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"TOPICS EMERGING FROM THE AGENDA OF THE TAX ADMINISTRATIONS"

Sub-Topic 2.2:

REGULATION OF HOLDING COMPANIES AND TRUSTS

Federal Administration of Public Revenues

Argentina

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Case study
Topic 2.2

REGULATION OF HOLDING COMPANIES AND TRUSTS

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ABSTRACT

In 1992, Argentina adopted the worldwide income criterion, and issued the pertinent legislation in 1998. Subsequently, protection mechanisms for the national tax base were introduced, such as regulations on transfer pricing, thin capitalization, international tax transparency, tax havens, among others.

With regards to the holdings and trusts domiciled in foreign jurisdictions, there are certain specific tax regulations aimed at curbing potential abuse, such as the case of inclusion of certain holding schemes on the list of countries and zero or low taxation jurisdictions and the assumption, admitting evidence to the contrary, with regards to the distributions made by foreign trusts, to the benefit of residents in the country.

On the other hand, in addition to the enforcement of the worldwide income criterion there are general mechanisms to deter international tax planning strategies, such as the economic reality principle; the general assumption of unjustified acquisition of wealth and particularly, several anti- tax haven provisions.

Likewise, other government agencies work to deter abuses with such financial instruments and with offshore activities in general. In this respect, money laundering prevention regulations are worth highlighting, and very specially, the regulations issued since the year 2003 by the regulatory agency of corporations of the City of Buenos Aires.

With regards to the audits' experience, we have detected the use of trusts in tax havens (with different purposes, but mainly to avail themselves of the secrecy and flexibility thereof) and holding companies, with a preferential treatment in certain countries that have subscribed Double Taxation Agreements with Argentina, thus resulting in treaty shopping.

From the experience, we introduced improvements in legislation (eliminating asymmetrical treatment fostering abuse) and vis-à-vis controls' management, increasing risk perception by way of organizational changes and on the working methodologies, including the interaction with other regulatory agencies, cooperation with Tax Administrations of other countries, etc.

As a corollary to this work, it is worth stating that financial instruments are very attractive to design tax shelters. The liberalization of financial activity and the advancement of CITs shall enable more sophisticated developments posing even greater challenges for the Tax Administrations. In the face of such phenomenon, it is vital to strengthen the control role thereof, particularly in the face of these and other complex and/or innovative financial instruments.

1. INTRODUCTION

This document addresses the regulatory framework, with special focus on the tax framework, applicable to holding companies and trusts, chiefly those domiciled in foreign jurisdictions, which may be used by resident taxpayers to design and execute international tax planning strategies, whether by their location in zero or low taxation countries as well as in other countries featuring preferential tax regimes that, together

with the tax treatment stemming from the Double Taxation Agreements subscribed, may foster tax abuses, such as, treaty shopping.

We also review control experiences, describing in particular two very illustrating case studies using trusts based in tax havens. Likewise, we briefly set forth certain treaty abuse schemes with holding companies, recently detected.

Following, we identify the improvements at the regulatory and control management level arising from the AFIP working experience.

Lastly, we set forth certain future prospects and recommendations in the form of good practices, arising from the experience of controls on these institutions in the last few years.

2. TRUSTS

2.1 Created pursuant to Act N° 24.441

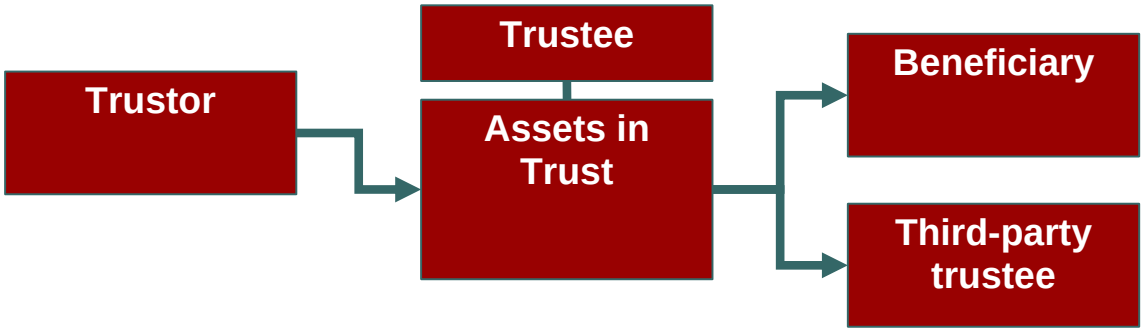
2.1.1 Description and notion

The Housing and Construction Financing Act N° 24.441 published on the Official Gazette (B.O., as per the Spanish acronym) on January 16th of 1995 for the first time addresses integrally the entity of trust, although a precedent existed in the Civil Code (Art. 2262).

The trust incorporated by such Act, N° 24.441, is based on the same entity in Anglo-Saxon Law, where the trustee is not the beneficial owner although he holds the title and usufruct of the assets, but whose function is somewhat different.

The essential feature of the trust arising from such legislation is that it constitutes a piece of property devoted to a specific purpose, which is distinguished from the traditional notion of ownership right in rem, although it coincides in certain respects therewith. That is to say, the assets assigned in trust constitute autonomous assets for a specific purpose different from the trustor estate, the trustee's estate and the beneficiary's estate, over which none holds an absolute right in rem. It constitutes a different estate is held harmless from the encumbrances on the estate of the assignor, nor the estate of the assignee for administration purposes, nor the end beneficiary.
Pursuant to Act N° 24.441, a trust exists when an individual (trustor) assigns the trust ownership of certain assets to another party (trustee), who promises to assume it to the benefit of the party designated in the agreement (beneficiary) and transfer such assets after a term or condition lapses to the trustor, beneficiary or a third-party (third-party trustee), and shall be held accountable for his actions.

