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Non-discrimination under the Andean Community Law

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In order to close this cycle of dissertations about non-discrimination in International Tax Law, we will finish by talking about the specific case of the Andean Countries.

Decision 578 of the Andean Community – which is aimed at avoiding the double taxation of income and wealth taxes for taxpayers in Colombia, Peru, Bolivia and Ecuador – has a non-discrimination clause which goes far beyond the scope of Article 24.1 of the Double-Tax-Convention Models. In fact, it is closer to National Treatment clauses included in FTA's and BIT's. According to Article 18 of said Decision, member countries shall not grant residents of the other contracting states less favourable treatment than that granted to their own residents, with respect to the taxes covered by the Decision. The Cartagena Treaty,[1. Acuerdo de Integración Subregional Andino or "Acuerdo de Cartagena".] which is the Convention that created the Andean Community, also states in Article 74 that, with respect to domestic taxes of any kind, countries shall grant products which have their origin in other contracting states a treatment no less favourable than that granted to their own products. These provisions have given rise to important decisions taken by both local authorities and tribunals, as well as the Andean Court of Justice.

The Peruvian Tax Administration (SUNAT), for example, has said that, according to Article 18 of Decision 578, an individual covered by said Decision can benefit in full from the rules of taxation of income from employment applicable to Peruvian residents, even if they have not complied with the 183-day term as defined by local regulations for consideration as a Peruvian resident.[2. Informe Nº 183-2010-SUNAT/2B0000.]

Likewise, The Colombian Tax Administration (DIAN) has stated that the importing of goods from countries which belong to the Andean Community or other countries with which Colombia has a trade agreement incorporating a National Treatment Clause, have to be taxed at the same VAT rate as goods produced or marketed in Colombia, irrespective of the domestic laws incorporating higher tax rates.[3. DIAN, Ruling 051530, 2003.]

The power given to the principle of non-discrimination by the Andean Community, however it is ruled[4. Either by means of "Non-discrimination", "National Treatment" or "Most Favoured Nation" clauses.] (and despite the discredit of said community, particularly in recent years),[5. Venezuela left the Andean Community some time ago and Colombia is also considering the possibility of following suit.] is demonstrated in a case in which an Andean country had serious grounds for "discriminating" against or, more accurately, creating rules aimed at non-discrimination against its own domestic products. Colombia has local VAT regulations which

differentiate “excluded” from “exempted” goods and services, with the result that excluded goods do not give the right to credit the input VAT, while exempted goods do give that right (zero-rated).

Colombia, subsequently, issued Law 488/98, which stated that imports of “excluded” goods would be taxed at a rate equivalent to the “implicit VAT” which had to be assumed by local producers or marketers, as a result of not having the right to credit said VAT. This measure, then, was a way of correcting the local law, as it discriminates against its own national producers or marketers, forcing them to bear higher costs, taking into account foreign producers or marketers of equivalent products which are zero-tax-rated as a result of the export. Notwithstanding the above, the authorities of the Andean Community considered that if Colombia had a list of VAT-excluded items, it had to be consistently applied to both local and foreign products, irrespective of its own local-law deficiencies.[6. Tribunal de Justicia de la Comunidad Andina, Process Nº 79-AN-2000.] Colombia, in the end, had to abrogate its legislation, since it also was considered contrary to the compromises taken within the World Trade Organization (WTO).

In other cases, the Andean Court of Justice has taken very strong positions with respect to cases of “hidden discrimination”. For example it has condemned, as has the WTO,[7. See WTO, case DS 396,403 (European Union and United States against Philippines). For more information about world controversies over spirits, see: “Wines and spirits among members’ trade concerns”: WTO 2008 News Item, 2 July 2008, found at http://www.wto.org/english/news_e/news08_e/tbt_2july08_e.htm.] the imposition of taxes over foreign alcoholic beverages (spirits) by countries whose tax rates are based on the degree of alcohol in each spirit or any other characteristics, if it is proven that similar local spirits with lower taxes do not reach the level of alcohol contained in the foreign spirits or otherwise have different characteristics. In these cases, the Court has understood that higher tax rates based simply on alcohol levels or other irrelevant characteristics might be the result of a kind of euphemism aimed at dodging the evidence of real discrimination against foreign products.[8. See, amongst others: Tribunal de Justicia de la Comunidad Andina, Process 03-AI-97.] The Colombian Council of State has not shared this view up to now and has stated that imposing taxes based on the alcohol degree of spirits does not in itself show discrimination.[9. Consejo de Estado, Section 4th, Ref: 76001233100020010022 8 01, Judgement of December 6th, 2012 (Guinness UDV Colombia S.A and others v. Department of Valle del Cauca). See also, Ref: 23001-23-31-000-2000-03659-01 (18633), Judgement of March 22nd, 2013 (Guinness UDV Colombia S.A and others v. Department of Cordoba).]

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