Florida Tax Review

Volume 22 Article 26

2023

Is Argentina Ready for the New International Tax Era?

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FLORIDA TAX REVIEW

Volume 22 *2019* *Number 3*

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by

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ABSTRACT

We are facing a new era in the international tax system. Even though we have achieved consensus in many areas, adopting multilateral solutions or standardizing by establishing minimum standards, we are also facing unilateral measures due to a lack of consensus in other very sensitive areas. Argentina's approach toward the international tax system has always been very dependent on the local politics. In very recent years, the objective of becoming a member of the OECD has made Argentina its best student. But it has not always been this way. To understand if Argentina is ready to face the new era that the international tax system is going through, we will review four relevant—and capriciously chosen—aspects of Argentine international tax rules, taking into account the evolution, current situation, and effects. We will analyze the tax treaty network, transparency policy, CFC rules, and taxation of digital economy.

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I. Introduction

The fight against tax evasion and aggressive tax planning has been, in general, a common goal for both developed and developing countries. Lack of transparency and coordination was the main impediment. But, of course, that lack of political willingness on the part of developed countries was the real cause.

The OECD, originally formed by the largest economies, was the main—and probably sole—designer of the international tax rules until the United Nations, empowered by the developing countries, stood up in the late 1970s. Since then, the OECD has started to show interest in topics that affect developing countries, such as the role of tax havens—arguably, sponsored or backed by developed countries. Also, OECD countries—or at least some of them—have started to accept deviations from the OECD Model when negotiating tax treaties with developing countries.

Finally, the 2008 financial crisis caused the OECD, this time pushed by the G-20, to seriously address the lack of transparency and the need to fix the rules that enabled aggressive tax planning, by means of the BEPS project. Even though it is argued that the international tax system is basically formed by the tax treaty network,[1] the BEPS project aimed to influence the amendment and standardization of several domestic rules with international impact. On the other hand, avoiding double taxation always created tension between developed and developing countries. While developed countries considered it the main objective of tax treaties, developing countries just pursued, with no success, the preservation of their first right to tax.

The rationale was that developed countries had similar flows of investments, which were capital exporters and residence countries.

1. See Yariv Brauner, *Treaties in the Aftermath of BEPS*, 41 Brook. J. Int'l L. 973 (2016), and the citations included therein.

Developing countries, on the contrary, were capital importers and source countries. The digital economy broke this logic. The source country is where users and the market are, and the residence country is everywhere—and nowhere. Market countries—or source countries under the digital economy logic—include the United States, the United Kingdom, and Germany but also China, India, Brazil, Indonesia, and Nigeria.

We are now facing a new era in the international tax system. Even though we have achieved consensus in many areas, adopting multilateral solutions or standardizing by establishing minimum standards, we are also facing unilateral measures due to a lack of consensus in other very sensitive areas. Argentina's approach toward the international tax system has always been very dependent on the local politics. In very recent years, the objective of becoming a member of the OECD has made Argentina its best student. But it has not always been this way.

To understand if Argentina is ready to face the new era that the international tax system is going through, we will review four relevant—and capriciously chosen—aspects of Argentine international tax rules, taking into account the evolution, current situation, and effects. We will analyze the tax treaty network, transparency policy, CFC rules, and taxation of digital economy.

II. The Argentine Tax Treaty Network

It has been argued that the international tax system is basically formed by the tax treaty network.[2] In this sense, the traditional—and original—reason to enter into a tax treaty was the avoidance of double taxation. It is understood that double taxation became critical after World War I, when countries had to increase taxes substantially. The newly created League of Nations and the International Chamber of Commerce led the search for solutions.[3] The Economic and Finance Committee of the League of Nations asked four economists to prepare a report on this

2. *Id.*

3. *See* Joint Comm. on Internal Rev. Tax'n, Legislative History of United States Tax Conventions, Volume 4: Model Tax Conventions sec. 1, 4001 *et seq.* (1962) (League of Nations materials) [hereinafter Vol. 4: Model Tax Conventions].

topic,[4] which was the starting point for the Draft Model Convention for the Prevention of Double Taxation, prepared by the League of Nations.[5]

As a result of the report submitted in 1923 by the four economists and a second report submitted in 1925 by a newly created group of technical experts,[6] the League of Nations prepared the first model convention, together with a new report on double taxation.[7] The 1927 Model was criticized by Chile, which was the only South American country that issued an opinion. Chile argued that the 1927 Model gave too much predominance to residence taxation, which would lead to a major loss of revenue for developing countries.[8]

With the outbreak of World War II, the countries not involved in it[9] formed a new subcommittee within the Fiscal Committee. This new subcommittee held two meetings in Mexico, which led to publication of a new model convention in 1943.[10] Following Chile's reaction to the 1927 Model, the new subcommittee drafted a model seeking to favor source taxation. Developed countries' response came very soon after. As a result of a new meeting of the League of Nation's Fiscal Committee, a new model convention was published in 1946.[11] The London Model

4. G. Bruins et al., Report on Double Taxation Submitted to the Financial Committee (1923), *reprinted in* Vol. 4: Model Tax Conventions, *supra* note 3, at 4003.

5. Double Taxation and Tax Evasion: Report Presented by the Committee of Technical Experts on Double Taxation and Tax Evasion (League of Nations 1927), *reprinted in* Vol. 4: Model Tax Conventions, *supra* note 3, at 4111 [hereinafter 1927 Double Taxation & Tax Evasion Report].

6. Double Taxation and Tax Evasion: Report and Resolutions Submitted by the Technical Experts to the Financial Committee of the League of Nations (League of Nations 1925), *reprinted in* Vol. 4: Model Tax Conventions, *supra* note 3, at 4057.

7. 1927 Double Taxation & Tax Evasion Report, *supra* note 5.

8. Arvid A. Skaar, Permanent Establishment: Erosion of a Tax Treaty Principle 84 (1991).

9. These countries were basically Latin American countries, the United States, and Canada.

10. League of Nations, Model Bilateral Conventions for the Prevention of International Double Taxation and Fiscal Evasion (1943).

11. League of Nations, Model Bilateral Convention for the Prevention of the Double Taxation of Income and Property (1946).

was basically a redrafting of the Mexico Model, back to previous models published by the League of Nations,[12] which favored residence taxation.

The task of establishing a mechanism to solve the problem of double taxation at an international level was followed by the Organisation for European Economic Co-operation (OEEC)[13] and finally by the OECD. A series of four reports prepared by the Fiscal Committee of the OEEC from 1958 to 1961[14] led to the publication of the first version of the OECD Model.[15] Also, the United Nations made important contributions to this area.[16]

In order to achieve the first—and at that moment primary—objective of avoiding double taxation, a very important question needed to be answered: Which country should have the right first to tax: the source or the residence country? This discussion was solved—in general terms—by granting limited taxation of passive income to source countries and unlimited taxation to residence countries. In the case of active income, the residence country would tax (without limit), and the source country would have no power to tax, unless the recipient had a permanent establishment in the source country.

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12. We refer to the 1927 Model and the three multilateral draft conventions prepared by the League of Nations and published in 1931.

13. The predecessor of the OECD. *See* Vol. 4: Model Tax Conventions, *supra* note 3, sec. 2, 4443 *et seq.* (OEEC materials).

14. *Id.* at 4445–4700 (reprinting these four reports); *see also* OECD, Model Tax Convention on Income and on Capital: Condensed Version 2017, intro. ¶ 6 (2017), https://doi.org/10.1787/mtc_cond-2017-en (describing history).

15. OECD, Draft Double Taxation Convention on Income and Capital (1963), https://doi.org/10.1787/9789264073241-en [hereinafter 1963 OECD Model].