The following chart graphically explains the structure of a typical trust:



The trustee holds the imperfect ownership of trust property, in agreement with the provisions in the trust agreement, since the estate assigned in trust constitutes a separate estate from the trustee's personal estate, as explained above.

The following assets may be subject of a trust: real estate property, registered or non-registered personal property, money, securities, etc., when their requirements and features may be individualized or described at the time of creation of the trust.

The trust may extinguish by lapsing of the term, a condition subsequent or the lapsing of the maximum term of 30 years, by revocation of the trustor and any other ground provided for in the agreement, such as, inadequacy or total destruction of the asset assigned in trust, conclusive court ruling declaring the nullity thereof, inability to substitute the trustee, etc.

They may be liquidated in court proceedings or according to out-of-court settlements, pursuant to the case. In general terms, they are liquidated in out-of-court settlements, unless minors or disabled parties or a public interest implied.

2.1.2 Parties

Pursuant to the foregoing notion, the following parties participate in a trust:

- Trustor: the party who assigns the assets (no legal restrictions apply on the parties who may act as trustors).

- Trustee: the party who, on the basis of such assignment, assumes the trust ownership, giving the assets the aim set forth in the agreement. Such party is

accountable for its performance and shall carry separate accounting records. They may be individuals or corporations, except in the case of financial trusts that establish restrictions for the performance of such role, as it shall be explained hereunder.

- Beneficiaries: subject for whose benefit the trust property is administrated.

- Third-party trustee: subject who shall benefit from the assignment of the assets in trust (it may be the same subject as the beneficiary).

Certain role incompatibilities have been defined, such as the trustor-trustee.

2.1.3 Types

Act N° 24.441 distinguishes among trusts by establishing, on the one hand, the general requirements that shall be met in order for the entity of trust to apply, and on the other, expressly providing for the financial trust exclusively. There is no classification foreseen in the law or in any other regulation, except for theories and international experience.

It would be impossible to present the different types of trusts possible in a comprehensive and complete manner, given the versatility of the entity. Nevertheless, the following are the most widely adopted types worth highlighting:

- Financial trusts: those in which the trustee is a financial institution governed by Act N° 21.526 (subject to the control of the Central Bank) or a corporation expressly approved by the National Securities and Exchange Commission (CNV, as per the Spanish acronym) and the beneficiaries (investors) own the securities in trust issued by the trust (debt securities and trust participation certificates). It is essentially used in the securitization of credit assets or future flows. It is broadly used by the home appliances' businesses to securitize the loans for the sales of such goods (or the credit card voucher issued).

  Financial trusts may be classified as:

  - Based on a public offering: authorized by the CNV to make the public offering of the trust bonds issued.

  - Not based on a public offering: they lack such authorization. That is to say, they perform private placements of the trust bonds.

- Regular trusts: they may be classified according to:

- Collateral Trust Fund (or non-operating): the trust assets are used to secure the compliance with certain inherent trustor obligations or of a third-party. In the assumption of non-compliance, the trustee may dispose of the assets, pay-off the obligation and in the case of surpluses, return them to the trustor. This type of trust is similar in purpose to the mortgage or chattel mortgage with the advantage of expediting and facilitating credit management.

- Operating: which may adopt some of the following alternatives:

- Of administration: its purpose is that the trustee administrates the assets assigned in trust and the proceeds and income from such administration be transferred to the beneficiary. It is usually employed to guarantee the appropriate administration of the assets of a minor or disabled individual.

- Real Estate Property: in which certain individuals, as trustors, deliver money and land to the trustee (in certain cases, only the money is delivered and the trust, through the trustee, purchases the land) who shall administrate the trust that builds and delivers the units to the beneficiaries, who in their majority are trustors (they may be different). In the cases in which the trustors only assign money, they shall then decide on the purpose of the units: use, sale, rental, etc.

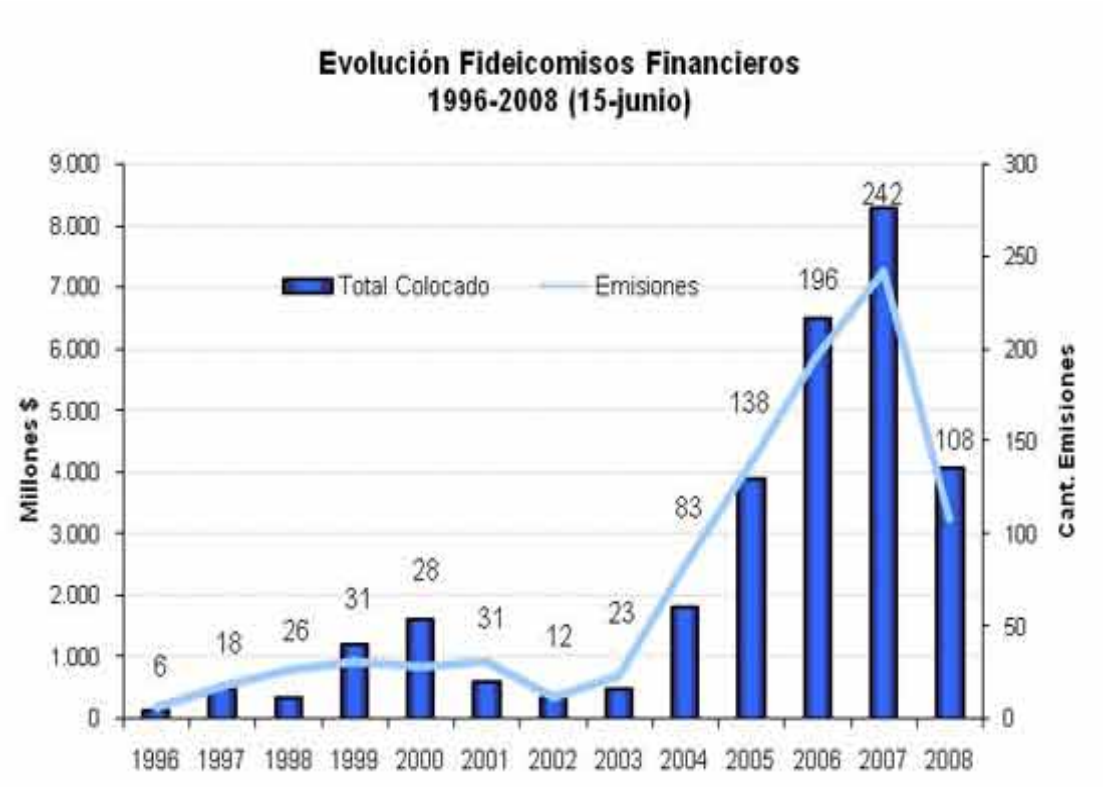
- Agricultural: they may be also organized as financial trusts to securitize loans for the sale of supplies and agrochemicals or collection expectations (future flows) over the sale of the harvest proceeds. They are also organized as operating trusts where trustors contribute with money and land to undertake agricultural production, distributing the profits thereafter. It is a usual modality to constitute sowing pools.

