Working Papers

Tax Studies and Research Directorate

2

June 2016

Main Trends in Double Taxation Agreements in Latin America

ISSN 2219-780X

CIAT

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EXECUTIVE SUMMARY

The report **Main Trends in Double Taxation Agreements in Latin America** deals with one of the most relevant aspects in connection with fighting the phenomenon that governments around the world have endeavoured to discuss in recent years – *tax base erosion and profit shifting*.

This paper is based on broad research on Double Taxation Agreements (DTAs) signed by eleven Latin American countries, namely Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela. The research makes a comprehensive review of the structure of said international instruments, as well as the main trends regarding the addition in their texts of notions relative to the strengthening of the fight against evasion and avoidance and how the efforts made by these countries are in line with those of the International Community, which has used joint actions in recent years to develop thorough research on the way to avoid illegitimate application of the benefits awarded by these agreements by persons who are not residents of any of the signor countries or who seek to transact with scarce or null economic substance with the sole purpose of benefiting from the agreements.

The basis for the report was an Excel matrix divided into fields of study, including: Residence, Permanent Establishment, income tax allocation provisions, measures to fight double non taxation, anti-evasion or anti-avoidance measures, Exchange of Information, mutual administrative assistance and the use of Tax Sparing and Matching Credit provisions.

The structure used enables a comprehensive vision of the reality of each one of the eleven countries in terms of provisions relative to which their development has been most evident in recent DTA negotiation processes. These include the notions of force of attraction, inclusion of services as making up Permanent Establishments (PEs), treatment of passive income, including Limitation on Benefits (LOB) measures and reference to domestic anti-abuse measures included in each Contracting State's laws, all of which shall enable a snapshot even of the aspects that might eventually be subject to renegotiation aimed at their strengthening.

In this regard, the Organization for Economic Cooperation and Development (OECD) has proposed a specific action (Action 15 in the "Base Erosion and Profit Shifting" Plan) for governments to explore the feasibility of a multilateral instrument that would have the same effects as a simultaneous renegotiation of several bilateral tax treaties, with a special interest in strengthening agreements on issues regarding the fight against base erosion and profit shifting.

Finally, the analysis performed tackles two visions. On the one hand, a regional vision considers the total number of DTAs signed to establish the trend in the signing of said agreements based on the items described earlier. On the other hand, an individual perspective will enable a determination of which countries have made further progress in the exercise of including in their agreements provisions that strengthen the taxing power of their tax administrations as capital importing countries (source principle) as well as shielding their agreements against harmful tax practices by including both generic and specific anti-abuse provisions.

1. INTRODUCTION

This study provides an updated and expanded vision of the main trends in the negotiation and signing of double taxation agreements in Latin America. It further offers a report showing the main practices for negotiating and signing these instruments, including new clauses and specific treatment for extremely relevant aspects such as, inter alia, “residence”, “permanent establishment”, “exchange of information”, “business profits” and “force of attraction”.

This paper identifies the comparative evolution of the actions taken to counter the phenomenon of double taxation by analysing the progress made on both general anti abuse rules (GAARs) and specific anti abuse rules (SAARs), the implementation of the bona fide principle and the strengthening of own systems to combat tax avoidance in the respective domestic legislations, all of which facilitates the interpretation and administration of such agreements and, thus, the fight against these phenomena.

The report will help to draw the full picture of our region’s status relative to the negotiation and management of such agreements. In addition, it will show how tax administration efforts are in line with the progress made by UN and OECD studies on combating evasive or avoiding practices and their relationship with actions such as those outlined on the “Base Erosion and Profit Shifting – BEPS” plan, especially regarding Actions 6, 7 and 15 on said Plan, and the work performed jointly by the United Nations and the Inter American Center of Tax Administrations (CIAT) on the analysis of tax base erosion in developing countries and the efforts undertaken to counter it.

2. DOUBLE TAXATION AND MEASURES TO COMBAT DOUBLE TAXATION[1]

To enable a more thorough understanding of this report, we shall briefly analyse the main features of the tax phenomenon known as “double taxation”, where it started and why countries have undertaken to fight it.

Basically, “double taxation” has become more relevant a result of the so-called “economic globalization” together with the growth in market internationalization, which has prompted countries to conduct economic transactions not only within their own territories but also with their international peers.

Consequently, specific criteria are used in the different States to determine the taxable income within their territory. These criteria may be categorized into two groups: real, territorial or source-based; and personal or residence-based.

The double taxation problem arises when a transaction takes place between a taxpayer located in a country where the real, territorial or source taxation criteria are applied, and a resident from another country where the personal or residence taxation criteria are in place.

The same issue further emerges when the income source is situated in a state where the worldwide income criterion or a hybrid (territorial and personal) are adopted, in which case the residence country of the income earner shall also claim the power to tax the income received by its resident anywhere else in the world, thus creating a double taxation issue.

It may be noted that the double taxation phenomenon is characterized by the existence of an economic transaction in which a taxpayer is taxed twice on the same income by the application of taxation

1 *The ideas elaborated on in this section of the report were prepared by the consultant as part of the research underlying the publication of an International Taxation Treaty in Ecuador.*

criteria. Said phenomenon is known as “juridical double taxation”. There is another type of double taxation called “economic double taxation”, which differs from the former in that the same income obtained by two taxpayers is taxed twice. The most practical example of this type of economic double taxation is evidenced by corporations that are liable for their income obtained in a given fiscal year while their shareholders are taxed again on the same income upon its distribution in the way of dividends or profits from the aforementioned corporation.

Both “economic” and “juridical” double taxation are harmful phenomena when it comes to attracting investment, further harming the principles that should be observed by all tax systems, such as tax neutrality and tax justice. In this regard, faced with double taxation phenomena, an investor may seek to invest in territories where there is a lower or null tax burden, and even consider investing in tax havens or lower taxation systems. In other words, tax considerations may become a determinant of an investor’s decision to invest in a given country, together with other factors such as legal stability or certainty, and social and political stability.

However, the tax aspect will always be part of an investor’s economic analysis prior to making investment decisions, since in the case of double taxation in a State lacking a double taxation agreement with their country of residence, the phenomenon translates into additional investment costs and may adversely affect their decision to conduct business in said country.

To combat “double taxation” there are both “unilateral” and “bilateral or multilateral” measures. “Unilateral” measures are basically those established in countries’ own legislation, reflected in exemption provisions or tax allocation or credit.

The exemption method eliminates the source vs residence conflict and it exists in two modalities. The full exemption method is applied when the residence country excludes income from foreign sources in calculating the tax base of its residents. The exemption with progression method excludes the income from foreign sources from the income tax base in the country, although it does consider said income when defining the progressive tax rate it shall apply to domestic taxable income.

The tax credit method eliminates the source vs residence conflict and there are also two modalities of it. The full credit method is applied when the country of residence affords its resident the possibility of deducting the total amount from the taxes paid on foreign source income derived in the source country. On the other hand, the ordinary credit method means that the residence country only allows for the credit of taxes paid in the source country, but limited to the rate applicable on that type of income in the residence country. Thus, it means that in the latter case, the juridical double taxation will be fully eliminated only when both countries have maximum rates identical to those in the country of residence.

The deduction method allows for the deduction off the tax base of taxes paid on foreign income, contingent upon said income being included in the tax base of the tax due in the country allowing the deduction. This method fails to achieve the full elimination of double taxation.

In view of the methods described above, it can be stated that the double taxation issue is not always eliminated upon applying some of these unilateral measures. Therefore, countries are inclined to negotiating DTAs.

Nevertheless, it should be noted that unilateral measures are only useful in eliminating the double taxation that could arise in the countries of the legislation that establish such measures, although not in every residence country of the respective investors, since not all said countries will keep unilateral measures in their legislation to eliminate this phenomenon. This prompts the need for establishing clear and effective measures applicable both on the country receiving the investments and in the country of residence of the foreign investors making them.

In turn, agreements to avoid double taxation make up the so-called "bilateral or multilateral measures" to combat this phenomenon, depending on the parties involved in their signing.

3. AGREEMENTS TO AVOID DOUBLE TAXATION AND THEIR INTERNATIONAL MODELS

Double Taxation Agreements (DTAs) are used with the purpose of attracting investments while combating tax avoidance and evasion, mainly by enforcing the exchange of information provisions contained in these instruments. They are technical taxation agreements setting forth clear rules for the signing countries, enabling the identification of their tax powers on income derived in their territories from economic transactions and using the source or residence criteria pursuant to the articles in said agreements.

In terms of the structural models of these agreements[2], their formats have been almost identical. DTAs emerged in the aftermath of World War One, when a group of experts from the League of Nations[3] was commissioned to identify the issues relative to double taxation. This group of experts proposed to approach the issue through a bilateral agreement and published a model convention in 1928, which would become the predecessor to all the DTAs we know to date. Currently, the main models are the Model Tax Convention on Income and on Capital of the Organization of Economic Cooperation and Development (the OECD model convention) and the United Nations Model Convention on Double Taxation between Developed and Developing Countries (Model UN Convention). Decision 40 and Decision 578 of the ACN also establish a DTA model to be used by this bloc of countries, and an Andean regime to avoid double taxation, respectively.

The OECD's Model Convention was first published in 1958[4]. It was designed to solve the double taxation issues in the countries which are members to this organization --mainly developed countries with similar tax systems. This Model is intended to have the source country reduce the tax levied on the income in said country, while the residence country grants a credit or exemption on said income for the tax paid in the source country.

The OECD's Model Convention includes both articles and commentaries to each article.

The commentaries refer to aspects of application and interpretation and further include the position of certain countries in this connection. The OECD's Model Convention is updated regularly with contributions from its member countries based on the experience in negotiating, applying and interpreting the DTAs.

The UN Model Convention was built on the OECD's Model Convention. Thus, it follows a similar format. However, unlike the OECD's Model Convention, it takes into consideration the position of developing countries. For this reason, it includes more favourable provisions for developing countries. The UN Model Convention also includes commentaries to every article, where application and interpretation aspects are discussed. Like the OECD's Model Convention,

2 *Pecho, Rodríguez, Vásconez, Draft Working Document, ¿Influyen los Convenios para evitar la Doble Imposición en la atracción de Inversión Extranjera Directa?, CIAT, 2012.*

3 *The League of United Nations was the predecessor body to the United Nations Organization.*

4 *The OECD considers 1958 as the first date of publication of its Model Convention. However, the first actual publication date was in 1977, with a final language that had been ready since 1963. Said language from 1963 consisted basically in the consolidation of four drafts, the first of which was published in 1958.*

it is updated regularly with the contributions from the Committee of Experts on International Cooperation in Tax Matters[5].

The articles of the OECD's Model mainly contain residence taxation criteria, i.e. that the power to tax the income derived from an economic transaction shall lie with the residence country of the foreign investors. This implies a tax compromise for the capital importing country or the country receiving the investment, which compromise shall be mitigated by the income arising as a result of the investment attracted. Thus, capital importing countries or "source" countries seek to sign an agreement that will effectively attract real present and future investments, since an instrument of this kind signed in absence of investment interests by the other country may result in unjustified tax compromises or, much worse still, harmful application of the agreement as a tool for harmful tax planning.

Notwithstanding the above, it is important for each State to develop their own model convention to serve as a basis to start and develop their respective negotiation processes relative to these instruments in consideration of the features of their tax systems, consistent with their own economic and social realities, ultimately establishing very clear and objective guidelines for more effective application of the agreement, without overlooking the purpose of "attracting investment".

In connection with this, several countries in the region have carried out exercises in negotiating these instruments with own models, which have proven to strengthen the establishment of provisions to combat treaty shopping, especially of a specific nature.

Furthermore, the countries in the region have undertaken to include in their agreements mechanisms to effectively attract investments by implementing "Tax Sparing" provisions (or tax credit on the unpaid tax) which, despite appearing as methods to avoid double taxation by recognizing a tax credit, have the main feature of serving as a major investment attraction tool, since the credit being recognized in the investors' income returns in the residence country match the tax not paid in the country receiving the investment by virtue of the application of given tax benefits established in the domestic legislation of both countries. In other words, as a result of the application of "tax sparing provisions", the investor who obtained income in the source country on which he did not pay taxes by the application of a given exemption or deduction may apply as a tax credit in the residence country the tax that would have been due in the source country had there not existed such exemptions or deductions. This results in the avoidance of double taxation. In addition, the benefits sought by capital importing countries are not neutralized through the recognition of tax incentives in national legislation by exercising the sovereign powers of the States implementing them. This type of provision serves as a strong driver of investments framed within the States' own policies, which in turn respond to public policies aimed at investment promotion.

4. NEGOTIATING DOUBLE TAXATION AGREEMENTS[6]

Regarding the exercise of negotiating agreements to avoid double taxation, it implies more than knowing the strategies and provisions of the negotiating technique from the perspective of reaching an optimum outcome favourable to both parties. This would be a basic and, most importantly, logical perspective, if we consider the typical meaning of the word. However, from the pragmatic perspective, the negotiation has a much deeper connotation that must be developed by Tax Administrations currently.

5 *Pecho, Rodríguez, Vásconez, Draft Working Document, ¿Influyen los Convenios para evitar la Doble Imposición en la atracción de Inversión Extranjera Directa?, CIAT, 2012.*

6 *The ideas elaborated on in this section of the report were prepared by the consultant as part of the research underlying the publication of an International Taxation Treaty in Ecuador.*

Designing an appropriate policy for negotiating DTAs is important when it comes to assessing their effectiveness in reaching the goals defined, since there may be cases in which these agreements create “tax shields” from economic transactions having scarce economic substance or reality in connection with the activity that gave rise to them. Furthermore, in these cases the only purpose may be to leverage the benefits of the agreements, which is equivalent to an abuse of the international instrument.

This study has identified shortfalls in the legal structure of some of the instruments analysed – mainly the older agreements – where there is an absence of anti-abuse provisions (especially of a general nature) or limitation on benefits provisions, which may imply that the Agreement is applied failing its purpose of attracting investments. Especially in the case of source countries, this objective truly warrants the signing of a DTA, although harmful practices of tax avoidance and evasion are prevalent instead.

Based on the above, it can be noted that in the seventies, eighties and nineties, the experience of negotiating DTAs in Latin America failed to target the addition of effective measures to combat abuse of these instruments. They also failed to strengthen a mechanism for exchange of information and mutual cooperation between tax administrations.

On this point, it is relevant to stress the importance of having strengthened institutionalization in the countries that will be involved in a negotiating process, to enable the development of sound negotiating teams. Inter-institutional coordination should be in place encompassing not only the technical know-how of tax matters but also the technical aspects inherent to negotiation, combined with the support from business, economic and investment analytics. All of these will provide the States with a broader, cross-cutting view of the ideal scenario to start a negotiation process.

At present, countries are more concerned with developing instruments that respond to their own legal and economic realities, trying to ensure appropriate application of the agreements with provisions that allow for their strengthening against harmful tax practices, thus rendering them effective.

On this point, it is important to emphasize the content of the United Nations publication “Negotiation of Tax Treaties”[7] regarding the fact that the reasons why a given State decides to enter into the negotiation of such agreements in capital exporting countries differ from those in capital importing countries.

Thus, it could be stated almost without a doubt that the first step toward starting a negotiation process is structuring appropriate public policies for the negotiation of agreements and, subsequently, developing an adequate understanding of said policies among all the taxpayers subject to the application of these instruments.

In this regard, as discussed in the UN and OECD fora, the determinants within the state policy of whether tax agreement negotiations should be conducted may be of several types and will depend on each country’s perspective as capital exporters or importers, as summarized below[8]:

7 *UN Department of Economic and Social Affairs, La Negociación de Convenios Tributarios, New York, UN, First Edition, 2014.*
8 *UN Department of Economic and Social Affairs, La Negociación de Convenios Tributarios, New York, UN, First Edition, 2014, page 3.*

a. **To promote cross-border investments – Perspective of capital exporting countries:** By eliminating or reducing double taxation; reducing excessive taxation on the source; reducing or eliminating ultimate discrimination in the tax treatment relative to foreign investments; simplifying and providing certainty relative to tax systems and conditions awarded to foreign investment in the source country.

b. **To attract incoming foreign investment, technology transfer – perspective of capital importing countries:** By eliminating or reducing double taxation; eliminating excessive taxation at the source; certainty in tax systems applicable to incoming investments, establishing clear rules for the settlement of disputes by mutual agreement procedures, accessing incentives granted to incoming investments at the source (Tax Sparing provision).

c. **To fight evasive or avoiding tax practices:** By structuring sound networks for exchange of information; mutual agreement procedures and assistance in tax collection.

d. **For political reasons:** When it becomes necessary to send signs of good will to the International Community in connection with adopting international tax standards; strengthening diplomatic relations with other States; strengthening regional economic and business ties; meeting international obligations, such as provisions in regional economic agreements; political pressure from other States.

5. DTAs IN LATIN AMERICA[9]

Latin America has never had a broadly developed DTA network. Few countries have a network similar to those of developed and OECD-member countries. Incidentally, the Latin American countries with comparable DTA network sizes, namely Mexico and Chile, are OECD members.

In most of the countries in the region, isolated efforts have been made to sign and pass DTAs. However, it is important to mention the cases of Ecuador and Uruguay, which from 2011 to 2015 kept close to 30 synergic uninterrupted processes of negotiation of these agreements, many of which have already been passed and are in force, while the rest are under their constitutional process of ratification.

Currently, the most dynamic and developed economies in the region have migrated to the worldwide income system, taxing residents' income regardless of where their activities are performed. Furthermore, there is greater awareness on the benefits resulting from a DTA reflected as a tool for eliminating the double taxation phenomenon, but mainly focused as an instrument to combat evasive and avoiding tax practices by the exchange of information mechanism and the concern for strengthening both general and specific measures for combating treaty shopping.

Currently, there are some 223 DTAs signed and in force in the region. Similarly, there are close to 39 DTAs signed which have not been passed or are still undergoing approval procedures.

This shows how Latin America has changed relative to DTAs, with increasingly more countries joining this exercise and building more significant networks. As a result, the analysis of DTAs in force in countries like **Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay** and **Venezuela** becomes more relevant. It will further allow us to show clearly what the trend has been in the negotiation of DTAs based on some of the sections in this study, which were selected to address the need for strengthening anti-abuse regulations and combating

9 *References were extracted by the consultant from the draft working paper "Pecho, Rodríguez, Vásconez, Draft de Documento de Trabajo, ¿Influyen los Convenios para evitar la Doble Imposición en la atracción de Inversión Extranjera Directa?", CIAT, 2012.*

phenomena such as “double non-taxation”. These provisions protect agreements against evasive and avoiding practices to secure the goal of providing tools for attracting investment and combating the double taxation phenomenon.

From the perspective of capital importing countries, as is the case of most Latin American countries, signing a DTA would imply a tax sacrifice or compromise by the Tax Administrations in exchange for the main goal such jurisdictions pursue when signing these agreements, namely attracting investments and, consequently, deriving income from the economic activities performed in their territories. However, this is not necessarily true, since the mere existence of an agreement per se does not ensure there will be increased investments in the source country. Actual investments will depend on additional factors, such as legal and political certainty.

In this regard, the analysis of the 223 effective agreements in the 11 countries of Latin America mentioned above shows that the older agreements focus mainly on the allocation of the taxes levied by the respective tax administrations, limiting them significantly relative to the source country. Consequently, lower revenues were achieved in said territories.

This fact may bring about adverse effects when the negotiation of a DTA is not backed by a sound and comprehensive policy of investment attraction, since in such cases the DTA could translate into an instrument for tax avoidance or evasion, in addition to failing to ensure increased investments in the source country.

Faced with this possibility, the Latin American countries have endeavoured to strengthen and protect their DTAs by implementing and improving the use of general and specific anti-abuse provisions, as well as provisions to combat harmful tax practices coupled with an outline of comprehensive governmental policies to attract investments. Another important aspect is the protection of the instrument against tax avoidance and evasion. All of the above is in line with international practice on this matter.

6. GENERALITIES ABOUT THE MAIN PROVISIONS OF A DTA CURRENTLY BECOMING MORE RELEVANT IN THE OBJECTIVE SCOPE OF THE NEGOTIATION AND SIGNING OF DTAs IN LATIN AMERICA

When identifying the motivations prompting the design of a State policy favouring the negotiation and signing of DTAs, the countries tend to define the technical and conceptual framework of said policy. They also point out the parameters for establishing the taxing rights criteria of the respective country, considering not only the standards set forth by international models but also the unique conditions of each State depending on whether they are capital importers or exporters, rich in natural resources or interested in expanding their networks of technology or know-how transfer, cases in which the negotiation will be mainly focused on provisions such as permanent establishment and business profits, for example.

In this connection, it is important to stress that most of the agreements signed in the 2011-2016 period expressly include in their structures provisions relative to the addition of general anti-abuse rules (GAAR) as well as the strengthening and diversification of specific anti-abuse rules (SAAR), the implementation of notions such as force of attraction in the application of the business profits provision, and (in some of the countries) the strengthening of the exchange of information article with provisions for the application and implementation of said exchanges.

6.1. General Anti-Abuse Rules and Specific Anti-Abuse Rules and their correlation with the development of actions in the Action Plan against base erosion and profit shifting (BEPS)

In their capacity as capital importers, the countries in the region have endeavoured to strengthen not only the source taxation but also the control of avoiding or evading tax practices by including in their treaties both General and Specific Anti-Abuse Rules (GAAR and SAAR, respectively), avoiding the misuse of treaties through the incorporation of enterprises with the sole intention of obtaining resident status in a Contracting Party's territory and thus become the beneficiaries of the provisions therein, although there is scarce economic reality and substance in the business activities they seek to cover with the benefits of a DTA.

The international community has undertaken an analysis of the measures that States may adopt either in their national legislation or through international treaties or agreements signed with peers with the aim of preventing the granting of treaty benefits under "inappropriate circumstances". From this perspective, the Organization for Economic Cooperation and Development (OECD)'s Action Plan on Base Erosion and Profit Shifting (BEPS) has brought actions aimed at combating this type of harmful phenomena into the international taxation field.

The BEPS Plan deemed that globalization has driven trade and increased Foreign Direct Investment (FDI) in many countries. Thus, globalization supports growth, creates jobs, fosters innovation and has facilitated an exit from poverty for millions of people. However, globalization has a decisive influence on the corporate tax systems in all countries.

"Countries around the world agree on the need to eliminate double taxation and the need to achieve this on the basis of agreed international rules that are clear and predictable, giving certainty to both governments and businesses. International tax law is therefore a key pillar in supporting the growth of the global economy. As the economy became more globally integrated, so did corporations. Multi-national enterprises (MNE) now represent a large proportion of global GDP. Also, intra-firm trade represents a growing proportion of overall trade. Moreover, the growing importance of the service component of the economy, and of digital products that often can be delivered over the Internet, has made it much easier for businesses to locate many productive activities in geographic locations that are distant from the physical location of their customers. These developments have been exacerbated by the increasing Action Plan on Base Erosion and Profit Shifting – © OECD 2013 8 – 1. Introduction sophistication of tax planners in identifying and exploiting the legal arbitrage opportunities and the boundaries of acceptable tax planning, thus providing MNEs with more confidence in taking aggressive tax positions.

These developments have opened up opportunities for MNEs to greatly minimise their tax burden. This has led to a tense situation in which citizens have become more sensitive to tax fairness issues. It has become a critical issue for all parties:

Governments are harmed. Many governments have to cope with less revenue and a higher cost to ensure compliance. Moreover, Base Erosion and Profit Shifting (BEPS) undermines the integrity of the tax system, as the public, the media and some taxpayers deem reported low corporate taxes to be unfair. In developing countries, the lack of tax revenue leads to critical under-funding of public investment that could help promote economic growth. Overall resource allocation, affected by tax-motivated behaviour, is not optimal. • Individual taxpayers are harmed. When tax rules permit businesses to reduce their tax burden by shifting their income away from jurisdictions where income producing activities are conducted, other taxpayers in that jurisdiction bear a greater share of the burden. • Businesses are harmed. MNEs may face significant reputational risk if their effective tax rate is viewed as being too low. At the same time, different businesses may assess such risk differently, and failing to take advantage of legal opportunities to reduce an enterprise's tax burden can put it at a competitive disadvantage. Similarly, corporations that operate only in domestic markets, including family-owned businesses or new innovative companies, have difficulty competing with MNEs that have the ability to shift their profits across borders to avoid or reduce tax. Fair competition is harmed by the distortions induced by BEPS"[10].

The BEPS Plan sets forth **Action 6** "Prevent Treaty Abuse" which considers the need to develop model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances. To that end, Action 6 points out that work will also be done to clarify that tax treaties are not intended to be used to generate double non-taxation and to identify the tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country. This Action is closely linked to Action 2 in the BEPS Plan regarding the neutralisation of the effects of hybrid mismatch arrangements.

6.2. Implementation of the Exchange of Information

Countries such as Ecuador, Uruguay, Peru and Mexico have further endeavoured to develop the operational aspects of information exchange as a major point. Appropriate monitoring of evasive tax practices by applying DTAs is achieved by an agile system of access to information between the tax administrations of the Contracting Parties. In this regard, some of the agreements analysed establish specific terms for replying to information requests and the exchange modalities (automatic, spontaneous, upon request).

6.3. Assistance in Tax Collection

Although several countries in the region, such as Colombia, Mexico and Uruguay have concerned themselves with developing assistance in tax collection and this aspect is included in the sphere of negotiations, it faces a limitation in its application in connection with the domestic legislation. Specifically, its full application calls for the domestic legislation of the countries including it in its agreements to foresee assistance mechanisms such as audits in foreign countries or simultaneous audits. In absence of these, the actual effectiveness of the assistance could be compromised.

6.4. Force of Attraction

In addition, countries like Ecuador, for example, have sought to include in their recently negotiated agreements which are currently in the process of ratification a notion under the Article on "Business Profits" to enhance the possibility of taxation at the source for income attributable to a permanent establishment (PE) of an enterprise residing in one Contracting State which performs activities in the other Contracting State's territory. This is the so-called "force of attraction", whereby the income raised from economic activities between a resident of a Contracting State (the source state) requiring a service, for example, when the service is provided by a person in the other Contracting State (the residence state) and if the latter person has a Permanent Establishment (PE) in the source country and the service could have been provided by said permanent establishment, the income derived in this transaction could be attributed to the PE by "force of attraction".

10 *Organization for Economic Cooperation and Development, Action Plan on Base Erosion and Profit Shifting, 2013.*

6.5. Strengthening Domestic Measures on the Deductibility of PE Expenses

In the experience of applying Double Taxation Agreements, a recurring issue is the so-called "deductions" based on the article on Business Profits relative to PEs. According to said article, the expenses incurred by a permanent establishment in conducting an economic activity deriving taxable income attributable to the permanent establishment may be deducted for purposes of establishing the tax base of the income tax owed by the PE in the source country. In these cases, some of the agreements analysed set forth that in order for a given expense to be deductible, all the formal requirements contained in the domestic legislation of the corresponding Contracting State shall be met, which strengthens each State's domestic powers to regulate the source of deductibility of a given expense by monitoring its actual existence and connection with the income derived from a transaction.

6.6. Including Tax Sparing or Matching Credit provisions. Combating "double non-taxation"

Additional aspects, such as applying "*Tax Sparing*" provisions or the method of the unpaid tax, provisions allowing for the application of "Matching Credit" provisions as well as combating double non-taxation have also been identified in several of the agreements analysed, which has enabled the strengthening of efforts to prevent treaty abuse and harmful tax practices. This progress undoubtedly translates into better negotiated instruments that lead to actual attraction of legitimate foreign investments.