16. For an extensive and in-depth analysis of the history of double tax treaties, see the proceedings (not yet published) of the conference on the history of double taxation that took place in 2008 in Austria. *See The History of Double Tax Conventions, Rust (2008)*, WU, https://www.wu.ac.at/taxlaw/eventsmain/internatevents/scientificrust/historydtc (last visited Sept. 4, 2020) (invitation, program, and gallery from the conference); Matthias Huber & Daniel P. Rentzsch, *Conference Report: History of Double Taxation Conventions, Rust, 4–7 July 2008*, 36 Intertax 533 (2008); *see also History of Tax Treaties*, Tax Treaties History, http://www.taxtreatieshistory.org/ (last visited Sept. 2, 2020).

This structure of the tax treaties seemed to make sense in the case of two countries having similar flows of cross-border income. In a second stage of the evolution of tax treaties other issues became critical and shared the top concerns, together with the avoidance of double taxation, in entering into a tax treaty: preventing international fiscal evasion, non-discrimination, and exchange of information, among others.[17] In response to the structure given by the OECD Model some alternatives surged.[18] A first example was the model convention prepared by the Andean Pact, especially relevant in South America.[19] This model convention was the opposite of the OECD Model and was based on territorial taxation, granting exclusive power to tax to the source country (with very few exceptions). Somewhere in the middle—probably closer to OECD's side—between the OECD (based on residence taxation) and Andean Pact (based on source taxation) model conventions, we could place the model convention prepared by the United Nations.[20] It could be said that both alternatives failed.[21]

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17. OECD, Model Tax Convention on Income and on Capital 2010, intro. ¶ 16 (2012), https://doi.org/10.1787/9789264175181-en.

18. Among others (in chronological order): General Convention for Fiscal Cooperation Among the Member States of the African, Malagasy, and Mauritian Common Organization (OCAM), Jan. 29, 1971, Tax Analysts Doc. 97-32923; Treaty on Avoidance of Tax Duplication and Control of Tax Evasion Amongst the States of the Arab Economic Unity Council, Dec. 3, 1973, Tax Analysts Doc. 96-9280; Council for Mutual Economic Assistance (Comecon) Agreement on the Avoidance of Double Taxation on the Income and Property of Bodies Corporate, May 19–June 21, 1978, Tax Analysts Doc. 95-30498; Association of Southeast Asian Nations: 1987 Intra-ASEAN Model Double Taxation Convention, Dec. 15, 1987, Tax Analysts Doc. 2000-31082; Caribbean Community Agreement Concerning Taxes on Income, Profits or Gains and Capital Gains, and Regional Trade and Investment, July 6, 1994, Tax Analysts Doc. 95-30604.

19. Model Double Taxation Convention for the Andean Pact Countries, Nov. 16, 1971, Tax Analysts Doc. 96-11757.

20. U.N. Model Double Taxation Convention Between Developed and Developing Countries (2001), https://www.un.org/ga/search/view_doc.asp?symbol=ST/ESA/PAD/SER.E/21&Lang=E.

21. Only two countries could enter into a tax treaty based on the Andean Pact Model Convention with a country outside the Andean Pact (now Andean Community). These countries were Chile and Bolivia; both signed a tax treaty with Argentina. See discussion *infra* notes 27–29 and accompanying text. The U.N. Model was not used for many tax treaty negotiations; only

Argentina's concern for double taxation started very early.[22] In 1961, a special commission in the Treasury Department was formed to deal with treaty negotiations.[23] Even before this, as early as 1946, Argentina had entered into several tax treaties, limited to income derived from international transport activities.[24] Argentina was probably one of the first countries in South America to enter into a general tax treaty. The one with Sweden was signed on September 3, 1962, and became effective on January 1, 1963, even before the publication of the first version of the OECD Model.

After this occurred, Argentina entered into various tax treaties. The first one (second overall) was signed with the Federal Republic of Germany on July 13, 1966.[25] At the end of 1972, with effect from January 1, 1974, Argentina terminated this tax treaty, but it was renegotiated and a new tax treaty was signed in 1978.[26] Also, even though Argentina was not a party to the Andean Pact, in 1976 it signed

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a few provisions are commonly incorporated into double taxation conventions (articles 5.2, 12, and 14).

22. For a complete analysis, see Adolfo Atchabahian, *Argentina's Tax Treaty Network and the Distinctive Features of Its Treaties*, Tax Treaty Monitor, June 2001, at 225; Axel A. Verstraeten, *Argentina's Struggle in Negotiating Double Tax Conventions*, 49 Tax Notes Int'l 957 (Mar. 17, 2008).

23. *See* Atchabahian, *supra* note 22.

24. As of August 2019, Argentina had 17 treaties in force regarding income derived from international transport activities: China, Colombia, Cuba, Ecuador, Greece, Iran, Israel, Japan, Malaysia, Panama, Paraguay, Peru, Portugal, United States, Uruguay, and Venezuela. *See Convenios Vigentes para Evitar la Doble Imposición en Materia de Transporte Internacional*, Gobierno Arg., https://www.argentina.gob.ar/economia/ingresospublicos/conveniostransporte (last visited Dec. 10, 2020).

25. The two countries agreed to temporary measures in order to apply certain provisions of the tax treaty in 1974 and 1975 (as established by Law No. 21352, July 6, 1976 (Arg.); *see also* Mary Mercedes Marti, *Latin American Tax Law Update: 1976*, 9 Law. Americas 584, 587 & n.13 (1977); *infra* note 26.

26. Convention Between the Federal Republic of Germany and the Argentine Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and Property, Ger.-Arg., July 13, 1978, 1246 U.N.T.S. 241.

two—very similar—tax treaties with Bolivia[27] and Chile[28] based on the Andean Pact Model.[29] In 1979, Argentina signed tax treaties with Austria,[30] France,[31] and Italy,[32] and in 1980 with Brazil.[33] All of these tax treaties were based on the 1977 OECD Model, with some differences. In 1980, Argentina signed a tax treaty with the United States,[34] which

27. Convention Between the Argentine Republic and the Republic of Bolivia for the Avoidance of Double Taxation, Arg.-Bol., Oct. 30, 1976, Tax Analysts Doc. 97-27828.

28. Convention Between the Argentine Republic and the Republic of Chile for the Avoidance of Double Taxation with Respect to Taxes on Income, Earnings, or Profits, and on Capital and Wealth, Arg.-Chile, Nov. 13, 1976, Tax Analysts Doc. 97-24819 (in force from Dec. 19, 1985, but since terminated).

29. For an analysis of the treaty with Chile, see Axel A. Verstraeten, *El Convenio para Evitar la Doble Tributación Entre Chile y la Argentina*, Revista Derecho Fiscal, Mar./Apr. 2009, at 207. For an analysis of the treaty with Bolivia, see Axel A. Verstraeten, *El Convenio para Evitar la Doble Tributación Entre Bolivia y Argentina*, *in* Temas en Derecho Tributario en Homenaje al Profesor Alfredo Benitez Rivas 83 (Alvaro Villegas Aldazosa ed., 2010).

30. Convention Between the Argentine Republic and the Republic of Austria for the Avoidance of Double Taxation with Respect, to Taxes on Income and on Capital, Arg.-Austria, Sept. 13, 1979, Tax Analysts Doc. 97-24818. This treaty was unilaterally terminated by Argentina on June 28, 2008, effective from January 1, 2009. *See* Larissa Hoaglund, *Argentina Terminates Tax Treaty With Austria*, 51 Tax Notes Int'l 147 (July 14, 2008).

31. Convention Between the Government of the French Republic and the Government of the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, Fr.-Arg., Apr. 4, 1979, 1264 U.N.T.S. 3.

32. Convention Between the Argentine Republic and the Italian Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital and for the Prevention of Fiscal Evasion, with Protocol, It.-Arg., Nov. 15, 1979, Tax Analysts Doc. 97-28609-I.

