre la renta», in SOL GIL, Jesús (Coord.), *60 años de imposición a la renta en Venezuela. Evolución histórica y estudios de la legislación actual*, Venezuelan Association of Tax Law, Caracas, 2003, pp. 163-167.

(9) Official Gazette of the Republic of Venezuela No. 5.390, Extraordinary Issue, October 22, 1999.

The regulation mentioned above is at present set forth in Article 1 of the 2007[10] Income Tax Law (ITL) along the following lines:

> «Article 1: Any annual, net and disposable income obtained in cash or in kind, shall be taxed pursuant to the provisions of this Law. Unless otherwise provided in this Law, every individual or corporation, whether a resident of or domiciled in the Bolivarian Republic of Venezuela, shall pay taxes on income from any origin, whether the cause or source of income is located inside or outside the country. (...)»[11].

In view of the foregoing, it has been properly concluded that the Venezuelan income tax regime comprises three fundamental areas: (i) the taxpayer net operating income from *territorial activities*, which is determined by deducting from territorial gross income the costs and expenses incurred in the country during the fiscal year, (ii) the *inflation adjustments* on taxpayer (non-monetary) assets and liabilities (holding gains), which will increase or reduce the net operating income mentioned in (i) above, and (iii) the taxpayer net operating income from *extra-territorial* activities, which is determined by subtracting from the extra-territorial gross income the costs and expenses incurred outside the country in obtaining that income during the relevant fiscal year. From the tax resulting after applying the assessment procedure indicated above, any applicable *tax credits* will be deducted as well as any income *tax paid abroad* by the taxpayer, provided it does not exceed the highest Venezuelan tax rate, which is thirty four percent (34%)[12].

2. Domestic and Foreign Dividends

The dividend tax regime is regulated by Title iV, Chapter II, under «capital gains», and expounded in Articles 66 through 78 of the ITL. It sets forth, among other regulations, the meaning of dividend, how it is taxed and withheld, and certain rules applicable to foreign dividends.

According to the sole paragraph of Article 67 of the ITL, a *dividend* is the portion that corresponds to each share of stock in the profits of stock companies and other assimila-

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(10) Official Gazette of the Republic of Venezuela No. 38.628, February 16, 2007.

(11) For a detailed study of territorial and worldwide income effective in Venezuela, *vid.* PAREDES, Carlos Enrique, *El principio de territorialidad y el sistema de renta mundial en la Ley de Impuesto sobre la Renta venezolana*, Andersen Legal, Caracas, 2002, p. 283.

(12) Cf. ROCHE, Emilio J., «Transparencia fiscal internacional», in SOL GIL, Jesús (Coord.), *60 años de imposición a la renta en Venezuela. Evolución histórica y estudios de la legislación actual*, Venezuelan Association of Tax Law, Caracas, 2003, p. 670.

ted taxpayers[13], such as, for instance, those resulting from participation quotas in limited liability companies.

A dividend tax is, pursuant to Article 66 *eiusdem*, a proportional tax that has its origin in such net income of the paying company that is greater than or exceeds the taxed net fiscal income. For these purposes, it is necessary to understand the meaning of: (i) net income, and (ii) taxed net fiscal income. *Net income* is the result (profits) approved by the Shareholders Meeting on the basis of the financial results[14]. Meanwhile, *taxed net fiscal income* means the one that is taxed in accordance with corporate rates[15].

Under the previously stated rules, the calculation of the shareholder dividend tax can be summarized as follows:

DNI = NI – (TNFI + EI + DRT)[16]

According to Article 73 of the Law, dividend taxation is subject to a thirty four percent (34%) rate and to total withholding upon being paid or credited on account.

Yet, Article 71 of the ITL introduces a very important distinction depending on whether a *domestic dividend* or *foreign dividend* regime is involved. In this respect, the first paragraph of Article 68 states that if dividends are received either (i) from enterprises incorporated and domiciled abroad or (ii) from enterprises incorporated abroad and domiciled in Venezuela, i.e., *foreign dividends*, such dividends will be treated as excluded from the net income for purposes of domestic calculations. As in the case of domestic dividends, fo-

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(13) According to the First Paragraph of Article 7 of the ITL, entities *assimilated* to stock companies means: limited liability companies, (ii) limited stock partnerships (*comandita simple por acciones*) (iii) civil associations, and (iv) irregular or de facto associations incorporated as stock companies, as limited liability companies, or as limited partnerships.

(14) For an analysis of the criteria regarding the accounting system that applies for declaring and paying dividends in Venezuela (*historical* accounting or *updated* accounting, i.e., *inflation*-adjusted), *vid*. ROCHE, Emilio J., «De la entrada en vigencia de la reforma de la Ley de Impuesto sobre la Renta de 2001 y del régimen sobre dividendos», *Impuesto sobre la Renta e ilícitos fiscales. VI Jornadas venezolanas de Derecho tributario*, Venezuelan Association of Tax Law. Caracas, 2002, pp. 159-179; and ROMERO-MUCI, Humberto, «Naturaleza jurídica de los principios de contabilidad de aceptación general en Venezuela y su incidencia en la determinación de la renta financiera para el cálculo del impuesto sobre la renta de dividendos (análisis de los artículos 67 y 91 de la Ley de Impuesto sobre la Renta)», *Impuesto sobre la Renta e ilícitos fiscales. VI Jornadas venezolanas de Derecho tributario*, Venezuelan Association of Tax Law, Caracas, 2002, pp. 181-251.

(15) Cf. ROCHE, Emilio J., «Parte general del Impuesto sobre la Renta. Relatoría Tema I», in KORODY TAGLIAFERRO, Juan Esteban (Coord.), *70 años del Impuesto sobre la Renta. Memorias de las XII Jornadas Venezolanas de Derecho Tributario*, volume II, Venezuelan Association of Tax Law, Caracas, 2013, p. 151.

(16) DNI: Dividend net income; NI: net income; TNI: taxed net fiscal income; EI: exempt or exonerated income; DRT: dividends received from third parties. In a similar sense, Cf., *Idem*.

reign dividends are subject to a proportional tax rate of thirty four percent (34%). To this result, the dividend tax paid abroad is applicable.

Lastly, under its Article 72, the ITL provides for a *presumptive regime* on foreign dividends in the case of (i) enterprises incorporated abroad and domiciled in Venezuela or (ii) enterprises incorporated and domiciled abroad and having a permanent establishment in Venezuela, pursuant to which they must pay thirty-four percent (34%) on their net, neither exempt nor exonerated, income in excess of the taxed net income of the fiscal year, unless the branch shall prove to have reinvested and maintained in the country –for a least five years– the difference between the taxed net fiscal income and the net income[17].

II. TAX HAVENS AND HARMFUL TAXATION

1. Concept of Tax Havens in Venezuela

It could be said that there are as many concepts or definitions of tax havens are there are tax havens, given that the semantics or terminology will depend on the criteria utilized to benefit or not benefit the user[18]. Nevertheless, apart from the difficulty of defining a tax haven, or low-tax jurisdiction, or preferential tax system, or offshore jurisdiction[19], because their condition as such is subject to, among other things, political and legislative changes in the location jurisdiction, in truth it is known that it is possible to identify common characteristics in jurisdictions that are tax haven sites, such as (i) rates or aliquots that are either special, reduced or non-existent, (ii) commercial and bank secrecy, (iii) political and financial stability, (iv) absence of foreign exchange controls, (v) developed infrastructures, and (iv) self-promotion[20].