Finally, it is worth mentioning that any model convention should include provisions that accurately reflect the negotiation policy defined by the country, regardless of whether it seeks to attract investments, or to strengthen taxation at the source, to facilitate the implementation of strategic projects, to fight tax fraud, etc. States should strive to word clear provisions whose application is not affected by conflicting domestic legislation or the absence of legislation enabling a provision contained in an agreement to avoid double taxation. To this end, the governmental team in charge of this task must have sound and comprehensive knowledge of the domestic tax system, international standards on the matter, model conventions used worldwide, comparative rules, etc. which will result in their model containing not only appropriate allocation of the taxation right to the different types of income but also effective application of its provisions, with a very clear understanding of the red flags arising from the previously defined negotiating policy, and a comprehensive vision including inter-institutional coordination mindful of technical taxation issues and the macro targets sought by the State's economic and trade policy.

7. ANALYSIS OF THE DTAs SIGNED BY LATIN AMERICAN COUNTRIES

For the purposes of this paper, a database was put together including information from the entire universe of signed agreements, specially emphasizing the enhanced application of general and specific anti-abuse provisions. This analysis was performed for 223 DTAs in force in 11 countries[11]. The 11 benchmark countries were Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

The matrix used as a basis for the comparative analysis of the different trends in negotiating and signing these instruments, attached to this report, is made up of a questionnaire including 58 questions[12] dealing with the following aspects:

11 *For the purposes of this study, the Andean Community countries are considered individually, not as one single supranational agreement. (Decision 578).*

12 *Notwithstanding, for purposes of preparing statistical charts, 38 questions were selected out of the 58.*

1. Objective scope;
2. Residence;
3. Permanent Establishment;
4. Allocation of income;
5. Double non taxation;
6. Strengthening non-conforming provisions in the application of non-discriminatory provisions;
7. Anti-evasion and anti-avoidance provisions;
8. Exchange of information and mutual administrative assistance; and
9. Tax Sparing and Matching Credit provisions.

Below we provide an overview of each general item in the analysis matrix.

1. Objective Scope

The objective scope seeks to address aspects relative to the specialty of given taxes which may have the nature of direct taxes similar to an Income Tax but specific features focused in many cases on different types of industries or economic activities.

This analysis further seeks to establish differences regarding the treatment or approach toward issues of inclusion or mention of other types of taxes, as in the Agreement between Ecuador and China, which makes special reference to the Tax on Capital Outflows in the application of the DTA.

It also includes an analysis of the countries which have included express reference in the scope of the Agreement to the possibility of establishing income taxes for permanent establishments, which are not regulated in some countries' legislation although in most Latin American countries there is specific treatment for the tax arising from a permanent establishment allocating its profits or surplus to its parent company.

Another comparative is the determination of which percentage of the DTAs signed in Latin America make explicit reference to the timeframe for meeting the duty to notify any changes to domestic tax legislation relative to the DTAs objective scope. It has often been the case that said commitments have become dead letter when Contracting States have failed to notify as per their commitment to enable an assessment of the regulatory evolution in each State on the matters regulated in the DTA.

In this regard, several countries have included in their negotiations the request for the agreement to include a timing reference as to when this commitment should be met by either party. The parameters consist in referring to "*the end of the year or tax year*" as the time when regulatory amendments arising in said period should be notified.

In other cases, it has been found that agreements expressly establish that regulatory amendments should be communicated to the other party within 90 days of the effective or issue date of the respective law. Finally, a few agreements also mention in this connection that said commitment shall be met within a "*reasonable period of time*", which leads to subjective interpretation of what each party deems "reasonable" for purposes of meeting the notification commitment.

The purpose of including this type of provision is to provide objective guidance for Contracting States to meet an obligation which will undoubtedly enable the follow-up of the regulatory realities in each jurisdiction and how these changes might affect the application of the DTA. In other words, it is a very useful aspect for the respective Tax Administrations when it comes to administering and interpreting the convention, which is in the interest of capital importing countries (as is the case of most Latin American countries), which are focused on leveraging these agreements as effective tools for attracting investments. This is best achieved when the States have the necessary information available about the amendments that might affect the application of the agreement under certain circumstances. The opposite would lead to reduced effectiveness of the DTA in its purpose of eliminating double taxation, as well as combating evading and avoiding tax practices in each contracting State.

2. Residence

In this sphere of analysis the intent is to address two highly sensitive aspects for capital importing countries. The first one is whether to include in negotiated and signed DTAs from an explicit exclusion of the deemed “residents” for purposes of the application of the agreement those persons who derive income exclusively from sources obtained in the respective State. This reference is contained in the second phrase in paragraph 1 of Article 4 in the agreements and, based on same, a person is not deemed resident of a Contracting State if, even when they are not domiciled in said State, they are deemed resident pursuant to domestic legislation, but are subject to limited taxation on income derived in said State or the capital located in it. The commentaries to the OECD’s Model Convention point out that this situation emerges in some States relative to individuals, in particular in the case of diplomats and consular staff who provide services in their territories. However, including them may raise concern, especially if one of the Contracting States is a jurisdiction where a territorial income system is applied and, thus, only income derived from sources located in said country are taxed (such as in the agreements signed by Venezuela, for example). Thus, in such cases, the practice in negotiations has been for each Contracting State to establish its regulatory conditions applicable to each reality in the language of paragraph 1 in Article 4.

On this point, the commentaries to the OECD Model state that pursuant to its terms and spirit, the second phrase excludes from the definition of resident of a Contracting State corporations of foreign ownership exempt from taxes on their foreign profits by applying privileges designed to attract strategic corporations. It further excludes corporations and other persons that are not fully liable to taxation in a Contracting State on grounds that, despite being residents of said State by virtue of its tax legislation, they are deemed resident of another State by virtue of the provisions in an agreement signed between both States. However, the application of the second phrase brings about difficulties and creates limitations. It should be construed as stated by the OECD, in consideration of its objective and purpose, namely to exclude persons that are not fully liable to taxation in a State (full liability), for in any other case it could exclude from the scope of the Agreement all residents from countries applying the territorial taxation principle, which would evidently be an undesired outcome.

The next area of analysis regarding Residence seeks to assess whether the articles on this matter as negotiated by Latin American countries use as tie-breaker rule for legal persons’ residence the criterion of “place of incorporation” or “place of management” or “effective place of management” or “mutual agreement” or others , all of which will serve as a basis for collecting data on the trend of using one measure which might well be considered an “anti-abuse” measure, namely that of “effective place of management”, by means of which tools will be provided to the agreement’s administrators so that they can determine which jurisdiction actually makes the transcendental decisions in a corporation, the place where actual economic transactions shall be made by said legal entity, preventing corporations with majority ownership by residents of third countries from benefiting or requiring the application of benefits as per the Convention if they are not actual residents of one of the Contracting States.

3. Permanent Establishments

The treatment of permanent establishments (PEs)[13] is one of the most relevant provisions in a DTA. This definition will determine whether the source country is in a position to levy the income from activities performed in said country in the same manner as it taxes its residents or if, on the contrary, it is precluded from taxing these activities, since they are not taxable because they are not being carried out by means of a PE.[14]

It is important to note that Action 6 and Action 7 in the BEPS Action Plan, "Prevent Treaty Abuse" and "Prevent the artificial avoidance of PE status", respectively, set forth that the definition of permanent establishment (PE) shall be reviewed to prevent abuses, since in many countries, the interpretation of the treaty rules, such as on agency-PE, allows contracts for the sale of goods belonging to a foreign enterprise to be negotiated and concluded in a country by the sales force of a local subsidiary of that foreign enterprise without the profits from these sales being taxable to the same extent as they would be if the sales were made by local distributors.

In many cases, this has led enterprises to replace arrangements under which the local subsidiary traditionally acted as a distributor by "commissionaire arrangements" with a resulting shift of profits out of the country where the sales take place without a substantive change in the functions performed in that country. Similarly, MNEs may artificially fragment their operations among multiple group entities to qualify for the exceptions to PE status for preparatory and ancillary activities"[15].

Hence the importance of developing amendments to the definition of PE to prevent artificial avoidance of the PE status relative to the erosion of the tax base and profit shifting, even by using commissionaire mechanisms and specific activity exemptions, including issues in connection with profit allocation to the PE, as set forth in Action 7 of the BEPS Plan.

On the other hand, this provision allows for an interrelation with the article on Business Profits, which establishes as a general rule that income derived by an Enterprise in a contracting state in the other contracting state shall only be taxed in the residence state, unless the enterprise has carried out the activity in the source state through a permanent establishment located there.

The permanent establishment provision is of particular importance to capital importing countries in the sense that, depending on the presence or absence of protracted periods in configuring a permanent establishment in their territories, taxing rights may or may not be claimed in such territories on the income the foreign enterprises receive for the activities in their jurisdictions as a result of an economic activity.

Generally speaking, for a capital importing country it would be better for these time periods to be as short as possible so that the setup of the permanent establishment is completed expeditiously and, thus, taxation at the source is secured. It is important to stress that the reference to "timeframe" in an article on permanent establishment encompasses construction works as well as the services performed as a consequence of said work (administrative and consulting services, technical assistance, etc.).

13 *Pecho, Rodríguez, Vásconez, Draft Working Document, ¿Influyen los Convenios para evitar la Doble Imposición en la atracción de Inversión Extranjera Directa?, CIAT, 2012.*

14 *Paragraph 1 in Article 7 of the OECD Model Convention and the UN Model Convention establish that the benefit of an Enterprise in the other contracting state cannot be taxed unless the Enterprise caries out transactions through a PE.*

15 *Organization for Economic Cooperation and Development, Action Plan on Base Erosion and Profit Shifting, 2013.*

Notwithstanding, the PE provisions also foresee the possibility of setting up this institute in case the economic activity is related to a project of exploration, exploitation or extraction of natural resources, in which case the presence of a PE is not conditioned to a specific timeframe but to the carrying out of the activity as such.

Activities related to natural resources are very common in Latin America for countries are very rich in natural resources. Hence the need to approach this aspect when analysing trends with a view to establishing to what extent the agreements signed expressly provide the possibility of setting up PEs for economic activities carried out with or related to natural resources.

Further analysis will be made of the extent to which the countries in the region have endeavoured to include in this article some reference to other rules enabling the strengthening of the source taxation criterion when in the presence of warehouses or storage facilities belonging to an Enterprise from the other contracting state which uses said facilities for selling or distributing the goods stored either domestically or internationally. In this regard, the rule has been that when these scenarios arise and the facilities are only used for the display, delivery or storage of goods, a PE should not be set up. However, if the facilities are also used to sell the goods, the economic activity exists and a PE is required. The Enterprise shall pay taxes on the income derived from the sales activity carried out by the PE in the source state.

The following elements are perused under the article on PE in the DTAs signed: i) Which activities are included relative to natural resources? ii) Does the article foresee the three activities in connection with natural resources – exploration, exploitation and extraction?; iii) Does the article include periods of less than 12 months for construction activities?; iv) Does paragraph 3 include service rendering?; v) Does it consider administrative, technical or consulting services?; and, vi) to establish the exclusion of the existence of a PE, does it consider the subjective intent of selling or exporting goods or services?

4. Allocation of Income

This broad topic encompasses how agreements to avoid double taxation negotiated and signed by Latin American countries establish the rules of allocation of the taxing powers on the income in the purview of the DTA, with special emphasis in covering the most relevant aspects from the perspective of a capital importing country and how the countries have deployed their efforts in negotiating these international instruments with the purpose of strengthening the source income criterion without overlooking the need to add provisions aimed at attracting investment into their territories.

The income derived from the sale of real estate is especially relevant for capital importing countries, for example, as are the income arising from interest, royalties and dividends whose articles allow the source country to tax the income derived in its territory at a reduced rate.

The possibility to tax at the source the income derived from the transfer of rights whose value is related either directly or indirectly with property located in the source country has become a highly relevant aspect for capital importing countries, since the trend is to allow said country to tax the income derived from such transfers by virtue of their relation to the property. This is often the case with natural resource exploitations held by foreign enterprises, which raise the share price of the enterprises in the stock market and thus result in large profits or income at the time of selling.

The trend of adding provisions on independent personal services has also been evaluated, considering that the changes introduced by the OECD Model mean that this aspect is currently treated as part of Article 7 on Business Profits on account of the fact that technical and professional practice is regarded as a "business activity" as per the definition in the convention.

The topics or items contained in the analysis matrix in connection with "income allocation" are listed below":

4.1. Income Derived from Immovable Property

a. Are natural resource concessions included in the scope of the article? Application of private law provisions relative to real estate transactions?
b. Does the article treat the equipment associated with the exploitation of natural resources as "real estate property"?
c. Does the article consider rights to receive variable or fixed payments on the development or concession of the development of mineral deposits, sources and other natural resources?

The goal of this part of the analysis is to determine to what extent Latin American countries and, most importantly, those with a wealth of natural resources have focused their negotiations on including provisions in this article to enable taxation in their territories of income derived mostly from mining activities, concessions and from natural resources in general. There are instances of this article contemplating the treatment of income from rights or shares of an enterprise whose value is related directly or indirectly with immovable property situated at the source state (capital importing country) as income derived from "real estate property".

4.2 Application of the article on business profits:

a. Does the article prescribe the application of the notion of "force of attraction"?
b. Does the article provide for measures to strengthen compliance with formal duties for the deductibility of expenses of the PE?
c. Does the article refer to domestic legislation to determine the cases in which an expense will be recognized as deductible? Does it include specific provisions for deductibility?

With regard to this article, guidelines were sought to measures the percentage of Latin American countries that have focused on strengthening the source taxation criterion by implementing notions such as "force of attraction" whereby any income received by an enterprise of the other Contracting State derived from a transaction in goods or services of a similar nature to those that could have been sold or provided directly by a permanent establishment of that enterprise in the source country could be attributed to said PE and thus be taxable in the capital importing country. An effort is made to identify the trend in Latin America to include in the Business Profits article or in the DTAs Protocol any provisions focused on strengthening measures established in the domestic legislation of each contracting state with regard to the compliance with formal requirements (seeking tax or external auditors' certificates, for example) for granting the benefits under the purview of the DTA, as well as to determine whether a given expense incurred by the PE can be deducted. In short, this strengthens the competencies and powers of each Contracting State's Tax Administration relative to the enforcement of the agreement.

4.3. Application of the Article on Income Derived from "International Traffic"

a. Does the article provide for the possibility of the term "benefits" to include interest on amounts derived directly from the operation of ships or aircraft in international traffic, provided such interest is ancillary to the operation activity?

Although the majority criterion for the distribution of income derived from international traffic is the place of residence of the shipping enterprise, or its place of effective management, countries may now use negotiations to broaden the scope of this article to include activities relative to international traffic (like the lease of aircraft or interest on amounts derived directly from their operation) as covered in this article. Regarding interest, including it in this article instead of under the article on “Interest” per se might reduce the power of capital importing countries to levy such income in their territory at a low rate.

4.4. Provisions Relative to “Associated Enterprises” and “Transfer Pricing Systems”

a. Does Article 9 provide for the possibility of including as associated the cases mentioned in the corresponding transfer pricing systems of the Contracting States?
b. Is there a strengthening of the possibility to apply, without prejudice to the language in the article, each Contracting State’s own transfer pricing system?
c. If so, what mechanism does the agreement use? A reference in a specific article or in the Protocol?

Transfer pricing systems are considered valid tools for combating harmful tax practices from taxpayers performing economic transactions with their associated parties, seeking to increase expenses to erode their tax base or, conversely, to reduce their income, in an attempt to pay lower taxes. Hence the need for countries to strive to increasingly strengthen these systems so that they are not rendered any less effective by the application of a DTA. In this regard, some countries have identified the practice of clarifying in agreement texts that their provisions shall not preclude the association or identification criteria of associated parties established in their domestic legislation from being fully applicable and that, combined with the association provisions in the DTA, will be further strengthened in their application.

4.5. Application of Tax Exemption Provisions on Interest Earned from Special Loans

a. Are exemptions provided for in special payments to attract investments, export promotion, inter-governmental payments?

One mechanism used by capital importing countries to develop investment projects is including in their domestic legislation or as explicit DTA provisions exemptions to the payment of taxes in the source country in the case of interest earned from inter-governmental loans or loans aimed at promoting a country’s exports or purchasing industrial machinery or equipment that might help to strengthen and facilitate the productive capacity of the loan beneficiary. In this regard, statistical data have been sought to enable a determination as to the extent to which the trend to include this type of provision in the agreements has grown in Latin America.

4.6. Application of the Provision on Royalties

a. Was the shared taxation agreed by explicit mention?
b. Does it include Technical Assistance?
c. Does it include the use or right to use industrial, commercial or scientific goods?
d. Does it include the definition of new varieties of plants?

One of the most carefully studied aspects by DTA negotiating teams is “royalties”, since from the perspective of a capital importing country it may imply the possibility to tax in their territory, albeit at a reduced rate, the income derived from the use or right to use intellectual property (copyright, industrial property). The OECD model provides for a taxation criterion on the residence exclusively. However, Latin American countries use the criterion of "shared income" in their agreements. Regarding the decision of whether to include "technical assistance" in the scope of the article, it shall imply that the source country guarantees at least a minimum tax in its territory, since in absence of this, the income earned from such activity may be deemed covered under the "business profits" article and, depending on its duration and provided that a permanent establishment is set up in the source country, the income derived could be taxed in that country. Conversely, all the taxation would go to the residence country of the recipient.

The same criterion could be followed when the treatment of income is approached from the scope of the article on "independent professional income" provided that the recipient is a natural person and carries on activities in the source country through a fixed base. Relative to the use or right of use of industrial, commercial or scientific goods, the motivation for capital importing countries to include these items under the article on royalties is the same - to secure minimum taxation in their territory. However, failing to do so would imply treating such income under the article on "business profits" and even under the article on "capital gains".

Finally, in connection with new varieties of plants, since Latin American countries are rich in biological diversity, it is of paramount importance to determine what percentage of the DTAs signed expressly include under the notion of "royalties" that of "new varieties of plants", allowing them to retain in their territory part of the taxation derived from their exploitation.

4.7. Application of Provisions Relative to Source Taxation on the Income Derived from Capital Gains

a. Does it contain a provision on the alienation of shares/bonds with the intrinsic value of real estate property?
b. Is the treatment of the alienation of shares/bonds explicit? Shared, limited, residual, exclusive?

In this regard, the approach is aimed at considering the Latin American reality and, in particular, the interest arising from the negotiation of these provisions mainly targeting the alienation of shares whose value is directly or indirectly related to immovable property located in this region. Hence the importance of determining percentages of presence of these provisions in the agreements signed by Latin American countries and how the income allocation criteria are generally managed in the case of share or bond sales. It is important to clarify the terminology used in this analysis in connection with shared, limited, residual or exclusive rights to tax income from capital gains, specifically shares or rights.

Shared taxation implies that the tax may be levied either in the source country or in the residence country, applying the relevant method to avoid double taxation as stated in the DTA (exemption or tax credit). Limited taxation at the source implies that the country has taxing rights but at a reduced rate or with a rate cap, without prejudice to the fact that the entire income amount may be taxed at the residence country with the subsequent application of the method provided for in the DTA (tax exemption or tax credit). Residual taxation refers to the cases in which the article fails to specifically mention the transaction involved (such as the sale of shares whose value is derived from immovable property) and thus provides for "the rest of the cases not expressly mentioned" an income allocation rule that may fall on the residence or source countries. Finally, exclusive taxation implies that the respective income can only be taxed either at the residence or at the source, as established in the DTA.

4.8. Application of Specific Articles Governing Income Derived from Independent Professional Services

a. Does the DTA include Article 14? What is the criterion used?

Here, the analysis is intended to determine the percentage of Latin American countries that include in their agreements specific provisions governing this type of income, taking into consideration that under the amendments made to the OECD Model, this type of income is now covered by the “Business Profits” article in agreement with the provisions contained in the “Permanent Establishment” article.

4.9. Provisions that Strengthen Taxation at Source on Income Derived from Activities by Artistes and Sportsmen

a. Does Article 17 make any reference to including within its scope the income derived from an artiste’s or sportsman’s fame or renown?
b. Does Article 17 incorporate any exceptions/exemptions arising by reason of cultural international agreements or government funding?

There are two clear realities underlying this item which have been identified in some of the latest agreements signed by Latin American countries: On the one hand, the inclusion in the article of the idea of “income derived from an artiste’s fame or renown” securing taxation at source. Otherwise, this type of income might be included under the “Royalties” or “Business Profits” or “Other Income” articles with the resulting consequences for allocation of income. And, on the other hand, an assessment of the number of agreements that incorporate, among the provisions governing this type of income, tax exemptions whenever the artiste’s or sportsman’s performance is funded by cultural agreements between countries or with state funds, which is quite a frequent practice in Latin American countries.

4.10. Criteria Mainly Applied under “Other Income”

a. Source criterion on Other Income?
b. Broad but shared, limited or residual

This analysis is intended to establish the extent to which the agreements subscribed by Latin American countries reinforce the source criterion in the provisions that are applicable to income that cannot be classified according to the specific provisions of the DTA. “Broad” means that the source criterion is applicable with no restriction as to the tax rate, “but shared” means that —although the criterion is broad— the country of residence may also tax the income in its territory; in these cases, the relevant methods to avoid double taxation are to be applied. “Limited” means that in practice the source criterion is limited either to a specific type of income or to a reduced rate. Finally, “residual” means that the source criterion only applies to income other than the income expressly referred to in the article and which follows specific criteria for allocation.

5. Double Non-Taxation

Double non-taxation occurs where, upon application of the provisions of a DTA, a certain income is attributed —for purposes of taxing rights— to a country (whether source or residence) where, pursuant to internal rules, such income is exempt or not subject to taxation, thus resulting in a “double non-taxation”. In this respect, it generally may be said that only a few Latin American countries have considered including in their agreements provisions intended, expressly or indirectly, to eliminate this effect when the agreement is applied: expressly, by including specific rules providing for the non-application of the DTA in such cases, so that the taxing right of the country which the agreement would have limited remains intact; and indirectly, through the possibility for countries to identify these cases in practice and request a renegotiation of the agreement from their counterparty to eliminate double non-taxation.

6. Reinforcing Measures that are Supposedly Inconsistent in the Application of Non-Discrimination Provisions

This item of the matrix is intended to determine the extent to which Latin American countries include in their conventions, in the main document or as a protocol, express provisions inherent to the nature of their own domestic tax systems that "at first sight" might seem contrary to the Non-Discrimination Provision prescribed by the DTAs but which, upon agreement with their counterparty, are listed in the instrument with an express or indirect indication that such provisions are not to be considered discriminatory or that they may be applied under the DTA framework. As an example, let's examine the case of countries whose domestic laws provide for exemptions or for very favourable systems, from a fiscal viewpoint, for their nationals but which, upon agreement with their counterparties, decide to expressly establish in the agreement that such exemptions or regimes do not alter the principle of "Non-Discrimination". Also within the scope of this item, there are agreements including provisions related to specific matters of the law of each country (deductions, conflict resolution, treatment of interest, royalties, application of other agreements to other topics, etc.). These provisions, as they are listed or expressly included in the text of the agreement, are indeed applicable by mutual agreement of the Contracting States.

7. Anti-Avoidance and Anti-Tax Evasion Measures

One of the main items considered when studying the trends in Latin America is the application and/or strengthening of anti-tax evasion or anti-avoidance provisions under the treaties negotiated or signed.

As expressed throughout this report, one of the reasons why a country decides to sign a DTA is to prevent tax evasion and tax avoidance and further protect tax bases. International tax evasion and tax avoidance occur when taxpayers take advantage of the differences existing among the several methods for tax base calculation or tax types when carrying on international transactions, and also profit from the benefits derived from the international networks of DTAs.

The provisions that countries have included in their DTAs to prevent tax evasion or tax avoidance are of interest for the purposes of this analysis, as they will allow us to visualize a clear scenario of trends in the progress made in this area and what the countries do to safeguard such treaties against tax evasion or tax avoidance practices. All this is directly related with the objective of attracting investments; a purpose that should be attained without creating adverse consequences for the tax collection capability of each Tax Administration pursuant to the provisions of the Treaty and the domestic law in each case.

The database gathers the information on the anti-evasion and anti-avoidance provisions included in the respective DTAs of the 11 countries subject to analysis. The database is detailed enough to determine whether the rules are general[16] or specific. So the database shows whether the provision is general or specific, whether it makes reference to the domestic law, whether certain entities are specifically excluded to prevent them from profiting from the benefits of the DTA,

16 *The IBFD defines anti-abuse general rules as legal measures against evasion which provide general application criteria and are not addressed to specific taxpayers or transactions.*

whether the provision makes reference to the beneficial owner[17] and, finally, whether these measures are considered to qualify as "treaty shopping".

Treaty shopping or abuse of treaties occurs when a third party, in general a non-resident of either of the Contracting States of the DTA, uses such instrument to take advantage of fiscal benefits awarded by the instrument. Basically, treaty shopping involves a transaction that only exists according to the law, while the parties involved have no intention of actually conducting transactions of economic substance.[18]

For the purposes of the report, the analysis has been divided according to the following issues:

a. Whether the treaty contains anti-abuse provisions or not;
b. Whether the rules are general or specific. General rules are applicable in a cross-cutting way to the whole treaty, such as provisions for the limitation of benefits or provisions that require an analysis of the true intention of a person involved in a certain transaction regarding application of a DTA, as such application should not be intended only to take advantage of the treaty;
c. In the case of specific rules: Determine the type of rule or the article to which they relate (beneficial owner, analysis of the true intention underlying the application of one of the articles of the treaty);
d. Whether the treaty contains provisions excluding certain persons from the scope of the DTA (application of mechanisms for the limitation of specific benefits in the case of certain entities which are precluded from applying the DTA —based on particular characteristics such as transparency in their organizational process— when the entities do not meet certain requirements that allow the Tax Administrations to ascertain the true economic substance of the transaction or the actual involvement of residents of the Contracting States in the transaction);
e. Whether the treaty contains provisions that prescribe the application of anti-abuse measures set forth by the respective domestic laws of each Contracting State (these domestic anti-abuse measures may include provisions for combating thin capitalization, application of transfer pricing systems, economic event and analysis of economic substance over legal form, among others);
f. Whether the treaty contains provisions related to the beneficial owner (actual beneficiary in the transaction; it shall not suffice to be formally present as a player or as an involved party, but proof is to be furnished that such party's economic interests in the transaction and the deriving effects arise in the context of the meaning of "resident" of one of the Contracting States);
g. Whether the measures qualify to be considered measures combating treaty abuse;
h. Whether the treaty makes express reference to the *Bona Fide* principle (this entails including the definition of the principle as such in the text of the treaty, associated with the intent to not unlawfully benefit from the treaty by structuring shams or simulations ultimately intended to take advantage of the benefits awarded by the instrument).

It is worth highlighting that this report will evidence the extent to which Latin American countries are actually implementing the actions developed by the international community to combat treaty abuse.

17 The concept of beneficial owner prevents persons or entities from irregularly benefiting from a DTA in connection with 3 types of profits: dividends, interest and royalties. This anti-abuse rule protects the State of the source, which shall only apply the preferential rate (reduced by the DTA) when the beneficiary of the dividends, interest or royalties is a resident of the other Contracting State.

18 Pecho, Rodríguez, Vásconez, Work Paper Draft, ¿Influyen los Convenios para evitar la Doble Imposición en la atracción de Inversión Extranjera Directa?, CIAT, 2012.

In this respect, the United Nations and the Inter-American Center of Tax Administrations have made every effort to develop international comparative and research studies in order to determine the actions to be taken, the scope of treaty abuse and actions to reduce or eliminate such abuse with the aid of GAAR or SAAR rules.

In this regard, Graeme S. Cooper, a Tax Law Professor, developed in this context of inter-institutional cooperation a study on the prevention of tax treaty abuse. In his paper, Professor Cooper states that in order to determine the best way to combat treaty abuse, the States may approach the matter through the eyes of their domestic laws in agreement with the provisions contained in their respective tax treaties. Thus, there are three significant themes the States need to strengthen.

