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Tax treaties and tax avoidance: application of anti-avoidance provisions

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Summary and conclusions

International tax avoidance could be deemed to include those situations characterised by the involvement of a foreign legal system which avoids the territoriality of the tax for a tax-saving purpose. Two predominant schemes can be identified within the ambit of international tax avoidance: (a) the use of preferential tax regimes, as in countries with low or nil taxation (tax havens) for international transactions or the artificial establishment of residence; and (b) the abuse of treaty provisions in order to avoid international double taxation.

The conventions signed by Argentina do not provide a definition of treaty abuse, and therefore nor do they contain a general anti-abuse provision. The treaties have dealt with some specific situations based on the guidelines of the OECD and UN models.

Under domestic law, the situation is different. Following German legislation of 1919 and 1933, Argentina was the first Latin American country to adopt, in 1946, the principle of economic reality or "substance over form" in the application of tax law (article 1, Law no. 11,683) and, as a corollary, also a general anti-abuse rule applicable to the characterisation of events whereby the interpreter may set aside legal forms that are found not to correspond to the economic substance of the transaction. The domestic general clause has been applied to the assessment of international transactions. In view of the indeterminate nature of these rules and the breadth inherent in their general character, it has proved problematic to apply them to specific cases, especially those in which the boundary between legitimate tax saving and improper avoidance becomes rather blurred.

At the domestic level, there are also numerous specific anti-avoidance rules with international focus or effect. Some of them are designed to avoid the use of previously known damaging tax practices. Others may serve to prevent such practices, even if their primary purpose is not that but rather to avoid the erosion of the tax base of income tax in Argentina as a country of source. Argentina has aligned its legislation with the OECD guidelines set forth in the *Report on Harmful Tax Competition* (1998).

Internal regulations state that foreign corporations whose principal corporate purpose is to conduct business in Argentina and which cannot prove real economic substance in other jurisdictions have to become Argentine residents or else their

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registration will be cancelled (article 124 of the Corporation Law, no. 19,550, and *Resolución* 7/2005, *Inspección General de Justicia*).

In principle, there are no restrictions upon the use of the general anti-abuse provisions or regulations and special anti-abuse regulations in international transactions, including those conducted between residents of two countries that have signed a convention for the avoidance of international double taxation. It is clear, however, that in this case domestic law may not limit the benefits afforded by the treaty. This consequence flows clearly from the priority in rank that international treaties enjoy over domestic law under the Argentine constitutional system (as provided by article 75 of the Argentine Constitution). Nonetheless, this rule of priority does not remove the problems, already complex in themselves, entailed by the characterisation of events, especially the problem of which authority in the country has powers to make such a characterisation and to what limits its powers are subject when the legal system of another country is involved. The answer can only be given after a careful analysis of each individual case. However, the Argentine tax authority seemed to recognise its limits when issuing General Regulation 3469, which relies on the certification of the country of residence regarding the status of "beneficiary or receiver" of income from an Argentine source subject to limited withholdings under the convention.

From a conceptual viewpoint, it is possible to reconcile domestic anti-avoidance provisions and treaty provisions. In this connection, the commentaries on article 1 of the OECD model introduced in 2003 are fully acceptable under the Argentine standard. This conclusion is supported by the Vienna Convention (1969) on the Law of Treaties (VCLT), which Argentina has signed. Accordingly, two approaches appear to be possible – and reconcilable – as a response to international tax avoidance practices: (a) application of domestic law; (b) application of the rules of interpretation of the international convention. In this latter case, it is important to note that "double non-taxation" may be an acceptable consequence of the application of a convention and, in any event, the fact that such a consequence ensues should not be used as an "anti-avoidance" principle.

The fight against tax avoidance (and naturally, against tax evasion, too) as one of the purposes pursued by the conventions signed by Argentina is clear from the broad language of the clauses on exchange of information, which in some cases extend to taxes not covered in the convention and to residents of third countries. However, experience is scant as to the application of clauses of this kind, and no regulations have been made to govern their use. Therefore, it is impossible to pass judgement, even provisionally, on the promises contained in the treaty about a secret use limited to the purposes of the treaty itself, or on the non-impairment of safeguards to which taxpayers are entitled.

Finally, the 18 conventions signed by Argentina contain special anti-abuse rules which follow, in general, the traditional models in this field, and include: (a) the notion of beneficial owner regarding dividends, interest and royalties; (b) special relationship rules applicable to interest and royalties; (c) rules on "independent agents" that do not constitute a "permanent establishment"; (d) rules on the limited attraction of earnings attributed to permanent establishments in order to prevent abuse; (e) a rule on star companies; (f) arm's length principles applicable to the price of certain transactions; (g) limitation on benefits when there is evidence of tax avoidance practices; (h) special treatment of the allocation of profits other than those

earned by independent companies; (i) symmetrical adjustments made in the case of transfer pricing adjustments whereby the profit attributed to a company based in a contracting state is not allowed in cases of fraud or negligent act or omission; (j) special definitions regarding dividends, interest and royalties.

1. Domestic anti-avoidance provisions with an international scope

1.1. General overview

For the purposes of this report, we will use the notion of tax avoidance adopted by the Latin American Institute of Tax Law (Instituto Latinoamericano de Derecho Tributario (ILADT)) at the 24th Conference held on Isla Margarita (Venezuela, 2008), namely:

> "Tax avoidance is the behaviour of a tax obligor consisting in averting the event that gives rise to any tax liability, or in reducing the tax burden through a legally improper means, such as the abuse of legal provisions, the abuse of form or the distortion of the cause of a legal transaction as described by law, without directly breaching the mandate of the legal norm but contravening instead the values or principles underpinning the tax system."[1]

International tax avoidance could be deemed to include those situations characterised by the involvement of a foreign legal system which avoids the territoriality of the tax for a tax-saving purpose. Two predominant schemes can be identified within the ambit of international tax avoidance: (a) the use of preferential tax regimes, as in countries with low or nil taxation (tax havens) for international transactions or the artificial establishment of residence; and (b) the abuse of treaty provisions in order to avoid international double taxation.

With regard to the foregoing definition, the following is worth noting:

- Argentine tax law provides a general rule of construction of the letter of the tax law based upon the principle of economic reality or "substance over form" (section 1, Law no. 11,683). As a spin-off of this principle, a general tax anti-avoidance rule has been adopted which, in essence, follows this economic approach, with the aim of preventing the taxpayer from exploiting the formalism and loopholes of the law. But it is highly important to note that economic theory adopts the formula of an anti-abuse provision, which means that a transaction may be recharacterised only where a non-corresponding legal form has been used (section 2, Law no. 11,683).