The ITL does not define in Chapter II, Title VII on International Fiscal Transparency Regime what should be understood as tax havens or, as called in the ITL, *low-tax jurisdictions*. Notwithstanding the foregoing, Ruling (*Providencia*) No. SNAT/2004/232[21] has established a method –a mixed and alternative one– for qualifying tax havens based on three criteria: (i)

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(17) In this respect, *vid.* VECCHIO D., Carlos A., *El impuesto al dividendo presunto de las sucursales. Especial referencia a los tratados para evitar la doble tributación*, Venezuelan Financial Law Association, Caracas, 2004, p. 151.

(18) Cf. ROCHE, Emilio J., «Transparencia fiscal...», *cit.*, p. 666.

(19) Cf. DÍAZ IBARRA, Valmy J., «Las reglas de transparencia fiscal internacional en Venezuela. Consecuencias de la vinculación de contribuyentes venezolanos con sociedades en "paraísos fiscales"», in DUPOUY M., Elvira and DE VALERA, Irene (Coord.), *Temas de actualidad tributaria. Homenaje a Jaime Parra Pérez*, Academy of Political and Social Sciences -Venezuelan Association of Tax Law, Caracas, 2009, p. 341.

(20) Cf. ROCHE, Emilio J., «Transparencia fiscal...», *cit.*, pp. 667-669.

(21) Official Gazette of the Republic of Venezuela No. 37.924, April 26, 2004.

preferential tax system (maximum taxation of 20% on income or capital), (ii) *black list express inclusion* (*blacklisted countries*), and (iii) *absence of double taxation agreement with an information exchange clause*. In the presence of any of these criteria, a jurisdiction will qualify as a low-tax jurisdiction or tax haven for Venezuelan purposes[22].

The topic of tax havens and of jurisdictions with elements of *harmful tax competition*, the slight distinctions of which renders them often alike[23], is especially relevant for the international fiscal transparency regime, as it is located its core, and as from them, its application activates. Therefore, it is important to review the most relevant aspects of this particular regime.

2. International Fiscal Transparency Regime

Also known as *controlled foreign corporation rules*, or CFC rules, this regime consists in viewing entities located in tax havens or low-tax jurisdictions as non-existent or transparent. For this reason, an investor domiciled in Venezuela or non-domiciled in Venezuela but having a permanent establishment therein, must report the income, costs and expenses attributable to such an entity (whether or not the company and its members have, as they in fact do, different legal capacities[24]), even if dividends have neither been declared nor distributed[25].

As such, it is clear that the objectives of this regime are (i) to improve the application of the worldwide income system, given that tax is applied on such income obtained by the foreign entity that has not paid tax offshore or that has paid it at rates lower than the thirty-four percent (34%) rate of Venezuelan law, and (ii) to avoid deferral of payment of income tax in Venezuela, thus discouraging deferral of declaration and payment of dividends by the foreign entity to the Venezuelan taxpayer. Under this assumption, even if the investor does not receive any dividend payment, due to the fact that the entity is deemed transparent (as if it did not exist), the Venezuelan taxpayer must report the income, costs and expenses, and Venezuelan tax will be applied to the extra-territorial income[26].

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(22) Cf. DÍAZ IBARRA, Valmy J., *op. cit.*, p. 358.

(23) While in *tax havens* the collection of income tax is not part of public finances and those places are promoted as an escape for residents of jurisdictions with high levels of taxation, *jurisdictions with harmful tax competition elements* are often characterized by collecting important sums of income tax and offering tax benefits for specific activities. Cf. *Ibid.*, pp. 341-342.

(24) Cf. FALCÓN Y TELLA, Ramón and PULIDO GUERRA, Elvira, *Derecho fiscal internacional*, Marcial Pons, Madrid, 2010, p. 243.

(25) Cf. ROCHE, Emilio J., «Transparencia fiscal...», *cit.*, p. 673.

(26) Cf. *Idem*.

2.1. Application Criteria

Article 100 of the ITL sets forth that taxpayers having investments made directly, indirectly, or through intermediaries, in branches, corporations, real or personal property, shares of stock, bank or investment accounts, and any manner of interest in entities with or without legal capacity, trusts, business associations, investments funds, as well as in any other similar legal body created or organized under foreign Law and located in low-tax jurisdictions, will be subject to the application of this regime.

To these ends, it is a necessary condition that the taxpayer can decide the time for distributing profits or dividends derived from low-tax jurisdiction, or when the taxpayer has control over their administration, either directly or indirectly or through an intermediary.

On its part, Article 102 of the Law provides for those events in which an investment is deemed situated in a tax haven or low-tax jurisdiction, as follows: (i) when the accounts or investments of any type are in institutions located in that jurisdiction, (ii) when having a domicile or post office box in that jurisdiction, (ii) when the person has its actual or principal management or administration headquarters, or has a permanent establishment in that jurisdiction, (iv) when incorporated in that jurisdiction, (v) when having physical presence in that jurisdiction, or (vi) when making, regulating, or consummating any type of legal transaction under the laws and regulations of that jurisdiction.

Fiscal transparency rules do not apply if fifty percent (50%) of the income-producing assets of the entity located in a low-tax jurisdiction are fixed assets that produce, and also, if less than twenty percent (20%) of the income obtained by the entity comes from passive receipts (*e.g.* royalties, dividends, leases, etc.). In sum, whenever the entity conducts a business or industrial activity in the foreign jurisdiction, the international fiscal transparency rules will not activate[27].

2.2. Blacklisted Countries

Under Article 2 of Ruling (*Providencia*) No. SNAT/2004/232, the following are low-tax jurisdictions as they are expressly included in the black list: Anguilla, Antigua & Barbuda, Svalbard Archipelago, Aruba, Ascension, Belize, Bermuda, Brunei, Campione D'Italia, Commonwealth of Dominica, Commonwealth of the Bahamas, United Arab Emirates, State of Bahrain, State of Qatar, Independent State of Western Samoa, Commonwealth of Puerto Rico, Gibraltar, Grand Duchy of Luxembourg, Grenada, Greenland, Guam, Hong Kong, Cayman Islands, Christmas Island, Norfolk Island, Saint Pierre and Miquelon Island, Isle of Man, Qeshm Island, Cook Island, Cocos or Keeling Island, Channel Islands

(27) *Ibid.*, pp. 674-675.

(Guernsey, Jersey, Aldemey, Great Sart, Herm, Little Sark, Brechou, Jethou and Lihou Islands), Falkland Islands, Pacific Islands, Solomon Islands, Turks & Caicos Islands, British Virgin Islands, United States Virgin Islands, Kiribati, Labuan, Macau, Malta, Montserrat, Niue, Palau, Pitcairn, French Polynesia, Principality of Andorra, Principality of Liechtenstein, Principality of Monaco, Kingdom of Swaziland, Hashemite Kingdom of Jordan, Dominican Republic, Gabonese Republic, Lebanese Republic, Republic of Albania, Republic of Angola, Republic of Cape Verde, Republic of Cyprus, Republic of Djibouti, Republic of Guyana, Republic of Honduras, Republic of Marshall Islands, Republic of Liberia, Republic of Mauritius, Republic of Nauru, Republic of Panama, Republic of Seychelles, Republic of Tunisia, Republic of Vanuatu, Republic of Yemen, Eastern Republic of Uruguay, Democratic Socialist Republic of Sri Lanka, American Samoa, Saint Vincent and the Grenadines, Saint Helena, Most Serene Republic of San Marino, Sultanate of Oman, Tokelau, Tristan da Cunha, Tuvalu, Canary Special Zone, and Ostrava Free Zone.