33. Convention Between the Federative Republic of Brazil and the Argentine Republic for Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Braz.-Arg., May 17, 1980, 1300 U.N.T.S. 33.

34. Joint Comm. on Tax'n, 97th Cong., JCS-49-81, Explanation of Proposed Income Tax Treaty (and Proposed Protocol) Between the United States and the Argentine Republic (1981); *see also Argentina-United States:*

resembled the 1977 OECD Model and the 1977 U.S. Model, but included a tax sparing provision. This treaty, however, did not obtain approval by the U.S. Senate.

During the rest of the 1980s, Argentina did not enter into any tax treaties; however, this changed dramatically in the 1990s. During the 1990s and early 2000s, Argentina signed eleven tax treaties (Australia,[35] Belgium,[36] Canada,[37] Denmark,[38] Finland,[39] Netherlands,[40] Norway,[41]

1981 Income and Capital Tax Convention and Final Protocol, Tax Analysts Doc. 94-30747 (treaty was not approved and was abandoned).

35. Agreement Between the Government of Australia and the Government of the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Protocol, Austl.-Arg., Aug. 27, 1999, Tax Analysts Doc. 1999-31445.

36. Convention Between the Argentine Republic and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Arg.-Belg., June 12, 1996, Tax Analysts Doc. 1999-3944.

37. Convention Between Canada and the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Can.-Arg., Apr. 29, 1993, Tax Analysts Doc. 93-31570.

38. Convention Between the Government of the Kingdom of Denmark and the Government of the Republic of Argentina for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Den.-Arg., Dec. 12, 1995, Tax Analysts Doc. 96-31248.

39. Agreement Between the Republic of Finland and the Argentine Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, Fin.-Arg., Dec. 13, 1994, Tax Analysts Doc. 96-2267.

40. Convention Between the Kingdom of the Netherlands and the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Neth.-Arg., Dec. 27, 1996, Tax Analysts Doc. 98-4044.

41. Convention Between the Kingdom of Norway and the Republic of Argentina for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Nor.-Arg., Oct. 8, 1997, Tax Analysts Doc. 98-4932.

Russia,[42] Spain,[43] Switzerland,[44] and the United Kingdom[45]) and renegotiated the treaty it had with Sweden.[46] All of these tax treaties seem to resemble the U.N. Model.

In principle, it could be said that Argentina could divide its tax treaties into four groups, which respond to different moments in Argentina's political situation. A first group would include the early versions of the treaties signed with Sweden and Germany in the 1960s. A second

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42. Convention Between the Government of the Russian Federation and the Government of the Republic of Argentina for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, Russ.-Arg., Oct. 10, 2001, Tax Analysts Doc. 2007-2310.

43. Convention Between the Kingdom of Spain and the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Spain-Arg., July 21, 1992, 1854 U.N.T.S. 149. This 1992 treaty terminated as of January 1, 2013. *See* Sebastián López-Sansón & Fernando Esteban Morera-Martínez, *News Analysis:Why Argentina Terminated Its Tax Treaties with Chile, Spain, Switzerland*, Tax Analysts Doc. 2012-15224 (2012).

44. Convention Between the Swiss Confederation and the Argentine Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, as Amended Through 2006, Switz.-Arg., Apr. 23, 1997, Tax Analysts Doc. 97-30953-I. The tax treaty was not submitted to Congress for approval nor published. However, both governments agreed that the tax treaty would become effective on January 1, 2001 (note exchanged on Nov. 23, 2000). *See* Cristian E. Rosso Alba & Lucía Ibarreche, *Argentina Terminates Provisional Application of Tax Treaty with Switzerland*, Tax Analysts Doc. 2012-2785. This was done in order to avoid the trigger of several most favored nation clauses included in Argentine tax treaties signed with other European countries. *Id.* In 2012, the 1997 treaty was terminated. *Id.*; *see also* López-Sansón & Morera-Martínez, *supra* note 43.

45. Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, U.K.-Arg., Jan. 3, 1996, Tax Analysts Doc. 96-31575.

46. Convention Between the Kingdom of Sweden and the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Swed.-Arg., May 31, 1995, Tax Analysts Doc. 95-30592; *see also* Lag (1995:1338) om dubbelbeskattningsavtal mellan Sverige och Argentina (Svensk författningssamling [SFS] 1995:1338) (Swed.).

group would include those signed—including the one renegotiated—between the mid-1970s and early 1980s. A third group would include the treaties signed during the 1990s and early 2000s. A fourth group would include treaties signed since 2013.

The first group of treaties signed by Argentina responded to different situations. The treaty with Sweden was based on the source principle, meaning that each country taxed the income originating in its territory. This was the prevailing doctrine in those years. The treaty with Germany was based on the 1963 OECD Model[47] and represented a sacrifice to Argentina. The second group of tax treaties was negotiated during a de facto government that had an open economy strategy. The treaties signed with Bolivia, Brazil, and Chile represent the common idea, during those years, that a regional integration was the objective of the region; also, these countries had de facto governments as well as very good relations with the Argentine government. This is maybe the reason why the treaties with Bolivia and Chile were based on the source principle. Following the economic model adopted by the de facto government in power during this stage, the treaties signed with Austria, France, and Italy gave many advantages to investments arising from those countries into Argentina.

During the 1980s, no tax treaties were negotiated because the government considered that it was not worthwhile to sign treaties if they implied a revenue sacrifice. This changed in 1989 when a liberal president won the elections. Argentina began an open-economy period: public services were privatized—following the Washington Consensus recommendations—and treaty negotiations restarted. Argentina's negotiations were focused on European countries because foreign direct investment came from those countries; Australia and Canada were the exceptions. These treaties followed the U.N. and OECD Models, and in some cases contained special provisions not commonly included in tax treaties between developed and developing countries. In a sense, these deviations could be considered as a victory for Argentina. Consequently, these countries making concessions to Argentina included most favored nation clauses, making sure that the "exceptions" they were making were applied to other OECD countries. The fact that Argentina's tax treaty

47. *See* 1963 OECD Model, *supra* note 15.

negotiator was Antonio Hugo Figueroa (a member of the U.N. Group of Experts that drew up the U.N. Model) was surely an influence.[48]

It is very important to take into account that the first and second group of tax treaties signed by Argentina were negotiated when Argentina had a territorial taxation system in force. This changed in 1992 when the law was amended. However, it was not until 1998 that the worldwide taxation system came into force with the enactment of a whole new chapter in the income tax law and regulations. This situation may explain some of the provisions contained in Argentina's tax treaties signed in the past, considering Argentina had no tax interest regarding foreign income earned by Argentine taxpayers.

The inertia of this period lasted until 2006 when the last tax treaty of this group was signed with Russia. Argentina had suffered substantial changes, including a massive economic crisis in 2001 and the election in 2003 of a soon-to-become populist government that lasted 12 years. Some of the tax treaties in force included loopholes that created substantial tax savings for foreign investors. The tax treaty with Austria included exemptions on interest payments, capital gains, and tax on assets, which allowed an Argentine resident individual to invest abroad through Austrian structures that resulted in double non-taxation.[49] The tax treaties with Chile, Spain, and Switzerland exempted residents of those countries from paying taxes on Argentine assets, discriminating against residents from elsewhere. The tax treaty with Chile included exemptions on several other flows of income[50] and the one with Switzerland beneficial tax treatment on royalty payments.

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48. *See* Antonio Hugo Figueroa, *International Double Taxation: General Reflections on Jurisdictional Principles, Model Tax Conventions and Argentina's Experience*, 59 Bull. Int'l Tax'n 379 (2005).

49. Axel Verstraeten, *Bonos Austríacos, ¿Ahora Qué?*, El Cronista (Aug. 7, 2008), https://www.cronista.com/impresageneral/Bonos-austriacos-ahora-que-20080807-0093.html.