[1] See www.iladt.org/documents/Resolutions. This notion is similar to that adopted by the general reporter, Professor Victor Uckmar, at the 37th IFA Congress (Venice, 1983) in connection with tax avoidance and tax evasion. According to Professor Uckmar's report, tax avoidance can be defined as a way of removing, reducing or postponing tax liability other than by means of tax evasion and tax saving. It is an indirect violation of tax law or, differently put, the exploitation of areas which the legislator intended to cover but for one reason or another did not.

- Section 2 of Law no. 11,683 operates as a corollary to the principle of economic reality embodied in section 1. Section 2 provides as follows: "In order to determine the true nature of the taxable event, regard shall be had to the acts, situations and relations of an economic nature actually performed, pursued or established by the taxpayers", and ends by prescribing that, for such purposes, the actual intention of the taxpayers must be ascertained if, as a result of such

  "acts, situations or relations of an economic nature, [they resort to] legal forms or structures which are not manifestly those that private law makes available or authorises so that the exact economic and actual intention of the taxpayers may be correspondingly materialised; [for such purpose,] upon the real taxable event being examined, the non-corresponding legal forms and structures shall be set aside, and regard shall be had to the real economic situation as falling within the scope of the forms or structures that private law would apply to them regardless of those chosen by the taxpayers or that [private law] would allow them to apply as those which most closely correspond with the actual intention thereof."

- Nonetheless, in spite of the length of time for which the formula has been in place (it was introduced in 1946 based on the German model), it has not been possible to develop a consistent conceptual construction, either in the administrative or the judicial sphere; as a result, many difficulties continue to arise at the time of defining when a tax planning scheme should be labelled as tax saving, tax avoidance or even tax evasion.

The Supreme Court of Argentina has followed different approaches to define in what cases the legal forms used by taxpayers lack economic substance. The prevailing trend during the 20th century was to regard certain legal forms as "non-corresponding" (and, therefore, unenforceable under tax law) even where such legal forms were unobjectionable under private (civil or commercial) law.[2] However, in recent years the Supreme Court has recognised the need to reconcile the doctrine of economic reality with principles of "legality" and of "legal certainty", considering both such principles to be interests protected by the Argentine Constitution as a guard against a discretionary application of the law. In practice, this approach entails admitting that the propriety of transactions or business as viewed by private law reduces the chances of applying the tax law in order to enforce the principle of economic reality and the anti-avoidance formula contained in section 2 of Law no. 11,683.[3]

2 In connection with this approach, branch reporter Díaz Sieiro stated as follows in his report submitted in the 56th IFA Congress (Oslo, 2002): "What is worthy of criticism, however, is that the National Supreme Court of Justice has never taken into account the fact that in order to set aside the legal forms or structures used by the taxpayers, the legislator has required that the inappropriateness of the forms chosen should be manifest" (*Cahiers de droit fiscal*, vol. 87a, pp. 81 *et seq.*). See, for example, SCJ, *Cobo de Ramos Mejía, María* v. *Provincia de Buenos Aires* (1961); SCJ, *Refinerías de Maíz* (1964) and SCJ, *Parke Davis y Cía de Argentina* (1973). At the same time, the Supreme Court of Argentina has also adopted the well-known universal principle that the taxpayer has the right to develop its business or affairs by trying to minimise the tax burden to the extent permitted by law (in *Industrial Comercial Argentina SRL* v. *Fisco Nacional* (1958)).

3 SCJ, *Autolatina Argentina SA* v. *DGI* (1996); *YPF SA* v. *Provincia de Tierra del Fuego* (2004). In this case, the Supreme Court stated: "as regards the principle of economic reality that Defendant

A tax system may react against a taxpayer's avoidance practices by resorting to various techniques, which may include both (a) a rule of interpretation of the law (for example, under the principle of economic reality, i.e. substance over form) and (b) a general anti-avoidance provision. In Argentina, the anti-avoidance technique employed by the law (Law no. 11,683) entails that the rule of interpretation based on the economic reality is embedded in the standard articulated in the anti-avoidance provision, which invariably requires the use of a certain legal form that does not correspond with the actual substance of the transaction. Accordingly, no interpretation technique may be applied outside the scope of the standard embodied in the anti-avoidance provision, which incorporates this technique.

1.1.1. General anti-avoidance provisions with international focus or effect

There are no restrictions on the use of the general anti-avoidance provision or rule as a test of the propriety or transparency of international transactions. Although specific anti-avoidance rules are increasingly used in this area, the tax authority regularly assumes that the general anti-avoidance provision as a residual rule is applicable to situations that have not been specifically discussed. Insofar as these transactions have effects in Argentina, i.e. produce results which have an Argentine "source" and are thus subject to the Income Tax Law (ITL),[4] the tax authority considers itself authorised to examine them under the standard of the anti-avoidance provision in order to determine in each case whether the legal forms used for the international transaction are consistent with their economic substance. As stated above, the problem is that concepts like "economic reality" and "non-corresponding legal form" are often used in a broad sense by tax authorities.[5]

In the past, the Supreme Court has applied this provision to recharacterise transactions between related companies on the grounds that such companies formed an "economic group".[6] Relying on the presumption that the existence of an economic group meant that the related companies acted in furtherance of a common interest, the Supreme Court negated the normal tax effects stemming from arm's length transactions. The test of the international economic group has also been used to benefit the taxpayer.[7] At present, however, this doctrine has been overridden through the inclusion in the ITL of provisions which allow related companies to act as independent entities on condition that all transactions are carried out on

cont.

invokes in order to prove the taxability of the event and charge Plaintiff with tax avoidance conduct, it is sufficient to say that the establishment of clear rules setting forth the obligations and exemptions which taxpayers must observe in their tax behaviour is the best system to avoid any potential manoeuvres of this kind"; *San Buenaventura SRL* v. *Dirección General Impositiva* (2006).

4 Law no. 20,628 (BO 31 December 1973) as revised by Decree 649/97.

5 An example can be found in Opinion 57/96. Here, the Argentine Board of Public Revenues (AFIP) stated that the insurance premiums paid by an Argentine resident to a foreign insurance company in connection with a loan had to be treated similarly to the payment of interest, because under the standard of "economic reality", an insurance premium covering against the debtor's insolvency was equivalent to an increased financial cost.

6 See cases cited in footnote 2 and Díaz Sieiro, *op. cit.*, p. 81.

7 SCJ, *Kellog Co. Argentina SA* (1985).

an arm's length basis (1977), and through the inclusion of rules on transfer pricing (1998).