III. THE VENEZUELAN REGIME AND THE ADOPTION OF INTERNATIONAL TAXATION CRITERIA

In 1999, Venezuelan income tax legislation suffered an important change. By an integral reform of this fiscal sub-regime, it moved from an –exclusively- territorial system to a worldwide income system. This significant change was accompanied by the insertion of rules of international fiscal transparency and transfer pricing in the ITL, completing in 2007 the adjustment of the Venezuelan regime to the most modern international taxation trends, with the inclusion of undercapitalization or thin capitalization rules[28]. We will briefly proceed to review below each one of these changes and the adoption of international taxation criteria.

1. Worldwide Income

Beyond any doubt, the adoption of the worldwide income system in 1999 by the Venezuelan ITL reflects an important change in the very idea of the country, typically regarded on the list of capital importers. Even though Venezuela is still characterized as an importing country, and even more at present given the multiple internal problems and official measures that discourage domestic production as will be noticed further on, the truth is that in an attempt to conform to worldwide economy globalization and commercial integration of countries, the Venezuelan tax regime has included this modification that actually revisits and takes into account the *principle of taxpaying capacity* set forth in Article

(28) Cf. DÍAZ IBARRA, Valmy J., *op. cit.*, pp. 352-353.

316 of the Constitution[29], as it captures the entire taxpayer income regardless of the location of its source[30].

Said ITL reform and adoption of the worldwide system meant that since 1999 all foreign source income produced and obtained by residents or domiciled persons in Venezuela became taxed in accordance with the new regime.

2. International Fiscal Transparency

As previously stated, the purpose of international fiscal transparency, or controlled foreign companies, is to improve the worldwide income system and consists in taxing passive income (e.g., dividends, royalties, etc.) generated from foreign investments located in tax havens or low-tax jurisdictions, to the Venezuelan taxpayer controlling such investment, whether or not the income is distributed to the Venezuelan shareholder[31]. In other words, for Venezuelan purposes, the foreign entity is deemed *transparent* –hence, the name of the regime– and for this reason the Venezuelan taxpayer controlling such entity shall report and pay tax on income, as if it were his own, obtained in the tax haven. These rules constitute a presumptive lifting of the corporate veil (disregard of the legal entity).

3. Transfer Pricing

The system of transfer prices was first introduced in Venezuelan income tax regulation with the 1999 reform, following the guidelines of the Brazilian legislation on the matter. With the legislative amendment of 2001, it was changed entirely by adopting the criteria and directives of the Organization for Economic Cooperation and Development (OECD), such as applying to interest the comparable free price or comparable uncontrolled price (CUP) method. With the most recent reform of the ITL, occurred later in 2007, the rules on the matter remain unchanged.

Transfer pricing rules are contained in Chapter III, Title VII, Article 111 through 170 of the Venezuelan ITL. Their purpose is none other than achieving that the financial results –departing from fixed prices and general contracting terms– of transactions (supply of goods, provision of services) *between related parties be* similar for tax purposes to the results that would be obtained between *non-related or independent parties*. All of it invol-

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(29) Official Gazette of the Republic of Venezuela No. 36.860, December 30, 1999, later reprinted with some corrections in the Official Gazette of the Republic of Venezuela No. 5.453, Extraordinary Issue, March 24, 2000. Its first amendment as well as the whole text of the Constitution was published in the Official Gazette of the Republic of Venezuela No. 5.908 Extraordinary Issue, February 19, 2009.

(30) EVANS MÁRQUEZ, Ronald, *Régimen jurídico... cit.*, p. 12.

(31) Cf. DÍAZ IBARRA, Valmy J., *op. cit.*, pp. 353-354.

ves application of the *arm's length principle*[32], i.e. that no prices –lower or higher than market value– be fixed that may transfer and locate a greater benefit in the country with the lowest taxation or a greater expense in the country with higher taxation[33].

A *related party*, according to Article 116 of the ITL means an enterprise that participates directly or indirectly in the management, control or capital of another enterprise, or when the same persons participate directly or indirectly in the direction, control or capital of both enterprises, following in this sense the guidelines delimited in that respect by the OECD[34].

These rules, as well as the ones we will comment below, act as mechanisms against tax avoidance and prevent the abuse of forms, with the ultimate purpose of reducing international tax evasion[35].

4. Thin Capitalization

Undercapitalization or thin capitalization rules were introduced for the first time in the ITL with the 2007 reform. These rules or *antiavoidance clauses* are intended to avoid (i) the transfer of the income tax base (*profit shifting*) from one jurisdiction to another, (ii) the concealing of dividend payments and consequently the non-payment of dividend tax in the country of origin, and (iii) the creation of a fictitious expense to reduce the tax base of the enterprise that repays a loan[36].

Pursuant to Venezuelan law, a *thinly capitalized enterprise* is that whose debts to a related party from a received loan exceeds its stockholders' equity; that is, its debt/equity ratio evidences excessive indebtedness of the borrowing enterprise under a financing (loan) transaction with a related party (lending enterprise)[37].

In effect, Article 118 of the ITL limits the deductibility of interest paid directly or indirectly to related parties. In order to determine if the amount of debts exceeds the net

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(32) Cf. ANDRADE, Betty, «La subcapitalización y los precios de transferencia en el régimen venezolano», *Jornadas Internacionales. Cuestiones actuales de Derecho tributario*, Foundation of Administrative Law Studies, Caracas, 2007, p. 218.

(33) Cf. FALCÓN Y TELLA, Ramón and PULIDO GUERRA, Elvira, *op. cit.*, p. 231.

(34) Cf. *Idem*.

(35) Cf. *Ibid*., p. 223.

(36) Cf. FRAGA PITTALUGA, Luis, «Subcapitalización y reclasificación de los intereses no deducibles», in KORODY TAGLIAFERRO, Juan Esteban (Coord.), *70 años del Impuesto sobre la Renta. Memorias de las XII Jornadas Venezolanas de Derecho Tributario*, volume II, Venezuelan Tax Law Association, Caracas, 2013, pp. 374-375.

(37) Cf. *Ibid*., pp. 375-376.

equity of the taxpayer, the yearly average balance of the taxpayer debts to independent parties is subtracted from the yearly average balance of its net equity[38].

Lastly, the Venezuelan rule provides that such portion of the amount of debts incurred by the taxpayer directly or indirectly with related parties, and that exceeds the average balance of net equity, will be treated as net equity in any event. In this manner, it has been considered that, contrary to what happens in other legislations, the Venezuelan rule does not permit to reclassify non-deductible interest as dividends, but it rather incorporates such interest to the net equity of the taxpayer[39].

IV. DTAs AND INFORMATION EXCHANGE AGREEMENTS

The OECD Model on income and capital provides in Article 26.1 for the *exchange of information* of tax relevance between contracting States, not only for the application of the agreeement but also when pertinent for managing any domestic tax –at any political territorial level– even if said tax is not expressly included in the agreeement, as long as no imposition contrary to the agreement is involved[40]. It is –precisely– the main source of exchange of information in Venezuela[41].

1. Permitted Sources and Types of Information Exchange

in fact, the actual Double Taxation Agreeements (DTAs) ratified by Venezuela[42] constitute one of its sources for conducting *information exchange* with other States. As the

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(38) Cf. *Ibid.*, pp. 406-407.