50. Fernando Garcia & Axel Verstraeten, *¿Abuso de Tratado? (Primera Parte)*, Periódico Económico Tributario, no. 525 (Dec. 9, 2013); Fernando Garcia & Axel Verstraeten, *¿Abuso de Tratado? (Segunda Parte)*, Periódico Económico Tributario, no. 526 (Dec. 10, 2013).

These situations led Argentina to unilaterally terminate the tax treaties with Austria,[51] Chile,[52] Spain,[53] and Switzerland.[54] These terminations led to the formation of a committee[55] to review and assess all tax treaties in force. However, no more tax treaties were renegotiated or terminated.

Spain is one of the largest foreign investors in Argentina, so a new tax treaty was immediately negotiated and signed.[56] The same occurred with Switzerland.[57] These tax treaties, signed in 2013 and 2014, were very similar to the old ones, which were unilaterally terminated by Argentina, but did not include any of the loopholes that caused such termination. It could be said that they followed in essence the U.N. Model.

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51. The tax treaty was terminated on June 26, 2008, effective as of Jan. 1, 2009. *See supra* note 30. The termination notice was published on July 22, 2008, in the Boletín Oficial at page 20, https://www.boletinoficial.gob.ar/detalleAviso/primera/9254611/20080722?busqueda=2.

52. The tax treaty was terminated on June 29, 2013, effective as of Jan. 1, 2013. *Argentina Terminates Three Tax Treaties*, EY Tax Insights (Dec. 2012), taxinsights.ey.com/archive/archive-articles/argentina-terminates-three-tax-treaties.aspx [hereinafter EY Tax Insights].

53. *Id.* The tax treaty was terminated on June 29, 2012, effective as of Jan. 1, 2013.

54. The tax treaty had provisional application which was terminated by Argentina on Jan. 16, 2012, and effective as of such date. *Id.*; *see also supra* note 44.

55. Administración Federal de Ingresos Públicos [AFIP], Disposición 345/2013, Aug. 7, 2013.

56. Convenio entre el Reino de España y la República Argentina para Evitar la Doble Imposición y Prevenir la Evasión Fiscal en Materia de Impuestos sobre la Renta y sobre el Patrimonio, Spain-Arg., Mar. 11, 2013, Tax Analysts Doc. 2013-6458.

57. Convention Between the Swiss Confederation and the Argentine Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, Switz.-Arg., Mar. 20, 2014, Tax Analysts Doc. 2014-6762.

In 2015, Argentina signed new tax treaties with Chile[58] and Mexico,[59] the latter became the first new treaty partner of Argentina since 2006. Following the change of government in December 2015, with a more open economy idea, Argentina signed tax treaties with the United Arab Emirates (2016),[60] Qatar (2018),[61] Turkey (2018),[62] Japan (2019),[63] Luxembourg (2019),[64] Austria (2019),[65] amended the existing one with

58. Convenio entre la República Argentina y la República de Chile para Eliminar la Doble Imposición em Relación a los Impuestos sobra la Renta y sobra el Patrimonio y para Prevenir la Evasión y Elusión Fiscal, Arg.-Chile, May 15, 2015, Tax Analysts Doc. 2015-11910.

59. Acuerdo entre los Estado Unidos Mexicanos y la República Argentina para Evitar la Doble Imposición y Prevenir la Evasión Fiscal com Respect a los Impuestos sobre la Renta y sobre el Patrimonio, Mex.-Arg., Nov. 4, 2015, Tax Analysts Doc. 2015-26646.

60. Convention Between the Government of the Argentine Republic and the Government of the United Arab Emirates for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Arg.-U.A.E., Nov. 3, 2016, Tax Analysts Doc. 2016-23178.

61. Agreement Between the Government of the State of Qatar and the Government of the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Qatar-Arg., Apr. 19, 2018, Tax Analysts Doc. 2018-39354.

62. Convention Between the Argentine Republic and the Republic of Turkey for the Elimination of Double Taxation with Respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance, Arg.-Turk., Dec. 1, 2018, Tax Analysts Doc. 2019-5286.

63. Convention Between Japan and the Argentine Republic for the Elimination of Double Taxation with Respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance, Japan-Arg., June 27, 2019, Tax Analysts Doc. 2019-25281.

64. Convention Between the Argentine Republic and the Grand Duchy of Luxembourg for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Tax Evasion and Avoidance, Arg.-Lux., Apr. 13, 2019, Tax Analysts Doc. 2019-17002.

65. Convention Between the Argentine Republic and the Republic of Austria for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Tax Evasion and Avoidance, Arg.-Austria, Dec. 6, 2019, Tax Analysts Doc. 2020-11739 (not yet in force).

Brazil (2017),[66] and it is negotiating new tax treaties with Israel[67] and has been renegotiating the existing tax treaties with France and Germany.[68]

A common feature of the tax treaties signed by Argentina since 2015 is that they all substantially follow Action 6 of the BEPS project. Moreover, Argentina has already signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).[69] It is difficult to conclude if the change in Argentina's tax treaty policy, consisting of actual signed tax treaties in recent years and following BEPS, Action 6 guidelines, has had any positive effect. MLI is not in force yet for Argentina. The most important foreign investors in Argentina still have old tax treaties (Spain, Germany, Italy, France, and Switzerland) or no tax treaty at all (United States). What we can indeed conclude is that Argentina has tried to follow the OECD standard in this area, increasing the tax treaty network and following BEPS recommendations.

III. Information Exchange in Argentina

International exchange of tax information in Argentina is done basically by means of five instruments: (1) tax treaties including provisions related to exchange of information (art. 26), (2) Tax Information Exchange Agreements (TIEAs), authorized by section 101 of the Tax Procedure Law, (3) Convention on Mutual Administrative Assistance in Tax Matters (CMAATM), (4) Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (CRS MCAA), and (5) Multilateral Competent Authority Agreement on the Exchange of CbC Reports (CbC MCAA). As to tax treaties, all the network

66. Protocolo de Enmienda al Convenio para Evitar la Doble Imposición y Prevenir la Evasión Fiscal com Respecto a los Impuestos sobre la Renta entra la República Argentina y la República Federativa del Brasil y Su Protocolo, Arg.-Braz., July 21, 2017, Tax Analysts Doc. 2017-96770.

67. *See* Monica Anderson, *Argentina, Israel Negotiating Tax Treaty*, 2019 Tax Notes Today Int'l 242-10 (Dec. 17, 2019).

68. *See* Monica Anderson, *Argentina, France Sign Protocol to Tax Treaty*, 2019 Tax Notes Today Int'l 239-8 (Dec. 12, 2019); Larissa Hoaglund, *Germany Notes Status of Tax Treaty Negotiations*, 2020 Tax Notes Today Int'l 14-10 (Jan. 22, 2020).

69. Argentina: MLI Reservations and Notifications (Provisional), June 7, 2017, Tax Analysts Doc. 2017-93835.

mentioned above include information exchange provisions. All of these treaties include an exchange of information article, based on Article 26 of the OECD/U.N. Model. The only tax treaty that did not include this provision was the one with Switzerland, which was terminated by Argentina. However, Argentina and Switzerland signed a new agreement in 2014, following the OECD Model and including Article 26.

Until mid-2009, Argentina had no information exchange agreements with tax havens or in jurisdictions with bank secrecy rules. Following the current trend, Argentina signed TIEAs with countries considered to be tax havens and other countries. Argentina signed agreements with the following countries and jurisdictions: Andorra (in force),[70] Armenia (in force),[71] Aruba (in force),[72] Azerbaijan (in force),[73] Bahamas (in force),[74] Bermuda (in force),[75] Brazil (in force),[76] Cayman

70. Acuerdo entre el Gobierno del Principado de Andorra y el Gobierno de la República Argentina para el Intercambio de Información en Materia Fiscal, Andorra-Arg., Oct. 26, 2009, Tax Analysts Doc. 2009-24267 (approved by Law No. 26750, promulgated June 6, 2012, Boletín Oficial (June 7, 2012), https://www.boletinoficial.gob.ar/detalleAviso/primera/70670/20120607).

