

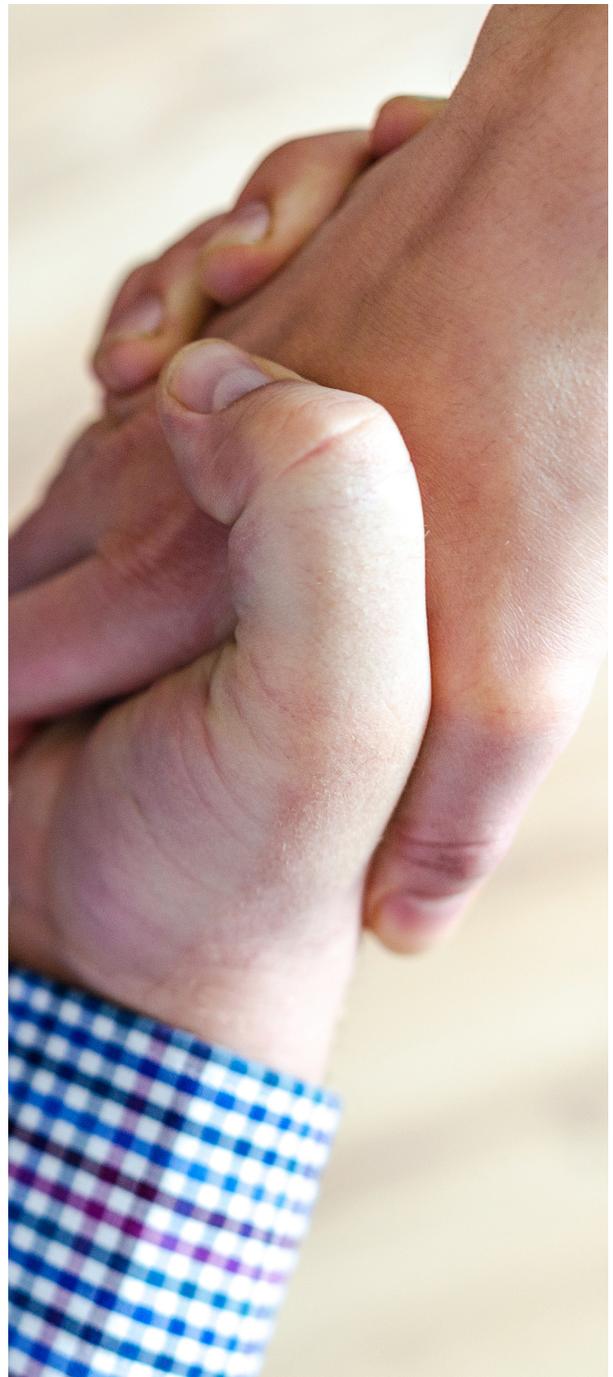
I PROPOSE THAT PANAMA AND COLOMBIA NEGOTIATE A DOUBLE TAX CONVENTION (DTC)

BY PUBLIO CORTÉS

Enjoying the climate of Bogotá and the historical flavor of the San Carlos Palace on 10 Street is always a pleasure. It is appreciative to taste the good coffee and to have the opportunity to see the window through which Manuelita Sáenz helped the Liberator escape in 1828, saving his life. It was there, where the negotiating teams of Panama and Colombia met a couple of times back in 2015, the same as in Panama City but here we used air conditioning.

Slow negotiation steps were being taken for a Double Tax Convention (DTC), including a clause for the exchange of tax information. We had stayed at that table seeking to resolve a dispute that produced a diplomatic skirmish on October 2014, when, in a matter of a week, Colombia first announced that it would include Panama in the list of "tax havens" for 2015 and, after talking with Panama, reported that it would not do so, given that negotiations for a DTC would begin.

The negotiations did not conclude in agreements. On the one hand, Colombia insisted on seeing the relationship between our countries in a segmented way, to such a degree in which the



Finance Ministry team was distant when it was mentioned that there was also a commercial agenda. On the other hand, Panama's position in 2015, before the Mossack Fonseca leaks, which occurred in April 2016, was not really favorable to the exchange of information for tax purposes, an issue that was Colombia's fundamental objective.