- Public: the State also employs this entity to finance infrastructure works and other projects.

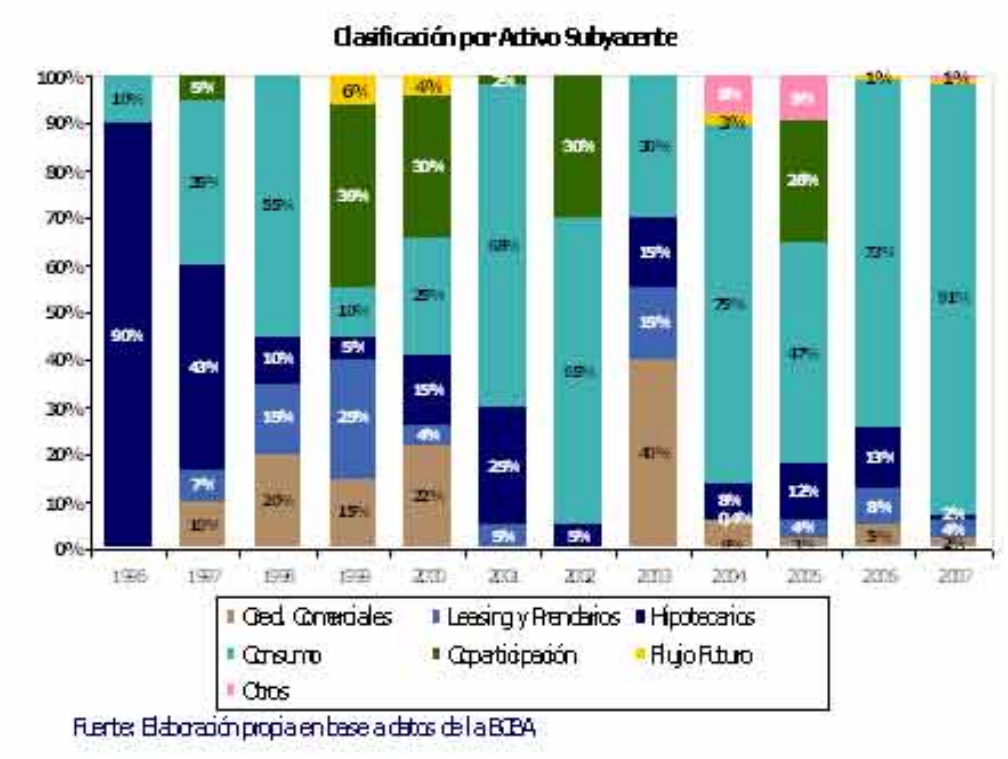
2.1.4 Economic relevance

After Act N° 24.441 was passed, the entity has been developed to a large extent in different businesses, particularly the modality of the financial trust, regarding which there is official information, by virtue of the controls in place for such trusts by the Central Bank and the CNV, according to the case.

Following, we set forth a number of charts were we can observe the evolution of financial trusts (in amounts and number of issues) and according to the type of asset assigned in trust.



Evolution of financial trusts (15 June). Million. Total placements. Issues. Total Issues.



Classification per underlying asset.
Box: from left to right: Commercial loans; Leasing and Chattel Mortgage; Mortgage loans; Consumer loans; Federal Revenue Sharing; Future flow; Other.
Source: Internally drafted with data from the Buenos Aires Stock Exchange.

As it may be observed, financial trusts for consumer loans (sales of home appliances and electronics) are the most greatly developed ones, given the growing share of consumer loans as an asset assigned in trust. Mortgages, which in the beginning were the reason to pass Act N° 24.441 that carries its name, have significantly dropped in importance.

Also, real estate trusts (called “at the cost”) have played a significant role in the last few years, as well as agricultural trusts to constitute sowing pools.

2.1.5 Tax treatment

The following charts show succinctly the tax treatment of the trust, the trustor, the beneficiaries and the trustee.

It is worth noting that although the trust does not constitute a legal entity, since it is an agreement, it does have a tax entity. Therefore, certain taxes apply thereto, under certain circumstances, and as any taxpayer, shall register with this Administration and

even meet the transactions' invoicing and registration regulations, as applicable. The trustee, as the trust administrator, is responsible for registration and filing tax statements.

With regards to the Income Tax, the regular trust (non-financial trust) becomes a seamless entity assigning the benefits to the respective beneficiaries in the assumptions in which they are the trustors as well. In the cases in which they are different subjects or non-resident subjects, the trust shall pay 35% on the income earned just like any corporation.