71. Agreement Between the Government of the Argentine Republic and the Government of the Republic of Armenia on Exchange of Information on Tax Matters, Arg.-Arm., July 7, 2014, Tax Analysts Doc. 2014-16920.

72. Agreement Between the Argentine Republic and the Kingdom of the Netherlands, in Respect of Aruba, for the Exchange of Information with Respect to Taxes, Arg.-Aruba, Sept. 30, 2013, Tax Analysts Doc. 2013-24052.

73. Agreement Between the Argentine Republic and the Republic of Azerbaijan on the Exchange of Tax Information, Arg.-Azer., Dec. 17, 2012, Tax Analysts Doc. 2013-3851.

74. Agreement Between the Commonwealth of the Bahamas and the Argentine Republic for the Exchange of Information on Tax Matters, Bah.-Arg., Dec. 3, 2009, Tax Analysts Doc. 2009-26640 (approved by Law No. 26748, promulgated June 6, 2012, Boletín Oficial (June 7, 2012), https://www.boletinoficial.gob.ar/detalleAviso/primera/70666/20120607).

75. Agreement Between Bermuda and the Argentine Republic for the Exchange of Information Relating to Taxes, Berm.-Arg., Aug. 22, 2011, Tax Analysts Doc. 2011-18395.

76. Acuerdo de Intercambio de Informaciones Tributarias y Aduaneras Argentina-Brasil, Arg.-Braz., Apr. 21, 2005, http://afip.gob.ar/institucional/Documentos/acuerdos/ac.impadua.brasil.pdf; *see also* David

Islands (in force),[77] Chile (not in force),[78] China (in force),[79] Costa Rica (in force),[80] Curaçao (in force),[81] Ecuador (in force),[82] Guernsey (in

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Roberto R. Soares da Silva, *Brazil, Argentina Sign Agreement on Exchange of Tax Information*, Tax Analysts Doc. 2005-8721 (Apr. 27, 2005).

77. Agreement Between the Cayman Islands and the Republic of Argentina on Exchange of Information on Tax Matters, Cayman Is.-Arg., Oct. 18, 2011, Tax Analysts Doc. 2011-22451.

78. Acuerdo de Intercambio de Informaciones Tributarias, Arg.-Chile, Oct. 24, 2006, http://afip.gob.ar/institucional/Documentos/acuerdos/AcuerdoCHILE.pdf; *see* OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Argentina* 92 (Nov. 2013), https://doi.org/10.1787/9789264205505-en [hereinafer *Argentina: OECD Global Forum*]. Chile considered that this agreement ceased to be in force when Argentina terminated the DTC. *See* López-Sansón & Morera-Martínez, *supra* note 43; EY Tax Insights, *supra* note 52. Even though there is a new DTC in force used to exchange tax information. *Supra* note 58 and accompanying text.

79. Agreement Between the Government of the Argentine Republic and the Government of the People's Republic of China for the Exchange of Information Relating to Taxes, Arg.-China, Dec. 13, 2010, Tax Analysts Doc. 2011-4718.

80. Acuerdo para el Intercambio de Información en Materia Tributaria entre la República Argentina y la República de Costa Rica, Arg.-Costa Rica, Nov. 23, 2009, Tax Analysts Doc. 2009-26034 (approved by Law No. 26,747, promulgated June 6, 2012, Boletín Oficial (June 7, 2012), https://www.boletinoficial.gob.ar/detalleAviso/primera/70668/20120607).

81. Agreement Between the Kingdom of the Netherlands, in Respect of Curaçao, and the Argentine Republic for the Exchange of Information with Respect to Taxes, Curaçao-Arg., May 14,2014, Tax Analysts Doc. 2014-13601.

82. Convenio de Cooperacón y Asistencia Administrativa Mutua e Intercambio de Información Tributaria entre el Servicio de Rentas Internas y la Adminstración Federal de Ingresos Públicos, Arg.-Ecuador, May 23, 2011, Tax Analysts Doc. 2011-13062.

force),[83] India (in force),[84] Ireland (in force),[85] Italy (in force),[86] Isle of Man (in force),[87] Jersey (in force),[88] Macao (in force),[89] Macedonia (in

83. Agreement Between the States of Guernsey and the Argentine Republic for the Exchange of Information Relating to Tax Matters, Guernsey-Arg., July 28, 2011, Tax Analysts Doc. 2011-16746.

84. Agreement Between the Government of the Argentine Republic and the Government of the Republic of India for the Exchange of Information and Assistance in Collection with Respect to Taxes, Arg.-India, Nov. 21, 2011, Tax Analysts Doc. 2012-6661.

85. Agreement Between Ireland and the Argentine Republic for the Exchange of Information Relating to Tax Matters, Ir.-Arg., Oct. 29, 2014, Tax Analysts Doc. 2014-26799.

86. Memorándum de Entendimento Sobre Cooperación e Intercambio de Información Entre la Administractión Federal de Ingresos Públicos (AFIP) y la Guardia di Finanza de la República Italiana, Arg.-It., Oct. 15, 2010, http://afip.gob.ar/institucional/Documentos/acuerdos/Acuerdo%20%20con%20Guardia%20Di%20Finanza-Italia.pdf; *see also* Larissa Hoagland, *Argentina, Italy Sign TIEA*, Tax Analysts Doc. 2010-22825 (Oct. 21, 2010).

87. Agreement Between the Isle of Man and the Argentine Republic for the Exchange of Information Relating to Tax Matters, Isle of Man-Arg., Dec. 14, 2012, Tax Analysts Doc. 2012-25860.

88. Agreement Between Jersey and the Argentine Republic on the Exchange of Information Relating to Tax Matters, Jersey-Arg., July 28, 2011, Tax Analysts Doc. 2011-16764.

89. Agreement Between the Argentine Republic and the Macao Special Administrative Region of the People's Republic of China for the Exchange of Information Relating to Taxes, Arg.-Macao, Sept. 5, 2014, Tax Analysts Doc. 2014-23272.

force),[90] Monaco (in force),[91] Peru (in force),[92] San Marino (in force),[93] South Africa (in force),[94] Spain (not in force),[95] Turkmenistan (in force),[96]

90. Agreement Between the Argentine Republic and the Republic of Macedonia on Exchange of Information on Tax Matters, Arg.-Maced., Apr. 26, 2013, Tax Analysts Doc. 2013-11770.

91. Agreement on the Exchange of Tax Information Between the Republic of Argentina and the Principality of Monaco, Arg.-Monaco, Oct. 13, 2009, Tax Analysts Doc. 2012-15286.

92. Acuerdo de Entre las Administraciones Tributarias de la República de Argentina y de la República del Perú para la Cooperación Técnica e Intercambio de Información Tributaria y Aduanera, Arg.-Peru, Oct. 7, 2004, http://afip.gob.ar/institucional/Documentos/acuerdos/ac.impadua.peru.pdf; *see also Argentina: OECD Global Forum*, supra note 78, at 65, 68, 72, 75, 94.

93. Agreement Between the Republic of San Marino and the Republic of Argentina Concerning Exchange of Information on Tax Matters, San Marino-Arg., Dec. 7, 2009, Tax Analysts Doc. 2011-18564 (approved by Law No. 26749, promulgated June 6, 2012, Boletín Oficial (June 7, 2012), https://www.boletinoficial.gob.ar/detalleAviso/primera/70672/20120607).