First, they should develop recommendations to prevent inappropriate access by taxpayers to the network of tax treaties signed by a certain country. To this end, both the international community and the particular States need to make every effort to amend DTA international models so as to incorporate new and improved anti-abuse provisions, on the one hand; and on the other hand, they need to define, under the domestic law of each country, actions to fight harmful tax practices, which should not be contrary to the provisions of the DTA, but rather supplement and reinforce the application of the DTA as a whole.

Second, the need to clarify, within the text of DTA international models, in the domestic law of each country or in the respective DTA signed by each State, that tax treaties are not intended to generate “double non-taxation”. To this end, any work to be developed from the OECD perspective is fundamental and should be coordinated with the activities under Action No. 2 of the BEPS Plan directed to neutralizing the harmful effects of hybrid adjustments.

Finally, the need for States to produce recommendations on the considerations that lead a country to initiate negotiations with another country with a view to signing a DTA. This will be achieved through an effective and consistent tax policy centered on these treaties, which policy should be aligned with the trade and development policies pursued by each State in the exercise of its sovereign power.

Similarly, the OECD through Action No. 15 of the BEPS Plan has underlined the relevance of considering matters of public international and tax law to develop a multilateral instrument that will enable the jurisdictions that so desire to implement strategies to tackle taxable base erosion under bilateral tax agreements. In this regard, the said Plan elaborates a multilateral instrument designed to offer an innovative approach for international taxation taking into account the accelerated growth of the global economy and the need to quickly adapt to such growth.

The conclusions that will emerge from the report will shed light on the trends followed by Latin American countries on these matters, in particular regarding the incorporation of anti-abuse provisions to their DTAs and the way in which the notion of International Taxation derived from such provisions is put into practice in administering the treaty.[19]

8. Exchange of Information and Mutual Administrative Assistance

Most DTAs in force at present contain exchange of information provisions through which the competent authorities of the Contracting States, generally Tax Administrations, agree to exchange information of fiscal relevance. However, the scenario is quite different in the area of mutual administrative assistance.

19 *Graeme S. Cooper, Preventing Tax Treaty Abuse, Papers on Selected Topics in Protecting the Tax Base of Developing Countries, UN, 2014.*

Both exchange of information and administrative assistance are considered powerful tools to combat tax evasion and avoidance, which are two of the goals pursued by countries when signing DTAs, as explained above.

The domestic laws of each country contemplate provisions associated with access to public information and empower Tax Administrations to request information from public and private entities as required for the exercise of their statutory duties. This notwithstanding, this power evidently does not extend beyond the territory of each country.

In a globalized world, Tax Administrations may no longer depend exclusively on national sources of information to tackle tax evasion and avoidance and they also need to develop networks of international administrative assistance to come up with effective control mechanisms beyond their borders such as audits abroad as well as simultaneous audits.

International administrative cooperation has been developed as a response to the difficulties faced in enforcing tax obligations. These difficulties arise from jurisdictional limits of the Administrations, who are unable to obtain information on, assess and identify the taxable events and the taxpayers involved in a transaction.

At the same time, at the international level, the exchange of information and assistance often takes place informally as a result of the countries' friendly relations. Such informal exchange of information and cooperation proves useful, although shortfalls arise from the lack of legal support, the intermittent flow of such exchanges and the domestic legal restrictions of the disclosing country, as well as the latter's goodwill as to the time, scope and manner in which such information or assistance is delivered or rendered.

In an environment of economic globalization, capital mobility and the presence of multinational companies in local markets have been on the increase. Tax Administrations need to understand these trends and develop initiatives to face them. To this end, governments must have tools that

- ensure proper income statements in international transactions
- define tax bases appropriate to the tax sovereignty of each country, and
- seek to enhance the efficiency of the different Tax Administrations.

All of the above may be achieved with broad and efficient mechanisms of mutual administrative cooperation and effective exchange of information among Tax Administrations.

Also, it is worth to highlight that favourable conditions are currently experienced worldwide in terms of transparency and cooperation in the exchange of tax information and, in particular, the opening up of the States in this area.

International administrative assistance and exchange of information have become more important as international trade increased. The share of taxpayers with income derived from foreign sources and foreign capital continues to rise, creating more opportunities for international tax evasion and avoidance. This phenomenon poses a threat to effective management by Tax Administrations as losses in tax revenues may be quite severe.

Provisions on exchange of information and mutual administrative assistance among Tax Administrations are effective mechanisms to strengthen the enforcement of tax obligations in international transactions and to combat harmful tax practices as they offer adequate tools to curb the current problems in terms of tax planning, use of tax havens and preferential tax regimes, transfer pricing, thin capitalization, e-commerce, among others.

This analysis is intended to determine whether Latin American countries have tended to include exchange of information and mutual administrative assistance or cooperation in their DTAs, taking account of the international parameters that make up the basis for application (principle of confidentiality, proportionality, reciprocity, and specialty) and enunciating, in the case of exchange of information, the mechanisms for such exchanges (regular or automatic, voluntary and specific exchange) and also include operating provisions to meet the respective requirements.

9. Tax Sparing and Matching Credit

Countries pursuing an increase in economic development try to attract capital to favour investment processes and, to such end, they usually offer tax incentives, which translate into tax reductions or exemptions.[20]

In this regard, when the non-resident investor who has obtained a tax benefit is then taxed by their State of residence, upon application of “worldwide income” criteria, the tax benefit granted by the State of the source loses effect if, to eliminate double taxation, the State of residence only allows for a deduction of the tax actually paid abroad.

Tax sparing provisions were analysed in this database as these are relevant when measuring the impact of DTAs on investments in Latin American countries.

These types of provisions enable a resident of a country to deduct a tax paid abroad, in addition to the tax the resident would have had to pay abroad but did not, in whole or in part, because there is an exemption in the country in which the investment is made.

The Commentaries to the articles of the OECD Model Tax Convention indicate that these provisions can take two forms:

a. The State of residence allows for the deduction of the whole amount, or the amount limited by the DTA, of the tax the source State may have collected pursuant to its domestic laws, not taking into account tax incentives, even if the source State has waived the whole or any part of the tax on account of tax incentives given to stimulate economic development; and
b. The State of residence exempts the income that has benefitted from tax incentives in the source State.

There may be limitations on the tax sparing provisions as regards the areas where they may be applied. This feature has also been studied in this database.

Unlike tax sparing, matching credit means that, rather than deducting the tax that would have been due in the absence of the tax incentive or benefit, the State of residence authorizes a deduction of an amount higher than the tax actually paid.

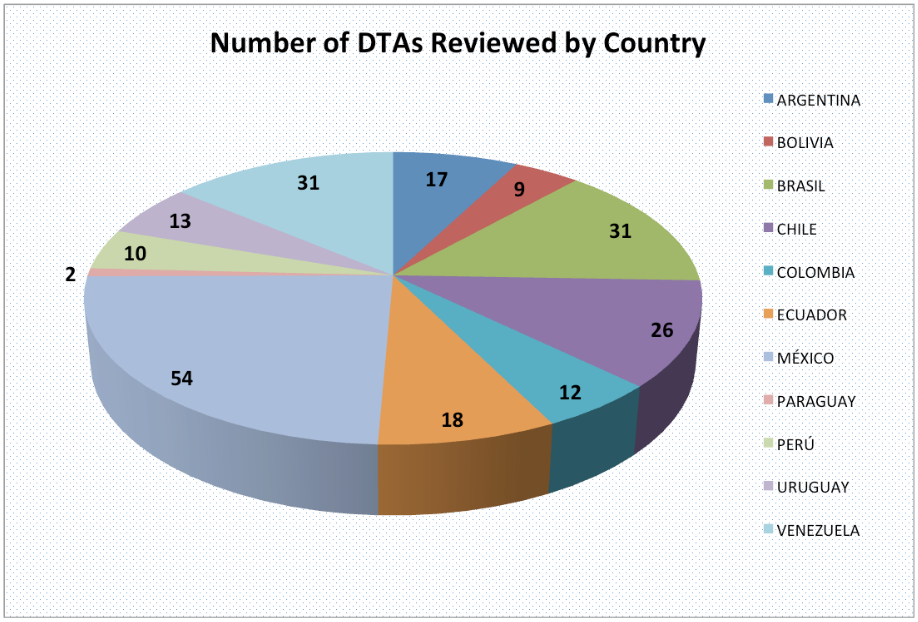
In this respect, it is worth determining through this analysis the number of Latin American countries that use these types of provisions in their conventions and the extent to which this trend is found at a regional level.

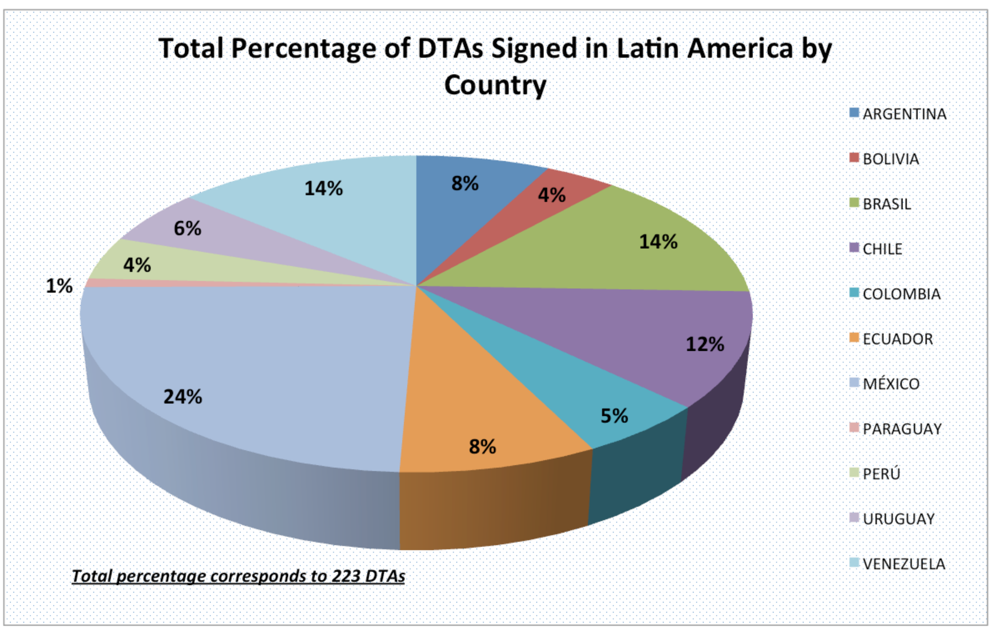
20 *Joan Hortala, Las cláusulas de tax sparing y matching credit. Incentivos fiscales a la inversión de países en vías de desarrollo a través de los convenios para evitar la doble imposición internacional. Journal: Revista Académica de Derecho, Spain, 1995.*

8. DATA AT REGIONAL LEVEL AND BY COUNTRY

8.1 At Regional Level

8.1.1. Analysis per Number of Agreements Signed[21]



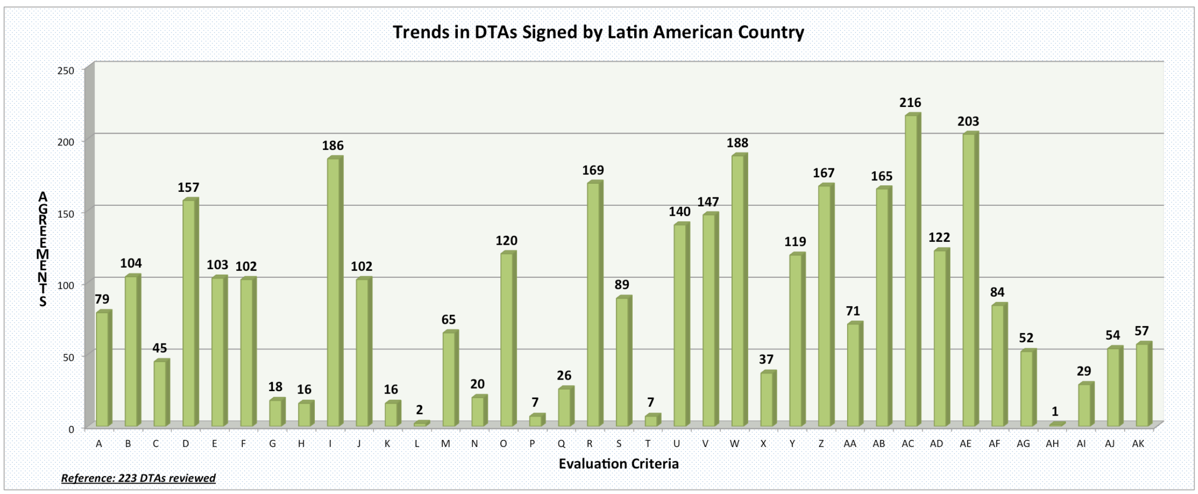


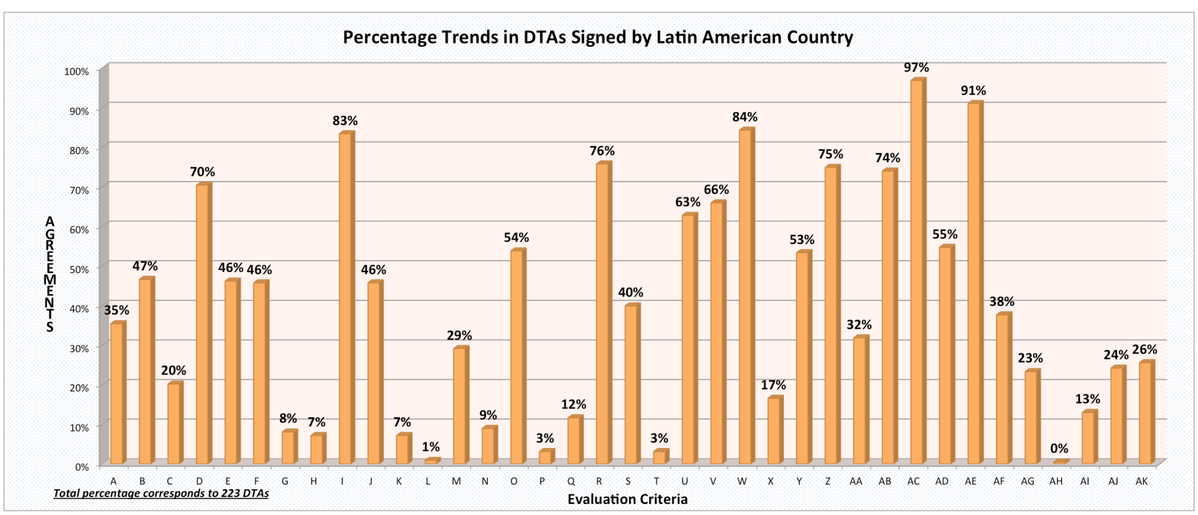
21 *For the purposes of this study, the Andean Community countries are considered individually, not as one single supranational agreement.*

These charts show that **Mexico** has the largest number of DTAs signed, with 54 agreements, accounting for 24% of the total number of agreements under analysis (223). **Brazil** and **Venezuela** follow, both with 31 DTAs signed and in full force and effect, amounting to 14% (each) of the total number of DTAs analysed. **Chile** ranks third, with 26 DTAs signed, or 12% of the total number of instruments perused. **Ecuador** stands fourth, with 18 executed DTAs that are currently effective, followed by **Argentina** with 17 agreements. As per decimal approximation, the percentage for both countries is 8% (each) of the total number of DTAs considered. Next come **Uruguay**, with 13 DTAs in force, **Colombia**, 12, **Peru**, 10, **Bolivia**, 9, and **Paraguay**, with 2 signed agreements in effect. In the aggregate, the latter group of countries hold 20% of the total number of agreements studied.

8.1.2 Analysis of trends in the agreements reviewed

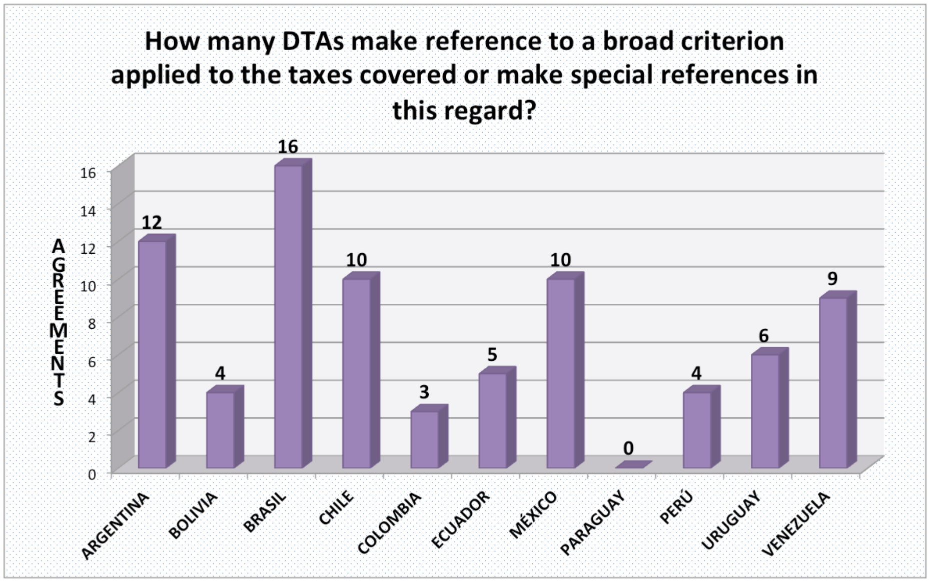
For purposes of analysing the graphs below, consideration should be given to the assessment criteria (represented by the letters of the alphabet and discussed below) applied to the aggregate of the agreements studied, in addition to the charts for each item examined.





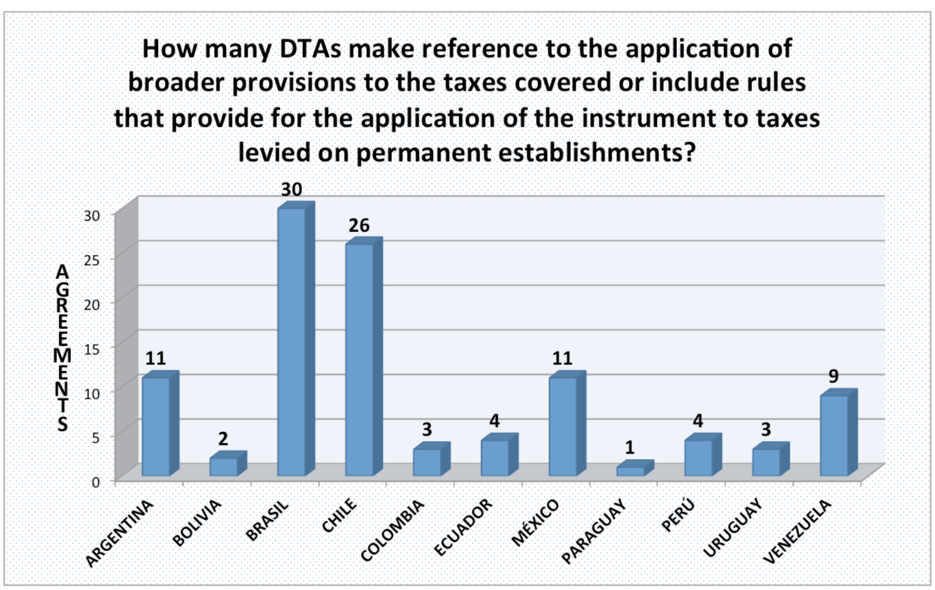
A: How many agreements make reference to a broad criterion applied to the taxes covered or make special references in this regard?

Out of the 223 agreements reviewed, only 79 of them include references of this kind, accounting for 35% of the total DTAs reviewed. Their distribution per country is shown below:



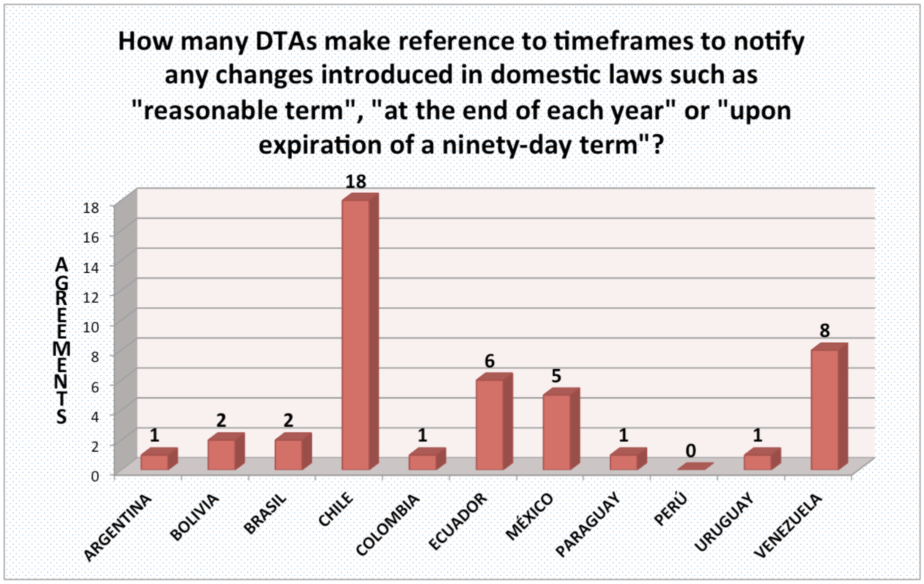
B: How many agreements make reference to the application of broader provisions to the taxes covered or include rules that provide for the application of the instrument to taxes levied on permanent establishments?

Out of the 223 agreements analysed, only 104 of them include references of this kind, accounting for 47% of the total DTAs reviewed. Their distribution per country is shown below:



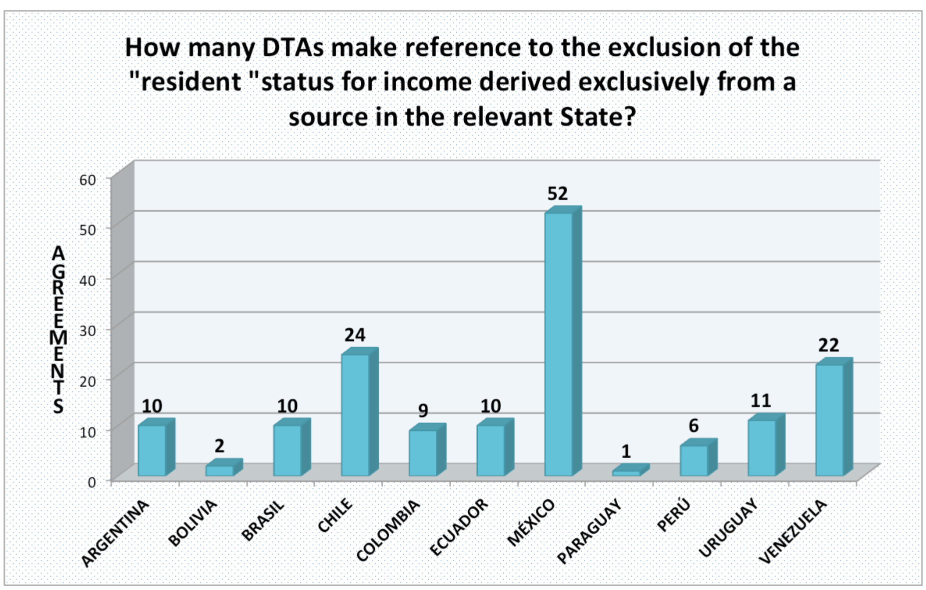
C: How many agreements make reference to timeframes to notify any changes introduced in domestic laws such as "reasonable term", "at the end of each year" or "upon expiration of a ninety-day term"?

Out of the 223 agreements analysed, only 45 of them include references of this kind, which accounts for close to 20% of the total DTAs reviewed. Their distribution per country is shown below:



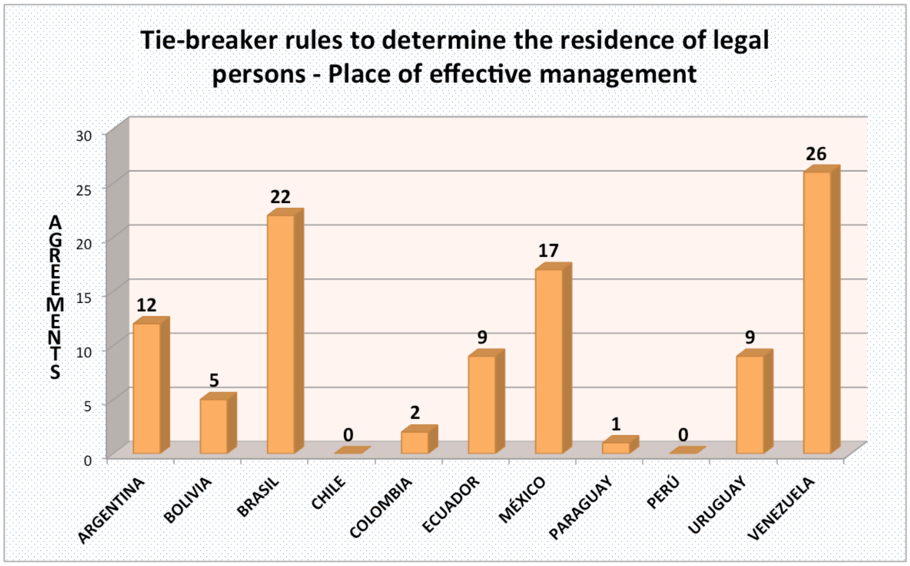
D: How many agreements make reference to the exclusion of the "resident" status for income derived exclusively from a source in the relevant State?

Out of the 223 agreements analysed, only 157 of them include references of this kind, accounting for 70% of the total DTAs reviewed. Their distribution per country is shown below:



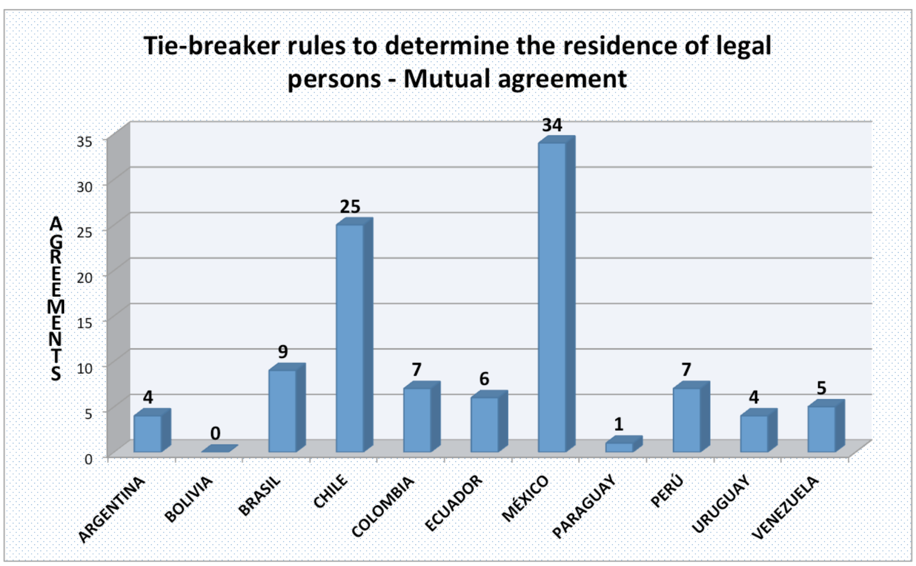
E: Tie-breaker rules to determine the residence of legal persons – Place of effective management.[22]

Out of the 223 agreements analysed, only 103 of them include the “place of effective management” criterion under these circumstances, which accounts for close to 46% of the total DTAs reviewed. Their distribution per country is shown below:



F: Tie-breaker rules to determine the residence of legal persons – Mutual Agreement.