1.1.2. Specific anti-avoidance provisions or rules with international focus or effect in the ITL

The techniques used by anti-avoidance provisions can follow different paths. Although the procedure consists in attributing certain consequences to a situation on the basis of a presumption, it is only in some instances that such a situation will constitute a prior case of avoidance that the law will correct. In many others, the main reason behind the use of these provisions is that a country is trying to preserve its taxing powers *vis-à-vis* other countries, or that efforts are made to prevent the income tax base from becoming eroded. The latter is the case in Argentina, for example as regards income-attributing provisions in certain activities (such as international transport or technical advice furnished from abroad) or in the case of provisions establishing a presumed income for non-resident parties. In these cases, the anti-avoidance effect can be indirect; the use of the presumption can even be detrimental, as where a taxpayer is made to pay a greater amount of tax than his actual tax-paying ability warrants or where a country is attributed a greater income than it should be. However, we have included in this report a reference to these provisions which, though in an indirect fashion, are also a part of a tax avoidance prevention system.

The ITL contains numerous special provisions designed to prevent international tax avoidance. The system here largely revolved around the use of non-rebuttable presumptions. The ITL adopted, with effect from 1999, the concept of "worldwide income" for companies organised in Argentina and resident individuals. The adoption of the concept of worldwide income was also accompanied by the incorporation of controlled foreign company (CFC) provisions and OECD recommendations regarding anti-tax-haven rules.[8] Consequently, the primary aim of special anti-avoidance provisions has been to strengthen the Argentine tax jurisdiction based on the source country principle, to avoid the erosion of the tax base of Argentine tax in the case of international transactions from or into Argentina, and to ensure an appropriate characterisation of cross-border transactions.[9]

Below is a summary enumeration of the specific anti-avoidance provisions contained in the ITL.[10]

(a) recharacterisation of the source of income in derivatives and derivatives transactions when the components thereof show that the true economic intent of the parties has been to engage in financial services (section 7, 1);

(b) adoption of a "public and well-known" international price in order to avoid under-invoicing and over-invoicing practices in the import and export of goods (section 8);

8 OECD, *Report on Harmful Tax Competition: An Emerging Global Issue* (1998).

9 Accord: G. Teijeiro, *General Anti-avoidance Rules in International Tax,* Seminar E, IFA Congress, Sydney (2003), p. III.2.

10 See Juan Ricardo Kern, "Las normas antiabuso más usuales", in *Interpretación Económica de las Normas Tributarias*, Casás (ed.), Ed. Abaco de Rodolfo Depalma, Buenos Aires, 2004; Guillermo O.

(c) Argentine sourcing of a portion of the income obtained by non-residents on certain international transactions: transport,[11] shipping, reinsurance, film and video licences, television broadcasts and similar activities (sections 9, 10 and 11);
(d) Argentine sourcing of income from technical or financial assistance services provided from abroad (section 12);
(e) direct attribution of income to a permanent establishment regarding separate accounting; re-allocation of income, based on the economic unit standard, between a local branch and the foreign head office when separate accounts do not allow for a clear determination of the Argentine-source income (section 14);
(f) no deductibility by the permanent establishment of the head office's administrative and direction expenses; expenses incurred for investigation and development cannot be deducted either;
(g) adoption of the arm's length principle among domestic permanent establishments and local corporations and their related or controlling companies abroad; readjustment of transactions inconsistent with arm's length principles (section 14);
(h) transfer pricing provisions applicable to related companies (subsidiaries and branches); pricing justification mechanisms apply which refer to comparable transactions made on an arm's length basis (section 15, subsection 5);[12]
(i) anti-tax-haven rules: Argentina has listed 88 jurisdictions as of low or nil taxation, to which anti-avoidance provisions apply, namely: (i) transfer pricing standards; (ii) international transparency standards on passive income (anti-deferral rules on domestic shareholders); (iii) presumptions as to stock ownership and disallowance of the indirect foreign tax credit for local shareholders; (iv) limitation on the computation of losses stemming from passive income; (v) the presumption of an unjustified gain on income originating from tax havens, unless evidence to the contrary is provided;
(j) reorganisation of companies: although the reorganisation of international companies is not mentioned among the benefits of Argentine law,[13] the priority requirements relating to the maintenance of losses and of the shareholding interest in the two subsequent years apply to non-resident direct shareholders of Argentine companies[14] (section 77) as a condition for access to the benefits of a tax-free reorganisation;
(k) thin capitalisation rules for loans taken from non-resident related parties (section 81);

cont.

Teijeiro, "Argentine Anti-Avoidance Rules: Application under Domestic and International Conventional Law", *Tax Notes International*, October 2003, p. 89.

11 The general principle established by the ITL has been modified by the tax treaties – both general and specific – signed by Argentina regarding international transportation by ships or planes. These treaties attribute the income to the country of residence of the transporting entity.

12 Argentina has followed, in all essential aspects, the OECD recommendations contained in the *Guidelines on Transfer Pricing to Multinational Enterprises and Tax Administrations* (1995).

13 So stated by AFIP, in Opinions 37/97, 6/98.

14 AFIP, Opinion 48/00 held that the condition applies to the direct shareholder (first tier) but does not extend to the holders of an indirect interest (second tier).

(l) limitations on deductions for foreign payments of trademarks, patents and technical advice (section 88, subsections (e) and (m), and the regulations thereunder);[15]
(m) withholding at source based on a net income presumption applicable to non-resident parties on interest, royalties, sale and lease of property, and other items (section 93);
(n) recharacterisation of cross-border leasing subject to certain conditions (section 155 of Decree 1344);
(o) rules on the residence of individuals and double residence (sections 119 and 125);
(p) allocation of foreign-source income and expenses of permanent establishments belonging to Argentine residents (section 129);
(q) application of the arm's length principle to transactions between residents or their permanent establishments abroad and related companies (section 130);
(r) computation of foreign-source losses only against income of the same origin (section 135).

1.1.3. Other anti-avoidance rules

1.1.3.1. Corporation law[16]

Argentine corporate law states that foreign corporations whose principal corporate purpose is to be conducted in Argentina should be treated as local corporations (article 124). This provision of the law was regulated by the *Inspección General de Justicia* (IGJ) (*Resolución* 7/2005). The regulation states that foreign entities acting habitually in Argentina have to prove their real economic substance outside Argentina by showing, among other requirements, that the majority of their non-current assets are located outside Argentina, that they are not offshore companies, that they have other branches outside Argentina, and by individualising their partners. Failure to prove this will lead to the cancellation of the foreign company's registration, unless the company incorporates in Argentina.