94. Agreement Between the Argentine Republic and the Republic of South Africa for the Exchange of Information Relating to Tax Matters, Arg.-S. Afr., Aug. 2, 2013, Tax Analysts Doc. 2013-20288.

95. Acuerdo de Intercambio de Información Tributaria Argentina-España, Arg.-Spain, May 7, 2004, http://afip.gob.ar/institucional/Documentos/acuerdos/AcuerdoEspa%C3%B1a.pdf; *see also Argentina: OECD Global Forum*, supra note 78, at 59, 94. Spain considered that this agreement ceased to be in force when Argentina terminated the DTC. *Argentina: OECD Global Forum*, supra note 78, at 17, 57; *see also* López-Sansón & Morera-Martínez, supra note 43. Even though there is a new DTC in force, *supra* note 56 and accompanying text, which is commonly used to exchange tax information.

96. Agreement Between the Government of Turkmenistan and the Government of the Argentine Republic on Exchange of Information on Tax Matters, Turkm.-Arg., Apr. 27, 2017, Tax Analysts Doc. 2017-4508.

United Arab Emirates (in force),[97] United States of America (in force),[98] Uruguay (in force),[99] and Venezuela (in force).[100]

The head of the federal tax authorities is empowered to execute information exchange agreements with foreign tax authorities. This is because tax secrecy does not apply when the federal tax authorities disclose information to foreign tax authorities, according to Argentina's Tax Procedure Law.[101] Moreover, Argentina has committed to exchange financial information on an automatic basis. In this sense, Argentina has also committed to apply the common reporting standard (CRS) and signed the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (MCAA).[102] Argentina is

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97. Agreement Between the Argentine Republic and United Arab Emirates on Exchange of Information on Tax Matters, Arg.-U.A.E., Feb. 5, 2016, Tax Analysts Doc. 2016-22212.

98. Agreement Between the Government of the United States of America and the Government of the Argentine Republic for the Exchange of Information Relating to Taxes, U.S.-Arg., Dec. 23, 2016, Tax Analysts Doc. 2017-1251.

99. Acuerdo entre la Republica Argentina y la Republica Oriental del Uruguay para el Intercambio de Información Tributaria y Método para Evitar la Doble Imposición, Arg.-Uru., Apr. 23, 2012, Tax Analysts Doc. 2012-8808 (approved by Law No. 26758, promulgated Aug. 21, 2012, Boletín Oficial (Aug. 22, 2012), https://www.boletinoficial.gob.ar/detalleAviso/primera/74265/20120822).

100. Acuerdo Entre las Administraciones Aduaneras y Tributarias de la Repúblic Argentina-Administración Federal de Ingresos Públicos (AFIP) y la República Bolivariana de Venezuela-Servicio Nacional Integrado de Administración Aduanera y Tributaria (SENIAT) para la Cooperación Técnica e Intercambio de Información Aduanera y Tributaria, Arg.-Venez., Feb. 18, 2014, http://afip.gob.ar/institucional/Documentos/acuerdos/acuerdoconvenezuela.pdf.

101. Tax Procedure Law, Law No. 11683, § 101 point d, Boletín Oficial (Jan. 12, 1933), as amended by Law No. 25795, Boletín Oficial (Nov. 17, 2003), https://www.boletinoficial.gob.ar/detalleAviso/primera/7257771/20031117?busqueda=1.

102. Argentina signed the Multilateral Convention on Mutual Administrative Assistance on Tax Matters on Nov. 3, 2011, ratified on Sept. 13, 2012, and the entry into force was Jan. 1, 2013. *Jurisdictions Participating in the Convention on Mutual Administrative Assistance in Tax Matters*, OECD, https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf (last updated July 22, 2020). Argentina has also committed to start

an early adopter and started to exchange information of financial accounts on an automatic basis on September 2017.

For purposes of implementing CRS at the local level, the federal tax authorities enacted General Resolution 3826/2015,[103] by which financial institutions are obliged to identify the beneficial owners of the accounts held by non-residents, and together with certain information, provide it to the tax authorities for further automatic exchange.

It is also worth mentioning that following the Peer Review Report, prepared by the Global Forum in 2013, Argentina exchanged information on an automatic basis with four countries and spontaneously to a lesser extent (less than 10 exchanges in 2011). Exchanges on an automatic basis were limited to information related to payment of passive income (dividends, interests, royalties, and rents). Argentina's most common information exchange partners include Spain, Brazil, Chile, Canada, Italy, France, Netherlands, and the United Kingdom. In addition, the Peer Review Report prepared by the Global Forum in 2013[104] concluded that, as of August 2012, the legal and regulatory framework for the availability of information in Argentina was in place.

As to information exchange with the United States, Argentina has not signed an IGA yet, but it did sign an information exchange agreement with the United States on December 23, 2016,[105] that may serve as a first step prior to the execution of an IGA. Thus, there are no implementation regulations related to this subject yet. The agreement between Argentina and the United States entered into force on November 13, 2017, and became effective as from January 1, 2018.[106]

In this regard, Argentine tax authority officials have informally explained in early 2019 that they are negotiating an IGA with the IRS. Also, U.S. Treasury has announced that Argentina is one of the

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exchanging information on automatic basis starting September 2017. *See Country Monitoring*, OECD, http://www.oecd.org/tax/transparency/country-monitoring/ (last visited Dec. 10, 2020).

103. Resolución General 3826, Boletín Oficial (Dec. 30, 2015), https://www.boletinoficial.gob.ar/detalleAviso/primera/139129/20151230, amended by Resolución General 4056-E, Boletín Oficial (May 22, 2017), https://www.boletinoficial.gob.ar/detalleAviso/primera/164002/20170522.

104. *Argentina: OECD Global Forum*, supra note 78 (reflecting the legal and regulatory framework as at Aug. 2012).

105. *Supra* note 98 and accompanying text.

106. *Supra* note 98 and accompanying text.

countries with which it is actively engaged in a dialogue toward concluding an IGA. There are no statistics regarding increase in revenue attributable to the exchange of information, as well as there is no data about reduction of tax related crimes (such as evasion, money laundering) or any other measurable or foreseeable gains as a result of this legislation.

A real measure of the effect of transparency was the success of the latest tax amnesty program. The change of government in 2015 and the potential entry into force of the CRS MCAA, of which Argentina became an early adopter, created the perfect scenario for a tax amnesty, also following the worldwide trend. In 2016, one year before Argentina would start receiving information, on an automatic basis, through the application of the CRS MCAA, Congress enacted a tax amnesty law.[107]

The consequence of this tax amnesty program was the second largest disclosure worldwide.[108] More than 254,700 taxpayers[109] disclosed assets for US $116,800 million. Most of the disclosed assets were passive income-producing assets[110] located abroad.[111]

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107. Law No. 27260, July 22, 2016, Boletín Oficial (July 22, 2016), https://www.boletinoficial.gob.ar/detalleAviso/primera/148428/20160722; *Argentina Publishes Legislation on Voluntary Disclosure, Tax Settlement, Eliminating Dividends Withholding Tax, and Other Measures*, Orbitax, https://www.orbitax.com/news/archive.php/Argentina-Publishes-Legislatio-21148 (last visited Sept. 7, 2020).

108. The biggest one was Indonesia for US $330,000 million. *Indonesia Tax Amnesty Nets $330 Bln—Now for Reform*, CNBC (Mar. 21, 2017), https://www.cnbc.com/2017/03/21/indonesia-tax-amnesty-nets-330-bln—now-for-reform.html.

109. 96% were individuals and only 4% legal entities. *See* El Sinceramiento Fiscal Superó los 116 mil Millones de Dólares, Gobierno Arg. (Apr. 4, 2017), https://www.minhacienda.gob.ar/el-sinceramiento-fiscal-supero-los-116-mil-millones-de-dolares/.