(39) Cf. *Ibid.*, pp. 420-421. In the same sense, *vid.* CASTILLO CARVAJAL, Juan Carlos, «Relatoría general. Tema II. Temas especiales de la Ley de Impuesto sobre la Renta», in KORODY TAGLIAFERRO, Juan Esteban (Coord.), *70 años del Impuesto sobre la Renta. Memorias de las XII Jornadas Venezolanas de Derecho Tributario*, volume II, Venezuelan Association of Tax Law, Caracas, 2013, p. 57. Against, *vid.* ANDRADE, Betty, *op. cit.*, pp. 257-260.

(40) Cf. FALCÓN Y TELLA, Ramón and PULIDO GUERRA, Elvira, *op. cit.*, pp. 197-198.

(41) For a detailed study of Tax Administration cooperation, with special reference to the Venezuelan case, *vid.* CARMONA BORJAS, Juan Cristóbal, «Colaboración y asistencia mutua entre Administraciones tributarias», *Revista de Derecho Tributario*, No. 100, Venezuelan Association of Tax Law, Caracas, 2003, pp. 161-219.

(42) Article 122 of the Venezuelan Organic Tax Code (Official Gazette of the Republic of Venezuela No. 37.301, October 17, 2001), sets forth that: «The Tax Administration will have the faculties, powers and duties prescribed in the Tax Administration Act and other laws and regulations and it may especially: (...) 11. Enter into inter-institutional information exchange agreements with local and international agencies provided that the classified nature of such information is protected as set forth in Article 126 of this Code and ensuring that the information supplied will be used by tax competent authorities only». According to Article 126 *eiusdem*: «Any Information and documentation obtained by any means by the Tax Administration will be classified and will be communicated only to the judicial or any other authority in the cases set forth by the laws. Any inappropriate use of classified information will bring about the application of the respective penalties».

DTAs that Venezuela has entered into follow –basically– the OECD Model, their exchange provisions, in line with Article 26.1 of the model, consist in enabling competent authorities to exchange the information required in order to apply the various agreements made, but they are not restricted to the *scope of application* of the DTA and enable information requests on transactions in tax havens and in jurisdictions that have elements of harmful tax competition.

The information received by Venezuela and the States with which it has entered into such agreements must be kept secret, as must the information obtained on the basis of the local Law of Venezuela and the other State, and will be communicated to authorities (including Courts and administrative agencies) competent for the management or collection of the agreement-regulated taxes, the related declaration or execution processes, and the decision of the appeals filed against any submitted claims.

2. Information Exchange Restrictions contained in the DTAs

The first limit established by DTAs entered into by Venezuela is that the reports obtained from the information exchange can be used by the authorities only for *these purposes*. As such, by argument to the contrary, any use for *purposes other than those* related to the application of the agreement would entail a violation of the latter.

On the other hand, Venezuelan DTAs establish the typical three limits of the OECD Model directed to not imposing on the contracting States an obligation to (i) take any administrative actions contrary to their administrative practice or legislation or contrary to those of the other contracting State, (ii) provide information that cannot be obtained on the basis of their own legislation or in the exercise of their regular administrative practice or that of the other Contracting State, and (iii) provide information that discloses trade, industrial or professional secrets, trade procedures or information the transmission of which is contrary to public order.

Lastly, beyond the established DTAs limits on information exchange between foreign and Venezuelan Tax Administrations, it is true that no agreement can affect the guaranties set out in the Constitution of Venezuela. For this reason, the *inviolability of home and correspondence* cannot be ignored by the agreements, for being individual and constitutional rights of the taxpayers[43].

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(43) Cf. LEÓN ROJAS, Andrés Eloy, «La doble tributación internacional. Diferencia entre países desarrollados y en desarrollo», *IV Jornadas Venezolanas de Derecho Tributario*, Venezuelan Association of Tax Law, Caracas, 1998, p. 324.

V. SPECIAL TERRITORIAL TAX REGIMES

In general, customs territories are constituted by geographic spaces having a special legislation that creates and delimits their special tax regime with extra-fiscal (tax benefit) purposes, for establishing a certain activity, customs controls and customs duties. For tax purposes, it is possible to distinguish in Venezuela three types of customs territories: (i) *free zones*, (ii) *free ports*, and (iii) *free areas (zonas libres)*.

1. Free Zone Tax Regime

Free zones are defined in Article 2 of the Venezuelan Free Zone Act[44] as «[T]he area of land physically delimited and subject to a special tax regime (...) where legal entities that for the purposes of this Act are authorized to engage in producing and marketing goods for export as well as in providing services related to international trade». In this manner, the objective of the State is the *development of a specific activity* (industry, trade or service) in an economically depressed area that is artificially delimited in the Act that creates that zone.

The principles contained in the Free Zone Act are expounded in its Regulations[45], which set forth the conditions and parameters for the creation, extension, reduction and termination of free zones.

There are three free zones in Venezuela, to wit: (i) *Zona Franca Industrial, Comercial y de Servicios ATUJA (ZOFRAT)*[46], located in the San Francisco Municipality, city of Maracaibo, State of Zulia, under the authority and control of the Principal Customs of Maracaibo, (ii) *Zona Franca Industrial, Comercial y de Servicios de Paraguaná*[47], located in the Paraguaná Peninsula, State of Falcón, under the authority and control of the Principal Customs of Las Piedras de Paraguaná, and (iii) *Zona Franca Industrial, Comercial y de Servicios de Cumaná*[48], located in the Autonomous Sucre Municipality, City of Cumaná, State of Sucre, under the authority and control of the Principal Customs of Puerto Sucre.

2. Free Port Tax Regime

On their part, *free ports* consist of a customs exemption regime boosting, via tax benefits and/or economic activity establishment benefits, the *economic development of a*

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(44) Official Gazette of the Republic of Venezuela No. 34.772, August 8, 1991.

(45) Decree No. 2.492 of 4 July 2003, Official Gazette of the Republic of Venezuela No. 37.734, July 17, 2003.

(46) Official Gazette of the Republic of Venezuela No. 36.096, November 29, 1996.

(47) Official Gazette of the Republic of Venezuela No. 5.145, Extraordinary Issue, April 30, 1997.

(48) Official Gazette of the Republic of Venezuela No. 36.249, July 16, 1997.

portion of territory that in principle is economically depressed. As opposed to free zones, these areas are territorially delimited by the area of a specific political territorial entity and are created by special law.

Free ports in Venezuela are located in Santa Elena de Uairén[49] and in the State of Nueva Esparta[50]. The first one consists of a preferential tax regime to encourage and promote the social and economic development of the region. This exempting regime covers the activities performed within the duly delimited territory of the free port. The goods entering under this free port regime do not pay import duties, although they are subject to the fee for customs services (1% *ad valorem*), nor are they subject to payment of domestic taxes, provided the goods are shipped for consumption at the free port[51].

The second one consists of a preferential (exempting) tax regime to encourage and favor the social and economic development of the State of Nueva Esparta. Goods entering under the free port regime are exempt from payment of import duties, Value Added Tax (VAT), taxes on cigarettes and manufactured tobacco, alcohol and alcoholic species, matches, and the like –unless domestic law determines otherwise– but are subject to payment of the fee for customs services (1% ad valorem)[52].

3. Free Areas (Zonas Libres) Tax Regime

Lastly, *free areas* or zonas libres are a mixture of the two previously commented regimes, as they are intended for the *development of a portion of the territory by means of a specific activity*, usually in an economically depressed area that is also delimited by the space of a specific political territorial entity.