1.1.3.2. Information regime regarding international transactions

Resolution 1375/2002 issued by the AFIP established an information regime applicable to all economic transactions, including those which are free, between Argentine residents and the representatives of foreign persons or entities. These representatives, and those intervening as service providers, should inform the AFIP of such economic transactions. A similar regime is established for the representatives of international transportation companies (AFIP, Resolution 2066).

15 Decree 1344 (BO 19 November 1998).
16 Law no. 19,550, BO 25 April 1972.

1.1.4. The relationship between the domestic anti-avoidance provisions and tax treaties

As regards the relationship between domestic anti-avoidance provisions and double tax conventions (DTCs), the constitutional status of these provisions must first be briefly discussed. Sections 31 and 75 of the Argentine Constitution provide that an international treaty pre-empts the domestic law whereby taxes are imposed. The Supreme Court has held that the adoption of a treaty by Congress is a complex federal act, whereby the federal executive concludes and signs the treaty, Congress approves or rejects it, and the federal executive ratifies it (section 75, subsection 22 and section 99, subsection 11 of the Argentine Constitution). But in this complex federal act, the participation of Congress, though necessary, is not conclusive. Under the Argentine constitutional system, it is the executive that, acting on behalf of the nation, exercises the constitutional powers which are unique to it in order to assume international obligations through the decision to ratify international treaties (sections 27 and 99, subsections 1 and 11 of the Argentine Constitution).[17]

The pre-emption of a treaty over statutory law has the following effects: (a) rules attributing tax powers among states override domestic law; (b) a domestic law (such as the income tax law) may not be enforced against the solution set out in a treaty.

The treaty provisions provide for solutions that amend the treatment afforded by domestic law to a specific situation. In general, such provisions are related to the allocation of taxing powers to the contracting countries (e.g. the allocation of income of international transportation companies) or the determination of the taxable base in the source country (deduction of headquarter company's management and direction expenses). The non-discrimination clauses included in treaties prescribe that in order to determine a company's benefits subject to taxation, expenses paid by the company to a resident of the other state are deductible under the same conditions as if they had been paid to a resident of the state of residence of the paying company (see e.g. article 24(3) treaty with Spain). This clause prevails over certain caps fixed by the ITL for the deduction of expenses incurred for the exploitation of trademarks and patents owned by subjects from abroad (article 88(m)), or for fees and other remuneration paid for technical-financial assistance rendered from abroad (article 88(e)).[18]

A still more complex situation arises upon trying to harmonise thin capitalisation domestic legislation and tax treaties. On the one hand, the conventions with Belgium, Canada, Denmark, Spain, Finland, Norway, Sweden and Russia expressly provide (in their protocols) that there is no bar against the application of domestic rules on thin capitalisation. The question one may pose is whether treaties making no reservation to the application of thin capitalisation provisions may be deemed excluded therefrom under the non-discrimination clause or under other clauses that establish arm's length principles for interest and transactions between affiliated companies.[19] In

17 For instance, the tax treaty with the United States signed in 1981 was ratified (with reservations) by the Senate of the United States, but it was never ratified by the Argentine Congress. See A. Atchabahian, *Tax Management: Business Operations in Argentina*, p. A-66.

18 (Legal scholar) A. Lorenzo *et al.*, *Tratado de Impuesto a las Ganancias* [Income Tax Treaty], 2nd edn, Errepar, Buenos Aires, 2007, pp. 860 and 936.

19 This matter has been considered in the comments to the OECD model, art. 24, para. 4, that proposes the need to harmonise thin capitalisation provisions with "interest" and "associated enterprises" provisions.

Argentina there are no precedents on this matter. However, it seems consistent to conclude that if the ratio established by the Argentine thin capitalisation provision for the debt/principal ratio (2:1) is not complied with, this transaction will not comply with the arm's length condition and thus residents will not be entitled to its deduction. Therefore, no conflict should exist as to the consistency of treaties and thin capitalisation provisions, which are always applicable.[20]

A controversial issue, however, is the compatibility between domestic anti-avoidance provisions and treaty provisions in cases that are not specifically provided for.

The practical difficulties that must be overcome in order to arrive at this reconciliation between provisions are a product of the fact that anti-avoidance provisions – in particular, general anti-avoidance provisions – call for the characterisation of certain circumstances in fact and in law. The foreign elements that the tax authorities of a country must take into account as the first interpreters of domestic tax rules include the assessment of factual situations (for example, how long a resident remains in another state) and legal issues that involve the legal characterisation of specific legal acts or transactions, for instance, establishing whether a company incorporated in another state was established in order to abuse a treaty and thus avail itself of benefits to which it would otherwise not be entitled if its situation were examined from the point of view of substance. Indirectly, these cases take the form of some of the instances of tax treaty shopping: conduit company, channel company, stepping-stone company, according to the commentary on article 1 OECD. The lack of specific provisions in treaties aimed at correcting these situations poses problems to the state that must address them based on its domestic law provisions. The provision of evidence in a foreign jurisdiction and the bar against a recharacterisation of legal schemes that are admissible under the law of another contracting state, or of a third country, render illusory the chances of applying domestic law provisions to specific avoidance arrangements or strategies. In this context, it is implied that there are no impediments to applying domestic anti-avoidance provisions to situations that fall within the purview of a DTC.[21]

From a conceptual viewpoint, a reconciliation between domestic anti-avoidance provisions and treaty provisions is possible. This approach is, without a doubt, endorsed by the states signatory to the treaty, if they are in agreement with the general purposes of such a treaty.[22] From a practical standpoint, however, the taxpayers' objections to the application of anti-avoidance provisions – especially general anti-avoidance provisions – are often understandable, because the tax authority often goes beyond the scope of these provisions, thus leading to an override of the tax treaty. And it should be borne in mind here that the general rule is that a treaty takes prece-

20 Accord: C. Casanovas and A. Becher, *Revista Derecho Fiscal*, no. 4/2007. A special situation is contemplated under the treaty signed with the Netherlands. This treaty provides for a sort of evidence to the contrary whenever for special business reasons of the affiliates involved the ratio prescribed by domestic legislation is exceeded and also deems such loan as entered into on an arm's length basis (item VI of the additional protocol to the treaty).