Time passed and today Panama and Colombia have, by multilateral means, full agreements in force and in application for the exchange of tax information, both for exchange of information upon request (EOIR), and automatic exchange of information of financial accounts for tax purposes (AEOI).

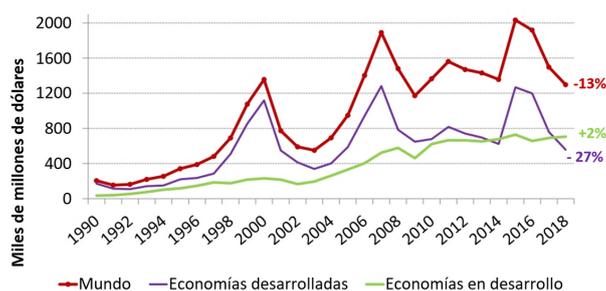
If the main stumbling block has already been overcome, the question arises: why don't we now sign a DTC, which is a mutually beneficial instrument for investments? My answer to that question is that we are before the perfect timing to begin negotiations of a DTC between Panama and Colombia, but that issue must be addressed considering various elements of judgment.

Specific and important economic considerations

According to data from the United Nations Economic Commission for Latin America and the Caribbean (ECLAC), if we compare Foreign Direct Investment (FDI) in the world in 2009 (approximately \$1.1 trillion) with the same data for the year 2018 (1.3 trillion) reflects an improvement, but not so overwhelming.^[1]

[1] Economic Commission for Latin America and the Caribbean (ECLAC), *Foreign Direct Investment in Latin America and the Caribbean*, 2019 (LC / PUB.2019 / 16-P), Santiago, 2019.
 [2] <https://datos.bancomundial.org/indicador/BX.KLT.DINV.WD.GD.ZS?l>
 [3] CEPAL, op cit.

La IED en el mundo disminuyeron 13% en 2018: 1,3 billones de dólares, su nivel más bajo desde 2009



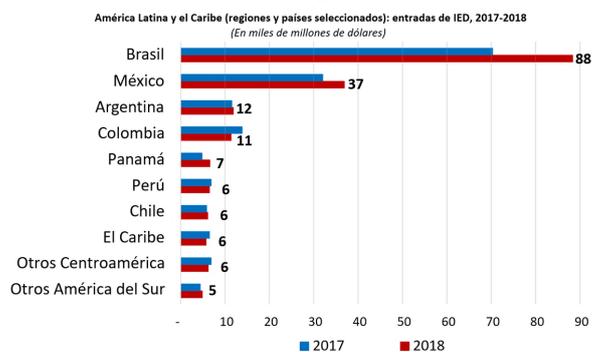
Fuente: Comisión Económica para América Latina y el Caribe (CEPAL), sobre la base de Conferencia de las Naciones Unidas sobre Comercio y Desarrollo (UNCTAD), World Investment Report 2019, Ginebra, 2019

On the other hand, according to data from the World Bank,^[2] if we compare those same years for Latin America and the Caribbean, we observe a growth in FDI of 8.53%.

With that reference, it seems really extraordinary that, comparing those same years and according to the same source, Panama has had an increase of 128.03% in the level of its FDI received.

If we look at the data for 2018 alone, according to ECLAC, in that year, the absolute figure of FDI received in Panama, that is, approximately 7,000 million dollars, is the fifth in all of Latin America, only below Brazil, Mexico, Argentina and Colombia.^[3]

Brasil y México explicaron la mayor parte de entradas de IED en la región en 2018



Fuente: Comisión Económica para América Latina y el Caribe sobre la base de cifras oficiales y estimaciones oficiales al 23 de julio de 2019.

Likewise, also according to ECLAC, it is indicated that in 2018 FDI from Central America grew, with respect to 2017, due to the impulse of Panama.^[4] On page 29 of that same report, ECLAC states the following about Panama:

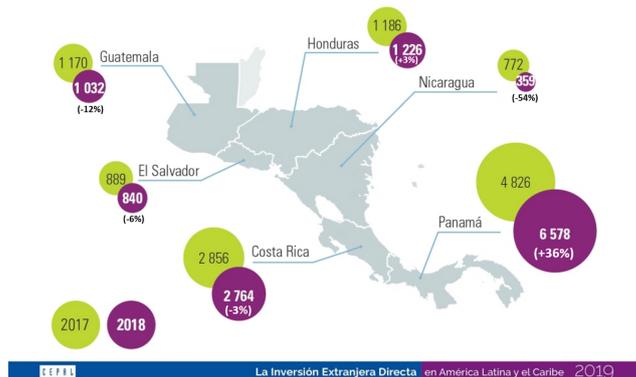
"It is worth highlighting the case of Panama, which is the only country in the region that, over the last decade, has increasingly attracted investment and between 2010 and 2018 it went from ninth to fifth recipient of FDI; in 2018 it received more investments than Chile, one of the most prominent markets for multinationals who decide to invest in Latin America and the Caribbean. The expansion of the Panama Canal and its development as a logistics and transportation hub, as well as a strategic definition sustained over time that has aimed at attracting investment in services, boosted the growth of FDI and is positioning the country as a platform for access to the region".^[5]

There is another valuable piece of information for our analysis and it is the growth of the Gross Domestic Product (GDP). During the decade that ran from 2009 to 2018, Panama's GDP growth was 6.1%.^[6] As benchmark we can see that, during the same period, the countries of South America had a cumulative GDP growth of 2.3%.^[7]

It seems only logical to understand that the excellent behavior of the attraction of FDI of Panama, explained above, has a lot to do with the GDP growth that the country maintained in the years prior to the pandemic. Therefore, it

La IED en Centroamérica creció con respecto a 2017 por el impulso de Panamá

La manufactura para la exportación sigue siendo un sector que atrae IED en la subregión



seems reasonable to say that, if we want to achieve post-pandemic economic recovery, if we want to grow again, it is very important that once again, Panama implements measures to attract FDI, as an element of interest in our foreign and economic policy.

Colombia as a natural source of FDI

Where should the FDI needed in Panama come from? The answer is that it must come from wherever, as long as they are legitimate funds that enhance knowledge, increase productivity and employment, and allow progress towards changing patterns of production, energy and sustainable consumption.^[8]

However, the level of attraction of quality FDI that we require, that is, all that is possible, will not come on its own, especially in the midst of this global economic crisis derived from the pandemic whereas the ability to invest abroad has clearly decreased, whilst the appetite of all countries to attract it has increased. Thus, the State must generate policies to attract as much of

[4] ECLAC, op cit.

[5] ECLAC, op cit.

[6] <https://datosmacro.expansion.com/paises/grupos/fmi>

[7] <https://datosmacro.expansion.com/paises/grupos/fmi>

[8] ECLAC, op cit.



this quality FDI for Panama as possible.

In my opinion, within the multiple markets from which we can attract investment, Colombia should figure in a prominent place, due to the following:

(1) Colombia is already investing in Panama and Central America. In a study prepared by the researcher MARTHA CORDERO in 2015, the following is stated:

"In recent years there have been greater investment flows from Colombia to the Central American countries. Most of this investment has been destined to Panama, but the increase in Colombian investments to the rest of the countries in the region has also been marked. The highest investments have been observed in the financial sector, although investment has also been extended to other sectors, such as manufacturing and energy, among others." [9]

"The increase in Colombian investments abroad, observed through greater investment flows abroad and the announcements of acquisitions and new projects, show the consolidation of Colombia as an important investor in Latin America. In terms of the theory of the international investment cycle, Colombia could be at a stage in which, in addition to being an important destination for global FDI flows, it increases its investments abroad. Today their companies show greater strength to compete in different economic sectors with international companies". [10]

A screenshot of a news article from the website 'elfinanciero.com.mx'. The article is in the 'ECONOMÍA' section and is titled 'Colombia desplaza a México como principal inversor en Centroamérica'. The text states that in the last five years, Colombians have taken the lead in investments in Central America, displacing Mexicans. The author is Leticia Hernández, and the article is dated 27/12/2019. Below the text is a photograph of the Colombian flag with a large 'E' watermark. The word 'Especial' is written at the bottom of the image.

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EL FINANCIERO

ECONOMÍA

Colombia desplaza a México como principal inversor en Centroamérica

En los últimos cinco años, los colombianos tomaron la delantera con mayores inversiones a Centroamérica, desplazando a los mexicanos.