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(49) Created by Decree No. 3.112, of 16 December 1998, dictating the Regulations on the Free Port of Santa Elena de Uairen System, Official Gazette of the Republic of Venezuela No. 5.288, Extraordinary Issue, January 13, 1999.

(50) Created by the Free Port Act of the State of Nueva Esparta, of 3 August 2000, Official Gazette of the Republic of Venezuela No. 37.006, August 3, 2000.

(51) Consulted in: http://www.seniat.gob.ve/portal/page/portal/MANEJADOR_CONTENIDO_SENIAT/04ADUANAS/4.4 REGIMENES_TERRITOR/4.4.1PUERTOS_LIBRES/4.4.1.1SANTA_ELENA. February 15, 2014.

(52) Consulted in: http://www.seniat.gob.ve/portal/page/portal/MANEJADOR_CONTENIDO_SENIAT/04ADUANAS/4.4 REGIMENES_TERRITOR/4.4.1PUERTOS_LIBRES/4.4.1.2NUEVA_ESPARTA, February 15, 2014.

They comprise the Culture, Science and Technology Free Zone of the State of Mérida (*Zona Libre Cultural, Científica y Tecnológica* (ZOLCCYT))[53] and the Free Zone for Tourist Investment Development of Paraguaná Peninsula (*Zona Libre para el Fomento de la Inversión Turística de la Península de Paraguaná*)[54]. The first of them is located in the State of Mérida in the territory of Libertador, Campo Elías, Sucre and Santos Marquina Municipalities, under the control of the Principal Ecologic Customs of Mérida. Its special preferential tax regime was established to promote the production, dissemination and distribution of the region's cultural, scientific and technological activities. Cultural, scientific and technological goods and services produced in the country, as well as goods and their parts coming from abroad and entering Venezuela with destination to the ZOLCCYT, are subject to the following preferential regime: (i) no customs duties, (ii) exempt from VAT and any other domestic tax directly or indirectly imposed on their import or sale, (iii) no customs service fees, and (iv) no tariff and para-tariff rates, except for those of a health-related nature.

The second one (Free Zone for Tourist Investment Development of Paraguaná Peninsula) is located in Paraguaná Peninsula, in the area comprised by the territory of Carirubana, Falcón, and Los Taques Municipalities of the State of Falcón, under the control of Las Piedras-Paraguaná Principal Customs. Its regime consists in that the income obtained by tourist service providers on new infrastructure investments made by persons authorized to operate within the free zone, are exempt for a period of ten years, prior verification that the investment has been made.

VI. TAX MEASURES AND INCENTIVES TO ATTRACT INVESTMENT AND ECONOMIC ACTIVITY INTO DEVELOPING COUNTRIES AND INTO COUNTRIES WITH HIGH LEVELS OF POVERTY

Tax incentives have always represented an important tool of fiscal policy[55], especially in developing countries, where they are used to compensate for other negative factors

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(53) Created by the Act on the Cultural, Scientific and Technology Free Zone of the State of Merida, of July 14, 1995, Official Gazette of the Republic of Venezuela No. 4.937, Extraordinary Issue, July 14, 1995; expounded by the Regulations on Cultural, Scientific and Technology Free Zone of the State of Mérida, of September 9,1998, Official Gazette of the Republic of Venezuela No 36.611, December 19, 1998.

(54) Created by the Act on Creation and Regime of the Free Zone for Tourist Investment Development of Paranguaná Peninsula, State of Falcón, of August 6, 1998, Official Gazette of the Republic of Venezuela number 36.517, August 14, 1998.

(55) Cf. EVANS MÁRQUEZ, Ronald, «Los convenios para evitar la doble tributación internacional y otros aspectos internacionales de la política tributaria venezolana», in DE VALERA, Irene (Organizer), *Comentarios a la Ley de Impuesto sobre la Renta*, Academy of Political and Social Sciences-Venezuelan Association of Tax Law, Caracas, 2000, p. 58.

that may discourage foreign investment[56]. Already since the beginning of year 2000, consideration was being given to the necessity for the country to carefully revise incentive policies to render them in line with postulates of economic reactivation and also to attain levels of competitiveness with other countries of the region[57]. But reality tells otherwise: Venezuelan is now –and ever more– far from competing with its neighboring countries, precisely due to the fiscal, regulatory, political and economic measures it has been establishing, unfavorable to opening to and welcoming foreign investment.

Presently, a number of fiscal measures are in force in Venezuela *formally* directed to attract economic activities, investments and capitals[58], being both *domestic* (in national laws) as well as *international* (via treaties and agreements), such those established with the Southern Common Market (MERCOSUR)[59], the Latin American Integration Association (ALADI)[60] and the Bolivarian Alternative of Latin America and the Caribbean (ALBA), among others, of which Venezuelan forms part and which represent cases of Latin American integration and harmonization.

In effect, one of the main objectives of MERCOSUR, according to Article 1 of the Asunción Treaty is to achieve «[f]ree circulation of goods, services and production factors between the countries through, among other things, the elimination of customs duties and non-tariff restrictions to the circulation of merchandise, and any other equivalent measure», «[e]stablishment of a common external tariff (...)», and «[c]o-ordination of macroeconomic and sectorial policies between States Parties on: foreign trade, agriculture, industry, tax, monies, exchange and capitals, services, customs, transportation and communications, and any others that may be agreed (...)», which evidences the relevance –for tax purposes– of said Treaty.

In this respect, in order to achieve the general objectives and postulates of MERCOSUR, it has been considered that the Venezuelan tax regime should be modified in, among other aspects, the following: (i) progressive harmonization and elimination of

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(56) Cf. BAZÓ PISANI, Andrés E., *op. cit.*, p. 172.

(57) Cf. EVANS MÁRQUEZ, Ronald, «Los convenios para evitar...» *cit.*, p. 59.

(58) On the matter, *vid.* PALACIOS MÁRQUEZ, Leonardo, «Medidas fiscales para el desarrollo económico», *Revista de Derecho Tributario*, Nº 97, Venezuelan Association of Tax Law, Caracas, 2002, pp. 179-224, and SOL GIL, Jesús, «Medidas fiscales adoptadas en Venezuela para el desarrollo económico», *Revista de Derecho Tributario*, Nº 97, Venezuelan Association of Tax Law, Caracas, 2002, pp. 225-248.

(59) For a study on the tax aspects of MERCOSUR and, in general, of Latin American integration, *vid.* VALDÉS COSTA, Ramón, «Aspectos fiscales de la integración con especial referencia a América Latina», *Revista de Derecho Tributario*, Nº 58, Venezuelan Association of Tax Law, Caracas, 1993, pp. 7-18.

(60) On ALADI and tax harmonization in Latin America, *vid.* MONTERO TRAIBEL, José Pedro, «La armonización tributaria en los procesos de integración», *IV Jornadas Venezolanas de Derecho Tributario*, Venezuelan Association of Tax Law, Caracas, 1998, pp. 279-311.

para-fiscal contributions, (ii) flexibilization of foreign currency control for countries of the block, (iii) revision of exporter VAT credit recovery system, (iv) implementation of income tax incentives, and (v) entering into DTAs with member countries of the block[61].