21 However, this is a controversial issue among Argentine authors. See J.C. Vicchi, Argentine branch reporter, *Interpretation of Double Taxation Conventions*, vol. 78a, *Cahiers de droit fiscal international* (1993), p. 169; Diaz Sieiro, *op. cit.*, p. 89; Teijeiro, *op. cit.*

22 The commentary on art. 1, p. 7 OECD model adds: "It is also a purpose of tax conventions to prevent tax avoidance and evasion."

dence over the provisions of domestic law. This means that anti-abuse measures should only be used for these purposes as spelled out in paragraph 26 of the commentary on article 1 OECD MC, which reads as follows:

> "It would be contrary to the general principles underpinning the Model Convention, and to the spirit of tax conventions in general, to extend the application of anti-abuse measures to activities such as production, the ordinary provision of services or the commercial pursuits of companies carrying on real business activities, when they are clearly inserted within the economic environment of the country of which they are residents and are conducted in a manner such that there can be no suspicion of tax evasion. Anti-abuse measures should not be applied to countries in which taxation is comparable to that in the country of residence of the taxpayer."

This shows that the 2003 commentaries on article 1 of the OECD model are fully consistent with the practices and theories in force in Argentina.

Therefore, whether the treaty abuse standard or the domestic law abuse standard is used, anti-avoidance conduct can be corrected. In either case, it is of the utmost importance to carry out a careful assessment of each specific instance, without any tax-raising purpose whatsoever. Once again, it should be noted that there are no judicial precedents regarding preference for either of these two approaches.

1.1.5. Abuse of the tax treaty itself: domestic law principles or interpretation of the treaty?

1.1.5.1. Interpretation of tax treaties according to the rules of the Vienna Convention

The Supreme Court has said that international treaties must be interpreted in accordance with articles 31 and 32 of the 1969 VCLT, which enshrine the principle of good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[23]

We share the opinion of those who find no difficulty in applying the rules of the VCLT in order to interpret DTCs, because their singular character is not sufficient to exclude the application of the standards for interpretation set out in the VCLT.[24]

According to the Argentine report in Florence (1993), the phrase included in the Vienna Convention, "context of an agreement", would be basically interpreted as including the treaty itself and the protocols and notes exchanged by the parties at the time the treaty was signed. Probably, it would also include the agreements concluded after that date in order to make clear some provisions of the conventions or to resolve some difficulties arising in its application. Finally, treaties should be interpreted in the context of their own logical structure and legal entity. Accordingly, interpretations made about provisions included in parallel treaties may only be taken into account if

[23] SCJ, *Manauta Juan J. y otros* v. *Embajada de la Federación Rusa* (1999).

[24] Rubén Asorey, "Los tratados internacionales y el ejercicio del poder tributario en América Latina", *Revista Derecho Fiscal*, no. 5, Lexis Nexis, 2007, p. 12.

those provisions are substantially similar to those which are applicable to the case to be resolved.[25]

It follows from this principle that:

- A domestic law provision may not negate a benefit flowing from a treaty.[26]
- The rule *pacta sunt servanda*, of paramount application to international treaties, must be adhered to.
- A treaty may not be unilaterally modified by one of the signatory states through the enforcement of a domestic provision.[27]

Considering these premises, it seems that an anti-avoidance theory is conceivable based on the interpretation of a treaty itself, regardless of domestic law provisions.

1.1.5.2. Argentine tax treaties: what is the purpose?

Argentina maintains in force 18 conventions aiming to avoid double taxation (see the appendix).[28] Many of these conventions have been signed with OECD member countries. Argentina is not a member of the OECD, but participates as an "observer". However, the provisions of its treaties that follow the OECD model find in the "commentary" a source of authority which, though not binding upon Argentine courts, serves as guidance to establish the purpose of such provisions.[29]

Argentina started to negotiate broad-ranging tax treaties during the 1960s.[30] Since then, depending on the government of the day, there have been opposing views regarding the need to sign treaties of this kind. Reality has shown that the expectations of generating a greater flow of investments into the territory as a consequence of such treaties being in force did not materialise.[31] As a result, some governments have refused to sign broad treaties in this area. Others, instead, have continued to

25 Vicchi, *op. cit.*, pp. 167 *et seq.*

26 S. 21 of the ITL provides that exemptions granted to non-residents cease to have effect if, as a consequence, income is transferred to the other country. This effect occurs if the country of residence actually taxes income declared exempt by Argentina. In the convention with Brazil (protocol, art. 10), Argentina reserves the right to apply this rule. This clause is neutralised in the agreements negotiated with certain European countries because they include a tax-sparing clause. The absence of a tax-sparing clause in the conventions with Bolivia and Chile is due to the fact that the source rule is maintained in such conventions without limitations.

27 See César García Novoa, general report on the 24th Conference of the Latin American Tax Institute (ILADT), 2008: *Tax Avoidance and the Means to Prevent It*, item XIII, "Measures and their connection with International Conventions. Relationship between domestic and international provisions", www.iladt.org/documents.

28 In 2008, Argentina unilaterally denounced the convention with Austria, which ceased to have effect as from 2009. Regarding the treaty with the USA, see the appendix.

29 TFN, *La Industrial Paraguaya* (1980).

30 The conventions signed by Argentina have atypical features. Although they follow, in general, the guidelines of the OECD model, they have incorporated certain peculiarities of the United Nations model designed to strengthen the rule of source in connection with items like interest, technology and services. This is the practice that Argentina has followed in the conventions executed with European countries, Canada and Australia. Outside this scheme are the conventions signed with Chile (1985) and Bolivia (1978), which follow the model of the Andean Pact (1970), which allocates tax powers based on the source principle. The treaty signed with Brazil (1982) also adheres to the source rule. See A. Figueroa, *Bulletin for International Fiscal Documentation* (IBFD), Special Issue, IFA 59th Congress, vol. 59, nos. 8/9, September 2005, *International Double Taxation: General Reflections on Jurisdictional Principles, Model Tax Conventions and Argentina's Experience.*

31 Figueroa, *op. cit.*

rely on them, though reality shows that the success of an investment-attraction strategy depends more on the business climate in a given country (i.e. economic stability and legal certainty) than on the signing of tax treaties. In any event, it seems clear that the decreased taxing power in the country of source and the loss of tax revenues caused in actual practice by the allocation standards followed by the OECD models, or even the United Nations model, should not become any worse if it were accepted that these conventions operated as umbrellas for tax avoidance or tax evasion manoeuvres.

Setting aside the political issue about the suitability of executing treaties in accordance with the current models, and having looked at the reality of the provisions contained in the treaties in force, it seems reasonable to say that just as the application of treaty clauses should provide certainty to taxpayers and remove overtaxation, so the application of such clauses should not become an instrument for tax avoidance to an extent that cannot be tolerated. Atchabahian and Schindel affirm in their general report to the 59th Congress of IFA, Buenos Aires, 2005, that:

> "The proliferation of DTCs broadens the scope for international tax planning. The abuse of DTCs, generally known as 'treaty-shopping', is one of the most widely used strategies for international tax planning. Nowadays, it is argued that DTCs have been reduced to mere off-the-shelf products used by people hiring international tax advisory services."