For financial trusts, until recently, the deduction of distributed earnings to the trust-holders was admitted, upon meeting certain requirements, by which the tax base was rendered null and the tax was, consequently, un-assessed. Recent publication of Decree N°1.207, on August 1st, pursuant to a proposal of the Federal Revenue Administration (AFIP, as per the Spanish acronym) eliminates such possibility, and financial trusts shall pay according to a 35% income tax rate.

This was somehow aimed at limiting the incentives to resort to tax planning practices based on shifting the income tax burden from the trustors to the trust, which they would then distribute, in the trust, as exempted income to the same companies that held the trust participation certificates.

The Administration, based on the experience gathered from audits, had determined that the companies selling home appliances would assign the credits (or credit card vouchers) for the sales made to such trusts; therefore, the financial profits (and even a portion of commercial profits) were shifted to the trust (that was exempted) and then distributed in the form of exempted income, the earning to the trust-holders who were definitely the same originating companies, their partners or related companies. Just as the levied income was shifted and became exempted, the expenses arising from the activity that were tied to the extension of the credits (advertising and commissions) were withheld by the originating company.

By eliminating such tax advantage, we avoid the asymmetrical treatment and achieve a greater neutrality that does not foster tax planning practices.

TAX TREATMENT OF TRUSTS			
Tax	**Item**	**Financial Trust**	**Regular Trust**
Income Tax	Income	Exempted if it met the requirements in Art. 70.2 of the Regulatory Decree (deduction of distributed earnings)[1]. Currently, it pays a 35% rate on the income earned.	It pays a 35% rate when the beneficiary is not a trustor or is a foreign resident. If the beneficiary and the trustors are one same subject, it becomes a seamless entity assigning the income to the beneficiaries, who shall pay the tax as applicable.
Value Added Tax	Sales and Services	It is subject to the tax if it conducts levied transactions.	
Tax on the minimum presumed income.	Assets	Non-applicable. The tax is filed by the owners.	It is subject to the tax.
Personal Property Tax	Property		Non-applicable.

As regards the requirements in Art. 70.2 of the Regulatory Decree of the Income Tax Act, it is worth mentioning:

- Securitization of credit assets.
- Placement by Public Offering.
- No asset substitution except for financial placements.
- Consistency between the trust life and liabilities'' cancellation.
- Benefit made up by the income from the assets assigned in trust.

[1] As previously set forth, this benefit has been recently eliminated by virtue of Decree N° 1.207/08. This Decree places financial trusts on the same footing as regular trusts (provided the beneficiaries are not trustors or are non-resident subjects) in the sense they shall pay a 35% Income Tax rate.

Tax treatment applicable to the trustor, beneficiary and trustee (non-financial trusts)				
Subject	**Income Tax**	**Tax on Minimum Presumed Income**	**VAT**	**Personal Property Tax**
Non-beneficiary Trustor	No income to file owing to its status. The taxpayer is the trust.	When the taxpayer shall deem the assets assigned in trust as exempted.	Pursuant to the transfer of assets to the trust, it may be levied or exempt.	Exempt.
Beneficiary Trustor	The income distributed is Third-Category income. The trust solely assesses income and distributes it among the beneficiaries.			Applicable based on the underlying business activity.
Non-trustor beneficiary	The income earned is exempted.	Inapplicable on the assets assigned in trust.	Inapplicable.	The right to the benefit is exempted.
Trustor	Trustor fees are levied. Legal entity: Third category. Individual: Fourth Category.	Inapplicable on the assets assigned in trust.	Trustor fees constitute taxable income.	Inapplicable to the assets assigned in trust.

The yields (interest) collected by the foreign holders of debt securities, individuals and corporations (source withholdings for the payment to foreign beneficiaries) issued by financial trusts are exempted from Income Tax, if they were placed effectively in a public offering. The earnings distributed by the trust participation certificates are exempted (assimilated as dividends).

Interest from such debt securities are exempted from VAT (when applicable) if they were placed in a public offering.

With regards to the Tax on Financial Transactions (debits and credits in bank accounts and others), the trust is subject to the tax. Nevertheless, the accounts employed exclusively in the specific performance of its activity are exempt, provided the requirements set forth in the foreign Art. 70.2 of the Regulatory Decree of the Income Tax Act, explained above.

2.2 FOREIGN TRUSTS

2.2.1 Differences with the national legal entity adopted for a trust

The Anglo-Saxon trust assumes property rights pursuant to common law and another type based on equity law. This entails, respectively, a distinction between “legal ownership” and “beneficial ownership”, which constitutes the inherent nature of the trust and implies that, for one same asset assigned to a trustee, two contemporary owners exist, a legal owner (trustee) and an equity or beneficial owner (beneficiary).

Certain opinions sustain the inadmissibility in these cases of the overriding principle of function over form, since in the trust such principle is rendered unfeasible as the latter features more than one function. This applies because in essence it is ever-changing, and thus, appropriate, among others, for collective investment. It is neither limited to private law, since a trust may exist in public law, in the limit between what is public and private.

Certain basic elements and the notion of such entity have been incorporated pragmatically in a diverse legal order such as Latin American legislation, based on the Roman Trust, to the creation of an entity that, under such denomination, would be marked by the inherent features of a new entity of undisputable value but, like its Anglo-Saxon equivalent, is also complex and involves multiple features.

The Latin American modality and the trust share the assignment of the property rights over the assets to a trustee, which is in both cases a beneficial owner.

Both entities generically correspond to the trustee businesses, but differ owing to the dual ownership feature already pointed out, regardless of the other historic and cultural differences.

In Anglo-Saxon law, the trustee and the beneficiary share the trust ownership. On the other hand, the Latin American trustee is the exclusive owner of the assets assigned thereto, during the term or condition agreed with the trustor for such purposes, the beneficiary being the holder of a right in personam against the latter.