However, apart from the existence and effectiveness of a series of tax measures and incentives prescribed in quite a number of treaties –which will be mentioned further on under *VIII. Investment Protection, Taxation, Bilateral and Multilateral Exchange Treaties*–, and also apart from local laws –as will be analyzed under *VII. Income Tax Credits (Reductions)*–, the Venezuelan Government has systematically adopted a series of guidelines that contribute little to the development and economic stability of the country, or to attract foreign investment or maintain domestic investment, and that without their mention –even succinct– this national report would be incomplete.

On the one hand, there are the tax matters per se. In fact, the National Integrated Service of Customs and Tax Administration (*Servicio Nacional Integrado de Administración Aduanera y Tributaria*-SENIAT) (which is the federal tax administration agency and highest competent authority in the area) has designed and implemented a number of measures within the framework of the highly-publicized –and questioned– «Zero Evasion Plan», which consists in imposing fines and penalties including temporary closing on enterprises for their purported failure to comply, in both cases, with formal obligations in indirect taxes[62]. Also to be borne in mind is the number of para-fiscal contributions that have been recently dictated, counting more than thirty to date, which has generated an important increase of taxes that do not integrate in a consistent and organized manner with tax laws and regulations, and that in turn increase the accumulated tax pressure on taxpayers[63]. This would not seem to make much sense when, in addition, one must take into account that Venezuela is a country that depends on its oil revenues –rather than its tax revenues–, such oil revenues having represented since 1950 and in the average more than ninety percent (90%) of *the total revenues* of the country[64].

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(61) Cf. ATENCIO VALLADARES, Gilberto, «Cuestiones tributarias del Mercosur: aproximaciones desde el Derecho tributario venezolano», *Revista de Derecho Tributario*, No. 141, Venezuelan Association of Tax Law, Caracas, 2014, pp. 8-14.

(62) Cf. ABACHE CARVAJAL, Serviliano, «La responsabilidad patrimonial del Estado "Administrador, Juez y Legislador" tributario venezolano. Especial referencia al paradigmático caso del procedimiento de verificación» (National Report - Venezuela), *Memorias de las XXV Jornadas Latinoamericanas de Derecho Tributario*, volume II, Abeledo Perrot-Latin American Institute of Tax Law-Colombian Institute of Tax Law, Buenos Aires, 2010, pp. 349-350.

(63) Cf. ABACHE CARVAJAL, Serviliano and BURGOS-IRAZÁBAL, Ramón, «Parafiscalidad... » *cit.*, p. 256.

(64) Cf. ROSS, Maxim, *¿Capitalismo salvaje o Estado depredador?*, Editorial Alfa, Caracas, 2008, pp. 21-22.

On the other hand, combined with the fiscal measures, it has become internationally known[65] that since 2001 the Venezuelan government has followed a negative trend in connection with the property right protected under Article 115 of the 1999 Constitution. According to the *International Property Rights Index 2012*, Venezuela occupied the last place in the world (130/130) in physical protection of property rights, and was in next to last place (129/130) in respect of intellectual property rights. While in the *International Property Rights Index 2013*[66] Venezuela «improved» in both cases (123/130 in physical protection of property rights and 119/130 in respect of intellectual property rights), it is last (130/130) insofar as legal and political environment, which in turn comprises, among other things, the judicial independence (130/130) and Rule of Law (129/130) indexes. Measures such as occupations, seizures, expropriations, price controls, etc., account for the above.

According to the Venezuelan Property Rights Watch Group, from 2007 to 2011 there have been 3,355 private property violations in Venezuela, distributed as follows: (i) 1,911 violations arising from «rescuing» lands fit for agriculture; (ii) 915 violations against the property of industries and businesses, and (iii) 529 encroachments or attempts of encroachment.

These actions, as can be noticed, instead of attracting economic activity, investment and capitals to the country, have had a negative effect internationally known, in view of the departure of important corporations and economic groups unwilling to continue to tolerate –or, simply, unable to keep in existence with– these guidelines and policies of the State.

VII. INCOME TAX CREDITS (REDUCTIONS)

In the past, various forms of credits (reductions) in the matter of income tax have been established as internal fiscal measures directed to attract economic activity, investments and capitals. At present, two forms of credits are regulated, i.e.: (i) for *new investments* in (1) industrial, agro-industrial, construction, electricity, telecommunications, science and technology activities, (2) tourist services, (3) agricultural, livestock, fishing or fish farming activities, and (4) preservation, defense and improvement of the environment; and (ii) for *excess payments*.

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(65) Cf. RONDÓN GARCÍA, Andrea, HERRERA ORELLANA, Luis Alfonso and ARIAS CASTILLO, Tomás A., «Case Study: Private Property Abolition in Venezuela», *International Property Rights Index. 2010 Report*, American for Tax Reform Foundation/Property Rights Alliance, Washington, 2010, pp. 55-57.

(66) Consulted in: http://www.internationalpropertyrightsindex.org/profile?location=Venezuela, February 16, 2014.

1. Reductions for New Investments

By disposition of Article 56 of the ITL a ten percent (10%) tax reduction is granted on the amount of new investments made in the five years following the effective date of that Law[67], to owners of income arising out of *industrial and agro-industrial*, *construction*, *electricity*, *telecommunications*, *science and technology activities* and, in general, all industrial activities representing an investment in advanced or cutting-edge technology, in new fixed assets other than lands and used to effectively increase production capacity, or to new enterprises, provided not previously used in other enterprises.

At the same time, pursuant to the aforesaid Law the owners of income obtained from the provision of *tourist services* –enrolled in the National Touristic Register–, are entitled to a seventy five percent (75%) credit on the amount of new investments used in building hotels, lodgings and inns, expanding, improving or refurnishing existing buildings or services, providing any tourist service or training their employees.

In the case of *agricultural*, *livestock, fishing or fish farming*, the credit will be of eighty percent (80%) on the value of new investments made in the area of influence of the production unit and intended for mutual benefit, both for the unit itself as well as for the community where it is inserted. A similar reduction will be granted to the *tourist activity*, *for community investments*, when such investments are made by small and medium-sized industries of the sector.

A ten percent (10%) credit, additional to the above, is also established on the amount of investment in assets, programs and activities for the *preservation, defense and improvement of the environment*.

Lastly, it must be taken into account that reductions for new investment in *fixed assets* must be made with figures adjusted by the inflation adjustment system rather than at historical cost[68], on one part and, on the other, that all the credits previously mentioned above can be carried over to the next three (3) fiscal years.

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(67) On the various possible interpretations of the five year term for using the credit, *vid*. ROCHE, Emilio J., «Parte general...», *cit*., pp. 141-148.

(68) *Vid*. Ruling of the Supreme Court of Justice, Political-Administrative Chamber, case: *Goodyear de Venezuela C.A.*, March 4, 2008.

2. Credits for Overpayment (tax credit)

The ITL also provides, in its Article 58, that if in case of advanced payments or payments on account arising out of withholding tax the taxpayer has paid more than the tax accrued in the respective fiscal year, there is a right to «subtract» such excess in future tax returns and subsequent fiscal years (tax credit), until concurrence with the amount of such excess or credit, without detriment to the right of refund.

VIII. INVESTMENT PROTECTION, TAXATION, BILATERAL AND MULTILATERAL EXCHANGE TREATIES

Jointly with the DTAs, the Bilateral Treaties for the Protection of Investments (BITs) appear internationally as the minimum legal framework necessary to promote investments in countries and, consequently, must be part of the external economic agenda of Venezuela as basic instruments to develop a State policy aimed at improving the legal conditions necessary for foreign investment(69), in harmony with point VI above (Tax Measures and Incentives...).