In view of that, "the logical solution, particularly for capital- and technology-importing countries, appears to be a new configuration of the source principle, or else the search for other alternatives to mitigate the issues described in the previous section".[32]

Again, the focus should be on the fine line dividing an economy of option from tax avoidance, such that the right to a legitimate tax saving that may be afforded under a treaty is not confused with illegitimate tax avoidance deriving from the abuse of such a treaty.

An observation is in order in connection with the commentary on article 1 contained in the seventh paragraph of the OECD model. It is therein stated: "It is also a purpose of tax conventions to prevent tax avoidance and evasion." This statement should be contextualised. In point of truth, it should read as follows: "The interpretation of treaty clauses shall not endorse tax avoidance." Because treaties are a legitimate tax planning instrument, but also a tool that may be used to accommodate sophisticated tax avoidance strategies, a statement to the effect that the purpose of a convention is to prevent tax avoidance seems to be devoid of content, as in any event the type of avoidance being discussed is a problem added by the convention itself to the general tax avoidance possibilities available under the domestic law of a country. In some cases, a treaty is viewed as a chance of perfecting, rather than preventing, tax avoidance. This is why treaty clauses are being improved all the time as a reaction

32 *Cahiers de droit fiscal international*, vol. 90a, 2005, pp. 27 and 47. Citing the 1983 *Annual Report of the UN Group of Experts on International Cooperation in Tax Matters*, Figueroa notes that treaties open up possibilities for evasion or avoidance that would not arise in countries that did not have any such treaties, which shows that it is more difficult to circumvent the law of each country than to manipulate a treaty or make an abusive use of it (Figueroa, *op. cit.*, p. 11).

against this trend, as evidenced by the clauses on exchange of information and the amendments introduced in the 2003 commentary on article 1.

1.1.5.3. Double non-taxation as anti-avoidance theory?

The comment on the purpose of conventions is useful to validate the use of treaties as legitimate planning tools when there is substance to the taxpayer's activity.

Along these lines, we believe it necessary to address the misconception deriving from an argument to the effect that if the purpose of a convention is to "prevent tax avoidance", it should also be admitted that its purpose is to "prevent double non-taxation". We have already discussed the scope that the first-mentioned purpose should be given. As regards the second purpose, we think it is incorrect to assume that the prevention of double non-taxation is the other side of the coin *vis-à-vis* the prevention of double taxation. This was the majority conclusion in the Vienna Congress (2004) that addressed this issue.[33] Therefore, the prevention of double non-taxation cannot be used as a general anti-avoidance standard, and is only admissible under express consideration, as asserted in the 1999 OECD report on partnership.

This misconception should be dispelled in view of the influence it may have in the area of treaty interpretation. If it were admitted that double non-taxation is one of the "purposes" or "objects" of a treaty, it would not be long, under the rules of interpretation of the VCLT, before tax authorities developed an anti-abuse or anti-avoidance doctrine to confront certain legitimate or authorised tax planning schemes.

As pointed out by the Argentine reporter to the Vienna Congress, the prevention of double taxation was never a concern for the Argentine negotiators of the treaties, and this is why the clauses signed by Argentina do not contain any reference to this principle. Thus, an interpretation articulated on the basis of this principle would violate the principle of legality in tax matters that applies to treaties.[34]

In recent years, the Argentine authorities have resorted to this principle to counteract what they judged to be a tax avoidance manoeuvre on the part of the taxpayer. The case was that several Argentine companies had purchased "Austrian bonds" issued by the government of Austria. The convention signed by Argentina and Austria provides as follows in article 13 (capital gains): "Gains deriving from the disposition of any other property not mentioned in sub-sections 1 through 3 shall only be taxable in the contracting state in which such property is located at the time of the disposition." (It should be noted that bonds and other securities were not mentioned there.) The provision makes clear that government securities are located in the state that has issued them. When in 2002 Argentina went through a formidable devaluation of its currency as a consequence of the economic crisis that erupted that year, the companies stated, based on the language of the above-cited provision, that the positive exchange difference was not subject to Argentine tax. But the tax authority responded by contending that this gain, i.e. the exchange difference generated by holding a security in dollars which increased its value in Argentine pesos almost fourfold, was not exempt under the convention. And one of the arguments used was that this gain could not be taxed

33 See *Cahiers de droit fiscal international*, vol. 89a, general report prepared by Michael Lang, where it is concluded that DTCs are by no means based on the idea of preventing double non-taxation and that this is true only for certain cases at the most. An example of prevention of double non-taxation is provided by the 1999 OECD report on partnership.

34 See J.M. García Cozzi, *Cahiers de droit fiscal international*, vol. 89a, p. 129.

in Austria, and if Argentina did not subject it to tax, a case of double non-taxation would arise. The tax authority resorted to the verification of double non-taxation as an argument to support the thesis in favour of the taxability of income from exchange differences for the benefit of the Argentine state. The companies appealed against this decision in court, but a recent tax holiday declared in Argentina (2009) has led these companies to abandon their claims, which has prevented this unprecedented issue from being finally settled in court.

2. General and specific anti-avoidance provisions in tax treaties

2.1. General overview

It should first be pointed out, as a general consideration, that the treaties signed by Argentina contain few specific provisions designed to prevent the abuse of a treaty. And there is no general anti-avoidance provision preventing the improper use of a treaty.

Nor is there any definition of treaty "abuse". As a contribution to such definition, paragraph 9(5) of the commentary on article 1 of the OECD model provides as a guiding principle that two elements must be present for certain transactions or arrangements to be found to constitute an abuse of the provision of a tax treaty: (a) that the main purpose of entering into these transactions or arrangements was to secure a more favourable tax position; (b) obtaining that more favourable treatment would be contrary to the object and purpose of the relevant provisions.[35]

We would like to raise the following objections to the proposed text: (a) the first-mentioned element requires probing into the taxpayer's intentions, which can be very difficult to ascertain objectively. Also, the reference to the search for a more favourable tax position is by no means reprehensible if it is supported by a substantive content. It may then be argued that the first element is interdependent upon the second element (b), to the extent that the saving pursued by the taxpayer must be contrary to the "object and purpose" of the treaty provisions. But once again we would be entering an area of abstract considerations, which might afford a broad margin of discretion to the interpreter and thus impair the principle of certainty. In Latin American doctrine, "abuse" exists where legal forms or structures are used which prove to be "improper or non-corresponding" due to a lack of real economic substance.[36] The objective assessment of such improper use allows for a safer and more neutral attitude towards the legal characterisation of the situation, thus averting the invariably conflictive probe into the reasons that may have guided a taxpayer's behaviour.