Economic motivations have lead different Latin American countries to incorporate in their legislation and under the name of trust, the entity of the Anglo-Saxon trust, vesting upon the trustee the administration of the assets assigned under trust, to the benefit of the subjects defined and with the clear objective of providing the greatest legal certainty, limiting the risk to the parties, as in the most developed countries.

On the other hand, two relevant legislative trends may be found in the region, as regards the ownership of trust property: a) the trustee-owner and b) the trust-owner.

In the first one, the trustor assigns to the trustee the ownership of the assets, according to the applicable formalities, which are inherent therein, and according to the case, for the administration thereby, for his own benefit or a third-party's. Argentina endorses the latter theory.

In the second one, there is trust-owner, featuring an independent estate devoted to a specific purpose, but with the characteristic that it holds its own legal entity, that is to say, it is a legal subject. According to such grounds, the trust is the owner of the assets before third-parties, including the trustee and the creditors thereof.

After the enforcement of Act N° 24.441 in January, 1995, an instrument was set forth in the country to conduct trust businesses of different types, by typifying the trust agreements as an instrumental channel in the transfer of the trust ownership, the requirements for the existence of the agreement and particularly, the key element in the entity: the separate assets made up by the assets assigned in trust. Although such norm was passed with the main purpose of securitizing financial assets, especially mortgage loans to finance housing and the construction industry–thus the name of said act -, the application in the country's economic life exceeded such scope.

Specialized theory sets forth the main differences between the trust and the national trust:

- The trust entails a division or breakdown of the property right; on the other hand, in the case of the national trust, there is only one owner (the trustee) with an imperfect ownership.
- The national trust constitutes an agreement while the trust is an entity of property rights.
- While the trust arises from a unilateral act, the national trust arises from a bilateral agreement between the trustor and the trustee.

- The settlor may assume the role of trustee, while in the national trust they shall be two different subjects.
- The trustee may not benefit from the trust, while in the national trust, the trustee may be the beneficiary.

2.2.2 The Hague Convention of 1985: Trust

In The Hague Convention of July 1st of 1985, the Signatory States set forth that they deemed the trust, just as addressed in the court of equity in the Common Law jurisdictions, -adopted with certain modifications in others-, a unique legal entity and they wished to establish common elements on the law governing trusts, considering the most relevant aspects regarding the acknowledgement thereof.

It is worth highlighting that the Convention does not intend or pursue the objective of introducing the entity of trust in the domestic legislation of the States who do not apply it. It solely seeks that the trusts applied in countries who know the entity, enjoy the status of harmonized international private law and, for those who do not apply such entity, that they implement a conflict-resolution rule that is missing in their domestic legislation, to enable to acknowledge the trust without arguing that such entity does not exist in their domestic legislation.

Likewise, it is worth highlighting that the Convention seeks to explain the trust in a more or less neutral manner with regards to traditional systems and, in spite of not being perfect, it avoids the issue of equity and division of property rights (inherent in Anglo-Saxon law), endorsing the principle of special or separate assets.

But maybe the most relevant notion worth highlighting is the acknowledgement, in such a significant sphere such as The Hague Conventions, of the relevance of this instrument.

2.2.3 Ineffectiveness based on fraud pursuant to Argentine Law

Legal theory, even case law, considers that in the assumption a party pursues fraud against Argentine Law based on foreign trusts, such act is rendered ineffective pursuant to articles 1207 and 1208 of the Civil Code.

Our legislation has deemed that the trusts based in zero or low taxation jurisdictions or not, according to the typical form of an administrative trust, do not necessarily imply a violation to the Argentine tax regulations when they are legitimately and reasonably structured, as follows:

- The business purpose has been determined (generally, legal protection, legal certainty, inheritance matters, etc.).
- A genuine assignment exists from the trustor to the trustee.
- Such assignment is irrevocable.

- There is no control and decision by the trustor over the assets assigned.

2.2.4 Tax treatment

- Income Tax: foreign trusts are not subject to taxation, to the extent they exclusively earn foreign income. As regards residents:
    - o Individuals: the foreign income earned by the beneficiary constitutes second-category foreign income. All the distributions made are deemed income, unless evidence to the contrary exists showing that no benefits were obtained or accrued from the years prior to the last one elapsed, including, in both cases, capital gains and other acquisitions of wealth. Should the taxpayer prove, as mentioned before, that the distribution exceeds the benefits, only the portion of the distribution corresponding to the latter shall be deemed income.
    - o Corporations: income earned from corporations in their capacity of beneficiaries, including the portion that does not correspond to the benefits mentioned in the foregoing item (vis-à-vis individuals or natural persons) or exceeding them, unless they are the trustor or equivalent entity, shall be deemed foreign third-category income.

- VAT: exempted transactions, except for services rendered to registered foreign subjects and used in the country for economic purposes (services' imports).

- Taxes on the Minimum Presumed Income: it is not subject to the tax. The securities issued owned by Argentine residents (corporations) are levied.

- Personal Property Tax: the assets assigned in trust are exempted (irrevocable trust). The securities issued owned by Argentine residents (individuals) are levied. The provision in Art. 26 of the tax law could apply when the foreign trust (in countries that do not apply the system of ownership of private securities)[2] owns assets in the country. In such cases, it is understood that they belong to individuals domiciled in the country (without admitting evidence to the contrary) and are subject to the tax. It does not expressly refer to trusts but it is defined as one of the assumptions of foreign assets assigned. In such cases, the substitute responsible party is subject to the tax.

[2] Regulations deemed that the presumption only comprises corporations, companies, permanent establishments, wealth or exploitations, domiciled, or otherwise, based in foreign jurisdictions, which by their legal nature or charter of incorporation feature the core activity of making investments outside of the jurisdiction of the country of incorporation and/or may not undertake therein certain transactions and/or investments expressly determined in the legal system or charters governing them.