As it is well known, one of the factors that can adversely affect investment flow between countries is –precisely– the phenomenon of double or multiple taxation of the same income or capital. This has generated an open and ever growing interest in countries to combat such pathology, as currently evidenced by the more than 2,000 agreements made and in force throughout the world(70).

1. Countries with which Venezuela has signed BITs

According to the Venezuelan National Council for Investment Promotion (CONAPRI): «[t]he main objective being sought by Venezuela with the signing of these Treaties is to encourage investment and increase the amount of flows of foreign capital towards its territory. In addition, favoring investment entails the promotion of the creation of jobs and technology development or transfer. This objective relies in the undisputable fact that a Bilateral Treaty with clear rules of mandatory execution, aimed at protecting the foreign investor, reduces the risks that may be encountered by the latter»(71).

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(69) Cf. EVANS MÁRQUEZ, Ronald, «Los convenios para evitar...» *cit.*, p. 61.

(70) Cf. *Idem*.

(71) Consulted in: http://www.conapri.org. February 15, 2014.

Currently in Venezuela there are 26 BITs effective with: Germany[72], Argentina[73], Barbados[74], Belarus[75], Belgium-Luxembourg[76], Brazil[77], Canada[78], Costa Rica[79], Cuba[80], Chile[81], Denmark[82], Ecuador[83], Spain[84], France[85], Great Britain and Northern Ireland[86], Iran[87], Lithuania[88], Paraguay[89], Portugal[90], Peru[91], Czech Republic[92], Russia[93], Sweden[94], Switzerland[95], Uruguay[96], and Vietnam[97].

(72) Official Gazette of the Republic of Venezuela No. 36.383, January 28, 1998.
(73) Official Gazette of the Republic of Venezuela No. 35.578, November 1st, 1994.
(74) Official Gazette of the Republic of Venezuela No. 4.853, Extraordinary Issue, February 8, 1995.
(75) Official Gazette of the Republic of Venezuela No. 38.894, March 24, 2008.
(76) Official Gazette of the Republic of Venezuela No. 37.357, January 4, 2002.
(77) Official Gazette of the Republic of Venezuela No. 36.268, August 13, 1997.
(78) Official Gazette of the Republic of Venezuela No. 5.207, Extraordinary Issue, January 20, 1998.
(79) Official Gazette of the Republic of Venezuela No. 36.383, January 28, 1998.
(80) Official Gazette of the Republic of Venezuela No. 37.913, April 5, 2004.
(81) Official Gazette of the Republic of Venezuela No. 4.830, Extraordinary Issue, December 29, 1994.
(82) Official Gazette of the Republic of Venezuela No. 5.080, Extraordinary Issue, July 23, 1996.
(83) Official Gazette of the Republic of Venezuela No. 4.802, Extraordinary Issue, November 2, 1994.
(84) Official Gazette of the Republic of Venezuela No. 36.281, September 1st, 1997.
(85) Official Gazette of the Republic of Venezuela No. 37.896, March 11, 2004.
(86) Official Gazette of the Republic of Venezuela No. 36.010, July 30, 1996.
(87) Official Gazette of the Republic of Venezuela No. 38.389, March 2, 2006.
(88) Official Gazette of the Republic of Venezuela No. 5.089, Extraordinary Issue, July 23, 1996.
(89) Official Gazette of the Republic of Venezuela No. 36.301, September 29, 1997.
(90) Official Gazette of the Republic of Venezuela No. 4.846, Extraordinary Issue, January 26, 1995.
(91) Official Gazette of the Republic of Venezuela No. 36.266, August 11, 1997.
(92) Official Gazette of the Republic of Venezuela No. 36.002, July 17, 1996.
(93) Official Gazette of the Republic of Venezuela No. 39.191, June 2, 2009.
(94) Official Gazette of the Republic of Venezuela No. 5.192, Extraordinary Issue, December 18, 1997.
(95) Official Gazette of the Republic of Venezuela No. 4.801, Extraordinary Issue, November 1st, 1994.
(96) Official Gazette of the Republic of Venezuela No. 36.519, August 18, 1998.
(97) Official Gazette of the Republic of Venezuela No. 39.170, May 4, 2009.

Similarly, Chapter VIII of the Group of Three Trade Liberalization Agreement, concerning investments, provides for an Investment Promotion and Protection Agreement between Mexico, Colombia and Venezuela[98 99].

2. Countries with which Venezuela has signed DTAs

Beginning in 1990, Venezuela was open to enter into DTAs with the principal countries of the world[100]. To this date, Venezuela has signed 31 Agreements[101] with the following countries[102]: Germany[103], Austria[104], Barbados[105], Belarus[106], Belgium[107], Bra-

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(98) Official Gazette of the Republic of Venezuela No. 4.833, Extraordinary Issue, December 29, 1994.

(99) On January 25, 2012, Venezuela *denounced* the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, to which it had been a party since 1993. Such denunciation had full legal effects 6 months after its notice pursuant to Article 71 of the Agreement and as result it is not longer possible for a foreign investor to bring to the International Center for Settlement of Investment Disputes (ICSID) the legal disputes arising in connection with its Investment in Venezuela, unless the foreign investor has timely accepted an arbitration offer from Venezuela under some Treaty or convention made between the State of origin of that investor and Venezuela.

(100) Cf. EVANS MÁRQUEZ, Ronald, «Los convenios para evitar...» *cit.*, p. 61.

(101) It is Important to mention that the position of the Venezuelan government in DTA negotiations has been of wide openness to eliminate tax barriers with the contracting States, and that it is even considered that this position should have been more moderate given that the rates granted by Venezuela to those countries have been significantly below the average granted by other developing countries. This has a twofold reading: (i) Venezuela has lost in its collection of those items, which in turn reduces the tax revenues of the State, or (ii) Venezuela offers greater advantages than other countries of the region to foreign investors. Cf. *Ibid.*, pp. 65-66. Another important topic is that the OECD Model was not designed based on the reality of Latin American Countries. For this reason, its implementation by countries like Venezuela has generated no little inconvenience in practice. This explains why, among other reasons, the Latin American Institute of Tax Law (*Instituto Latinoamericano de Derecho Tributario*-ILADT) (www.iladt.org) has taken the excellent initiative and difficult task, by the team including professors Addy Mazz, Antonio Hugo Figueroa, Heleno Taveira Torres, Jacques Malherbe, Natalia Quiñones Cruz, and Pasquale Pistone, of preparing the *ILADT Model of Multilateral Convention on Double Taxation for Latin America*, which responds to the distinctive features, realities and needs of countries of the region. The Model can be viewed at http://www.iuet.org.uy/docs/Modelo_Multilateral_ILADT_FINAL.pdf, February 19, 2014. On the other hand, for an analysis of DTAs in Latin America based on the Andean Pact, *vid.* UCKMAR, Víctor, «Los tratados internacionales en materia tributaria», en UCKMAR, Víctor (Coord.), *Curso de Derecho tributario internacional*, volume I, Temis, Bogotá, 2003, pp. 104-110.

(102) Consulted in: http://www.seniat.gob.ve/portal/page/portal/PORTAL_SENIAT, February 15, 2014.

(103) Official Gazette of the Republic of Venezuela No. 36.266, August 11, 1997.

(104) Official Gazette of the Republic of Venezuela No. 38.598, January 5, 2007.