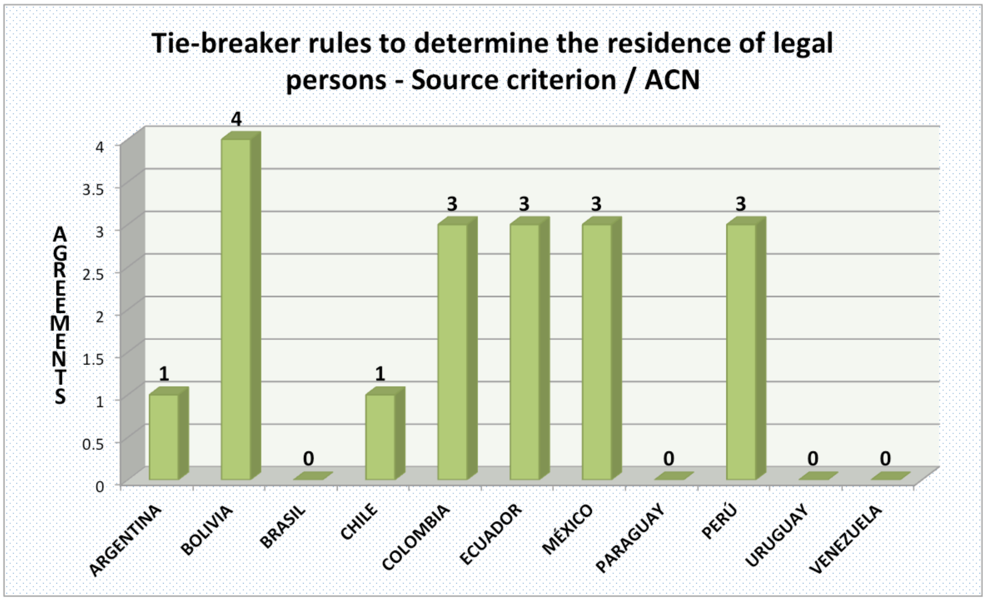
Out of the 223 agreements analysed, only 102 of them opt for amicable proceedings to establish the country of residence under these circumstances, accounting for 46% of the total DTAs reviewed. Their distribution per country is shown below:



22 *It should be clarified that the analysis of this item covered agreements which included the place of effective management criterion, but where this parameter was not conclusive in the event of a tie, because if it were impossible to determine in which country such place of management was, the conflict would be resolved upon application of “mutual agreement”.*

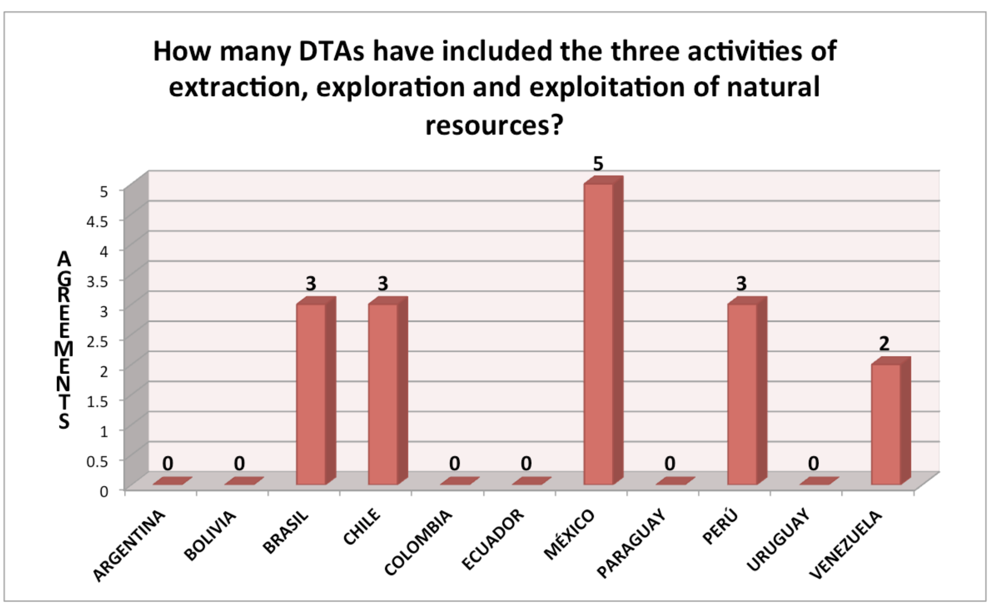
G: Tie-breaker rules to determine the residence of legal persons – Source Criterion / ACN.

Out of the 223 agreements analysed, only 18 of them use the source criterion to establish the country of residence under these circumstances, accounting for 8% of the total DTAs reviewed. Their distribution per country is shown below:



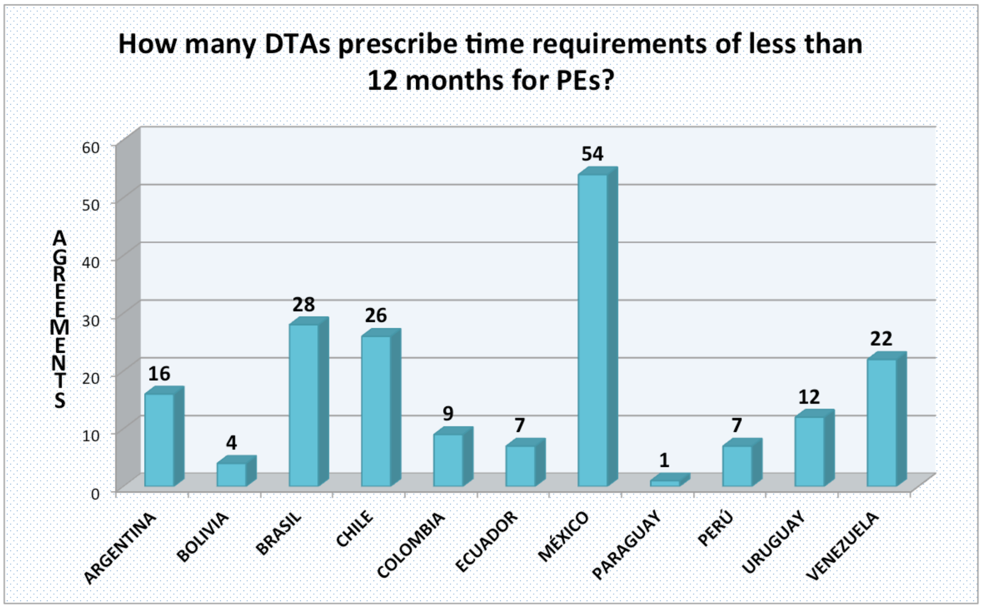
H: How many agreements have included the three activities of extraction, exploration and exploitation of natural resources?

Out of the 223 agreements analysed, only 16 of them have expressly included these three activities under the "Permanent Establishment" article, accounting for 7% of the total DTAs reviewed. Their distribution per country is shown below:



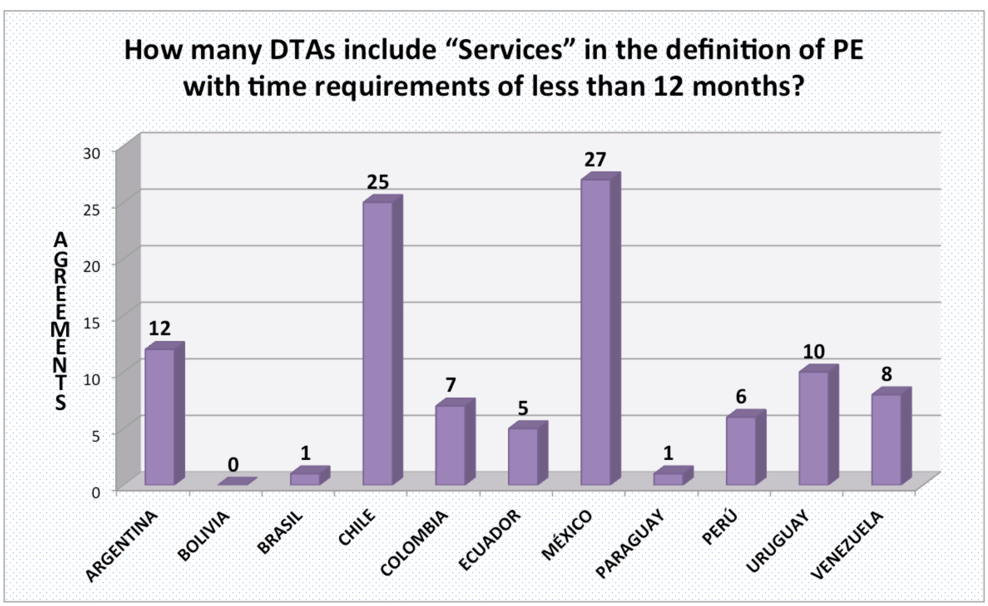
I: How many agreements prescribe time requirements of less than 12 months for PEs?

Out of the 223 agreements analysed, only 186 of them prescribe time requirements of less than 12 months to define a permanent establishment for construction projects, which accounts for 83% of the total DTAs reviewed. Their distribution per country is shown below:



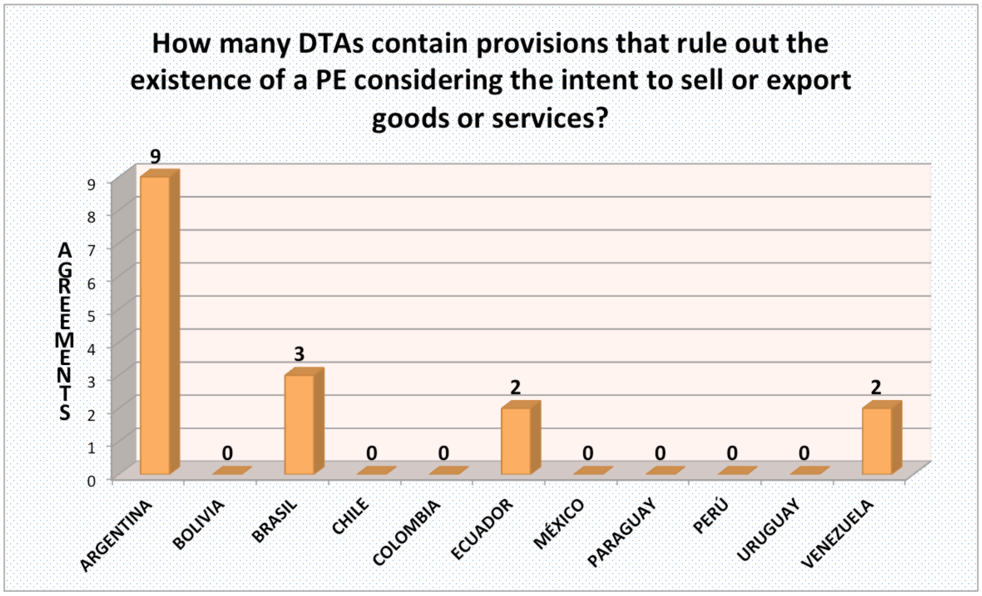
J: How many agreements include "services" in the definition of PE with time requirements of less than 12 months?

Out of the 223 agreements analysed, only 102 of them include references to "services" required for a permanent establishment to exist with time requirements of less than 12 months, which accounts for 46% of the total DTAs reviewed. Their distribution per country is shown below:



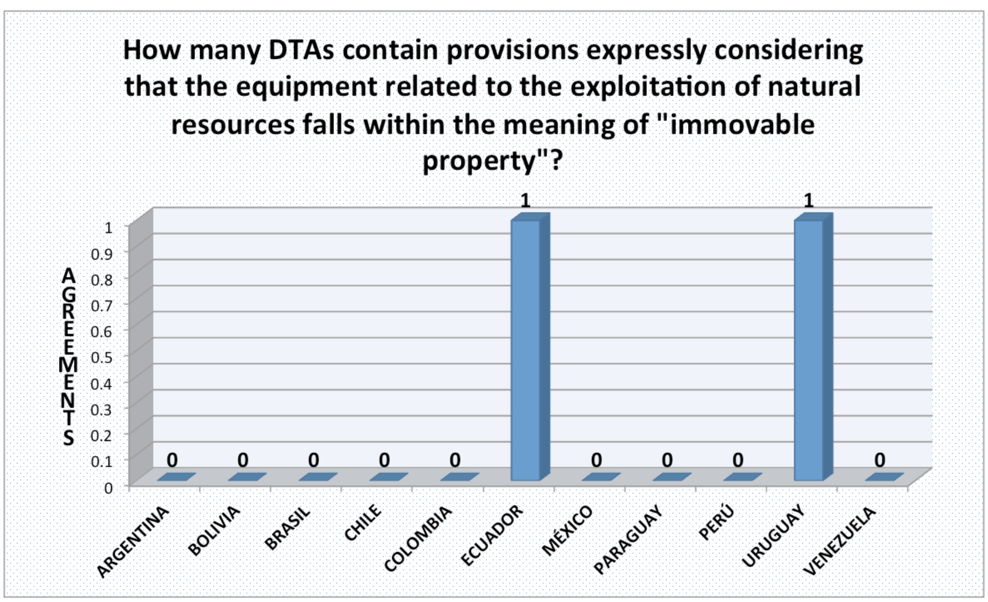
K: How many agreements contain provisions that rule out the existence of a PE considering the intent to sell or export goods or services?

Out of the 223 agreements analysed, only 46 of them include provisions of this kind, accounting for 7% of the total DTAs reviewed. Their distribution per country is shown below:



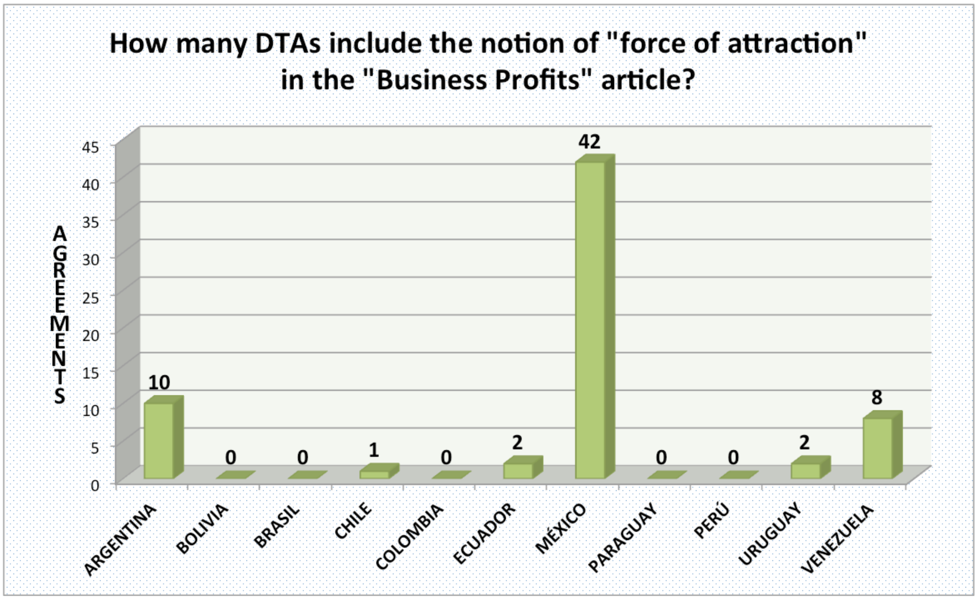
L: How many agreements contain provisions expressly considering that the equipment related to the exploitation of natural resources falls within the meaning of "immovable property"?

Out of the 223 agreements analysed, only 2 of them include provisions of this kind, accounting for 1% of the total DTAs reviewed. Their distribution per country is shown below:



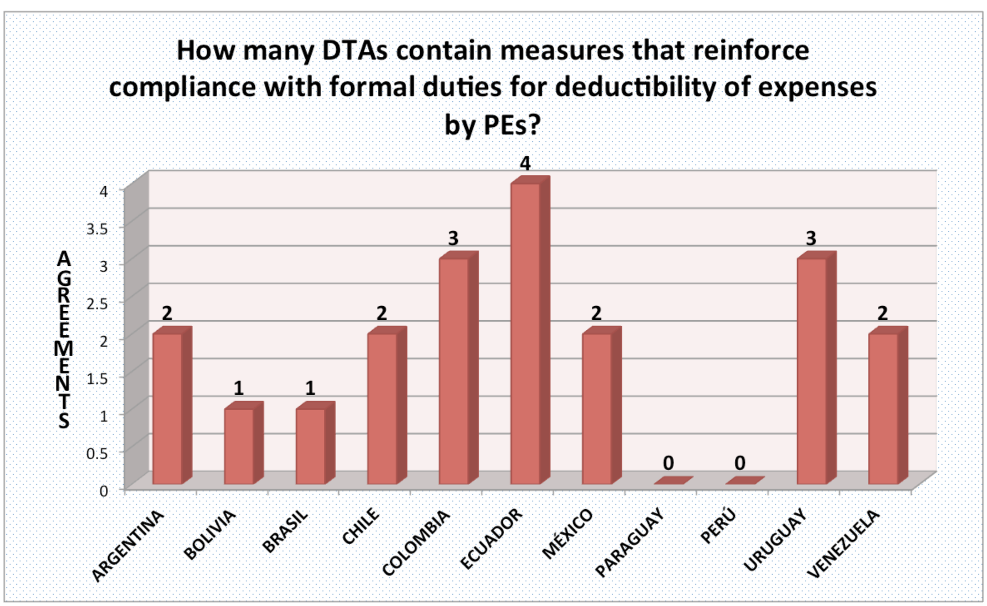
M: How many agreements include the notion of "force of attraction" in the "Business Profits" article?

Out of the 223 agreements analysed, only 65 of them include provisions of this kind, accounting for 29% of the total DTAs reviewed. Their distribution per country is shown below:



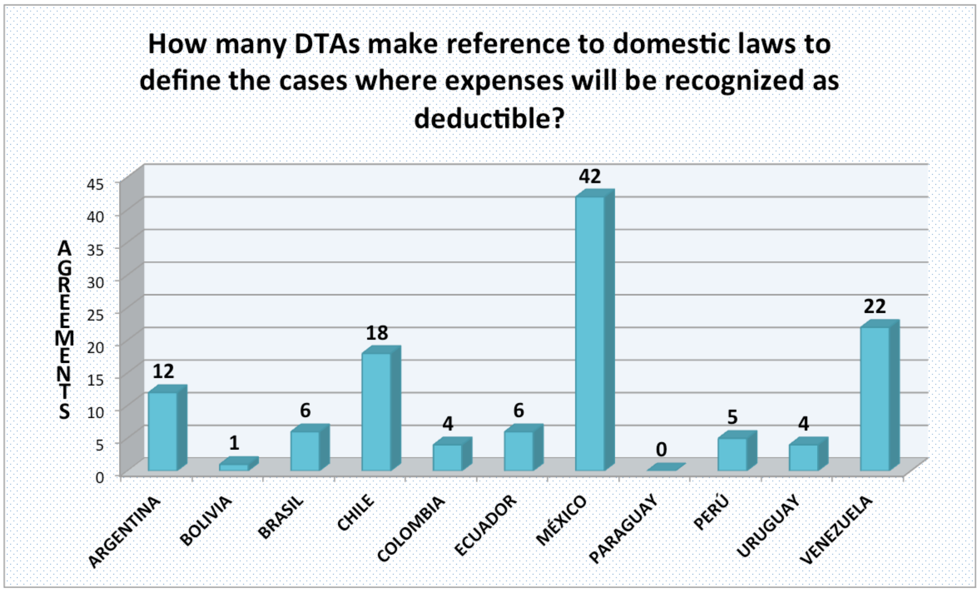
N: How many agreements include measures that reinforce compliance with formal duties for deductibility of expenses by PEs?

Out of the 223 agreements analysed, only 20 of them include provisions of this kind, accounting for 9% of the total DTAs reviewed. Their distribution per country is shown below:



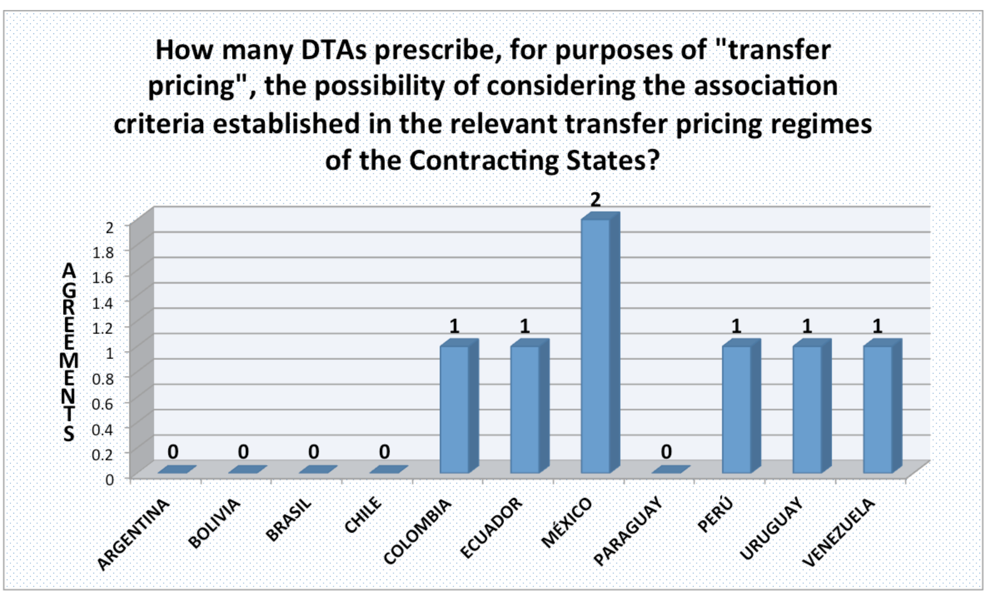
O: How many agreements make reference to domestic legislation to define the cases where expenses will be recognized as deductible?

Out of the 223 agreements analysed, only 120 of them include provisions of this kind, accounting for 54% of the total DTAs reviewed. Their distribution per country is shown below:



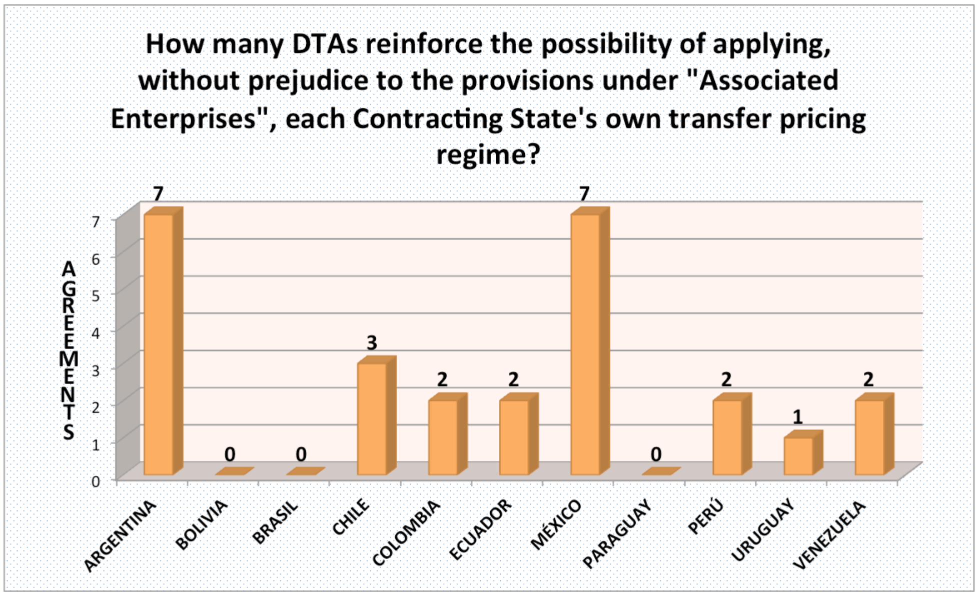
P: How many agreements prescribe, for purposes of "transfer pricing", the possibility of considering the association criteria established in the relevant transfer pricing systems of the Contracting States?

Out of the 223 agreements analysed, only 7 of them include provisions of this kind, accounting for 3% of the total DTAs reviewed. Their distribution per country is shown below:



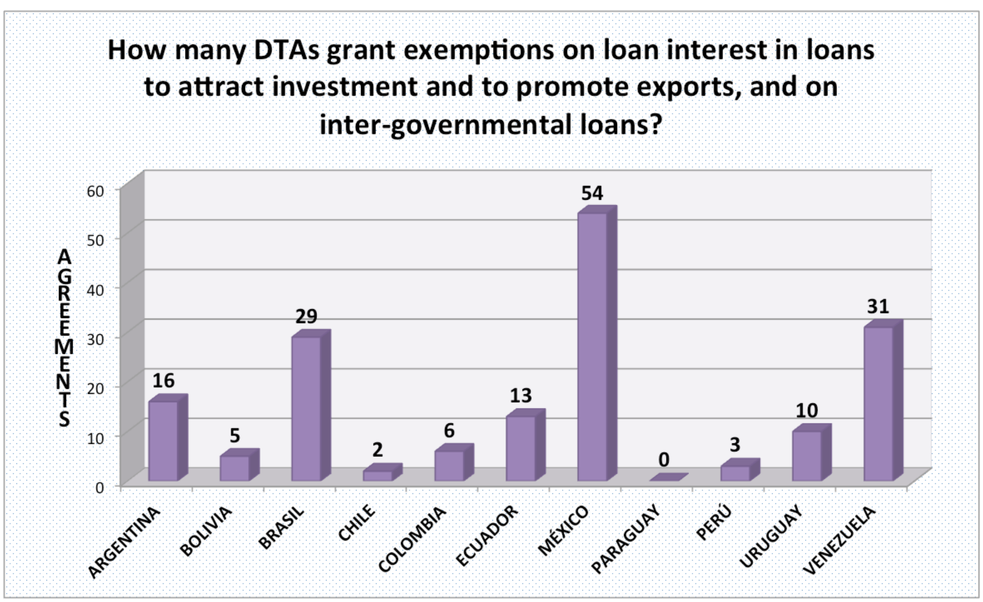
Q: How many agreements reinforce the possibility of applying, without prejudice to the provisions under "Associated Enterprises", each Contracting State's own transfer pricing system?

Out of the 223 agreements analysed, only 26 of them include provisions of this kind, accounting for 12% of the total DTAs reviewed. Their distribution per country is shown below:



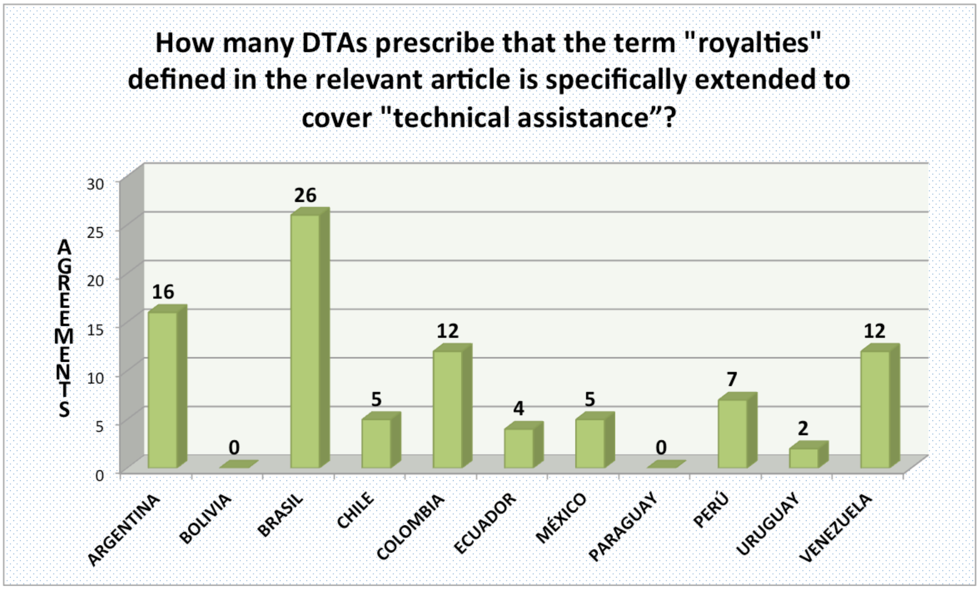
R: How many agreements grant exemptions on loan interest in loans to attract investment and to promote exports, and on inter-governmental loans?