3. HOLDING COMPANIES

3.1 Regulatory notions

There is no specific law governing the existence and performance of the holding companies based in the country or in foreign jurisdictions, except for a regulation issued by the regulatory agency of corporations of the Autonomous City of Buenos Aires, as explained hereunder.

Such regulation of the Regulatory Agency of Corporations (IGJ, as per the Spanish acronym) arises after the tragedy occurred in a disco ("*Cromañón*" in the neighborhood of Once in the Autonomous City of Buenos Aires) where tens of youngsters died, in which the real estate property where the disco operated featured a title deed in the name of a foreign corporation.

In this framework, our country regulated the treatment of holding companies, defined as investment entities or special purpose entities, which belong to a group, whose headquarters and controlling companies are chartered and domiciled in a foreign jurisdiction and subject to the laws of foreign countries. This is how we identify groups of corporations in which such special purpose entities, in the framework of group actions, receive investments from third-parties and channel them towards active corporations.

Such special purpose entities must file a statement expressing that they are effectively a vehicle for investments and render the group's organizational chart and the identity of the partners.

They are not required to report and meet certain requirements (Resolution 7/03). Such obligations shall be met by the mother or controlling companies (statement of assets and activities in the foreign jurisdictions, identification of the partners, information on potential operating restrictions in the country of origin, etc.).

The IGJ refers the transactions of such vehicle entities to the AFIP (specifically, offshore companies) so the latter may determine the legitimacy thereof.

Following, we shall briefly review the legislation issued by the IGJ, on the relevance thereof, in addition to the fact that it was an unprecedented experience in the region, which has triggered interest from international observers.

3.1.1 Control of the Registration of Foreign Corporations

In Argentina, a number of foreign corporations are operating by virtue of a more favorable legislation, with their headquarters or core business in the country. This has lead the IGJ of the Autonomous of Buenos Aires, to issue a number of resolutions with the purpose of verifying the appropriate framework thereof in the applicable legal provisions and their registration with the Public Registry of

Commerce pursuant to articles 118, third paragraph and 123 of the Commercial Corporations' Act N° 19.550.

Such framework seeks to distinguish among corporations that operate effectively in a foreign country and also wish to operate in Argentina making their productive investments in this framework, from those whose purpose conceals a breach of Argentine laws on the grounds that they are subject to a foreign law, employing such structures for illegal purposes.

The IGJ is a Registry of the Autonomous City of Buenos Aires pursuant to Act N° 22.315, presently in effect. It functions as a registry as well as a comptroller. Its authority as a registry entitles it to carry the National Registry of Corporations and Foreign Corporations, among other powers. By virtue of the auditing functions, under the scope of its competency, it may require information and any documentation deemed necessary to fulfill its task, undertaking investigations and inspections for which purpose it shall examine the records and documents of corporations, request reports from their judicial, administrative and law-enforcement authorities, when the events under the jurisdictions thereof may require the intervention of the public authorities.

The IGJ has prepared a series of legal proceedings against offshore corporations that were warned to comply with Argentine legislation and failed to regularize their situation according to Resolution N° 7/03, having sent thousands of notifications against entities who failed to become nationalized, by not certifying the ownership of significant assets in their countries' of origin or other jurisdictions.

Such corporate regulations were issued as of 2003, with the purpose of determining compliance with Article 124 of Act N° 19.550 (Commercial Corporations), combating the illegal use of corporations and concealment of the ownership of assets for tax purposes, highlighting among others[3]:

- Resolution 7/03: requirements for the identification of the actual owners of the shares, in the case of foreign investors, determining their origin, defining their responsibility and combating fraud by third-party corporations.

- Resolution 8/03: obligation to register the isolated acts performed by foreign corporations with regards to real estate property.

- Resolution 12/03: foreign corporation's compliance with Argentine Law, when the IGJ determines they shall be governed by Article 124 of the Commercial Corporations' Act.

[3] IGJ resolutions may be queried at: http://www.jus.gov.ar/registros/IGJ/. In general, the regulations mentioned herein may be downloaded from: http://www.infoleg.gov.ar. In the specific area of taxation, we recommend visiting the AFIP Web page: www.afip.gov.ar (E-library).

- Resolution 22/04: special purpose entities are exempted from Resolution 7/03 and corporations are required to abide thereby.

- Resolution 2/05: failure to register in the Public Registry of Commerce of foreign corporations lacking the capacity and legitimacy to act in their territory of creation.

- Resolution 3/05: disclosure set forth by Article 118, Section 2 of the Commercial Corporations' Act in the case of corporations or limited liability companies or companies chartered under a structure unknown to Argentine laws.

- Resolution 4/05: regulations issued to provide for the efficacy of the regulatory system set forth in Act N° 19.550, for the incorporation of such companies as well as the legitimacy and disclosure of their exertion of rights.

- Resolution 5/05: exemption of foreign corporations from the reporting requirement on the cancellation of their registration in their place of incorporation.

- Resolution 9/05: failure to register or report irregularities or ineffectiveness for administrative purposes of the agreements adopted in shareholders' meetings or meetings of associates, in which the companies who have failed to file the statements as required by articles 3º and 4º of Resolution 7/03 participated exercising their voting rights.

3.2 Tax treatment of Holding Companies

No advantages are in place for the use of holding companies based in the country, by virtue of the fact that they receive the same Income Tax treatment as any other resident corporation (corporation, which as such, is subject to the tax):

- Foreign dividends are levied as well as capital gains for the sale of shares from foreign corporations.

- The negative income produced by the sale of shares of foreign companies result in specific losses, and as such may be only set off with future income from the same source.

The income from the sale of shares of national corporations is levied by Income Tax in the case of resident holdings but exempted for non-resident subjects, except in the case of shares whose beneficiaries are offshore corporations. In such context, the incentive for foreign subjects of investing directly, and not through a holding company, is evident.