110. US $90 million, out of the US $98 million located abroad, were equities (listed or private), bonds, funds (US $55 million), cash in bank accounts (US $25,000 million) and real estate (US $10,000 million). The rest were cars, ships, planes, art, and jewelry. *See id.*

111. The United States and Switzerland concentrated more than 50% of the total disclosed assets located abroad. *See id.*; *Sinceramiento Fiscal: Se Exteriorizaron U$S 116.800 Millones*, CPCE Cordoba (Apr. 4, 2017), https://cpcecba.org.ar/noticias?idn=12360.

IV. Argentine CFC Rules

One of the main changes of the latest tax reform implemented in 2017 was the amendment of Argentina's CFC Rules. Argentine Income Tax Law (ITL)[112] applied only to Argentine source income until 1992 when Article 1 was amended, and residents were subject to worldwide taxation. However, it was not until the late 1990s that several amendments were introduced to the ITL over a couple of years[113] and the worldwide principle was effectively applicable. These changes included the first piece of CFC Rules. It has been said that "the general policy objectives pursued by the tax reform were to prevent the diversion of passive income to CFC's organized in tax haven and to avoid the accumulation of such income there."[114]

The ITL prevented deferral in two specifics cases, combining a "jurisdictional approach" with an "entity approach."[115] Argentine residents—individuals or legal entities—holding equity participations in foreign legal entities would recognize income on a current basis in the following cases:

Only the passive income should be recognized as taxable income if: (1) the capital of the foreign legal entity were represented in shares; (2) the foreign legal entity was incorporated or domiciled in a low or no tax jurisdiction—listed in the regulatory decree of the ITL; and (3) more than 50% of the income obtained by the foreign legal entity in such fiscal year was considered passive (i.e., rents, dividends, interests, royalties, among others).

All the income would be recognized as taxable income if the capital of the foreign legal entity were not represented in shares.

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112. Law 20628, Boletín Oficial (Dec. 31, 1973), as reorganized by Decreto 649/97, Boletín Oficial (Aug. 6, 1997), https://www.boletinoficial.gob.ar/detalleAviso/primera/7169578/19970806.

113. Law 25063, Boletín Oficial (Dec. 30, 1998), https://www.boletinoficial.gob.ar/detalleAviso/primera/7190749/19981230; Law 25239, Boletín Oficial (Dec. 31, 1999), https://www.boletinoficial.gob.ar/detalleAviso/primera/7202544/19991231; Decreto 290/2000, Boletín Oficial (Apr. 3, 2000), https://www.boletinoficial.gob.ar/detalleAviso/primera/7204448/20000403.

114. Juan Carlos Vicchi, *San Francisco IFA Congress: Argentina Report*, 86 Cahiers du Droit Int'l 329 (2001).

115. Walter Keiniger, *Copenhagen IFA Congress: Argentina Report*, 98 Cahiers du Droit Int'l 77 (2013).

Under the old system the concept of control was irrelevant. The legislation did not include a minimum threshold, which posed a practical problem for Argentine residents holding small percentages in foreign entities with respect to which they lacked information. In 2013 Argentina moved from a blacklist to a whitelist.[116] This meant eliminating the tax haven list included originally in the ITL's regulatory decree.[117] This new white list was going to be published yearly by the Argentine Federal Tax Authority (AFIP). The procedure was never clear. The first year the list was published directly on the tax authorities' website and only included the jurisdictions with which Argentina had information exchange agreements in place.[118]

The combination of the recently enacted whitelist system meant that the old CFC Rules had almost no practical application. For example, an Argentine resident was able to defer passive income simply by placing all of its passive income-producing assets in a share corporation domiciled in the British Virgin Islands, Cayman Islands, or Bermuda.[119] CFC Rules were very easily avoided because of the switch from a blacklist to a whitelist but also because Argentine residents disclosed few assets abroad (less than U.S. $20,000 million).

Following the tax amnesty, Argentina increased exponentially the numbers of taxpayers holding passive income producing assets,

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116. Decreto 589/2013, Boletín Oficial (May 30, 2013), https://www.boletinoficial.gob.ar/detalleAviso/primera/88528/20130530.

117. Decreto 1344/1998, Boletín Oficial (Nov. 25, 1998) https://www.boletinoficial.gob.ar/detalleAviso/primera/7188909/19981125?busqueda=2.

118. The white list was not very thorough but was improved over the years. The first white list did include Paraguay or Venezuela, with which Argentina had no information exchange agreements but were—and are—very important business partners and Mercosur members. The Income Tax Law included several negative tax consequences for doing business with counterparties in jurisdictions not included in the white list. See *Jurisdicciones Cooperantes y No Cooperantes*, AFIP, http://www.afip.gob.ar/jurisdiccionesCooperantes/#ver (last visited Sept. 12, 2020).

119. Most offshore jurisdictions had been included in the white list because they had an information exchange agreement with Argentina or had promised to execute one or to adhere to the CRS MCAA. The guidelines for the list were provided by Resolución General 3576, Boletín Oficial (Dec. 31, 2013), https://www.boletinoficial.gob.ar/detalleAviso/primera/100023/20131231?busqueda=2.

which could enjoy tax deferral by holding those assets though an offshore company with the sole condition that its capital had to be represented in shares. In late 2017, Argentine Congress passed a comprehensive tax reform,[120] including a substantial reform of the CFC Rules. The old regulations applied a combination of rules to attribute income to the Argentine resident shareholder. In the case of foreign branches and permanent establishments, income and expenses were attributed directly as if earned/made by the Argentine resident taxpayer itself. However, for foreign entities with capital not represented by shares, incorporated or domiciled in any foreign jurisdiction, their net income obtained at the end of their fiscal year was automatically attributed to the Argentine resident partner, applying a deemed dividend approach. For foreign entities with capital represented by shares, incorporated or domiciled in tax havens, that had 50% of passive income, also a deemed dividend approach applied but limited to passive income.

The new CFC Rules are quite innovative in this sense because they seem to apply a deemed dividend combined with a partial veil-piercing approach, understood in a way that only the existence of income—the occurrence of the taxable event—is defined at the level of the foreign entity. However, the new CFC Rules include a final paragraph—applicable to all relevant CFC situations—stating that the category of income, determination of net income, foreign exchange conversion, and tax rates will be the ones applicable to the Argentine resident to which the income is attributed as if obtained directly by him.[121] The CFC Rules apply to both individuals and legal entities as shareholders of foreign companies. However, this rule has many practical differences because there are several situations in which the tax treatment for individuals and legal entities differ substantially.

As an example, ordinary income and capital gains are taxed at the same rate[122] if obtained by legal entities. Capital gains obtained by

120. Law 27430, Boletín Oficial (Dec. 29, 2017), https://www.boletinoficial.gob.ar/detalleAviso/primera/176831/20171229; *see also Argentina Enacts Comprehensive Reform*, EY Global Tax Alert (Dec. 29, 2017), https://www.ey.com/Publication/vwLUAssets/Argentina_enacts_comprehensive_tax_reform/$FILE/2017G_07182-171Gbl_Argentina%20enacts%20comprehensive%20tax%20reform.pdf.

121. Income Tax Law art. 133, as amended by Law 27430, *supra* note 120.

122. 30% for 2019 and 25% from 2020 onward. *Id.* art. 69.

individuals are taxed at 15% and ordinary income at progressive rates ranging from 5% to 35%.[123] Income obtained by legal entities is taxed on an accrual basis. In the case of individuals, it may be on an accrual or cash basis, depending on the type and category of income. Another major difference is the foreign exchange differences, which is always taxed in the hands of legal entities but exempted for individuals in certain cases.