Out of the 223 agreements analysed, only 169 of them include provisions of this kind, accounting for 76% of the total DTAs reviewed. Their distribution per country is shown below:



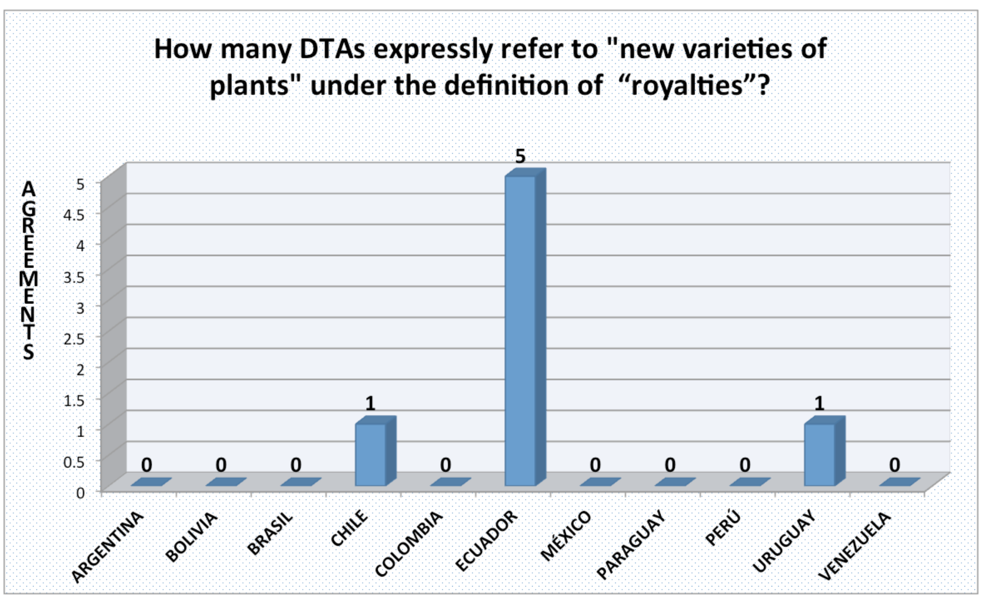
S: How many agreements prescribe that the term “royalties” defined in the relevant article is specifically extended to cover “technical assistance”?

Out of the 223 agreements analysed, only 89 of them include provisions of this kind, accounting for 40% of the total DTAs reviewed. Their distribution per country is shown below:



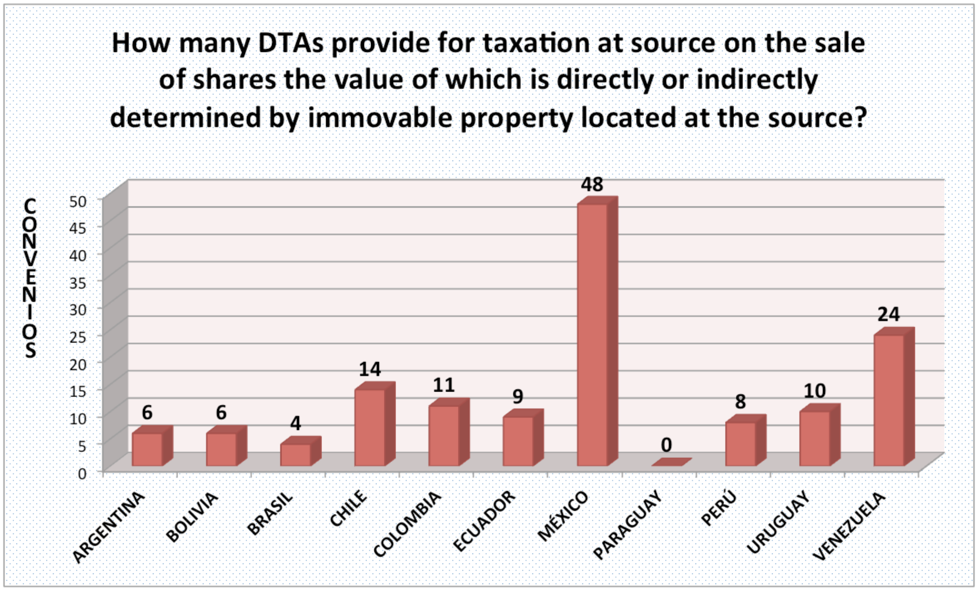
T: How many agreements expressly refer to “new varieties of plants” as part of the definition of “royalties”?

Out of the 223 agreements analysed, only 7 of them include provisions of this kind, accounting for 3% of the total DTAs reviewed. Their distribution per country is shown below:



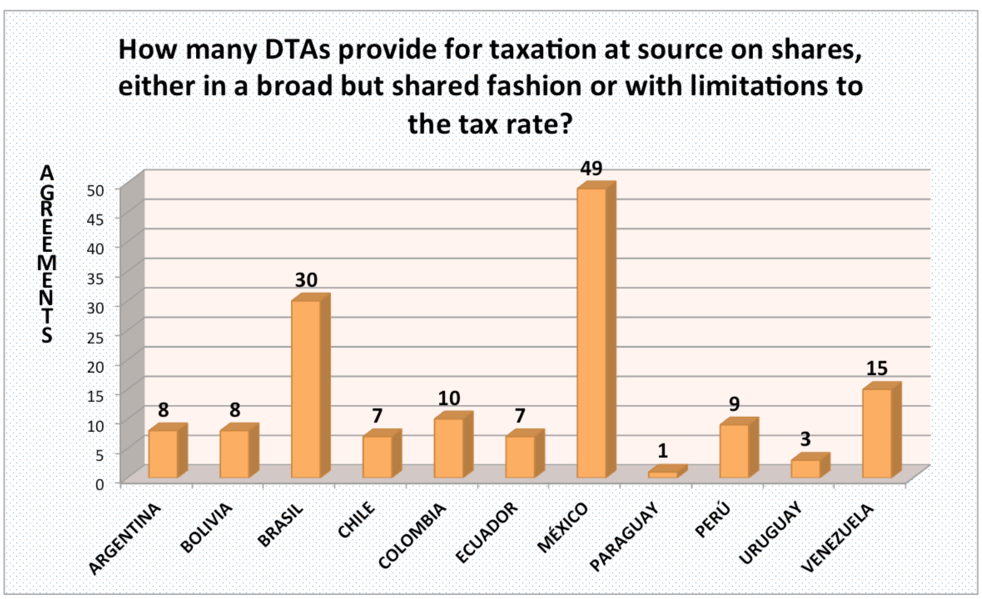
U: How many agreements provide for taxation at source on the sale of shares the value of which is directly or indirectly determined by immovable property located at the source?

Out of the 223 agreements analysed, only 140 of them include provisions of this kind, accounting for 63% of the total DTAs reviewed. Their distribution per country is shown below:



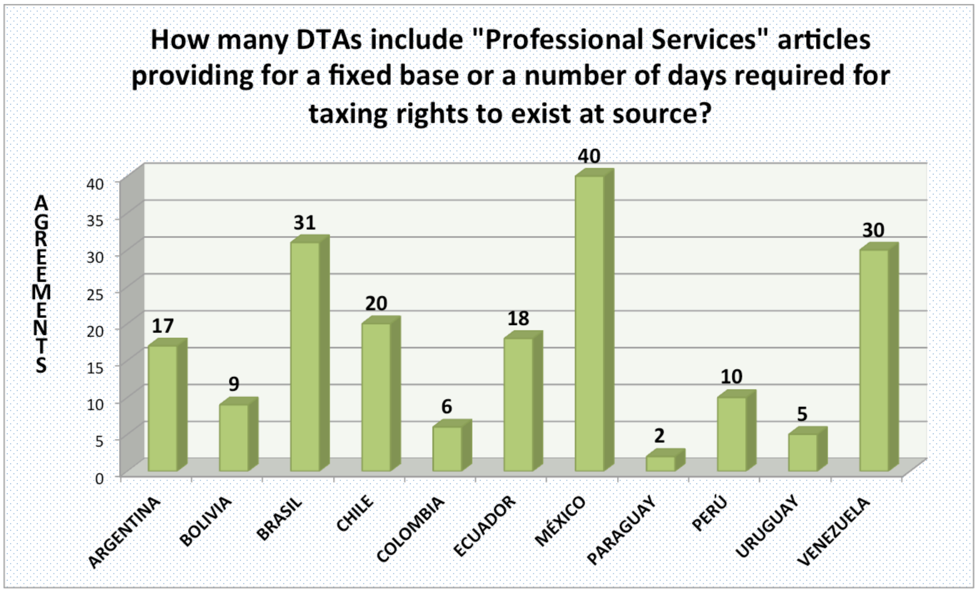
V: How many agreements allow for taxation at source on shares, either in a broad but shared fashion or with limitations to the tax rate?

Out of the 223 agreements analysed, only 147 of them include provisions of this kind, accounting for 66% of the total DTAs reviewed. Their distribution per country is shown below:



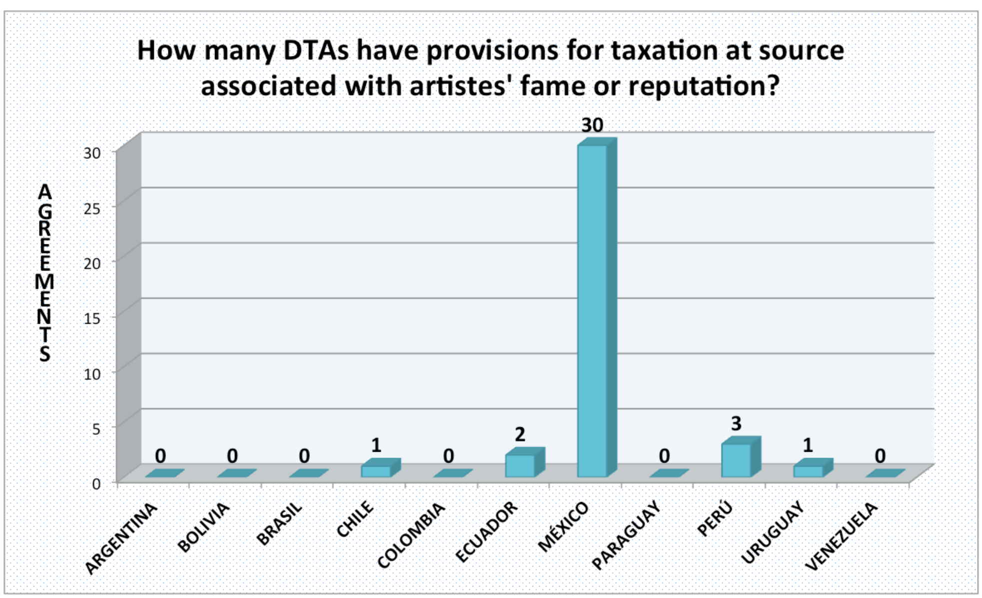
W: How many agreements include "Professional Services" articles providing for a fixed base or a number of days required for taxing rights to exist at source?

Out of the 223 agreements analysed, only 188 of them include provisions of this kind, accounting for 84% of the total DTAs reviewed. Their distribution per country is shown below:



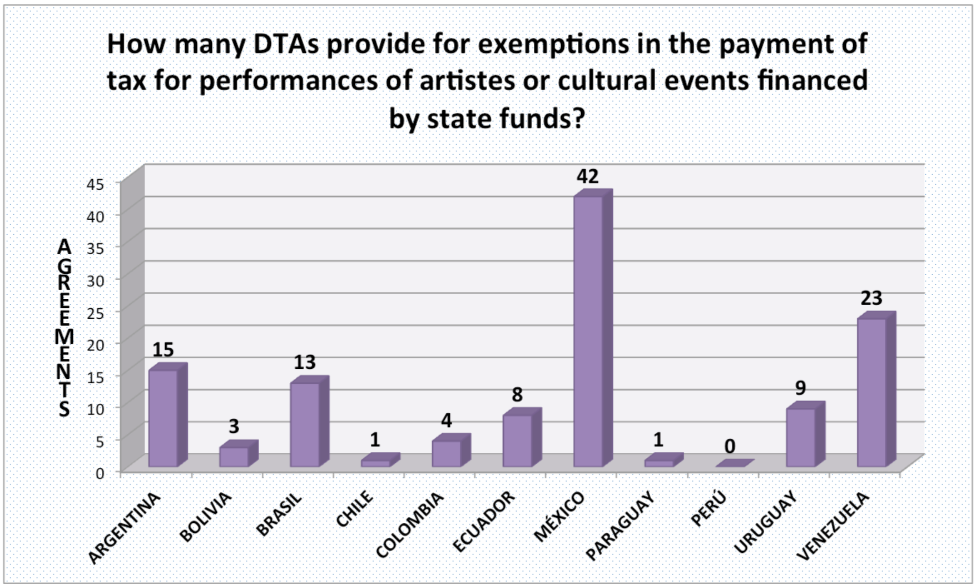
X: How many agreements have provisions for taxation at source associated with artistes' fame or reputation?

Out of the 223 agreements analysed, only 37 of them include provisions of this kind, accounting for 17% of the total DTAs reviewed. Their distribution per country is shown below:



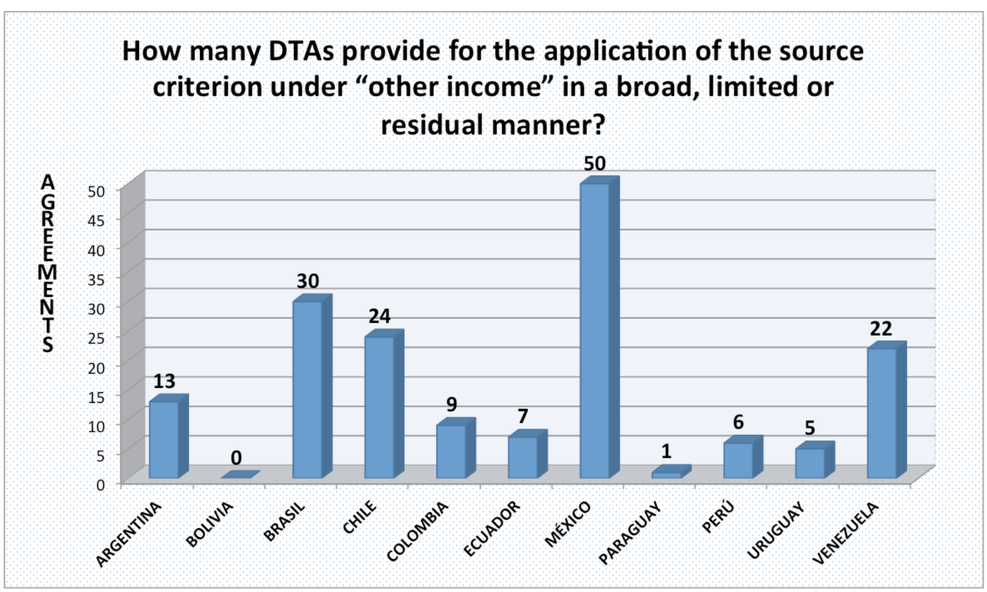
Y: How many agreements provide for exemptions in the payment of tax for performances of artistes or cultural events financed by state funds?

Out of the 223 agreements analysed, only 119 of them include provisions of this kind, accounting for 53% of the total DTAs reviewed. Their distribution per country is shown below:



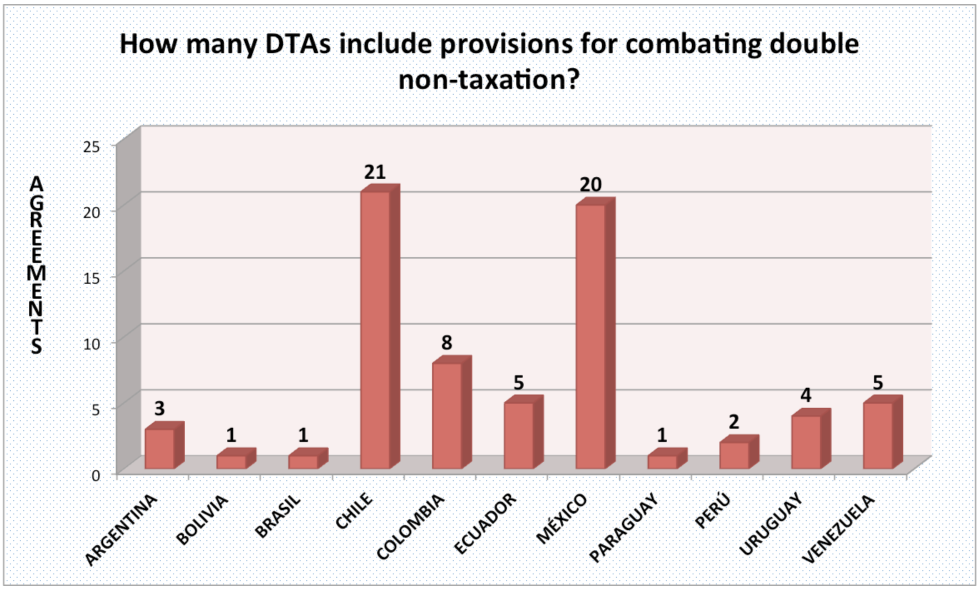
Z: How many agreements provide for the application of the source criterion under “Other Income” in a broad, limited or residual manner?

Out of the 223 agreements analysed, only 167 of them include provisions of this kind, accounting for 75% of the total DTAs reviewed. Their distribution per country is shown below:



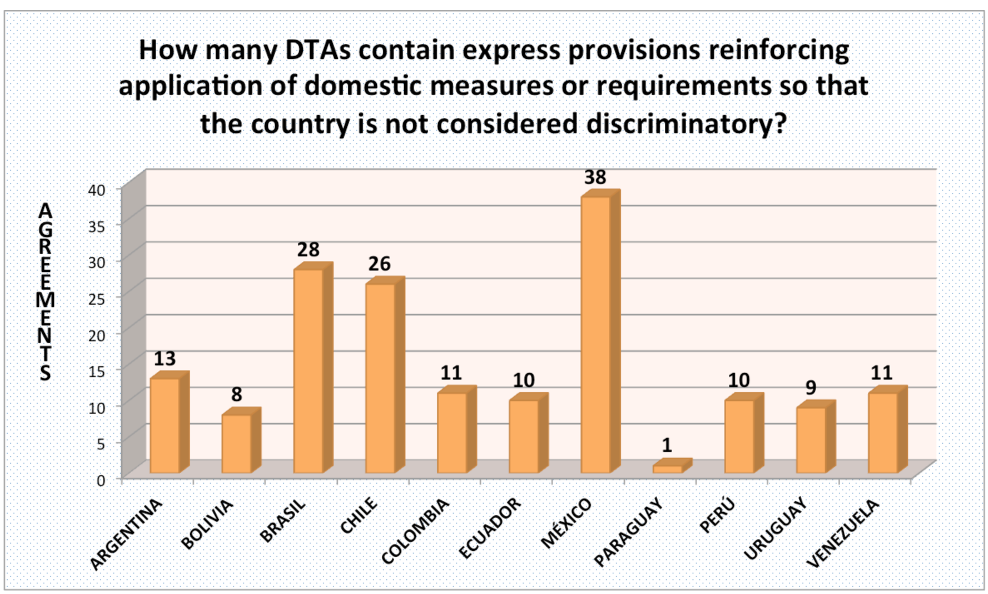
AA: How many agreements include provisions for combating double non-taxation?

Out of the 223 agreements analysed, only 71 of them include provisions of this kind, accounting for 32% of the total DTAs reviewed. Their distribution per country is shown below:



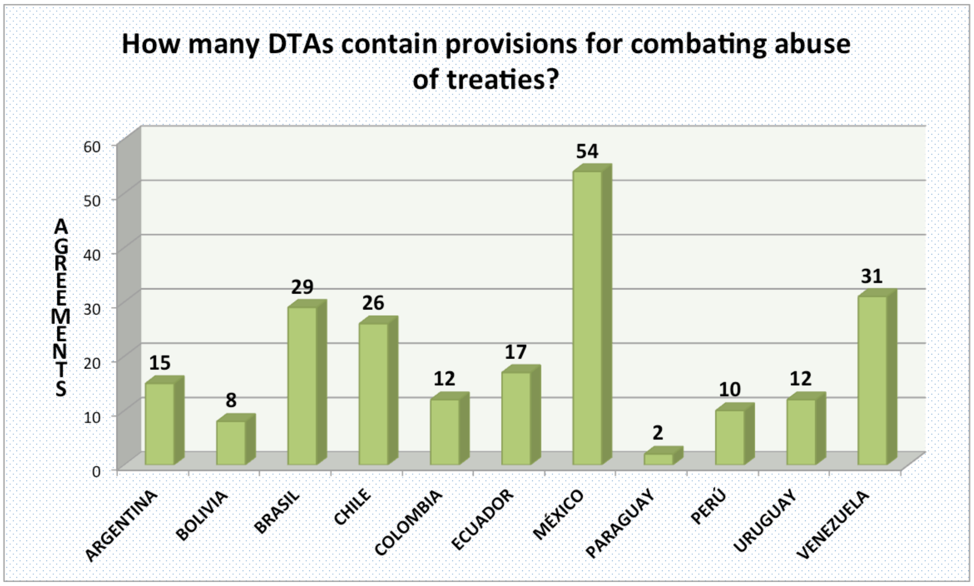
AB: How many agreements contain express provisions reinforcing application of domestic measures or requirements so that the country is not considered discriminatory?

Out of the 223 agreements analysed, only 165 of them include provisions of this kind, accounting for 74% of the total DTAs reviewed. Their distribution per country is shown below:



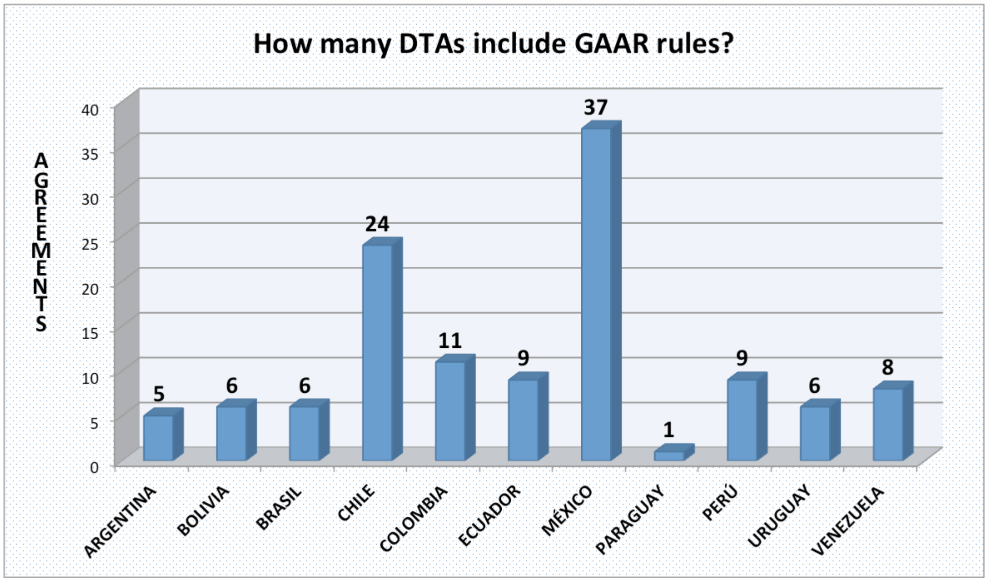
AC: How many agreements contain provisions for combating abuse of treaties?

Out of the 223 agreements analysed, only 216 of them include provisions of this kind, accounting for 97% of the total DTAs reviewed. Their distribution per country is shown below:



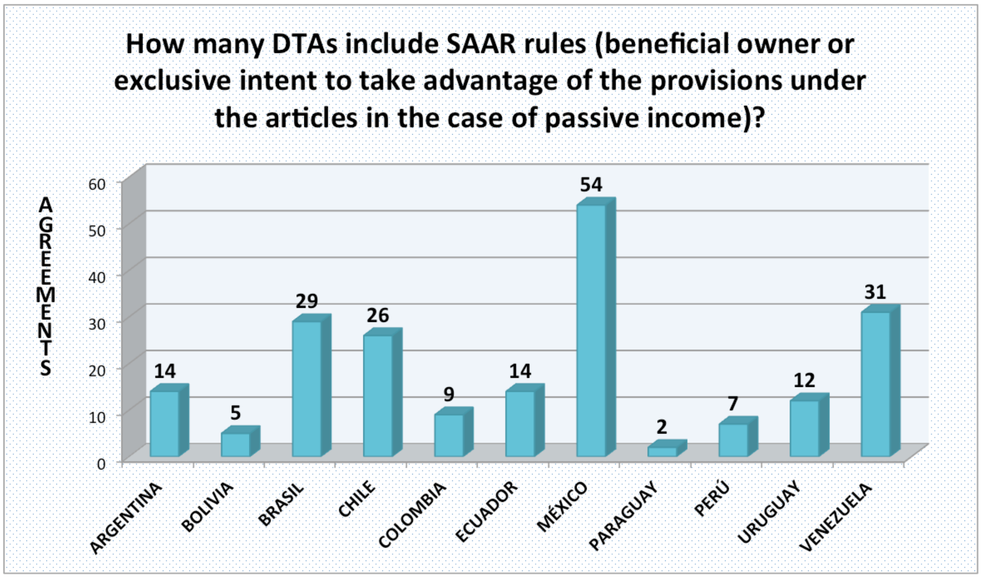
AD: How many agreements include GAAR rules?

Out of the 223 agreements analysed, only 122 of them include provisions of this kind, accounting for 55% of the total DTAs reviewed. Their distribution per country is shown below:



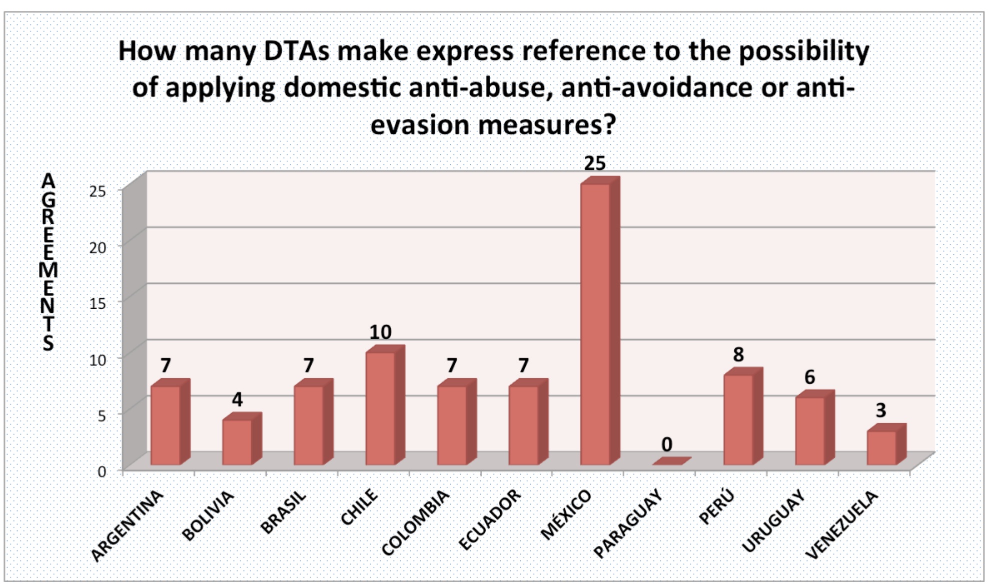
AE: How many agreements include SAAR rules (beneficial owner or exclusive intent to take advantage of the provisions under the articles in the case of passive income)?