Likewise, income taxes apply on the ownership of shares of foreign corporations.

4. APPLICABLE LEGISLATION FOR FOREIGN TRUSTS AND HOLDINGS: CURBING TAX ABUSES

4.1 Specific regulations

- Inclusion of some sort of holding system on the list of zero or low taxation countries and systems ("closed list" included in Art. 21.7 of the Regulatory Decree of the Income Tax Act). Consequently, the protection mechanism foreseen for transactions with the countries or systems included on such list apply thereto.

- Presumed income based on the distributions performed by foreign trusts to the benefit of resident subjects, unless evidence to the contrary exists.

4.2 General regulations

- The Principle of Worldwide Income, incorporated since 1992 (Act N° 24.073 published on the Official Gazette on 04/13/92) whose regulatory decree was issued in 1998 (Act N° 26.063 published on the Official Gazette on 12/30/98), incorporating transfer pricing regulations, anti-deferral provisions (international tax transparency) and anti-thin capitalization provisions, among others.

- Presumption of unjustified acquisition of wealth, in general by non-registered assets or bloated or fictitious liabilities, unless evidence to the contrary exists.

4.3 Anti-tax haven measures

A closed list has been created of countries deemed to be zero or low taxation jurisdictions. It includes domains, jurisdictions, territories, member States or preferential tax regimes.

This list shall exclude those establishing the effectiveness of an information exchange agreement subscribed with Argentina and, additionally, those which by virtue of their domestic legislation shall not argue bank, stock exchange or any other type of secrecy, upon the request for information by the applicable Tax Administration or, otherwise, which establish Income Tax amendments in their domestic legislation in order to adjust it to the international standards on the matter that render the condition of zero or low taxation jurisdiction null.

The transactions therewith trigger the following tax consequences for resident subjects:

- Analysis of the transaction based on transfer pricing regulations (and compliance with the respective reporting and documentation requirements).

- Proving the effective payment to deduct outlays benefiting counterparts based in such jurisdictions.

- Enforcement of international tax transparency, when the country's residents own shares in corporations based in such countries (anti-deferral provisions), according to the passive income.

- Presumption of unjustified acquisition of wealth by the income from such countries or systems, unless evidence to the contrary exists, for example, that such income arises from activities effectively performed by the taxpayer or third-parties in such countries or stems from duly filed placement of funds.

- Enforcement of the maximum presumption of income (100% of the payment) for the application of the tax withholding to the non-resident party as interest. In such cases, the local paying entity (for example, a corporation) has no limitations as to the deduction of the interest paid (that is to say, no anti-thin capitalization rules apply for the interest benefiting subjects domiciled in such countries; nevertheless, a 35% withholding applies on the payment, with which it is immaterial to leave the income in the country or transfer it to a foreign jurisdiction via an interest payment, that is to say, there no tax saving).

We shall also deem inapplicable the Income Tax exemption on the income from unlisted shares benefiting offshore corporations. In such cases, the Argentine buyer shall withhold the tax. For such purpose offshore corporations are understood as those domiciled or based in a foreign country, and whose core business owing to their nature or charter of incorporation is to make investments outside of the jurisdiction of the country of incorporation and/or those banned from performing therein certain transactions and/or investments expressly defined in the legal or statutory system governing them.

The Personal Property Tax rate for such corporations is 0.75%. In the case of off-shore corporations, the paying entity acts as the substitute responsible party, with a higher 1.5% tax rate. This entails that the effective taxpayer replaced the corporation in the payment of tax and shall later claim the applicable refund thereto.

Tax issues relating to tax havens have been treated inconsistently. That is to say, we lack a comprehensive vision of all the tax implications emerging from the relations or activities undertaken by the residents with the entities chartered in such jurisdictions.

In certain cases, for example, in order to identify tax havens, we resort to the black list (as mentioned above, pursuant to Article 21.7 of the Income Tax

Regulatory Decree) while for the other assumptions, vague and inaccurate reference is made to certain typical features of offshore corporations.

Likewise, the work of the IGJ in controlling the registration of offshore corporations is worth mentioning. In such respect, the IGJ shall not accept the registration of corporations that are unable to conduct businesses in their country of origin, allowing them to become nationalized if they wish to do so. Special purpose entities are exempted. Notwithstanding, pursuant to the foregoing, their records shall be submitted to the consideration of the AFIP.

In such respect, it is worth highlighting that the IGJ additionally includes "non-cooperating" companies in offshore jurisdictions.

All the documentation filed with the IGJ shall be certified, translated and an apostille shall be attached.

4.4 Money laundering prevention

Act N° 25.246 regulates the issues relative to prevention and punishment of asset laundering. The Financial Information Unit (FIU) is the control body that files cases with the Courts and receives the suspicious transactions' report (STR) from the subjects required to report.

The AFIP is held accountable by the FIU for filing the STR as one of its roles, identifying uncommon transactions, unwarranted, of unusual or unjustified complexity.

Determining the existence of trusts and offshore holdings shall surely warrant the submittal of an STR. In such regard, it is worth highlighting that the AFIP is bound by tax secrecy, except when it has reported the transaction as suspicious.

As regards the applicability, the AFIP shall report to the FIU in the case of registered subjects, when the adjustment is conducted or in the case of an official Administrative Resolution and non-registered subjects, when the events are proven.

As of 12/31/2007, the AFIP had filed 150 reports out of a total 3,134 reports completed by that date by all the subjects reporting to the FIU.

5. EXPERIENCES

5.1 Trusts

5.1.1 Case Study I: Assignment of assets by donation to a revocable trust.

- Personal Property Tax Exemption.