35 The OECD and UN models do not contain an express definition of "abuse". Pistone defines it as "a case in which a party, seeking to obtain a tax saving, relies on a convention system to which it would not be entitled based on its substantive situation" (P. Pistone, "L'abuso delle convenzioni internazionali in materia fiscale", *Corso di Diritto Tributario Internazionale*, V. Uckmar (ed.), Padua, Ccam, 1999, p. 498).

36 See Garcia Novoa, *op. cit.*

2.2. Exchange of tax information

The existence of clauses regarding the exchange of tax information between states provides incontestable evidence of the importance that Argentina attaches to the fight against tax avoidance (and against tax evasion) within the framework of DTCs. It should also be noted that exchange of information provisions are worded so that each contracting state can not only prevent the abuse of treaty clauses but also use such information to detect situations that go beyond the scope of the treaty and involve residents of each contracting country, or even residents of a third country. This is the scope that should be afforded to the statement, included in the conventions, to the effect that the exchange of information is not limited to parties that are residents of the (contracting) states (commentary on article 1 of the model convention).

However, the exchange of information clauses contain some guarantees in favour of taxpayers regarding the acquisition of information and its use in administrative and judicial procedures.[37]

Argentine negotiators have been paying increasing attention to these provisions, and it can be asserted that nowadays they are a strong stimulus for the execution of a treaty. It might be argued that Argentina, like other states, would not be willing to sign a treaty that did not contain exchange of information provisions. Despite the lack of development that these provisions have experienced in actual practice, as Argentina does not have any regulations in this regard, their potential to combat tax avoidance and evasion is sufficiently strong a reason to encourage the execution of a DTC.[38]

The language of these provisions shows that the treaty itself addresses the question of consistency with domestic law provisions. Thus, for example, the treaty signed with Great Britain and Northern Ireland provides as follows in article 27(1):

> "The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by this Convention insofar as the taxation thereunder is not contrary to this Convention, in particular, to prevent fraud and to facilitate the administration of statutory provisions against legal avoidance."

Some treaties use even broader language, because they not only refer to "taxes covered by this Convention" but also make clear that "the exchange of information applies to taxes of any kind or nature and is not restricted by the provisions of Article 1" (for example, the 2004 convention with Mexico).

37 See Dictamen AFIP 16/04.

38 See Asorey, *op. cit.*, p. 8. Atchabahian notes that the DTCs signed by Argentina (except for the convention signed with Switzerland) contain provisions regarding the exchange of information and reflect the need to prevent tax evasion, but he also points out that Argentine experience in the application of these provisions has not been too encouraging so far (Adolfo Atchabahian, "Derecho tributario internacional", in *Tratado de Tributación*, Astrea, Buenos Aires, October 2003, pp. 543 and 552).

2.3. Specific treaty provisions allowing application of domestic anti-avoidance provisions

The reconciliation between treaty provisions and the application of domestic anti-avoidance provisions is not a matter expressly dealt with in the relevant clauses, but rather arises from the interpretation of the intent or rationale behind some of the clauses. In this regard, exchange of information provisions again show the way towards renvoi to domestic law, as this type of clause provides that the exchange of information includes such information as is necessary to carry out the provisions of the convention "or of the domestic laws".

In this area, article 3, paragraph 2 of the OECD model, which Argentina reproduces in its treaties, can also be said to play a part. The provision to the effect that where the treaty is silent terms shall be assigned the meaning contemplated by the domestic laws of each country may well cover the case of anti-avoidance recharacterisation (subject to certain conditions established in such laws), so long as such characterisation or assimilation to domestic law does not violate the letter or the spirit of the treaty. An example of improper renvoi would be to ascribe a certain content to the term "beneficial owner" based on domestic standards instead of considering it a peculiar concept whose scope of meaning will be set by the rules of interpretation of the treaty itself.

2.4. General anti-avoidance provisions in tax treaties

The treaties signed by Argentina do not contain a general provision on the improper use of the treaty or limitation-of-benefits provision.

As stated above, the lack of any such provision does not bar the application of the domestic general anti-avoidance clause to cases falling under the provisions of the treaty, unless such application of the domestic law leads to a conflict with the treaty, in which case the conflict is resolved in favour of the treaty provisions.

In the opinion of this reporter, general provisions incorporated into treaties end up becoming declarations of principles with scant practical effectiveness, which add little to what is already mandated by the general rules of interpretation of treaties under the Vienna Convention or by the general rules of interpretation of law. And they entail the risk that the recourse to the "purpose or object" of a treaty formulated in an abstract fashion may end up granting tax authorities a degree of discretion capable of undermining legal certainty.

In any event, whether through the application of a general anti-avoidance provision or the renvoi to domestic law, the delicate problem can never be avoided of deciding which administrative authority is entitled to provide a legal characterisation of a contract[39] or of an international transaction whose result is regulated by the treaty: is it the authority in the country of residence or in the country of source? And once the authority has been decided, how should the characterisation be carried out?

[39] "Legal characterisation" is used here to mean the interpretative function whereby a factual situation is found to correspond with a generic hypothesis described objectively in a treaty provision. As such a factual situation, in the case of tax avoidance schemes, manifests itself through the adoption of a certain legal status, a legal characterisation always involves the interpretation of the contract or other legal device as a prior step to establishing a connection between such a contract or other device and the effects contemplated in the treaty for the situation described objectively.

What is the limit for any such characterisation, performed on the basis of legal rules or constructions of a given country when institutions or situations occurring outside the domestic territory are involved? There is therefore the risk of the undesirable effect that a conflict of interpretation between two contracting states may ultimately be detrimental to a resident of either state acting in the other.[40]

These are complex issues in which an answer can only be provided after the assessment of each individual case.[41] Even so, it seems possible to offer some guidelines. (a) The existence and capacity of a legal entity is determined by the law of the country where these entities are incorporated.[42] (b) The country of source must respect the characterisation performed by the authority of the country of residence regarding the condition of beneficial owner or receiver of income. (c) In the absence of a characterisation in the country of residence, the country of source may recharacterise the tax treatment of transactions producing effects on its territory.[43]

2.5. Specific anti-avoidance provisions in tax treaties

The treaties signed by Argentina contain some specific anti-avoidance provisions that follow the OECD and UN models, which are described below.