LETICIA HERNÁNDEZ

27/12/2019

Especial

[9] CORDERO, Martha, *The Colombian Investment in Central America*, Economic Commission for Latin America and the Caribbean (ECLAC), Subregional Headquarters of Mexico, Mexico City, 2015. Page 7

[10] CORDERO, Martha, Op. Cit. Page 43



Everything indicates that the trend continued, it is not a coincidence that the newspaper EL FINANCIERO of Mexico City, published a story by the journalist LETICIA HERNÁNDEZ on December 27, 2019, under the title: "COLOMBIA DISPLACES MEXICO AS THE MAIN INVESTOR IN CENTRAL AMERICA".

Without being experts, for anyone with a moderate knowledge of Panama, it is clear that there is strong Colombian investment in the fuel distribution, food industry, banking, hotels, construction and energy sectors.

(2) It is an obvious fact that there is cultural affinity. There is physical proximity between the two border countries and we have the same time zone. There is very good air, maritime and digital connectivity.

(3) Considering that Colombia is a country with a population of approximately 50 million people and a GDP of US\$ 331 billion^[11] in 2018, it is large enough to be able to expect that Panama can continue to attract quality FDI from Colombia, especially because of our economy is extremely smaller,

with a population of approximately 4 million people (slightly more than half of Bogotá) and a GDP in 2018 of approximately US\$ 65 billion.^[12]

Possible double taxation problems for the Colombian investor in Panama

In a quick overview we would be talking about the typical source-residence conflict, since, according to the Tax Statute of Colombia (ET), an individual considered a "tax resident" of Colombia or a corporation qualified as "*sociedad nacional*" (national entity) of Colombia, are taxed on a worldwide basis. In the event that a section of the income earned "outside of Colombia" could be classified as an income from a territorial source in Panama, according to the Fiscal Code (CF) of Panama, there are possibilities that the investor would be taxed, for the same income, both in Panama and Colombia.

Evidently, it is a deeper matter than the one addressed above, especially if we complicate it, for example, adding to the cocktail the "severe" regime of Controlled Foreign Companies (CFC) of

[11] <https://datosmacro.expansion.com/paises/grupos/fmi>

[12] <https://datosmacro.expansion.com/paises/grupos/fmi>

Colombia^[13] (article 882 et seq. of the ET) and the always interpretable article 254 of the ET that regulates the "Discount for taxes paid abroad". The truth is that there is a risk to pay in two countries, despite the Colombian domestic relief from double taxation.

However, Colombian investment has flowed to Panama significantly in the last decade. Does this mean that the DTC is not needed? I think it is needed anyway, mainly because of the following:

(1) The DTC would clarify the handling of double taxation in a manner suitable to the specific interaction between Panama and Colombia, without having to be only submitted to the general domestic regimes of Colombia. In that sense, as it would be a treaty subsequent to Law 1819 of 2016 which introduced the CFC regime in the ET of Colombia, some provisions could be included in the Protocol to clarify how the CFC regime is specifically applied, in the case of investments in Panama. For me personally, some abstract and generic comments made in Paris are not sufficient to say that the CFC regime is compatible with the OECD DTC model.

(2) If Colombian investment has already flowed to Panama in years prior to the pandemic, despite not having the DTC, this means that there is a vocation for Colombian capital to invest in the real economy of Panama. The DTC could accelerate an already demonstrated intention and consolidate the investments made, especially since the post-pandemic scenario needs to give a

new incentive to that investment. Therefore, it is essential to consider the practical experience of Colombian investment that has already been established in Panama as a reference.

General keys for an agreement to be reached

From the perspective of Panama's interests, it seems to us that there are some necessary conditions for an agreement of this kind to be viable:

(1) In Panama we must negotiate an agreement, understanding that we have to sacrifice some taxes to attract investments from Colombia, which must impact the real economy and the generation of jobs.

(2) As a counterpart to the foregoing: Colombia, as capital exporter to Panama, could not claim that Panama is the only Treasury sacrificed from a DTC, because this would imply a segmented view of our diplomatic relations.

(3) The DTC should not include the subject of information exchange for tax purposes. This matter is already operating multilaterally and has rules that are consistent with international standards.

