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U.S. Chamber of Commerce
United States Council for International Business

October 21, 2022

The Honorable Janet Yellen
U.S. Secretary of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Gina Raimondo
U.S. Secretary of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

The Honorable Katherine Tai
United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Dear Secretary Yellen, Secretary Raimondo, and Ambassador Tai:

We write to express our serious concerns with Colombia's recent tax bill No. 118 of 2022, which contains new requirements for U.S. companies that invest in and export to Colombia. The proposed bill would negatively impact U.S. goods and services exports and contravene the letter and spirit of the United States-Colombia Trade Promotion Agreement (USCTPA) in several ways. The bill passed in the Third Commission of both Chambers of Congress on October 6, 2022, and a new draft will likely be presented for the last two debates in plenaries of both chambers in late October, with the objective of final passage in early November.

We urge you to immediately engage with your Colombian counterparts to ensure the final measure is not passed in its current form. Specific concerns with the tax bill are outlined below.

**Taxation Based on Significant Economic Presence**

As currently drafted, the tax bill would change the status quo of Colombian taxable nexus from having a corporate residence or physical presence in Colombia to one based on "significant economic presence" (SEP). This new test contemplates imposing taxes on non-residents solely on the basis of having a deliberate and systematic interaction with users or clients in Colombia, taking into account a certain amount of gross income, the number of Colombian customers or users, or use of prices or acceptance of payments in the local currency. The result is that it would require virtually all U.S. companies to choose either (1) to pay Colombian income tax through a 10% withholding tax at source; or (2) pay a 5% tax on all gross income from the sale of goods and/or the provision of digital services from abroad to users located in Colombia.

Regarding the sale of goods specifically, Article 48 of the proposed legislation would impose the new taxes on U.S. businesses that (1) have a "deliberate and systematic interaction" with the Colombian market; and (2) meet a low threshold of gross revenue of "31,300 tax units" (approximately 300,000 USD at current exchange rates) during the relevant tax year. U.S. providers of digital services, meanwhile, do not have to meet those thresholds to be subject to the new tax regime; they simply must be providing any of the enumerated digital services in the country and the tax bill deems them to have a SEP. Those services would include offering online or downloadable mobile applications, e-books, music and movies, free-to-air streaming services, subscription-based audiovisual content, education services, and broad catch-all categories such as "[o]ther electronic or digital services" and "[a]ny other services provided through a digital market for users" in Colombia. Separately, Article 52 would establish a new 10% withholding tax on the sale of goods/ or services where there is a SEP in Colombia and other elements of Article 408 of the Colombian Tax Code do not apply.

Although the bill frames these requirements as an extension of the Colombian income tax regime (which would be problematic in and of itself, as the SEP approach contravenes long-standing international tax principles), there are multiple elements that evidence a legislative intent to protect domestic manufacturers and service providers from foreign competition.

First, as currently drafted, Articles 48 and 52 potentially would apply to all American companies that ship goods to Colombia, regardless of their physical presence in Colombia. Imposing new taxes on U.S. companies that sell goods to Colombia would nullify the duty-free treatment provided to U.S. exports to Colombia under the USCTPA. Both the 10% withholding that Colombian customers would have to apply to imports (including originating imports) from the United States and the 5% charge on gross revenue if U.S. companies elect to register to pay this charge, would have the equivalent effect of a tariff by raising the price of imported goods as compared to domestically produced products that are not subject to this tax. Colombia committed to eliminating tariffs on U.S. imports and to treating them on terms no less favorable than like domestic goods as part of the USCTPA. Indeed, the proposed tax regime would do away with the benefits intended to be provided to U.S. exports set out in Colombia's obligations under USCTPA (1) Article 2.3 not to adopt new customs duties on originating goods; (2) Article 2.8 of the USCTPA not to adopt or maintain restrictions on the importation of any goods of another party; and (3) Article 15.3 of the USCTPA not to adopt new customs duties, fees, or other charges on digital products. These new taxes would produce the same protectionist effect as a duty, contravening the objective and purpose of the USCTPA by targeting U.S. companies with additional costs for doing business in Colombia.

Second, given that the list of items covers an array of digital services and would only apply to non-Colombian providers, the 10% withholding and the 5% charge on gross revenue would be tantamount to a "digital services tax" (DST). Colombia's proposals are similar to DSTs in France and the United Kingdom, which USTR found to be discriminatory against U.S. companies, inconsistent with established principles of international taxation, and burdensome on U.S. commerce. Colombia's imposition of a DST would also be inconsistent with its national treatment obligations in Articles 2.2 (goods), 11.2 (services), and 15.3 (digital products) of the USCPTA. Furthermore, as discussed in greater detail below, the imposition of a new DST would directly contravene the "rollback and standstill" of such unilateral tax measures meant to exist during negotiations on the Organisation for Economic Co-operation and Development (OECD) Pillar 1 reallocation of taxing rights.

Third, these provisions appear inconsistent with Article 11.5 of the USCPTA, which prohibits Colombia from requiring that U.S. service suppliers have a local presence as a condition for the cross-border supply of a service. As noted, U.S. service providers would be subject to a 10% withholding for their sales to Colombia unless they register to pay the 5% charge on gross revenue. To recover the amounts withheld, a U.S. service supplier would need to file an income tax return in Colombia. However, the bill does not provide procedures or guidance on how non-Colombian entities without a permanent presence in Colombia could file a tax return and ensure that they benefit from the same deductions, exemptions, and credits as their Colombian competitors. Article 48 could effectively require U.S. suppliers to have a local presence in Colombia or risk losing the 10% withholding if it is greater than the amount of tax actually owed. This cannot be reconciled with Colombia's obligations under Article 11.5 of the USCPTA.