(105) Official Gazette of the Republic of Venezuela No. 5.507, Extraordinary Issue, December 13, 2000. 3, 20(

(106) Official Gazette of the Republic of Venezuela No. 39.095, January 9, 2009.

(107) Official Gazette of the Republic of Venezuela No. 5.269, Extraordinary Issue, October 22, 1998.

zil[108], Canada[109], China[110], Korea[111], Cuba[112], Denmark[113], United Arab Emirates[114], Spain[115], United States[116], France[117], Indonesia[118], Iran[119], Italy[120], Kuwait[121], Malaysia[122], Norway[123], The Netherlands[124] (denounced), Portugal[125], Qatar[126], United Kingdom[127] Czech Republic[128], Russia[129], Sweden[130], Switzerland[131], Trinidad & Tobago[132], and Vietnam[133].

It is observed in the above lists that the countries with which Venezuela has signed both DTAs as well as BITs are: Germany, Barbados, Belarus, Belgium, Brazil, Canada, Denmark, Spain, The Netherlands, United Kingdom, Czech Republic, Sweden and Switzerland, thus propitiating –theoretically, at least– investment from those countries in Venezuela.

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(108) Official Gazette of the Republic of Venezuela No. 38.344, December 27, 2005.

(109) Official Gazette of the Republic of Venezuela No. 37.927, April 29, 2004.

(110) Official Gazette of the Republic of Venezuela No. 38.089, December 17, 2004.

(111) Official Gazette of the Republic of Venezuela No. 38.598, January 5, 2007.

(112) Official Gazette of the Republic of Venezuela No. 38.086, December 14, 2004.

(113) Official Gazette of the Republic of Venezuela No. 37.219, June 14, 2001.

(114) Official Gazette of the Republic of Venezuela No. 39.685, May 31st, 2011.

(115) Official Gazette of the Republic of Venezuela No. 37.913, April 5, 2004.

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(121) Official Gazette of the Republic of Venezuela No. 38.347, December 30, 2005.

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(123) Official Gazette of the Republic of Venezuela No. 5.265, Extraordinary Issue, October 1st, 1998.

(124) Official Gazette of the Republic of Venezuela No. 5.180, Extraordinary Issue, November 4, 1997.

(125) Official Gazette of the Republic of Venezuela No. 5.180, Extraordinary Issue, November 4, 1997.

(126) Official Gazette of the Republic of Venezuela No. 38.796, October 25, 2007.

(127) Official Gazette of the Republic of Venezuela No. 5.218, Extraordinary Issue, March 6, 1998.

(128) Official Gazette of the Republic of Venezuela No. 5.180, Extraordinary Issue, November 4, 1997.

(129) Official Gazette of the Republic of Venezuela No. 5.822, Extraordinary Issue, September 25, 2006.

(130) Official Gazette of the Republic of Venezuela No. 5.274, Extraordinary Issue, November 12, 1998.

(131) Official Gazette of the Republic of Venezuela No. 5.192, Extraordinary Issue, December 18, 1997.

(132) Official Gazette of the Republic of Venezuela No. 5.180, Extraordinary Issue, November 4, 1997.

(133) Official Gazette of the Republic of Venezuela No. 39.183, May 21, 2009.

3. Countries with which Venezuela has signed Bilateral or Multilateral Exchange Treaties

There are several hundreds of treaties signed by Venezuela with countries of Latin America and the Caribbean, Asia, Oceania, the Middle East, Europe and Africa on subjects related –directly or indirectly– to bilateral or multilateral exchange. Therefore, instead of extensively listing such treaties, which cover fields such as petrochemistry, mining, energy, electricity, trade, economics, among others, we prefer to refer the reader to the official source (http://www.asambleanacional.gov.ve/tabs/aprobatorias) that lists all signed and effective treaties, and expressly mentions the Approving Law promulgated by the National Assembly which in turns permits direct consultation and furthermore allows to appreciate the current trend of the government on those subjects.

IX. TAX RATE STRUCTURES FOR INDIVIDUALS AND CORPORATIONS (*Compañías Anónimas*) (DOMESTIC AND FOREIGN)

Finally, the Venezuelan ITL establishes two large groups of taxpayers: (i) *individuals* and (ii) *corporations*, and their assimilated entities. From this classification the various rate or aliquot structures according to which those persons pay tax there are determined –in principle–, also adding a special rate list according to the income-producing activity.

1. Individuals

Individuals and similar taxpayers will pay tax according to Article 8 of the ITL, based on the rate and other tax types contemplated in Article 50 of the Law, except when derived from the activities mentioned in Article 12 (operation of mines and assignment of such royalties and participations).

In this respect, Article 50 of the Law contemplates rate No. 1 for individuals, expressed in tax units (T.U.)[134], in the following terms:

RATE No. 1

1. For the fraction up to 1,000.00: 6.00%.
2. For the fraction that exceeds 1,000.00 up to 1,500.00: 9.00%.

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(134) The tax unit (T.U.) is designed as an inflationary correction technique that utilizes a monetary module to restate automatically the nominal fixed values utilized by tax regulations (tax obligations, penalties, etc.). This unit is readjustable by the Tax Bureau, based on the previous year variation of the consumer price index (CPI) in the Metropolitan Area of Caracas, which must be published by the Central Bank of Venezuela at the beginning of each year. Cf. ROMERO-MUCI, Humberto, «Uso y abuso de la unidad tributaria», en SOL GIL, Jesús (Coord.), *60 años de imposición a la renta en Venezuela. Evolución histórica y estudios de la legislación actual*, Venezuelan Association of Tax Law, Caracas, 2003, pp. 469-472.

3. For the fraction that exceeds 1,500.00 up to 2,000.00: 12.00%.
4. For the fraction that exceeds 2,000.00 up to 2,500.00: 16.00%.
5. For the fraction that exceeds 2,500.00 up to 3,000.00: 20.00%.
6. For the fraction that exceeds 3,000.00 up to 4,000.00: 24.00%.
7. For the fraction that exceeds 4,000.00 up to 6,000.00: 29.00%.
8. For the fraction that exceeds 6,000.00: 34.00%.

Non-resident individuals, i.e., individuals whose stay in the country does not take longer than one hundred and eighty three (183) days in a calendar year and who do not qualify as domiciled in Venezuela, will pay tax according to the thirty-four percent (34%) aliquot.

2. Companies Engaged in General Business

Pursuant to Article 9 of the ITL companies (*compañía anónimas*) and similar taxpayers (whether domestic or foreign) who perform *general economic activities* (i.e., other than the exploitation of hydrocarbons and related activities), will pay tax under the rate set forth in Article 52 eiusdem, also expressed in tax units (T.U.), according to which:

RATE No. 2

For the fraction up to 2,000.00: 15%.

For the fraction that exceeds 2,000.00 up to 3,000.00: 22%.

For the fraction that exceeds 3,000.00: 34%.

3. Companies and Individuals Engaged in Special Hydrocarbon and Mine Exploitation Business

Lastly, those companies (*compañías anónimas*) and similar entities engaged in the exploitation of hydrocarbons and related activities, on the one part, and, on the other, those *individuals* who obtain income from the exploitation of mines and assignment of such royalties and participations, will pay tax according to rate No. 3 set forth in Article 53 of the ITL:

RATE No. 3

a. Proportional rate of sixty percent (60%) for the income specified in Article 12 (individuals).

b. Proportional rate of fifty percent (50%) for income specified in Article 11 (corporations).

Caracas, February 2014

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