- Application of the Economic Reality Principle (inexistence of an actual assignment: a businessman donated USD 715 million to two trusts located in the Cayman Islands and the Bahamas, with certain specific features: 1. It was revocable, 2. It did not designate beneficiaries, 3. It designated *fiducia cum amico,* removable thereby, from whom the *trustee* shall require instructions for every investment to be made and 4. It was unable to make donations until the death of the settlor). It was understood that the economic reality indicated that the proceeds from the sale of share packages from several companies donated to such trusts by the pertinent businessman, in which the disposability of assets was maintained, entailed evasion of the Personal Property Tax. A criminal proceeding was initiated, which was deemed inadmissible by the Courts (the lesser tax burden).
- It is currently being heard in Court.

5.1.2 Case Study II: undercover financing in the sale of oil with advance collection.

- Failure to Withhold the Income Tax on the payment of income (implicit interest) to non-resident subjects.
- We determined that foreign subjects placed funds in the country, whose yields are deemed income. It is a typical case of commodity finance:
    - Sale of crude barrels to buyers based in tax havens.
    - Advance collection of USD 680 Million (at USD 14 per barrel) with a very long term future delivery (7 to 10 years).
    - The oil company ensured a maximum price of USD 18 per barrel (a swap agreement was in place for such purpose).
    - We later discovered the issue of notes via a trust based in a tax haven securitized by the barrels to be received (securitized asset).
    - An implicit profitability for non-resident subjects was determined at USD 4 per barrel (complex transaction featuring several transactions).
- The tax claim was drafted and the omitted tax was paid, including VAT for imports of services.

5.2 Holdings

Hereunder, we describe two cases that have been recently addressed by the auditing areas:

- Treaty shopping, since holding companies (GMBH, as per the German acronym) are chartered in Austria to divert investments to other countries and take advantage of the benefits of Double Taxation Agreements (DTA).

By virtue of such Convention and the inherent domestic legislations, certain property and specific income are tax exempt in both countries. The investments made in Austria by Argentine residents consisting in bonds,

shares and other securities are exempted from the Tax on Personal Property as well their income, which is exempted from Income Tax.

This system was deemed abusive because to the extent known, the only reason for such diversion is to take advantage of the benefits of the DTA, since Austria does not levy the income from certain companies obtained in foreign jurisdictions.

Such agreement has been reported and we estimate its expiry by the end of this year.

- Exemption of foreign income (dividends) from Argentine residents, which resort to investment corporations in another country signatory of the DTA. The shares held from controlled companies based in third-party countries are delivered as a capital contribution to such holdings. Thus, the taxes applicable on such foreign income are avoided.

The dividends distributed to the resident subject (corporation) by the holding company are governed by Article 11 of the pertinent DTA and, therefore, tax-exempt in our country. We deemed it appropriate to introduce changes to the DTA that prevent tax planning practices that result in tax avoidance, and this is still under analysis.

Both cases are under review in the Ministry of Economy. It is worth highlighting that we have recently reported the DTA with Austria on July 22nd, 2008 (External AFIP Notification Nº 6/08), as mentioned above.

6. STRENGTHENING TAX CONTROL MANAGEMENT

- **Changes in regulations:**
  - Elimination of the preferential treatment of local trusts (Decree N° 1.207/08).
  - Claim for the annulment of the DTA subscribed between Argentina and Austria. Review of other Agreements.
  - Strengthening the anti-abuse legislation, particularly by the use of tax havens (income from such jurisdictions).
  - Regulations to enable other agencies to counter offshore transactions.

- **More and better quality information:**
  - Information system for transactions between residents with representatives of non-resident subjects: General AFIP Resolution N° 1.375/00.
  - Information system on the entry of foreign income to the country: General AFIP Resolution N° 1.926/05.
  - Information system on trusts: General AFIP Resolution N° 2419/08.

- **Inter-institutional cooperation with controlling bodies: Central Bank of Argentina.**
    - Interaction at a regulatory level (for example, offshore, etc.).
    - Information on the foreign exchange control regime.
    - Simultaneous audits on foreign exchange brokers.
    - Working meetings.
    - Educational initiatives on inherent topics.

- **Organizational changes:**
    - Specialized sectors in the control of international operations, financial activity, etc.
    - Technical coordination of topics.
    - Greater communication among areas.

- **Risk management:**
    - Notion of complete cycle: interaction of all the control cycle links (selection and planning; audits, assessment and contentious matters).
    - Creation of risk matrices:
        - Identification of risk sectors, groups and subjects.
        - Differentiated control strategies.

- **Corporate tax responsibility:**
    - Meetings with corporate authorities.
    - Working groups on complex issues.

7. PROSPECTS AND RECOMMENDATIONS

Financial instruments are very attractive tools for tax planning (tax shelters).

Opening up and deregulation of markets and financial institutions worldwide, considering the important technological development of communications and IT, greatly facilitate the design and implementation of sophisticated products.

Surely, the challenges would increase in the future for the Tax Administrations, in the face of these businesses, which, in addition to being sophisticated, are globalized, vis-à-vis the national jurisdiction applicable thereto.

In such context, it is vital to empower the auditing role thereof, particularly before these and other complex and/or innovative financial instruments.

The recommendations based on the Argentine experience are:

- As regards legislation:

  - Review national legislation and DTAs (eliminating asymmetrical, inconsistent treatments and legal vacuums). Consider a trade-off with economic policy objectives.
  - Introduce anti-avoidance measures.
  - Generate interaction among regulations.

- Strengthen the Tax Administrations performance in audits:

  - More and better quality information: a vital input in drafting and reviewing risk matrices periodically.
  - Specialized areas: international transactions; financial activity, etc. Ongoing education. Support by part-time experts.
  - Interaction with other national comptroller bodies: generate synergies that empower the role of the respective bodies, since in spite of the existence of diverse objectives, it is possible to establish areas for the coordinated efforts from such institutions.
  - International administrative cooperation with other Tax Administrations (information exchange, simultaneous audits, etc.).