Out of the 223 agreements analysed, only 203 of them include provisions of this kind, accounting for 91% of the total DTAs reviewed. Their distribution per country is shown below:



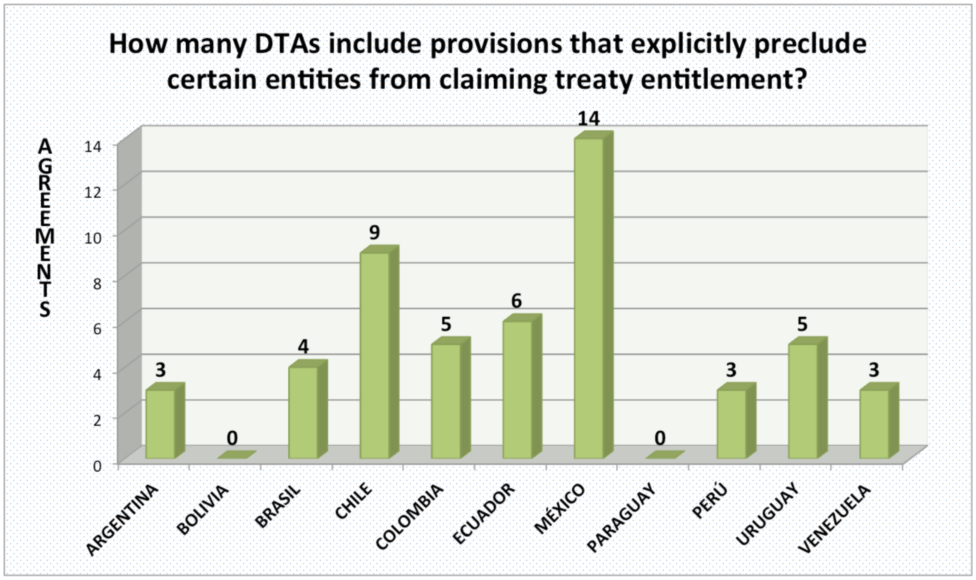
AF: How many agreements make express reference to the possibility of applying domestic anti-abuse, anti-avoidance or anti-evasion measures?

Out of the 223 agreements analysed, only 84 of them include provisions of this kind, accounting for 38% of the total DTAs reviewed. Their distribution per country is shown below:



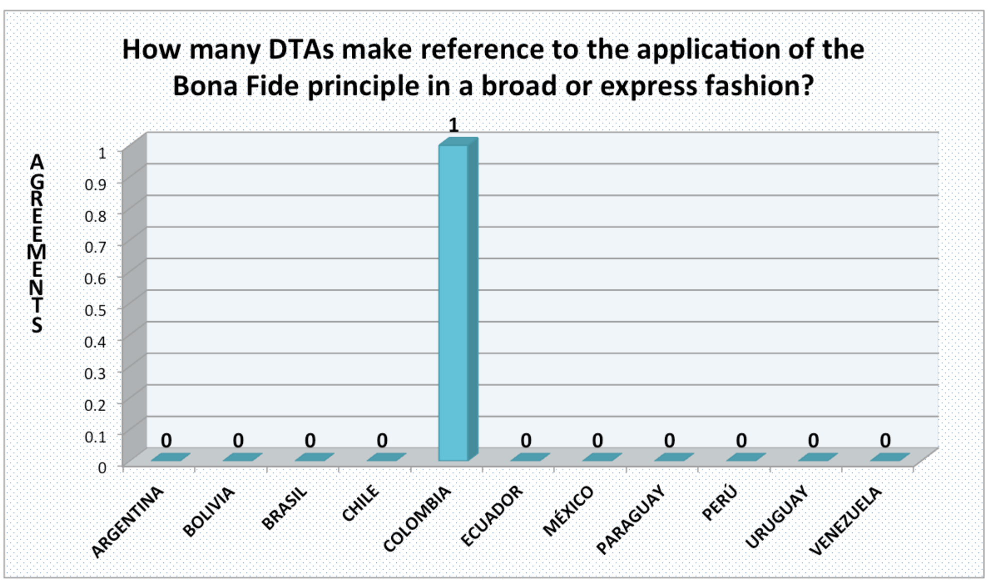
AG: How many agreements include provisions that explicitly preclude certain entities from claiming treaty entitlement?

Out of the 223 agreements analysed, only 52 of them include provisions of this kind, accounting for 23% of the total DTAs reviewed. Their distribution per country is shown below:



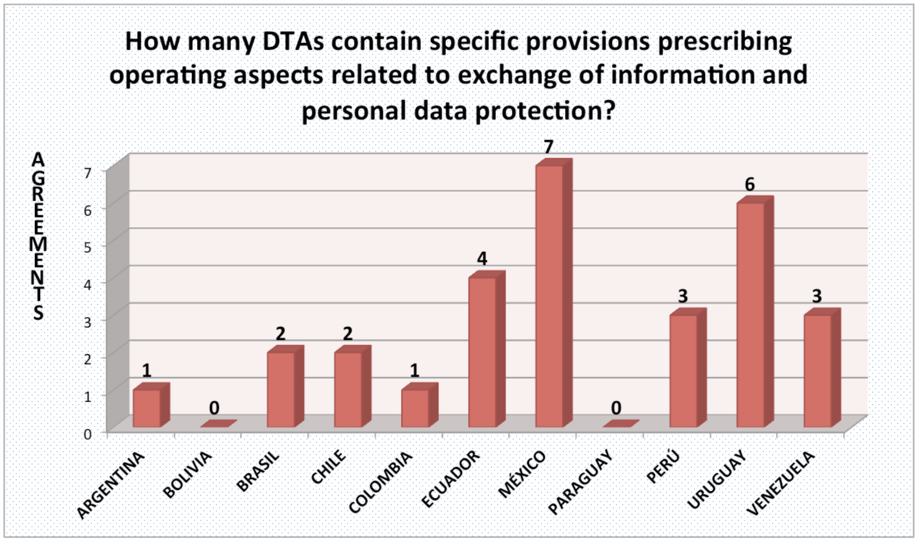
AH: How many agreements make reference to the application of the *Bona Fide* principle in a broad or express fashion?

Out of the 223 agreements analysed, only 1 of them includes provisions of this kind, accounting for less than 1% of the total DTAs reviewed. The distribution per country is shown below:



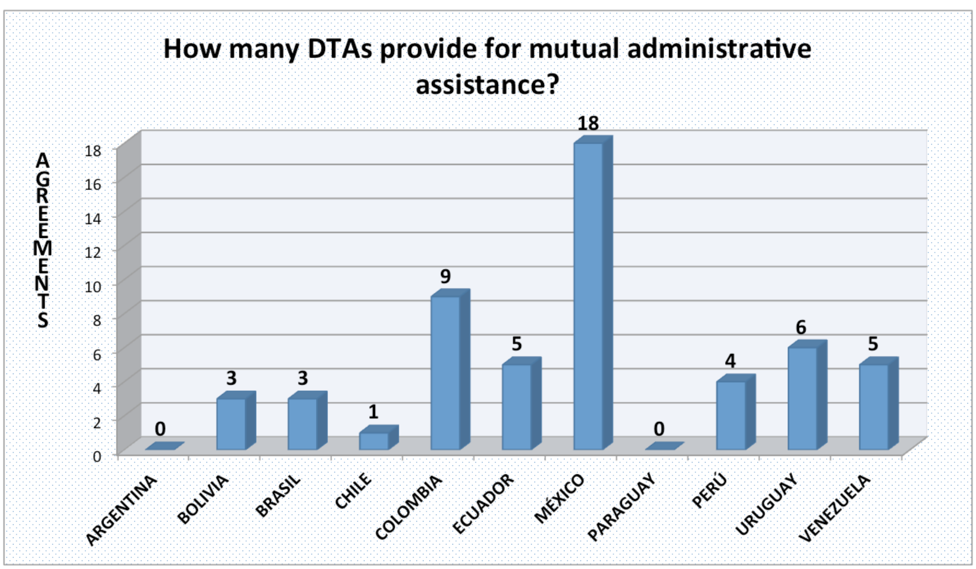
AI: How many agreements contain specific provisions prescribing operating aspects related to exchange of information and personal data protection?

Out of the 223 agreements analysed, only 29 of them include provisions of this kind, accounting for 13% of the total DTAs reviewed. Their distribution per country is shown below:



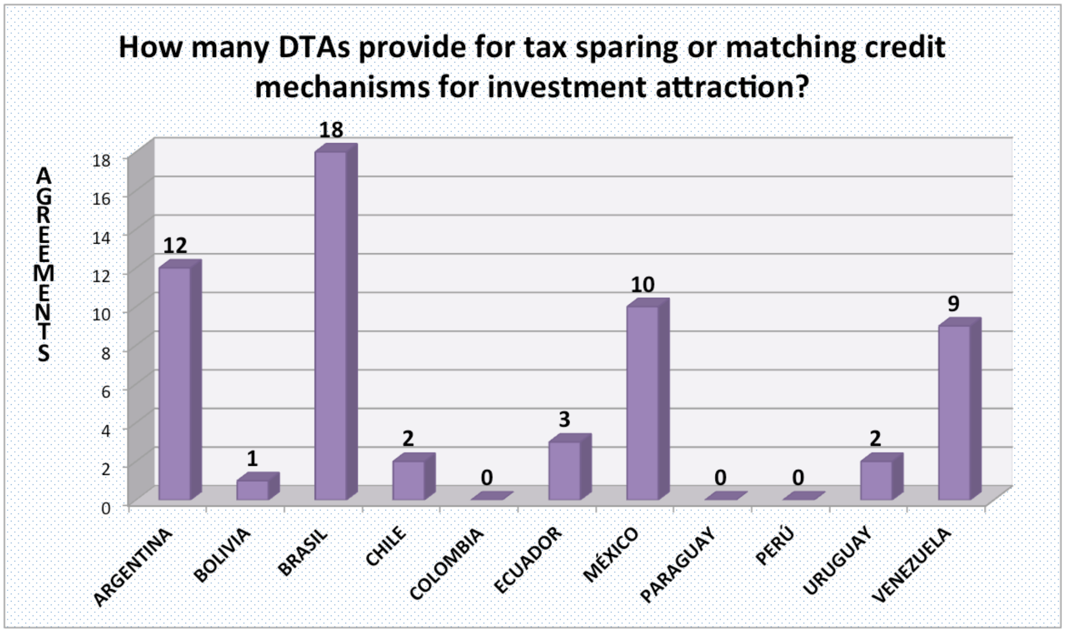
AJ: How many agreements provide for mutual administrative assistance?

Out of the 223 agreements analysed, only 54 of them include provisions of this kind, accounting for 24% of the total DTAs reviewed. Their distribution per country is shown below:



AK: How many agreements provide for tax sparing or matching credit mechanisms for investment attraction?

Out of the 223 agreements analysed, only 57 of them include provisions of this kind, accounting for 26% of the total DTAs reviewed. Their distribution per country is shown below:



8.2. Percentage data – country-by-country situation

Upon reviewing the preceding graphs, we can ascertain the situation in each country based on the trend observed both at regional and domestic level. For Latin America, this determination takes into account the total 223 DTAs signed; and at the domestic level, it considers the total number of agreements signed by country, as detailed in the charts below.[23]

23 It should be noted that the assessment criteria are the same as those applied in the preceding section, represented by the same letters of the alphabet indicated there.

9. CONCLUSIONS

Below there is a numbered summary for the region of the provisions that have been more and less frequently used by Latin American countries in the DTAs scrutinized (in descending order):

1. Anti-abuse provisions: Included in 216 out of the 223 agreements reviewed.

2. Specific rules (SAAR): Included in 203 out of the 223 agreements reviewed.

3. Provisions prescribing specific treatment of "income from professional services"[24]: Included in 188 out of the 223 agreements reviewed.

4. Provisions which define a PE for construction projects with time requirements of less than 12 months: Included in 186 out of the 223 agreements reviewed.

5. Provisions granting exemptions on loan interest in loans to attract investment and to promote exports, and inter-governmental loans: Included in 169 out of the 223 agreements reviewed.

6. "Other Income" articles that provide for the application of the source criterion in a broad, limited or residual manner for taxing rights to arise: Included in 167 out of the 223 agreements reviewed.

7. Provisions reinforcing application of domestic measures so that the country is not considered discriminatory: Included in 165 out of the 223 agreements reviewed.

8. Reference to the exclusion of the "resident" status for income derived exclusively from a source in the relevant State: Included in 157 out of the 223 agreements reviewed.

9. Provisions for taxation at source on income derived from the sale of shares: Included in 147 out of the 223 agreements reviewed.

10. Provisions for taxation at source on income derived from the sale of shares the value of which is directly or indirectly determined by immovable property located at the source: Included in 140 out of the 223 agreements reviewed.

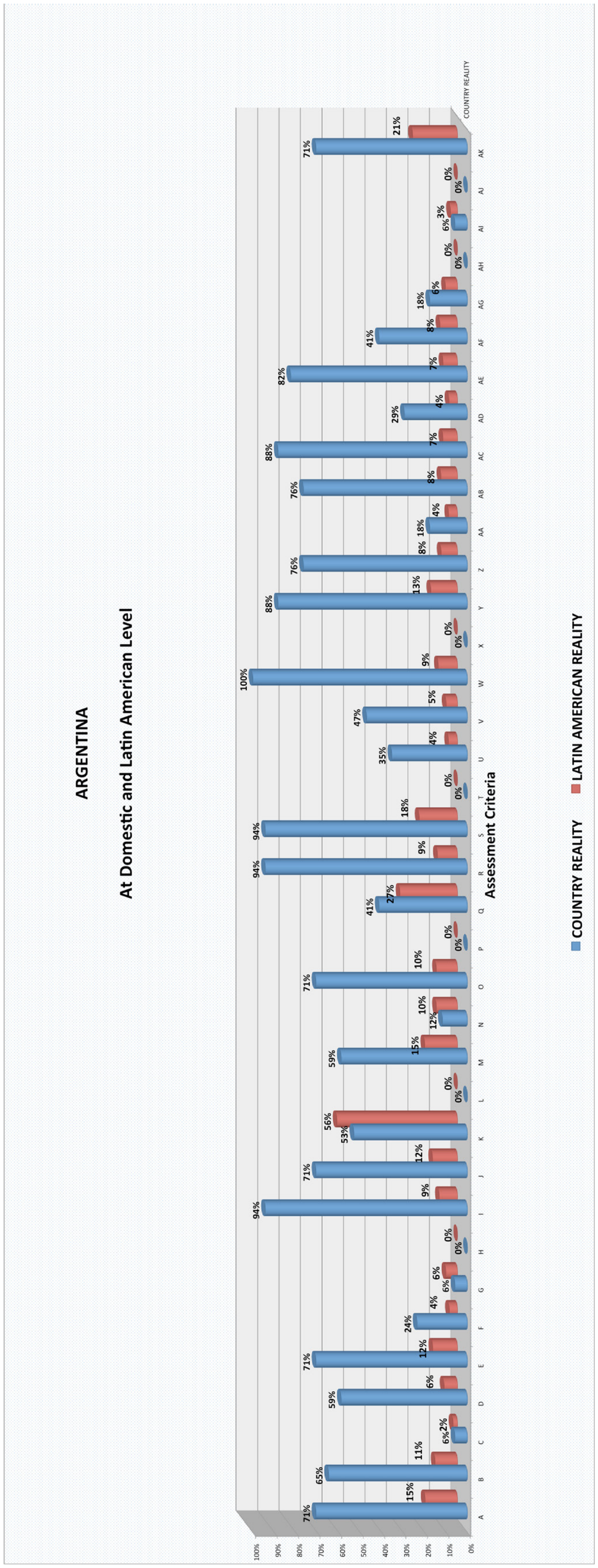
11. Agreements containing general anti-abuse rules (GAAR): 122 out of the 223 agreements reviewed.

12. Agreements including reference to domestic legislation of the relevant State to define the cases where PE's expenses will be recognized as deductible: 120 out of the 223 agreements reviewed.

13. Agreements providing for exemptions at source in the payment of tax for performances of artistes or cultural events financed by state funds: 119 out of the 223 agreements reviewed.

14. Agreements that include references to the application of broader provisions to the taxes covered (to other type of tax) or rules that provide for the application of the instrument to taxes levied on permanent establishments: 104 out of the 223 agreements reviewed.