Further concerning is the negative impact this unilateral measure would have on finalizing and implementing the OECD/G20 Inclusive Framework's Two-Pillar Approach.[1] In October 2021, 137 governments participating in the Inclusive Framework, including Colombia, committed to a moratorium on the imposition of new digital services taxes or relevant similar measures on any company from October 8, 2021, through December 31, 2023, or the coming into force of the Multilateral Convention to implement Amount A of Pillar One. Thus, the imposition of Colombia's proposed DST on any U.S. company in 2023 would likely violate its commitment under this multilateral agreement—a fact explicitly acknowledged by the revised text of Article 48. If the Colombian Government is proactively acknowledging that aspects of the measure would not comply with the international agreement, then the adoption of such a measure would seem to contravene the moratorium included in the October 2021 Statement. The disregard of Colombia's international commitments could spark a proliferation of similar unilateral measures by other Inclusive Framework countries, which would jeopardize the viability of this nascent two-pillar agreement and damage global investment and growth.

We also note that any taxes under the proposal, whether incurred via withholding at source or filing of a tax return, if enacted, would put U.S. companies that are active in the listed industries at a competitive disadvantage relative to non-U.S. competitors active in Colombia. Namely, such U.S. companies will effectively incur double taxation on all or a portion of their Colombian revenue because, under current U.S. law, the United States does not grant a (dollar-for-dollar) foreign tax credit against U.S. federal taxes due for Colombian taxes incurred. Meanwhile, non-U.S. competitors may not be subject to tax on their revenue from exports to Colombia or receive a tax credit against the tax due in their local jurisdictions.

**Removal of De Minimis for VAT**

Colombia's new tax bill would also eliminate *de minimis* treatment for VAT payments on imports valued at $200 or less. Article 73 of the proposed tax bill repeals Article 428(j) of the existing tax code, which granted VAT de minimis treatment for shipments up to $200. Article 5.7(g) of the USCTPA established that "no customs duties **or taxes** will be assessed on, nor will

[1] OECD/G20 Base Erosion and Profit Shifting Project, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (Oct. 8, 2021 https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf.) Pillar One is intended to reallocate a portion of taxing rights over the profits of the largest and most profitable multinational enterprises (MNEs) to market countries (i.e., where their users and customers are located). Pillar Two is intended to ensure that the profits of large MNEs are subject to an effective tax rate of at least 15%, regardless of where they are earned.

formal entry documents be required for, express shipments valued at US$200 or less" (emphasis added). Colombia previously delayed coming into compliance with its *de minimis* obligation under the USCTPA and only fully provided *de minimis* treatment for both customs duties and VAT in 2020, more than five years longer than permitted by Article 5.11 of the USCTPA. The new tax law would now roll back the country's commitment under the USCTPA, once again putting Colombia out of compliance with the agreement by removing the VAT *de minimis* benefit.

The effects of this violation are not theoretical; they would be tangible and detrimental to U.S. interests. In short, this decision would result in an effective price increase of 19% (Colombia's current VAT rate) on shipments valued at $200 or less shipped from the United States – an added cost in a time of already high inflation. These new costs will hit U.S. exporters, especially small- and medium-sized enterprises (SMEs) shipping to Colombia. As you know, SMEs are some of the biggest beneficiaries of global e-commerce growth, which makes it easier than ever before for companies of all sizes to market products and reach global markets. If implemented, this change will harm U.S. SMEs and their employees, who are already facing a series of challenges, including high levels of inflation.

**Performance Requirements for Tax Preferences in Free Trade Zones**

We understand that Article 10 of the legislation would establish cascading thresholds for companies operating in Free Trade Zones (FTZs) that do not have an established export obligation (export performance requirement), regardless of if they are a goods or services company. Under the new proposal, to qualify for the more favorable 20% tax rate, companies will need to develop and provide an "internationalization and annual sales plan" that demonstrates the "sum of their net income from operations of any nature in the national customs territory and the other income obtained by the industrial user different to the development of its activity for which it was authorized, etc." must be below increasingly smaller thresholds, to maintain the FTZ tax rate. While service companies do not historically have minimum export commitments, the article, as proposed does not include a carve-out for services industries.

The original text would have applied a 35% rate to non-compliant companies (and effectively eliminated the income tax rate reduction benefit from operating in FTZs), but the revised text provides that "industrial users that do not comply with the provisions of the first paragraph [performance requirements] of this article for three (3) consecutive years, shall lose the qualification, authorization or recognition as industrial users to develop their activity in free zones and shall lose free zone benefits".

U.S. companies obtained FTZ status and corresponding benefits based on specific investment and employment requirements to be performed, which did not include an obligation to draft an internationalization plan or meet a minimum threshold of exports. The imposition of new export performance requirements in FTZs would contravene commitments Colombia made under the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures, which prevents governments from creating performance requirements in exchange for receiving a direct tax benefit. It would also violate Colombia's obligations under Article 10.9 of the Investment Chapter of the USCTPA, which prohibits the imposition of mandates to export a given level or percentage of goods or services as a condition "in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory."

**Conclusion**

Urgent and direct engagement from the U.S. government is needed during this crucial window. We encourage you to request that the Colombian government to pause consideration of this draft bill and to launch a broad consultation with impacted stakeholders, including local and multinational companies doing business in Colombia. One of the core objectives of the USCTPA was to provide investors in Colombia and the United States with a predictable and transparent tax and regulatory environment to facilitate investment. The USTPA terms and conditions were purposefully created to achieve this objective, and the proposed tax bill circumvents both the spirit and context of such efforts.

We appreciate your attention to this matter and are happy to provide more information to you and your teams.

Sincerely,

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cc:
The Honorable Luis Gilberto Murillo Urrutia, Ambassador of Colombia to the United States.