(4) In Colombia, it should be borne in mind that relations between the two countries cannot be seen as if each issue were a watertight compartment. In other words, it is not only about the Fiscal issue, but the relations between the two countries also include security issues at the border, due to drug

[13] In this regard, I find it very valuable to read the following essay: Héctor Andrés Falla Cubillos. *Reflections on the Regime of Foreign Controlled Entities in Colombia*. Colombian Institute of Tax Law Magazine 81. January 2020. At. 019.



Economía //

Crisis golpea la Zona Libre de Colón: su actividad comercial se contrae 9.2%

La zona franca panameña reportó casi \$100 millones menos en el valor de sus reexportaciones en 2019. Sus importaciones también cayeron en más de \$1,000 millones



Para los especialistas, la ZLC ha perdido competitividad internacional para suplir a sus clientes en la región de la forma que tradicionalmente lo hacía. **Archivo | La Estrella de Panamá**



Por **Mirta Rodríguez P.**
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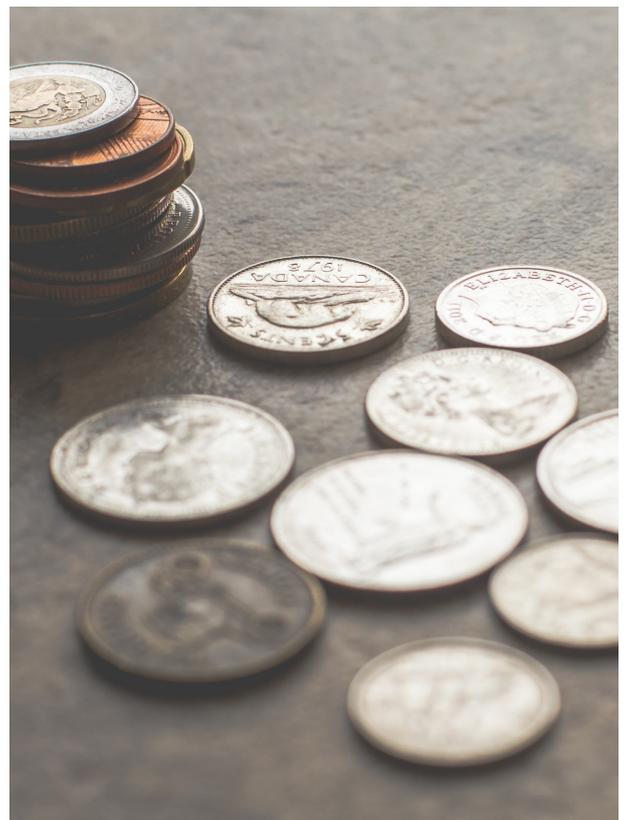
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trafficking, guerrilla, illegal immigration and environmental crimes.

(5) Likewise, our relationships involve commercial matters. A DTC could not be signed if Colombia's questionable tariff policy against Panama is not suspended, which has led to more than a decade of litigation before the WTO which has not yet concluded, delaying the ratification of the Free Trade Agreement subscribed since 2013, despite the fact we have complementary economies. The DTC must necessarily be linked to a

commercial agreement. Since before the pandemic, the Colon Free Zone had been showing concerning results. Many claim that the business model must be totally modified to adapt to digital commerce. It is probable that, Colombia's 2013 concerns regarding textiles, clothing and footwear could already be in another stage.

(6) A sense of loyalty in our bilateral relations would clearly justify Colombia into agreeing to resolve the trade dispute and sign a balanced DTC for both Treasuries, taking into account that Panama has already agreed to implement with Colombia, by a multilateral way, both the Automatic Exchange of Information on financial accounts for tax purposes (AEOI) and the Exchange of Information on Request for tax purposes (EOIR), an issue long awaited by the Governments of Colombia.



Final Comments

It is known that the impact of the pandemic on the world economy is and will be very important, neither Colombia nor Panama will escape the shock wave of this public health disaster. It is the opportunity to take a turn at the helm of what was there before the pandemic.

It is time to overcome trade disputes, resume the Free Trade Agreement and sign an Agreement to avoid Double Taxation that will bring commercial interaction between the two countries to better levels of mutual benefit, especially in the difficult next post-pandemic stage, whereas all economies need to strengthen each other to overcome bad times. Cooperating we are stronger.

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