24 *Even if the OECD International Model Convention has eliminated Article 14 and this income is included under the scope of Article 7, "Business Profits".*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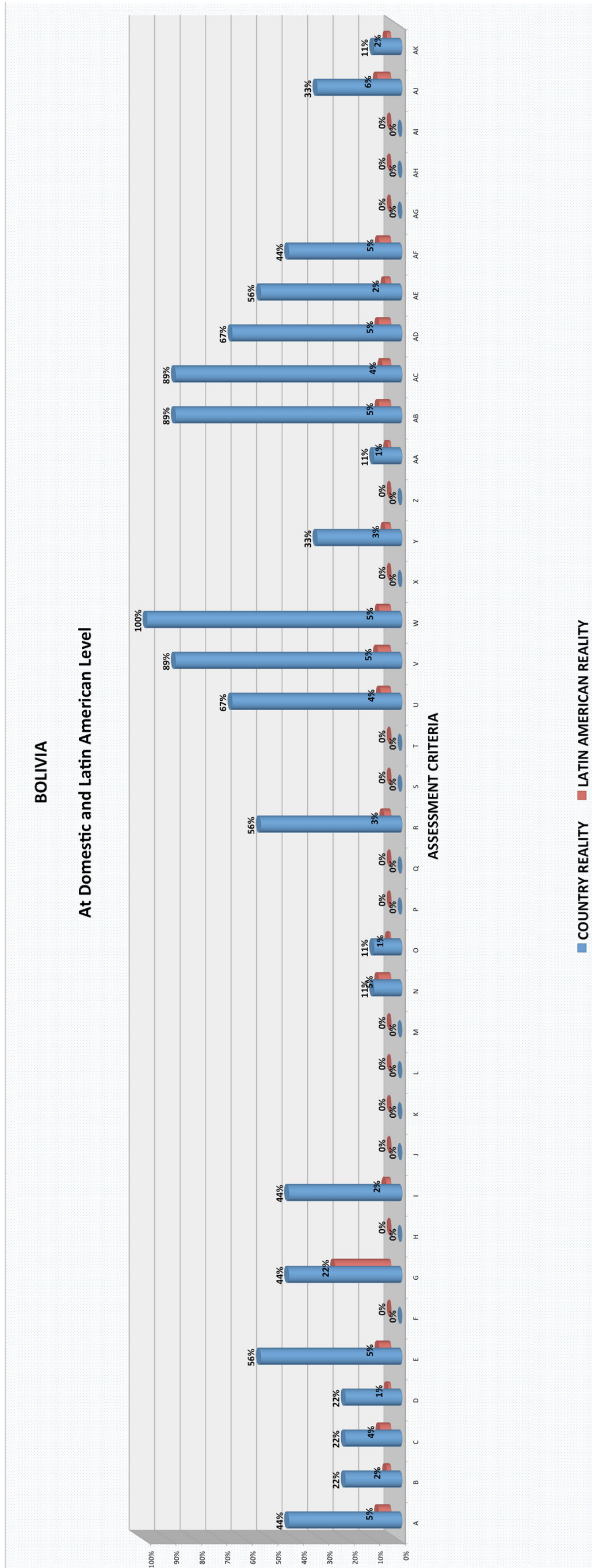
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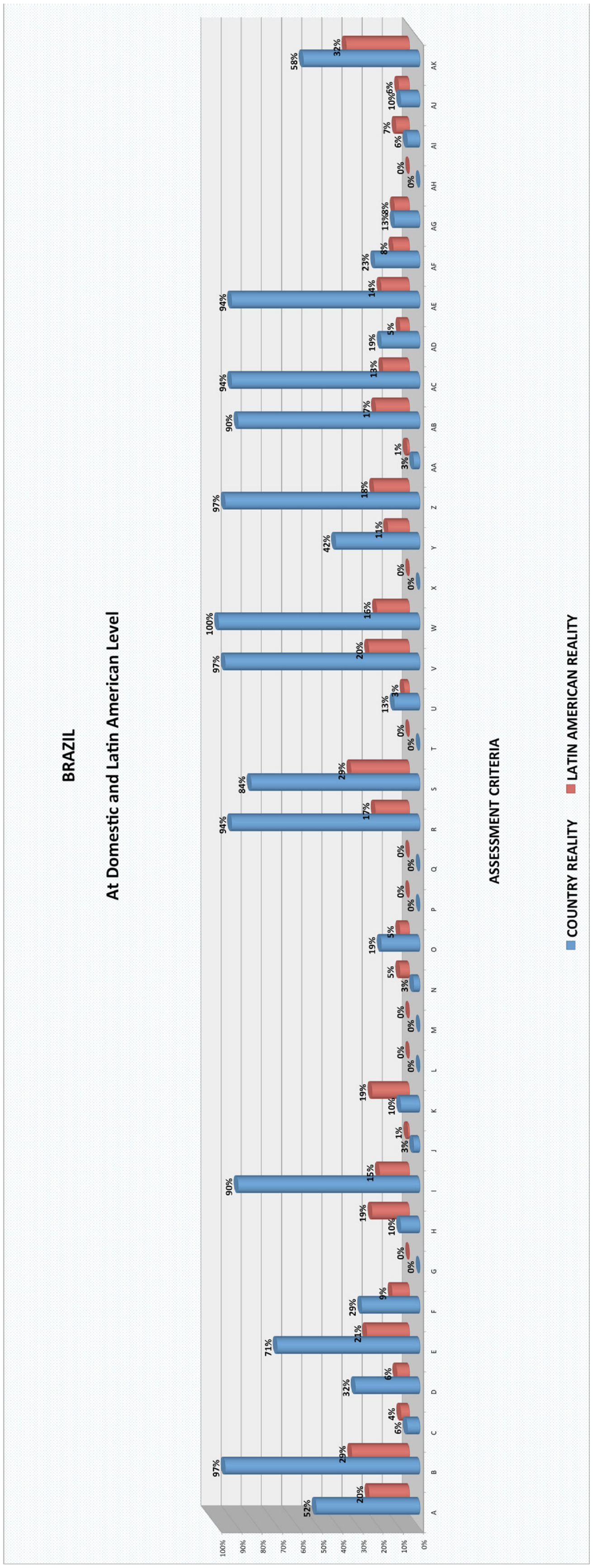
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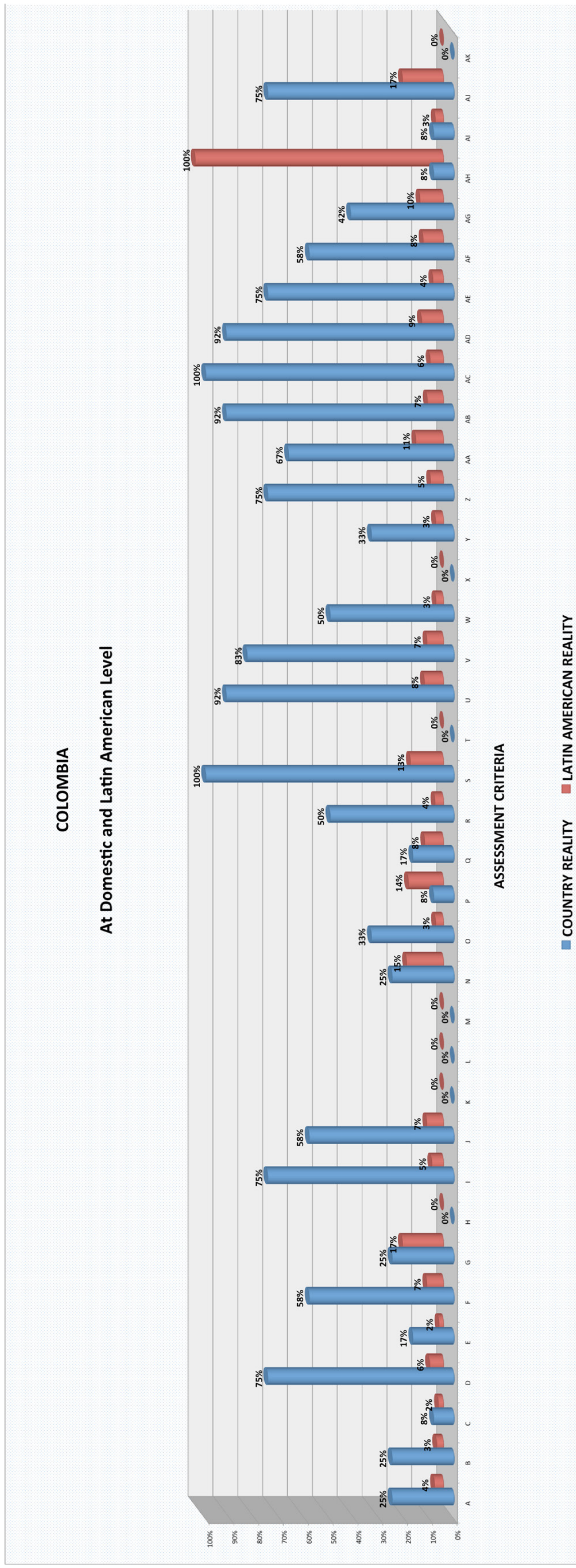
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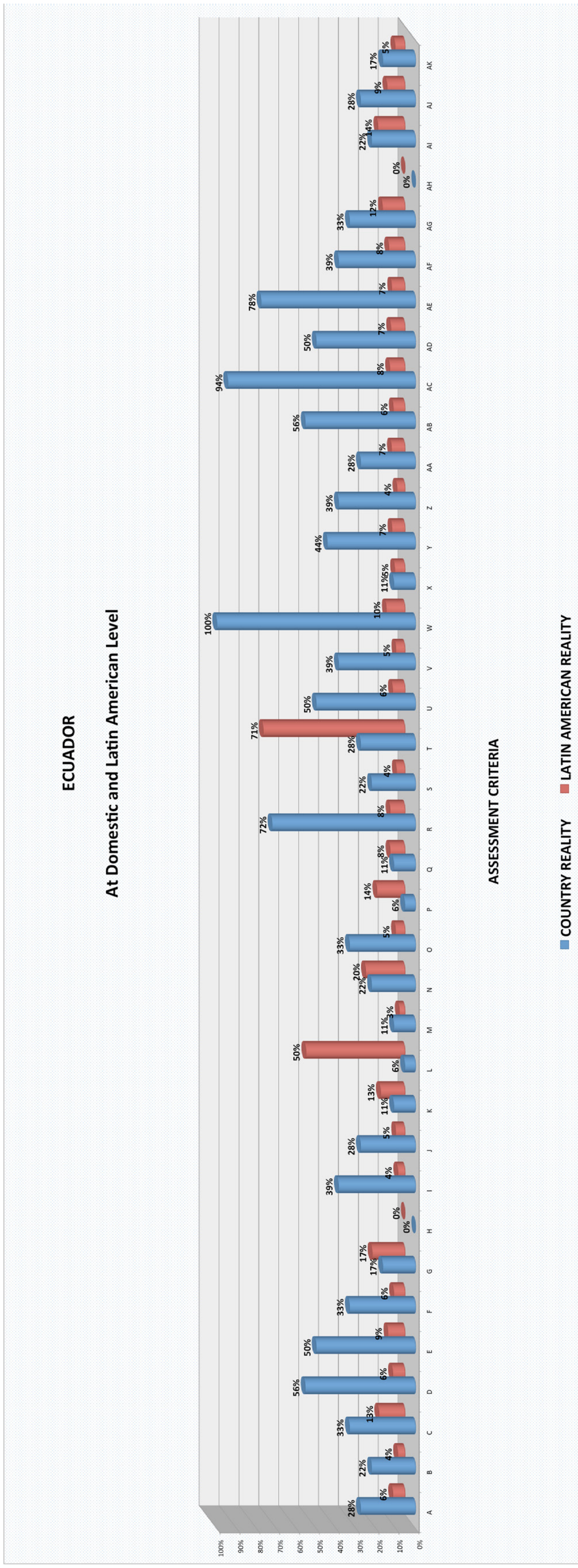
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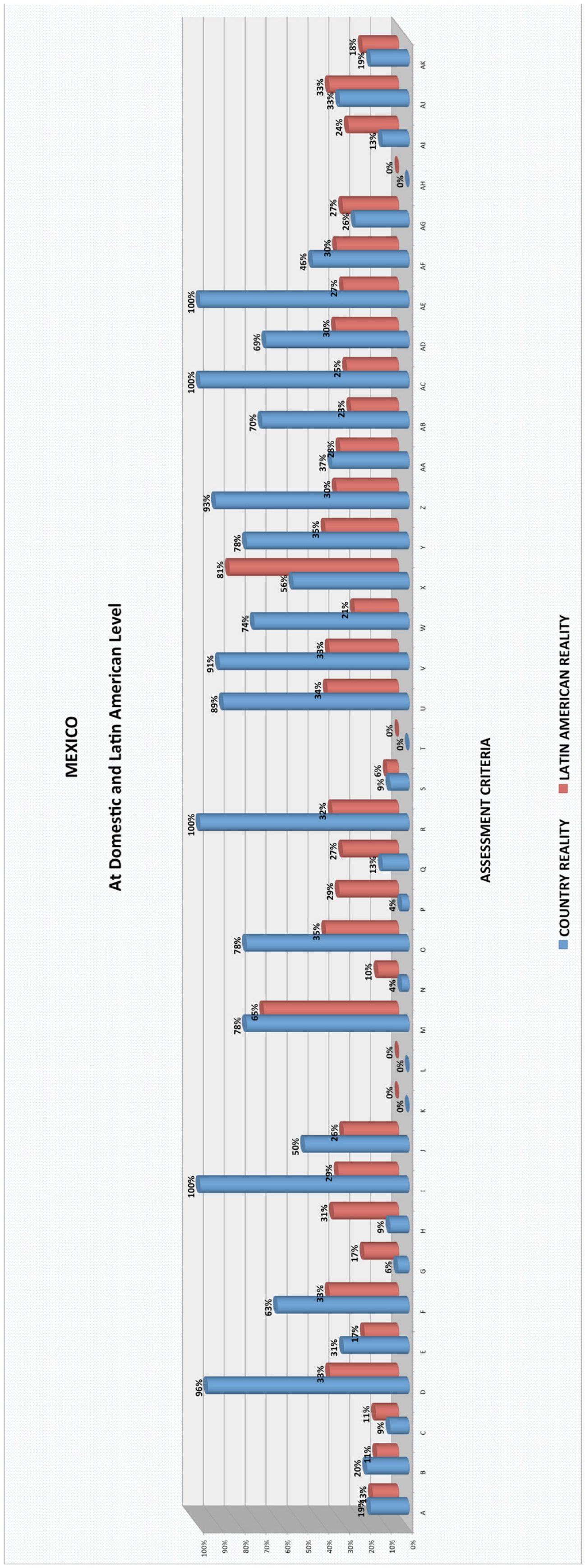
LATIN AMERICAN REALITY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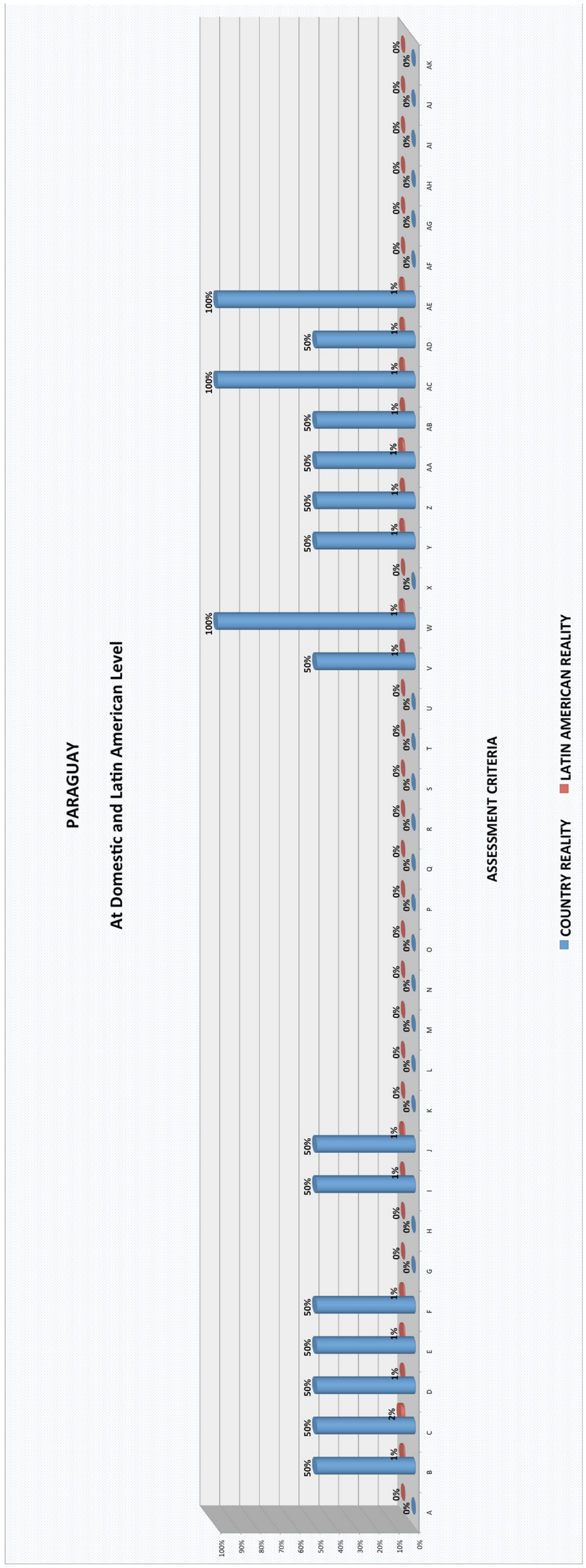
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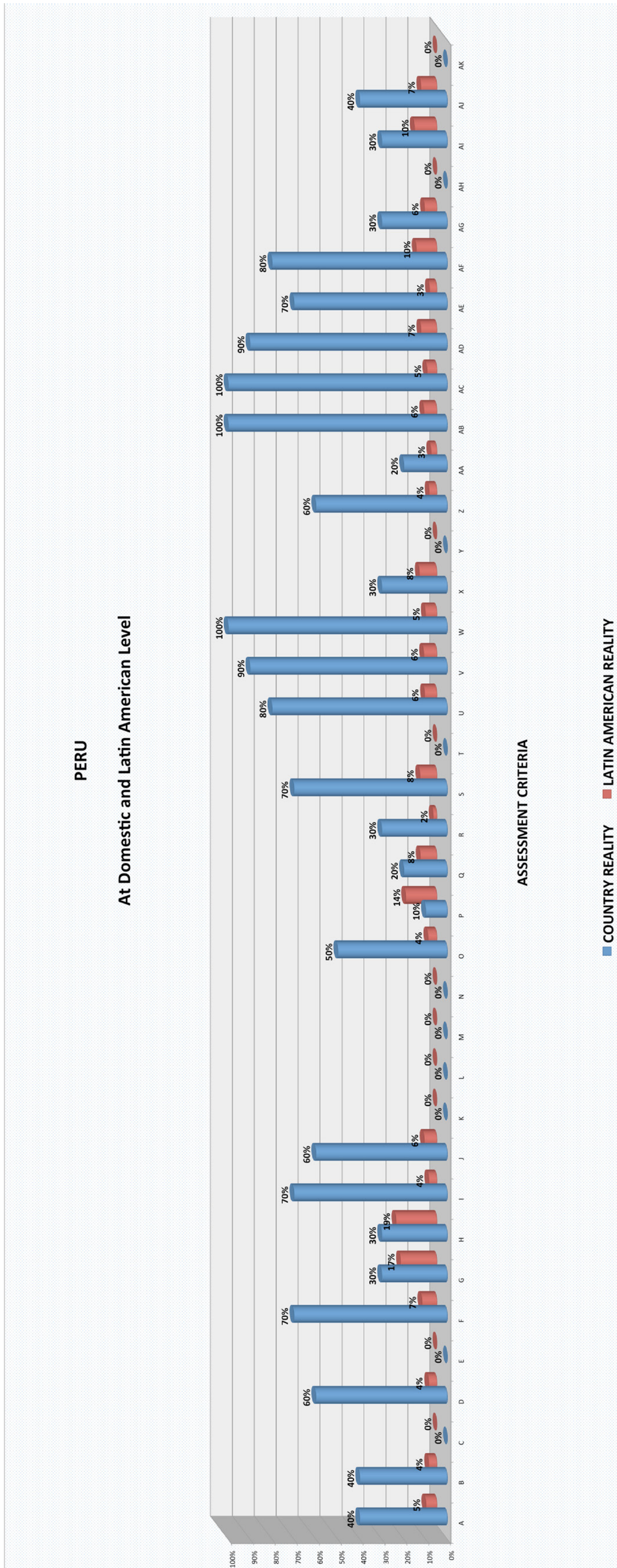
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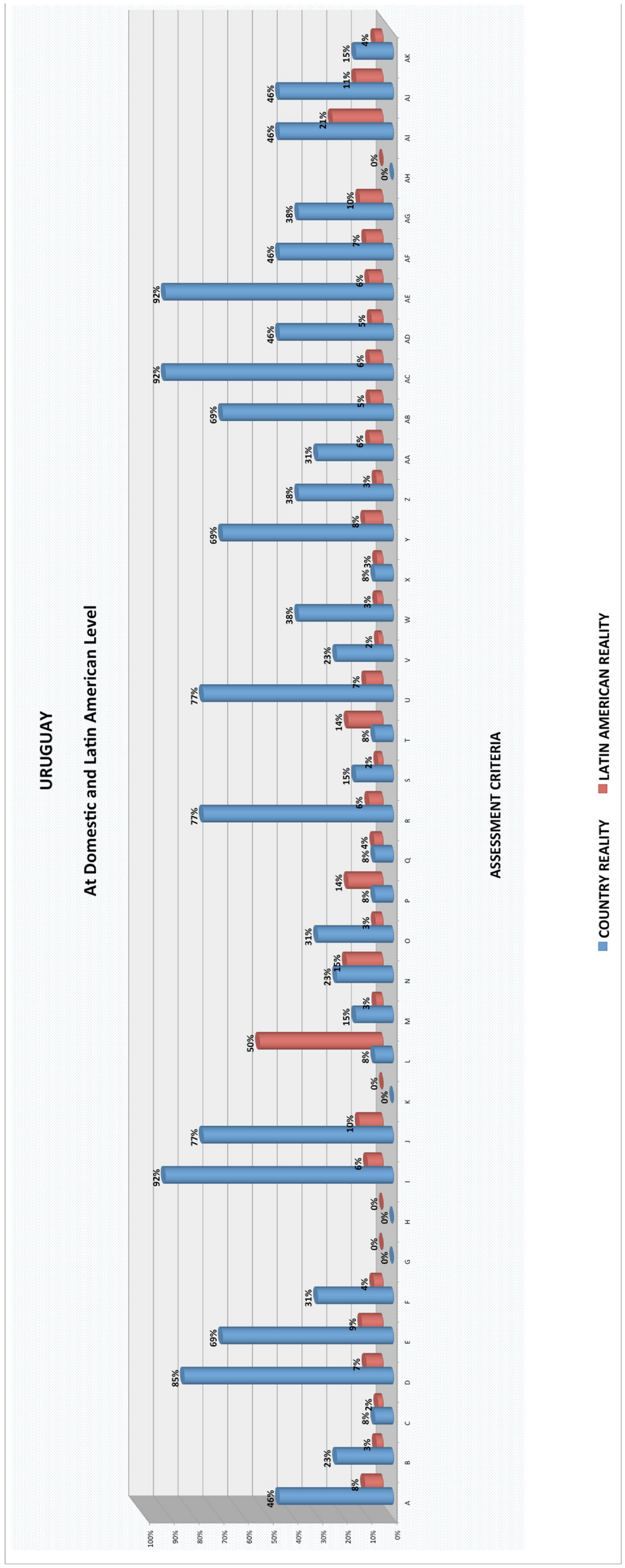
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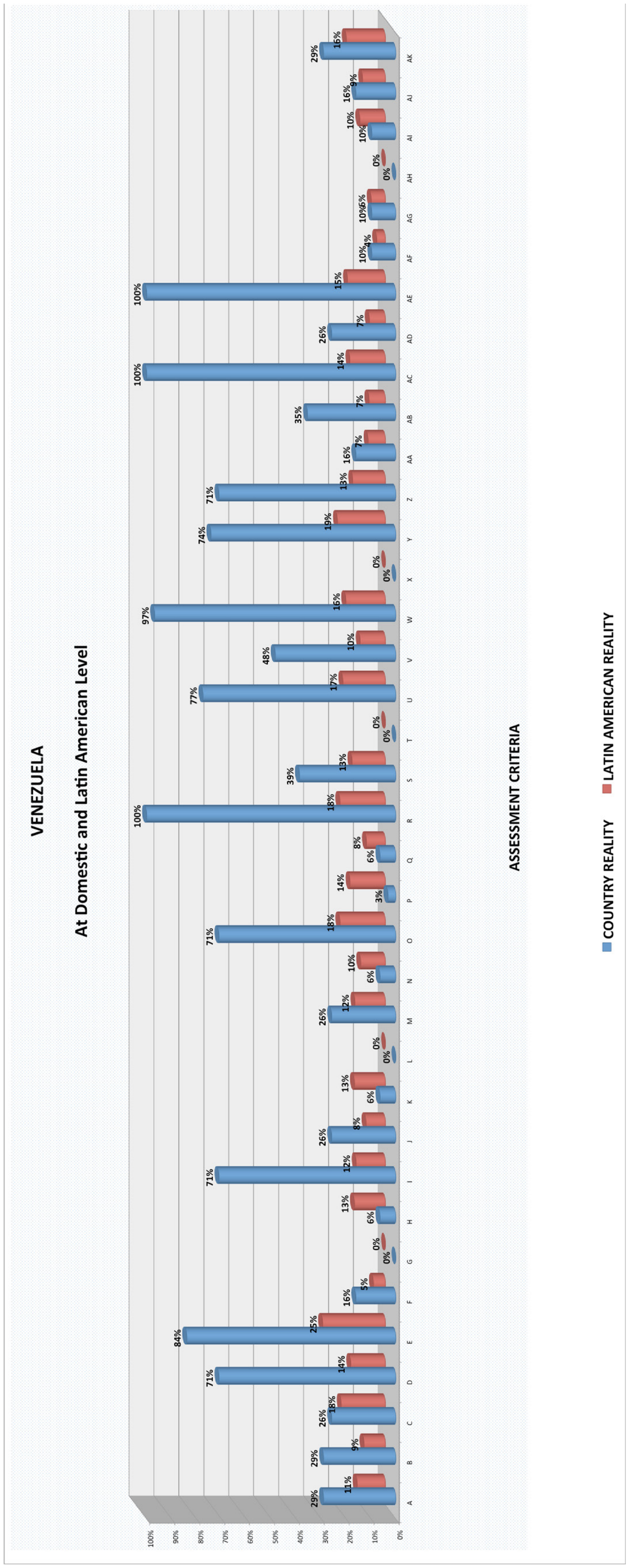
VENEZUELA
At Domestic and Latin American Level
ASSESSMENT CRITERIA
COUNTRY REALITY
LATIN AMERICAN REALITY

15. Agreements including the “place of effective management” rule as a tie-breaker to determine the residence of legal persons: 103 out of the 223 agreements reviewed.

16. Agreements including the mutual agreement mechanism as a tie-breaker to determine the residence of legal persons: 102 out of the 223 agreements reviewed.

17. Agreements including “services” in the definition of PE with time requirements of less than 12 months: 102 out of the 223 agreements reviewed.

18. Agreements providing for the term “royalties” defined in the relevant article to include “technical assistance”: 89 out of the 223 agreements reviewed.

19. Agreements including express reference to the possibility of applying domestic anti-abuse, anti-avoidance or anti-evasion measures: 84 out of the 223 agreements reviewed.

20. Agreements including reference to a broad criterion applied to the taxes covered or making special references in this respect: 79 out of the 223 agreements reviewed.

21. Agreements including provisions for combating double non-taxation: 71 out of the 223 agreements reviewed.

22. Agreements including the notion of “force of attraction” in the “Business Profits” article: 65 out of the 223 agreements reviewed.

23. Agreements providing for tax sparing or matching credit mechanisms for investment attraction: 57 out of the 223 agreements reviewed.

24. Agreements prescribing mutual administrative assistance mechanisms: 54 out of the 223 agreements reviewed.

25. Agreements including provisions that explicitly preclude certain entities from claiming treaty entitlement: 52 out of the 223 agreements reviewed.

26. Agreements that make reference to timeframes to notify any changes introduced in domestic laws such as “reasonable term”, “at the end of each year” or “upon expiration of a ninety-day term: 45 out of the 223 agreements reviewed.

27. Agreements that have provisions for taxation at source associated with artistes’ fame or reputation: 37 out of the 223 agreements reviewed.

28. Agreements containing specific operating aspects related to exchange of information and personal data protection: 29 out of the 223 agreements reviewed.

29. Agreements reinforcing the possibility of applying, without prejudice to the provisions under “Associated Enterprises”, each Contracting State’s own transfer pricing system: 26 out of the 223 agreements reviewed.

30. Agreements containing measures to strengthen compliance with formal obligations for deductibility of expenses by PEs: 20 out of the 223 agreements reviewed.

31. Agreements that use territorial / ACN criteria as a residence tie-breaker rule for legal persons: 18 out of the 223 agreements reviewed.

32. Agreements that include extraction, exploration and exploitation of natural resources in the definition of PE: 16 out of the 223 agreements reviewed.

33. Agreements that include a provision excluding the existence of a PE considering the intent to sell or export goods or services: 16 out of the 223 agreements reviewed.

34. Agreements that, for purposes of transfer pricing, provide for the possibility of considering the association criteria established in the relevant transfer pricing systems of the Contracting States: 7 out of the 223 agreements reviewed.

35. Agreements that expressly make reference to “new varieties of plants” as part of the definition of “royalties”: 7 out of the 223 agreements reviewed.

36. Agreements that include provisions expressly considering any equipment used for the exploitation of natural resources as part of immovable property: 2 out of the 223 agreements reviewed.

37. Agreements that make express reference to the application of a *Bona Fide* principle: 1 out of the 223 agreements reviewed.

9.1 Main Conclusions regarding Provisions on Taxes Covered under the Agreement, the Strengthening of the Source Principle in the Allocation of Income according to the DTA and the Fight against "Double Non-Taxation"

- At the regional level, several of the "Taxes Covered" sections of the agreements signed include references to special taxes responding to individual regulatory realities (capital contributions for emergency funds, tax on farming or afforestation companies, taxes specific to hydrocarbon activities, etc.). Although these taxes could be similar in nature to a direct tax like income tax, they are generally specific to the legal system of the other party to the agreement (i.e., the counterparty, typically a European country). It is important to mention the DTA between Ecuador and China as it includes indirect references to a tax that is completely different in nature from income tax, namely the Tax on Capital Outflows, (ISD, *Impuesto a la Salida de Divisas*), —one of the so-called "taxes with a regulatory purpose". This tax seeks to monitor currency exports from Ecuador as a consequence of its dollarized economy and the absence of a monetary policy, as well as to control Ecuador's balance of payments. However, the reference to the ISD entails that in cases where payments of interest, royalties and dividends from Ecuador to China are subject to this tax, the income tax rate for withholding at the source will decrease by up to 2 percentage points.

- Regarding the number of DTAs that include reference to a broad criterion applied to the taxes covered or making special references in this respect, we see that 35% of the agreements analysed include provisions of this kind, while 47% of such agreements include rules that provide for the application of the instrument to taxes levied on permanent establishments or to other taxes (such as in Ecuador, for example). In both cases, Brazil is the country that includes these provisions in most DTAs, followed by Chile and Argentina.

- On this point, the analysis shows that several of the agreements studied, mostly those signed earlier, have focused on providing express details about the different types of taxes, which have similar features to Income Tax, according to the description established in the respective domestic laws of each contracting state. However, countries have since shifted from a long list of the different taxes to making a generic reference in the DTA in the sense that its provisions further apply to similar or analogous agreements, provided that the other Contracting State is notified as to which taxes are involved, thus making the management of the agreement more flexible. In terms of the 47% of the agreements that contain references to their application on the income tax of permanent establishments, such percentage responds to the realities in the different contracting parties, since not all domestic laws provide for this type of tax.

- As regards the inclusion of timeframes for complying with the commitment to notify the counterparties of any changes or reforms introduced in connection with the taxes covered by the DTAs, the study shows that only 45 out of the 223 instruments analysed include provisions of this sort, which accounts for close to 20% of the total. Of these cases, agreements executed with Chile include these references most frequently (18 out of 26), followed by Ecuador (6 out of 18), compared to total number of agreements analysed. This percentage shows, on the one hand, that signor countries find it difficult to determine objectively the exact time for complying with the notification commitment, given that their domestic legislations provide for different procedures and timing for a legal amendment to become effective. In addition, they are always bound by publicity requirements in official gazettes. However, including a benchmark deadline undoubtedly provides the Contracting States with a reference for compliance with this duty. Thus, countries that choose this type of provision shall ensure that the time proposed is long enough to accommodate the entry into force of domestic laws while they are also controllable, measurable and subject to assessment.

- As regards exclusions of the “resident” status because income is derived exclusively from a source in the relevant State, 70% of the scrutinized agreements include these provisions. This responds to the different characteristics of the tax systems of the countries with which DTAs have been signed, which countries in general have a territorial tax system, as in the explanation in this respect provided above. The treaties that include this kind of provisions to the greatest extent are those signed by Colombia, Mexico, Chile, Uruguay, Venezuela, Argentina and Ecuador.

Notwithstanding, as mentioned earlier, this exclusion shall be construed, according to the OECD, in consideration of its objective and purpose, namely leaving outside of the scope of DTAs any persons not taxed wholly in one State (fully subjected), since if this were not the case it might exclude from the scope of the Agreement all the residents of countries applying the territorial taxation principle. For this reason, it is advisable for the different negotiation processes to clarify – usually through a protocol – the objective pursued with the exclusion to avoid an effect on jurisdictions that maintain a taxation system based on territorial principles.

- Another point worth highlighting is the application of tie-breaker rules to define residence for legal persons. Of the 223 agreements analysed, 103 agreements use the place of effective management as the deciding factor, while 102 opt for the mutual agreement mechanism to establish the country of which the legal person would be considered a resident. Finally, 18 agreements apply criteria based on the territorial principle (including treaties subscribed by ACN member countries). Brazil, Venezuela, Ecuador, Uruguay and Argentina are the countries which most use the place of effective management rule; while Chile, Mexico, Peru and Colombia most frequently employ the mutual agreement mechanism as a tie-breaker rule to establish residence for legal persons.

This outcome is understood from the perspective of the Contracting States’ intention to avail themselves of tools enabling tighter control in terms of the application of the DTA by unqualified persons, determining through the “place of effective management” in which jurisdiction a corporation actually makes its transcendental decisions, in which place the economic transactions entered into by said legal person will bear actual effects. On the other hand, the “mutual agreement” mechanism might be harmful for taxpayers who are legitimated but need to wait until the end of the procedure to qualify as “residents” and thus benefit from the DTA provisions. This prompts the suggestion for these procedures to be regulated via a protocol or memorandums of understanding that clearly state the deadlines and requirements for the analysis by the competent authorities. Finally, the outcome further shows realities in which DTAs used the “place of incorporation” criterion, for example, or the registration criterion, which could be quite vulnerable unless it is related to the intention of conducting transactions with real economic substance. Thus, even Decision 578 from the ACN points out that in absence of an incorporation instrument or if said instrument fails to state a domicile, the corporation shall be deemed domiciled in the place of its effective management as a subsidiary rather than a primary criterion.

- If we analyse the provisions on Permanent Establishments, we find that only 16 out of the 223 agreements have included the three activities of extraction, exploration and exploitation of natural resources in their definition of PE; this accounts for 7% of the total number of DTAs subject to the study. Out of these 16, Mexico signed 6; Peru, Chile and Brazil signed 3, respectively; while Venezuela signed 2 agreements.

Including all three activities explicitly in the permanent establishment article reflects the clear intention of strengthening source taxation in the countries where there is marked activity in connection with the use of natural resources. However, in many negotiation processes the rationale behind not including an express mention of exploration, extraction and exploitation has been that the PE article includes examples rather than an exhaustive listing. The argument further claims that it is more important to establish that it is in effect a fixed place of business in each specific case than to mention it explicitly.

- We found that 186 DTAs include time requirements of less than 12 months to define a PE for construction projects, which accounts for 83% of the total. Out of these, Mexico uses this criterion in all of its 54 agreements, Brazil applies it in 28 out of its 31 agreements, Chile uses it in every one of its 26 DTAs, Colombia in 9 out of 12 agreements, Argentina does so in 16 out of its 17 agreements, Uruguay in 12 out of 13, Venezuela in 22 out of 31, Bolivia in 4 out of 9, Ecuador in 7 out of its 18 agreements, Peru in 7 out of 10 and Paraguay in 1 out of its 2 DTAs.

This high percentage shows that most of the negotiation policies of the countries in the region seek to strengthen taxation at source of the income derived from these activities, which in most cases will have a duration exceeding 12 months. However, this aspect may have an effect on the investment in such sectors of the economy, considered “strategic sectors” in some countries’ domestic laws, the analysis of which to determine the will to invest the economic profit might be weighted higher than the condition as PE. In addition, it is worth noting that the presence of tax incentives (tax exemptions, for instance) on the income derived from activities in strategic sectors, may encourage positive investment decisions.

- As for time requirements for the furnishing of services in order to consider that a PE exists, Uruguay, Peru, Chile, Argentina and Colombia provide for periods of less than 12 months. Out of the total number of instruments reviewed, only 102 contain these references, which accounts for 46% of the total.

Including consulting, administrative or technical services with set-up times shorter than 12 months has the effect of strengthening taxation at source. Based on the figures above, it becomes evident that in this specific case analysed in the context of a PE, investment is favoured since the assumptions under which a PE is deemed established in connection with services are broader. However, it is relevant to make the same analysis as above regarding the factors that determine the decision to invest in these activities.

- Regarding the inclusion of provisions that rule out the existence of a PE considering the intent to sell or export goods or services, only the language of 16 out of the 223 agreements makes such reference (7% of the total). These are the agreements signed by Argentina (9), Brazil (3), Ecuador (2) and Venezuela (2).

It is important to note that this type of reference responds to the goal of strengthening taxation at source and avoiding the abuse of the PE device to avoid tax payments due on each transaction. In the presence of a warehouse that has the sole purpose of delivering goods to a foreign company, this warehouse does not make up a PE per se. However, clarifying the purpose to sell is important when it comes to administering a DTA in order to ascertain whether the warehouse was actually delivering the goods but with a selling purpose, in which case a PE should be deemed to exist.

This outcome leads us to conclude that, regardless of the clarification, these provisions reflect the constantly growing concern from the different governments to protect certain devices, such as “permanent establishments”, which may be abused as part of a harmful tax strategy to avoid tax payments in the source state. Without prejudice of this, these provisions can be understood as encompassed in the exclusion of the PE, resulting in most of the countries analysed not including them explicitly, although their practical usefulness for control purposes is very relevant.

- Interesting data is shown after analysing the number of DTAs which expressly provide that the equipment related to the exploitation of natural resources is part of the notion of “immovable property”. We see that only 2 out of the 223 DTAs reviewed contain such provisions: 1 was signed by Uruguay and the other one was signed by Ecuador. Measures of this kind constitute a guarantee for countries that are rich in natural resources, as they ensure that part of the income derived from the exploitation of natural resources will be taxed in the territory where the exploitation activity is conducted.