Application of the concept of "beneficial owner" in order to limit withholding rates on dividends, interest and royalties: Argentina follows in its treaties the language of articles 10, 11 and 12 of the OECD model. As is known, there is no definition of "beneficial owner" in the model, nor do the treaties signed by Argentina provide one. Nor have the courts or administrative authorities in Argentina developed any conceptualisation of the notion of "beneficial owner". The 2003 commentaries on article 10 of the model may help to structure this notion. The authors that have addressed this issue have highlighted the fact that the notion of "beneficial owner" is an autonomous concept that must be interpreted in accordance with the rules of interpretation of treaties rather than by reference to content-attributing standards under rules of domestic law, among which is the standard of economic reality (Law no. 11,683, article 1), together with its corollary, the general anti-avoidance provision (Law no. 11,683, article 2).[44]

General Regulation no. 3497 of the AFIP (as amended by General Regulation no. 2228 in 2007) (annex II) establishes a mandatory reporting procedure for parties residing abroad who are beneficiaries of income from an Argentine source in order to determine their status under the treaty. According to this procedure, (a) the beneficiary must report its status as resident and that it has no permanent establishment in Argentina. In addition, (b) the competent authority of the other country must:

40 See G. Gotlib and F. Vaquero, *Aspectos internacionales de la tributación argentina*, La Ley, Buenos Aires, 2005, p. 220.

41 See Teijeiro, *Revista Derecho Fiscal, op. cit.*, p. 238.

42 Art. 118, Law no. 19,550 and art. 2 of the *Convención sobre conflicto de leyes en materia de sociedades mercantiles*, Montevideo, 1979, ratified by Law no. 22,291.

43 See AFIP Opinion 57/96, *op. cit.*

44 Accord: C. Levene, "El Concepto de Beneficiario Efectivo", in *La interpretación económica de las normas tributarias*, J.O. Casás (ed.), Ed. Abaco, Rodolfo Depalma, 2004, p. 717; A. Linares Luque, "Apuntes sobre el concepto de beneficiario efectivo en los convenios para evitar la doble imposición", *RADT*, October–December 2003, p. 865; C. Laudato, "Un acercamiento hacia el concepto de beneficiario efectivo. El significado internacional del término", *Revista Derecho Fiscal*, no. 3, 2007, p. 181; Teijeiro, *Revista Derecho Fiscal, op. cit.*, p. 235.

(i) certify that the person or entity that is a "beneficiary or receiver" of the income resides in that country (in the past, the other state was required to declare that the non-resident party was the "beneficial owner", which requirement has been removed, and thus the numerous problems that the application of the requirement generated in practice have been overcome); (ii) declare that it ratifies, or is not aware of, or denies the statement of the beneficiary or receiver regarding the existence of a permanent establishment in Argentina. The main consequence of this regulation is that the Argentine tax authority would not be entitled to contest the status certified by the other state.[45]

In the case of Argentine residents, the AFIP is the competent entity to issue the certificates of fiscal residency.[46]

Limitation on benefits (LOB) provisions: the conventions signed with the United Kingdom and Sweden provide that the reduced withholding on interest and royalties shall not apply "if the main purpose or one of the main purposes of any related party" is to secure the benefits of the convention.

There are rules on "independent agents" that do not constitute a "permanent establishment" (article 5, paragraphs 5 and 6).

There is a special relationship rule applicable to interest and royalties (paragraph 6, article 11 and paragraph 6, article 12). This is applicable in most of the treaties that follow OECD/UN models.

The application of arm's length principles is necessary in order to enjoy the benefits of the treaty regarding dividends withholding at source.

There are special rules for associated enterprises:

(a) special treatment for the allocation of profits other than those earned by independent companies (article 9, OECD model). This is applicable in most of the treaties that follow OECD/UN models;
(b) symmetrical adjustments are made in the case of transfer pricing adjustments whereby the profit attributed to the company based in a contracting state is not allowed in cases of fraud or negligent act or omission (treaties with Canada, Finland, Sweden, Denmark, the Netherlands, Norway and Switzerland);
(c) the convention with Spain includes a tax-sparing clause that admits a tax paid in Argentina equal to 15 per cent of the gross amount of royalties paid for technical assistance and transfer of technology, provided that the beneficiary of the payments is not a company controlled by or controlling the Argentine company (through a percentage interest exceeding 50 per cent of the capital). The tax actually withheld under the convention comes to 10 per cent. Similar provisions are contained in the treaties with Germany, France, Italy, Spain, Canada, Finland and Sweden.

There is a rule on "star companies" (paragraph 2 of article 17) which is applicable in most of the conventions that follow OECD/UN models.

In some treaties, Argentina applies the UN standard according to which are taxed (a) the earnings obtained by a permanent establishment; or (b) the sales in the other state of property or goods where such sales are of the same or a similar type to those carried out by means of the permanent establishment; or (c) other activities carried on in that other state which are of the same or a similar nature to those conducted by

45 *Ibid.*, p. 237.
46 *Resolución* 336/2007, Ministry of Economy and Production, Argentina.

means of such permanent establishment. The provisions of subsections (b) and (c) do not apply if the company shows that the similar activities or sales mentioned in these subsections are not connected to such permanent establishment.

Special definitions of dividends, interest and royalties are applicable in most conventions that follow the OECD/UN model.

Appendix: List of existing DTCs

To date, treaties with the following countries are in force:

Bolivia (Law no. 21,780, BO 25 April 1978)
Germany (Law no. 22,025, BO 23 July 1979)
France (Law no. 22,357, BO 30 December 1980)
Brazil (Law no. 22,675, BO 17 November 1982)
Italy (Law no. 22,747, BO 24 February 1983)
Chile (Law no. 23,228, BO 1 October 1985)
Spain (Law no. 24,258, BO 19 November 1993)
Canada (Law no. 24,398, BO 13 December 1994)
Finland (Law no. 24,654, BO 10 July 1996)
United Kingdom of Great Britain and Northern Ireland (Law no. 24,727, BO 4 December 1996)
Sweden (Law no. 24,795, BO 14 April 1997)
Denmark (Law no. 24,838, BO 24 July 1997)
The Netherlands (Law no. 24,933, BO 15 January 1998)
Belgium (Law no. 24,850, BO 22 July 1997)
Australia (Law no. 25,238, BO 31 December 1999)
Norway (Law no. 26,461, BO 13 September 2001)
Mexico (Law no. 25,830, BO 13 January 2004)
Swiss Confederation (provisional application since 1 January 2001 according to the attached protocol dated 23 November 2000)
Russian Federation (Law no. 26,185, BO 3 January 2007)

There is no treaty in force with the USA. The instrument has not been ratified.