The review of this point once again shows the countries’ intention to ensure taxation at source, mainly with regard to the income deriving from activities related to the exploitation of natural resources. This is achieved through various mechanisms, namely including an explicit mention of these activities in determining the existence of a PE, provisions relative to the strengthening and broadening of the application scope for the article on “real estate property” where the predominant taxation criterion is that of the source or even the inclusion of explicit references in the article on capital gains on the sale of shares the value of which is directly or indirectly associated with real property located in the source State. It shall depend on the treatment that the Contracting States agree to award to this type of income, mainly considering whether the public policy intention is to promote investment in the sectors related to natural resources or to protect it by provisions seeking to ensure taxation at the location of the property giving rise to both the core and related activities, as in the use of equipment for the exploitation of such resources. Thus, the protection of this income is not necessarily tackled from this article, which is reflected in the low percentage of countries that have adopted this alternative.

- The notion of force of attraction, which is very favourable for taxation at source, is used only in 65 out of the 223 agreements analysed, which amounts to 29% of the total. This could be due to the difficulties that may arise in practice when the domestic rules of the country seeking to implement this notion do not provide for it. Mexico (42) and Argentina (10) are the countries that have focused the most on trying to include “force of attraction” in the Business Profits provision. Ecuador establishes this notion only in 2 of the 18 agreements it has signed, as does Uruguay (only in 2 out of 13 DTAs). Venezuela includes this notion in 8 of the 31 treaties it has entered into.

As pointed out earlier, although this device reinforces source taxation, the low percentage reflected may be due to the fact that optimum application shall depend on its inclusion in the domestic laws of contracting States wishing to implement it. In addition, this type of measure further implies the operation of Exchange of Information networks through which the Tax Administrations can clearly establish the resemblance between the goods and services provided by the parent Company and those offered by the PE.

- A very useful practice to strengthen the oversight powers of Tax Administrations, mainly in capital importing countries, is to include measures that reinforce compliance with formal duties for the deductibility of expenses by PEs. However, among the 223 DTAs assessed, only 20 agreements include provisions to this effect (9% of the total). Ecuador (4), Colombia (3) and Uruguay (3) are the countries which have used them to the greatest extent; and they are followed by Argentina, Chile, Mexico and Venezuela (with 2 agreements each), and Bolivia and Brazil (with 1 agreement each).

It may be concluded that most countries understand that issues of compliance with formal duties should be dealt with exclusively by domestic legislation and will not conflict with the enforcement of the DTA. However, this is not necessarily so, given that in practice cases have been identified where taxpayers claimed that the agreement supersedes domestic legislation and, thus, they would not be bound by the duty to obtain tax residence certificates to enjoy the benefits of the DTA, for example. This prompts the need to clarify in the agreement that the DTA does not preclude compliance with the formal duties established in each Contracting State's legislation, thus tightening the monitoring to be exercised by agreement administrators with the purpose of avoiding treaty shopping.

- In the same line of thought, regarding how many DTAs have references to each State's domestic legislation to define the cases where expenses will be recognized as deductible, or special references to the deductibility of expenses by PEs, we find that 120 out of the 223 agreements have provisions of this sort in their texts (54% of the total). Among those, Mexico (42), Venezuela (22), Chile (18) and Argentina (12) are the countries where these provisions are most prevalent in their agreements.

The result is limited to the scope of Article 7 on "Business Profits", which identified the percentage of provisions seeking to curb expense deductibility of Pes with a view to determining their tax base in the source State.

This outcome goes hand in hand with the application of the OECD model, where changes were made on the deductibility of expenses for PEs. However, it is also important to note that the percentage includes cases where special mentions were identified of the strengthening of domestic laws of Contracting States. These limit deductibility, such as in the case of thin capitalization measures, that must be observed when determining the corresponding tax bases of Pes. More than half of the agreements analysed include them.

- Given the reality of most Latin American countries as capital importers which seek to include in their agreements provisions to attract investments, it is important to know how many of the analysed agreements grant exemptions on loan interest in loans to attract investment or to promote exports, and inter-governmental loans. Out of the 223 agreements reviewed, 169 have this kind of reference (which accounts for 76% of the total). Mexico (54), Venezuela (31), Argentina (16), Brazil (29), Uruguay (10) and Ecuador (13) are the countries that most avail themselves of this kind of provision.

The result at this point reflects a major trend of Latin American countries to incorporate provisions to promote the activity of "export" in their jurisdictions, as well as industrial or scientific development, incorporating exonerations in the source country in respect of interests that are generated in loans granted from government to government.

- Although the treatment of income from technical assistance can be addressed on the basis of Article 7 "Business Profits", where the PE article provides that the furnishing of services is encompassed by the notion of permanent establishment, or on the basis of Article 14 "Independent Professional Services", where the DTA contains that kind of provision, there are several Latin American countries which have decided to afford special treatment to "technical assistance" considering it to be a "royalty". In this sense, our study shows that 89 out of the 223 DTAs reviewed provide for this kind of treatment (40% of the total); the countries where this provision can most frequently be found are Brazil (26), Colombia (12), Argentina (16) and Peru (7).

Including “Technical Assistance” in the scope of the article on “Royalties” implies, in the case of the agreements analysed, that at least the withholding percentage set forth in the article is ensured. This treatment may also go hand in hand with the one contained in the provisions of domestic laws in each Contracting State, in which cases it is agreed to maintain this legal consistency in the negotiation process.

From the perspective of attracting investment in services, applying the article on Royalties shall be contrasted against the time involved to provide assistance at the source, since this analysis may lead to conclude which was more beneficial from the investor’s perspective: applying a reduced rate (under the Royalties article), or a tax relief at the source, with taxes being levied exclusively in the residence country (when the activity is regarded from the perspective of the article on business profits and no PE is determined), or, conversely, if the activity is presented through a PE and, under the business profits article, a local rate is applied as if it were a corporation registered in the jurisdiction where the activity takes place.

What can be concluded thus far is that this type of provision may reflect public policies inherent to the respective States; legal consistency, or the need to attract investment through the determination of reduced percentages of withholding at the source.

- The treatment afforded to income from exploitation of new varieties of plants should be of interest for countries that have rich biodiversity, such as Brazil, Ecuador and Peru. Nevertheless, the study concludes that only 7 out of the 223 scrutinized agreements make express provision for treatment of this kind of income in the “Royalties” article. This accounts for only 3% of the total. In this case, Ecuador signed the highest number of agreements (5 out of 18) that provide specific treatment for this income, followed by Uruguay (1) and Chile (1).

New plant varieties are encompassed in the scope of Intellectual Property. Although the percentage of inclusion of this subject in the language of signed agreements is low, concern to tackle it expressly as a royalty is observed in three out of the eleven countries studied, which leads us to conclude that it is not a predominant aspect for all States when it comes to negotiating a DTA, considering also that some agreements make generic references to “other intangible intellectual property rights”, where certain countries understand that special reference to the notion of “new plant varieties” would not be necessary.

- The treatment afforded under Latin American countries’ DTAs to income derived from capital gains related directly or indirectly to immovable property located in their territories (for example, income from the sale of shares in a company which has been awarded a concession to exploit a mine in a Latin American country) is an aspect that becomes particularly relevant given the wealth of natural resources that exists in several of the countries examined. In this sense, out of the 223 agreements assessed, 140 provide for taxation at source for the sale of shares the value of which is directly or indirectly determined by immovable property located at the source (63% of the total). Mexico has included this kind of provision in 48 out of its 54 DTAs, followed by Venezuela which includes provisions of this sort in 24 out of its 31 agreements; Colombia, in 11 out of its 12 DTAs; Uruguay in 10 out of its 13 DTAs; Peru in 8 out of 10 DTAs and Ecuador in 9 out its 18 DTAs. To a lesser extent, these provisions are found in treaties signed by Argentina (6), Chile (14), Bolivia (6) and Brazil (4).

As mentioned in relation to the treatment of income derived from real estate property, the result of the analysis on this point again shows the countries’ intention to ensure taxation at source, mainly with regard to income derived from activities related to natural resource exploitation.

On the other hand, the effect of including provisions that strengthen taxation at the source of income derived from the sale of shares whose value is associated with real estate property through which the activity takes place might impact the decision to invest in such activity. However, a high percentage of the agreements analysed contains this type of provision, which leads us to believe that investment decisions are based on more considerations than the presence or absence of these provisions that should be further backed by the domestic laws of each contracting State where the possibility of this type of tax is foreseen.

- Although the OECD Model no longer provides for treatment of income from professional services in a separate specific article but as part of the business profits provision, we see a trend in Latin America to include Article 14 “Independent Professional Services” in DTAs. Out of the 223 analysed agreements, 188 have this article, which accounts for 84% of the total.

The trend in this field is quite clear. Agreements to avoid double taxation signed by the Latin American countries analysed for the most part preserve treatment of professional activities as a specific article.

This may derive from unique features in their domestic legislation that include specific provisions regulating the income raised by professional practice separately from the so-called “income from business activity”. It further considers that the rules governing the conditions to deem an individual as a resident not necessarily follow the same criteria when it comes to determining a PE.

- Including the treatment of income derived from an artiste’s or sportsman’s fame or renown as part of Article 17 “Artistes and Sportsmen” instead of as a royalty has been a trend that can be identified in the texts of several of the agreements signed by Latin American countries, considering that these provisions reinforce the taxation at source criterion. Out of the 223 DTAs analysed, 37 agreements include these provisions (17% of the total). Mexico has resorted to this criterion most often (30 out of its 54 agreements include provisions to that effect); followed by Peru (3), Ecuador (2), Chile (1) and Uruguay (1).

This treatment ensures taxation at source and the outcome shows that the country that uses it most widely has significant development in the arts and sports field.

The difference with agreements that do not contain this type of provision is that income derived from fame or reputation is discussed in the article on “royalties”, “business profits” or “other income”, with the implications that these articles bear in terms of income distribution.

The percentage shown mainly includes more or less recent agreements (mostly from the 2000’s), a time when this type of treatment was most widely developed.

- It is important to consider the prevailing trend regarding the taxing right criterion in the negotiation of the “Other Income” provision of the agreements signed at the regional level. Here, 167 out of the 223 DTAs (75% of the total) consider that the source criterion is the one that should be applied in these cases in a broad —but shared with the counterparty—, limited or residual way. The countries that have given the most consideration to this criterion compared to the number of agreements they signed are: Mexico (50), Colombia (9), Brazil (30), Chile (24), Venezuela (22), Peru (6) and Argentina (13). They are followed by Ecuador (7), Uruguay (5) and Paraguay (1).

On this regard, it is important to mention that, notwithstanding the source criterion being included in these cases, the possibility of taxation in the residence country is not restricted. Thus, the effective application of the “methods” will determine if double taxation is eliminated or mitigated in each specific case. This explains why the percentage of agreements having these references is high relative to the number of agreements analysed.

- Fighting against “double non-taxation” has been a trend identified in the more recent agreements at the Latin American level. Out of the 223 DTAs examined, we see that 71 of them have provisions that focus on directly or indirectly fighting this phenomenon; this amounts to 32% of the total number of agreements signed. Colombia (8 out of 12 agreements), Chile (21 out of 26) and Mexico (20 out of 54 agreements) are the countries that have included the highest number of direct or indirect references to fighting against “double non-taxation”. They are followed by Ecuador (5), Venezuela (5), Uruguay (4), Argentina (3), Peru (2), Bolivia (1), Brazil (1) and Paraguay (1).

The results show that a majority of countries is not concerned about including in their agreements any provisions that seek to eliminate this effect in applying the instrument either explicitly or indirectly.

This is understood from the perspective of each Contracting State, which may use general anti-abuse measures or resort to an amicable proceeding to request the renegotiation of the instrument if it is determined that its enforcement is creating this adverse effect. Notwithstanding, including specific “double non taxation” provisions is usually the case when the counterparties are jurisdictions where there are special treatments or reliefs on income received by their nationals (such as in some Middle East countries) and the intention is to protect taxation at the source, which does levy such income. In countries such as Chile, Mexico and Colombia this concern goes hand in hand with the intention to shield the language of the DTAs against harmful tax planning and the use of hybrid adjustments at the international level.

9.2 Main Conclusions regarding the Application of Anti-Abuse Rules

- At the regional level, in the territory under analysis, it can be verified that out of the 223 agreements analysed, 216 include provisions to prevent “treaty abuse” (97% of the total number of DTAs in the region). All the conventions signed by Mexico, Chile, Peru, Colombia, Paraguay and Venezuela contain this type of measures, followed by Brazil (with 29 out of 31 agreements including safeguards against the abuse of treaty provisions), Ecuador (17 out of 18 agreements contain these rules), Uruguay (12 out of 13 agreements have these provisions), Bolivia (8 out of 9 agreements have anti-abuse rules) and Argentina (with 15 out of 17 agreements addressing treaty abuse).

This apparently encouraging outcome should be analysed in the context of all anti-abuse measures, for this significant 97% also includes the agreements that only developed old anti-abuse measures, such as implementing the notion of “beneficial owner”, for example. Thus, a full picture of the evolution of anti-abuse measures in the region’s agreements requires considering the percentages associated with both general, specific and other measures for strengthening the domestic legislation of each contracting state.

- Likewise, in 122 out of the 223 agreements reviewed we can identify general anti-abuse rules (mainly in the form of “limitation on benefits” provisions), which apply in a cross-cutting way to the entire agreement. This amounts to 55% of the total number of agreements audited. Mexico, Chile, Colombia, Ecuador, Paraguay, and Peru include this kind of provisions in almost all of their agreements. Brazil has incorporated GAARs in only 6 of its 31 agreements; Venezuela in 8 of its 31 agreements; Uruguay in 6 of its 13 agreements; Argentina in 5 of its 17 agreements and Bolivia in 6 of its 9 agreements.

The 55% percentage encompasses, on the one hand, enforcement of generic provisions on Limitation of Benefits and, on the other hand, the application of cross-cutting provisions that require the analysis of the actual intention when using the DTA (the real economic substance). It is worth mentioning that applying LOB measures brings about difficulties when it comes to establishing comprehensive understanding of the requirements for purposes of qualifying as a legitimated taxpayer under the DTA. This explains why this difficulty results in not all DTAs containing it, since in some cases measures relative to application intention analysis are preferred, despite the LOB provision having much more accurate and effective results in fighting treaty shopping.

- In turn, 203 of the agreements reviewed comprise at least one specific provision to prevent treaty abuse (91% of the total number). This is generally implemented either by including a reference to the notion of “beneficial owner” in the articles dealing with passive income (dividends, interest and royalties) or by including a limitation to the application of reduced tax rates in the articles dealing with passive income, if it becomes apparent —given the scarcity or the absence of real economic substance in the underlying transactions— that the application of the tax arrangement they have entered into seeks only to obtain the benefits contained therein. Once again, as a share of the number of agreements signed by each country, we have the following data: Mexico, Venezuela, Paraguay and Chile provide for this form of treaty abuse prevention in all of their agreements; 29 of the 31 agreements subscribed by Brazil make similar provisions; 14 of the 18 DTAs signed by Ecuador establish a similar rule; 9 of the 10 arrangements executed by Colombia provide for this kind of protection. Additionally, Argentina has included this safeguard in 14 out of its 17 DTAs; Bolivia included this reference in 5 out of its 9 DTAs; Peru has 7 out of 10 DTAs which include this rule; and Uruguay has provided for this rule in 12 out of its 13 agreements.

Although the percentage is encouraging, it mostly considers DTAs that provide for a “beneficial owner”, which should be supplemented by a provision – through a Protocol, perhaps – clarifying its scope for effective enforcement. Fail this, it might result in practical difficulties in establishing the presence of said beneficial owner in a given transaction. In addition, tax administrations are subject to generic (domestic) laws on fraud, avoidance, evasion, economic event, etc.

- Another interesting aspect stemming from this analysis is that only 84 out of the 223 analysed agreements prescribe rules to secure the application of domestic anti-abuse measures existing in the domestic law of each Contracting State. This amounts to 38% of the total number of agreements analysed. The countries that most utilize this type of safeguards in their agreements are: Peru (8 out of 10 agreements provide for this kind of protection), followed by Uruguay, Colombia, Ecuador, Chile and Argentina. It is important to highlight that Mexico has signed 54 agreements that are still effective, but only 25 have these provisions; while Brazil has included these standards in 7 of the 31 agreements it subscribed. Venezuela has contemplated these anti-abuse measures in only 3 of its 31 DTAs and Bolivia in 4 of its 9 DTAs. Paraguay has not incorporated these measures in any of the agreements executed.

This is due to the fact that not all legislations set forth clear enforcement parameters for domestic anti-abuse measures. It was already mentioned above that there may be potential difficulties in applying the “beneficial owner” device, coupled with the domestic measures seeking to combat thin capitalization, the transfer pricing regime, etc. In this sense, the trend in Latin America favours the inclusion of own measures and mutual agreements established in the DTA per se, thus avoiding possible complications when one Contracting State applies a domestic measure one-sidedly, even if the practice of strengthening this domestic measure is highly positive from the perspective of developing efforts by government to fight harmful tax practices.

- Regarding the application of measures precluding certain entities that are "not qualifying" for treaty benefits from claiming treaty entitlement, the study indicates that only 52 out of the 223 treaties have this kind of protection, which amounts to only 23%. Considering the signed agreements, we could conclude that these measures are not very common at the regional level: in Chile, 9 out of 26 agreements include them; in Ecuador 6 out of 18 agreements; in Mexico 14 out of 54; in Colombia 5 out of 10; in Argentina 3 out of 17; Bolivia does not make provision for these measures at all and nor does Paraguay; in Brazil, only 4 out of 31 agreements contemplate this safeguard; in Peru 3 out of 10 agreements; in Uruguay 5 out of 13 and in Venezuela 3 out of 31 agreements.

This result is explained from the perspective of the complexity of identifying these "not qualifying" entities in practice and determining which benchmarks agreement administrators should use to attempt at identifying them.

- It is interesting to consider the application of the *Bona Fide* principle and the extent to which it is expressly provided for in the various agreements. From the examination we conducted, only the DTA signed between Colombia and India has expressly provided for this principle. Ecuador, for example, used this principle in the treaty entered into with Indonesia, but this treaty has not been ratified to date and was therefore not included in the universe of agreements studied.

The result is explained from the reality of an explicit inclusion of the bona fide principle in the texts of the agreements, showing that only one of them contains it in that manner. However, this does not mean that a practical deviation from the principle is not deemed an anti-abuse measure when countries refer to the analysis of the intention by taxpayers to use the DTA. This does not detract from the merits of the explicit reference that contributes to a conceptual identification of the principle and its institutionalization as part of the legislation of the States that wish to agree it this way, i.e. explicitly.

- It may be concluded that anti-abuse mechanisms in Latin American treaties have undergone significant progress as almost all the countries in the region provide for them in their treaties. Specific measures prevail over general ones, and, among the former, the safeguard to prevent treaty abuse identified as the most commonly used in connection with passive income is the notion of the "beneficial owner." Mechanisms such as express references to the *Bona Fide* principle, provisions specifically excluding certain entities and measures to strengthen the application of domestic anti-abuse rules have not been used as widely.

9.3 Main Conclusions regarding the Development of Provisions Focused on Efficiency and Effectiveness in the Exchange of Information and Mutual Administrative Assistance

- Regarding provisions that would allow for a more efficient exchange of information by governing the processing of assistance requests, and assistance mechanisms (voluntary assistance, assistance upon request, automatic assistance), of the 223 analysed agreements, only 29 pay regard to these measures, which accounts for 13% of the total number of agreements in force in the region. As a share of the number of executed agreements, the country with the highest prevalence of these provisions is Uruguay (6 out of 13 DTAs), followed by Peru (3 out of 10 DTAs) and Ecuador (4 out of 18). In Mexico, only 7 of its 54 agreements contain operating provisions of this kind; in Brazil, only 2 out of 31 agreements; in Venezuela, 3 of its 31 agreements; in Chile, 2 of its 26 agreements; Paraguay and Bolivia do not make provision for this; and Argentina and Colombia have one agreement each containing these measures.

- Assistance in tax collection is implemented in 54 out of the 223 agreements analysed, which accounts for 24% of the total. Colombia is the country which incorporates the highest number of tax assistance provisions in its DTAs (9 out of 10); 6 out of Uruguay's 13 DTAs cover tax collection assistance; Peru makes provision for it in 4 out of 10 agreements; Ecuador provides for this in 5 out of 18 agreements; Mexico includes it in 18 out of its 54 DTAs; Venezuela has consideration for tax collection in 5 out of its 31 agreements; and Bolivia prescribes it in 3 of its 9 treaties. Argentina's and Paraguay's Double Taxation Agreements make no reference to measures of this kind.

The percentages mentioned indicate that the trend to include operational provisions that enable expeditious exchange of information (which is much more effective in terms of establishing service times and implementation mechanisms) is low in the region. This is construed from a practical perspective in the sense that this type of provision may be the matter of specific exchange agreements or be part of the development of memorandums of understanding, but not be part of the actual DTA. However, this vision brings about a host of obstacles that in practice render the exchange slow and late in some cases.

Likewise, the low percentage of inclusion of specific mutual administrative and technical assistance provisions shows a regional reality where these aspects are either the subject of specific agreements or the States still lack domestic laws to enable effective rendering of assistance in each specific case.

As stated earlier, including Exchange of information and mutual administrative assistance provisions are effective mechanisms to strengthen compliance with tax obligations in international transactions, fighting harmful tax practices, with sufficient tools to face current issues concerning tax planning, the use of tax havens and preferential tax systems, transfer pricing, thin capitalization, e-commerce, etc.

9.4 Main Conclusions regarding the Application of Mechanisms to Attract Investment

In connection with the application of tax sparing or matching credit methods to attract investment to capital importing countries, the study has shown that only 57 agreements apply these methods, which is equivalent to 26% of the total DTAs signed in the region. Brazil and Argentina are the countries which have used these methods most frequently in their treaties: Brazil includes them in 18 of its 54 treaties and Argentina makes provision for these methods in 12 of its 17 DTAs. Mexico makes reference to them in 10 of its 54 agreements, while Venezuela uses them in 9 of its 31 treaties. Ecuador applies them in 3 DTAs; Uruguay and Chile in 2 treaties. Bolivia only contemplates these methods in one agreement; and Colombia, Paraguay and Peru have not included them in any of their treaties.

This percentage portrays a reality where it will be customary for countries that promote further economic development or choose a comprehensive policy to attract investment try to stimulate capital inflows to favour investment processes. To achieve it, they will provide tax incentives enshrined in tax reductions or exemptions. The conclusion from the agreements analysed is that the older agreements tend to contain this type of provisions and that including them undoubtedly responds to the enforcement of public policies aimed at strengthening the productive and industrial systems.

This analysis has considered a general overview of the various double taxation treaties signed by 11 Latin American countries, focusing on the most relevant areas from the perspective of their capital-importing realities. Likewise, the study has looked at several aspects on preventing treaty abuse, which has been the object of multiple international efforts, such as the OECD Action Plan on Base Erosion and Profit Shifting (BEPS) and several reports and workshops intended to address treaty abuse organized by the United Nations together with the Inter-American Center of Tax Administrations (CIAT).

As mentioned earlier, the analysis has examined two aspects. One is the regional aspect, which was designed to determine, taking into account the total number of DTAs signed, what the trend has been regarding the perspective mentioned in the previous paragraph. The other one is the individual aspect, which was intended to ascertain which countries are more advanced in the area of strengthening the taxing rights of their Tax Administrations by including provisions conducive to this end in their tax treaties as capital-importing countries (source principle), as well as by shielding their agreements against abuse, by including general and specific anti-abuse measures.

As shown by the findings of the study, remarkable progress has been made in Latin America toward the inclusion of anti-abuse measures in tax treaties. However, this does not mean that anti-abuse measures that have come into use more recently —such as the *Bona Fide* principle, the express exclusion of entities from the objective scope of the DTA in question, reference to strengthening of domestic anti-avoidance or anti-evasion measures, preventing “double non-taxation”— are included in every agreement analysed.

Stating that 216 tax treaties (out of 223) consider anti-abuse safeguards means that in all those instruments there is at least one anti-abuse measure and that measure is generally the oldest one in terms of implementation: the notion of “beneficial owner”, whereby the treaty administrator has the possibility to verify who the real beneficiary was in a certain transaction in connection with which the benefits of the DTA are being claimed.

Likewise, we see that Latin America does not show an upward trend in terms of the existence of provisions that target the strengthening of control mechanisms implemented in the domestic legislation of each State, regarding preliminary verification of formal requirements (fiscal residence certificates, audit certificates to verify the relevance of the expense, etc.) for the recognition of an expense as a non-deductible one, mainly in the case of permanent establishment expenses in the source State, for example.

Conversely, we find that there is a similar trend among the countries under examination regarding the time requirements for defining a PE in construction projects, the inclusion of “services” in Article 5 of tax treaties or the inclusion of a specific article dealing with income from independent professional activities, for example; and, generally, in the implementation of provisions intended to strengthen taxation at source of income from the sale of shares, creation of permanent establishments, territorial criteria in the application of the “other income” provision or application of criteria involving the place of effective management or mutual agreement mechanisms as residence tie-breaker rules in the case of companies.

The trend is also less marked in terms of the inclusion of provisions to operationalize the exchange of information or mutual administrative assistance, as well as in the use of investment-attraction methods such as tax sparing or matching credit, or the definition of timeframes for the Contracting States to notify each other of any significant change in their laws regarding the scope of application of the DTA for a better administration and interpretation of the Agreement.

Finally, although countries such as Brazil, Mexico, Venezuela and Chile have networks of signed agreements worldwide that are much larger than the networks of the rest of the countries studied in this report, we were able to verify that the most specialized notions to prevent treaty abuse were implemented in more recent agreements. The same holds true for provisions preventing "double non-taxation." Therefore, regardless of the number of agreements signed throughout the history of DTA negotiation in the 11 countries analysed, our findings show that countries which have not been signing these agreements for such a long period of time, such as Peru, Ecuador, Colombia and Uruguay, have evidenced significant advances in the implementation of source taxation criteria strengthening, GAAR and SAAR rules, with provisions that prescribe protection, in the agreement itself, from harmful tax practices.

10. BIBLIOGRAPHY

- United Nations Department of Economic and Social Affairs, “La Negociación de Convenios Tributarios”, New York, United Nations, First Edition, 2014.

- Organization for Economic Development, “Action Plan on Base Erosion and Profit Shifting”, 2013.

- United Nations Department of Economic and Social Affairs, “Convención Modelo de las Naciones Unidas sobre la Doble Tributación entre países desarrollados y países en desarrollo”, United Nations, New York, 2011.

- Andean Community’s Decision 578 “Régimen para Evitar la Doble Tributación y Prevenir la Evasión Fiscal”, published in the supplement to Official Gazette (Registro Oficial) No. 457 on 9 November 2004.

- Organization for Economic Cooperation and Development, Institute for Fiscal Studies, “Modelo de Convenio Tributario sobre la Renta y sobre el Patrimonio”, Spain, 2014.

- Graeme S. Cooper, “Preventing Tax Treaty Abuse, Papers on Selected Topics in Protecting the Tax Base of Developing Countries”, United Nations, 2014.

- Joan Hortala, “Las cláusulas de tax sparing y matching credit. Incentivos fiscales a la inversión de países en vías de desarrollo a través de los convenios para evitar la doble imposición internacional”, journal: “Revista Académica de Derecho”, Spain, 1995.

- Pecho, Rodríguez, Vásconez, Work Paper Draft, “¿Influyen los Convenios para evitar la Doble Imposición en la atracción de Inversión Extranjera Directa?” CIAT, 2012.

- International Bureau of Fiscal Documentation – IBFD’s database on Double Taxation Agreements.

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