The new rules construe that a foreign entity will be considered a CFC in the following two situations. The first case refers to foreign companies or legal entities (except trusts and foundations that have a specific tax treatment) that lack fiscal personality.[124] The regulations[125] explain that a company or legal entity will be deemed to lack fiscal personality when it is not considered liable for tax by the income tax—analogous to the Argentine income tax—in place in the jurisdiction in which it is incorporated, domiciled, or placed.

The second case includes any other company or legal entity, excluding trusts and foundations—that have a specific treatment—and entities with no tax personality, with respect to which the following three requirements are concurrently met:

Control: this requirement will be considered met if an Argentine resident has voting or economic rights of 50% or more. Any interest held by the spouse, cohabiting partner, or any third-degree relative or any company in which such person has control or is related to, will be added for purposes of calculating the 50%. This requirement will also be considered met if the Argentine resident holds less than 50% but: (i) has the right, in any way, to dispose or decide on the disposal assets of the legal entity, (ii) has the right to appoint the majority of the directors, administrators, or deciding members of the administration boards or bodies, (iii) has the right to remove the majority of the directors or administrators, (iv) has a current right on the benefits of the legal entity, (v) if at any moment during the financial year the foreign entity has financial assets that produce Argentine source passive income,

123. *Id.* art. 90.

124. *Id.* art. 133.e.

125. Decreto Reglamentario 1344/98, art. 165(VI).2, http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=54488 [hereinafter Income Tax Regulatory Decree].

exempt from Argentine income tax, that represent 30% or more of it total assets.[126]

The control test has several situations that are open for interpretation and have not been clarified in the regulations. For example, it is not clear what "related" means when testing if the Argentina resident holds a percentage in the CFC through another legal entity or what having "a current right on the benefits of the legal entity" means. These, among other issues, need further guidance from the tax authorities.

Substance and passive income: this requirement will be considered met if (1) the foreign entity does not have the necessary material and personal means to perform its activity, (2) 50% or more of its income is considered passive, or (3) its income causes—directly or indirectly—deductions to an Argentine tax resident related party.[127] The regulations[128] explain that the foreign entity will be considered to meet the substance requirement if it can be effectively proved that the organization has valid economic motivation and is adequate, in terms of infrastructure, assets, quantity and quality of personnel, to perform the business or activities.

Also, if the material and personnel means organized by the foreign entity are not enough, the requirement will be deemed met if the substance is provided by a foreign third party: (1) related to Argentine tax resident shareholder of the foreign entity, or (2) unrelated but incorporated, domiciled, or placed in the same jurisdiction in which the foreign entity is located, as long as such jurisdiction is not non-cooperative or a tax haven for Argentine income tax purposes.

The regulations[129] include an exhaustive list of what is considered passive income:

> (i) dividends and any form of distribution of profits derived from an equity participation, except dividends distributed by companies in which the CFC has direct or indirect control and the majority of its income derives from active income.

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126. Income Tax Law art. 133.f.2, as amended by Law 27430, *supra* note 120.

127. *Id.* art. 133.f.3.

128. Income Tax Regulatory Decree, *supra* note 125, art. 165(VI).5.

129. *Id.* art. 165(VI).6.

(ii) interests, except the CFC is a financial entity regulated by the local relevant authority in the jurisdiction in which it is incorporated, domiciled or placed, or the interests derive from loans between related parties of the same economic group, always that an Argentine entity is not directly or indirectly linked to the transaction.

(iii) royalties, except the CFC can prove that the asset producing the royalty was totally or substantially developed by the recipient.

(iv) rents of real estate, except the CFC's principal activity is renting real estate.

(v) income derived from insurance activities in case the beneficiary is the CFC, except it is regulated by the local authority in the jurisdiction in which it is incorporated, domiciled, or placed.

(vi) income derived from derivative transactions, except hedging and foreign exchange transactions.

(vii) income derived from trading of shares, equity participations, bonds, digital currencies, except the CFC is a financial entity regulated by the local relevant authority in the jurisdiction in which it is incorporated, domiciled, or placed

(viii) income derived from the sale of assets or rights that produce any of the income mentioned above.

Effective taxation: this requirement will be considered met if the foreign entity pays income tax—analogous to the Argentine income tax—in the country in which the entity is incorporated, domiciled, or placed, attributable to the income mentioned in (b) equivalent to less than 75% of the income tax that would have been paid under the Argentine income tax law. This requirement is deemed to be met—with no possibility of proving to the contrary—if the foreign entity is incorporated, domiciled, or placed in a non-cooperative or tax haven jurisdiction.[130] If the foreign entity is deemed a CFC because it lacks fiscal

130. Income Tax Law art. 133.f.4, as amended by Law 27430, *supra* note 120.

personality, CFC shall be disregarded for Argentine tax purposes, so a total look through approach applies. The ownership percentage is irrelevant, so even a shareholder holding 1% of the foreign entity should report its proportion of the income earned by the foreign entity. Also, all income earned by the CFC shall be attributed; there is no distinction between active or passive income.

However, if the foreign entity is deemed a CFC because the three requirements explained above are met, a combination of deemed dividend and veil piercing applies. If the CFC has no substance both active and passive shall be attributed. However, if the CFC has substance only passive income shall be attributed.

The situation gets complicated when a combination of entities interact because both CFC tests—together with the test that will be explained below applicable to trusts and foundations—must be performed down the corporate chain. CFC Rules potentially apply to all lower-tier subsidiaries. This means that the two CFC situations—fiscal personality and control, substance/passive income and effective taxation—have to be tested at each lower-tier subsidiary.

The new CFC Rules also target foreign trusts, private foundations, or other similar legal entities, structures, or arrangements that have as the main purpose the administration of assets.[131] The income obtained by this group must be attributed to the Argentine tax resident that has control in the year in which it is earned. The same article explains that an Argentine tax resident will be deemed to have control if it can be construed that the financial assets are under the power and/or are administered by such a person. The following situations, among others, will be considered examples of control: (a) if the trust or foundation are revocable, (b) if the settlor or grantor is also beneficiary, (c) when that person has direct or indirect power to invest or disinvest. Even though it seems that only income derived from financial assets should be attributed, the regulatory decree clarifies that it is income derived from any asset.[132]

The first draft of the bill that was sent to Congress included a reference to the control tests applicable to companies mentioned above. The way it worked was that the settlor or beneficiary would be deemed to have control in the case of a trust if they had power to appoint or remove the majority of the administrators, dispose of the assets, or

131. *Id.* art. 133.d.

132. Income Tax Regulatory Decree, *supra* note 125, art. 165(VI).1.

have a current right on the income. The reference was removed from the draft bill while being discussed in the committees. This meant that, in principle, the concept of control for trust purposes was narrower.[133] However, the regulatory decree included the reference back.[134]

The CFC Rules related to companies apply to all lower-tier subsidiaries owned by a trust, foundation, or similar arrangement. This means that if a trust is deemed a CFC, the CFC Rules must be tested at the first-tier companies owned directly by such trust and so on. All the rules regarding attribution, computation, and tax credit are exactly the same for CFC companies or trusts, foundations, or similar arrangements.

The old CFC rules had no practical application. The new CFC Rules applied for the first time to the 2018 fiscal year, which filings were due July 2019 so the actual effect cannot be measured. However, an increase in revenues should be expected.

V. Argentina's Approach Toward Taxation of Digital Economy

Argentina's rules were not prepared to tax income derived from digital economy. In the past, the old source rules were wrongly used by the tax authorities to attack certain situations. In the *Amadeus* cases, several local airlines paid Amadeus to access software that processed reserves and issued air tickets. The Argentine income tax law considers that income derived from assets located abroad but economically used in Argentina and from services rendered abroad deemed technical are from Argentine source. The Argentine tax authorities used different arguments, considering the payment a royalty for the use of an intellectual property, a fee for a technical service, and even a service economically used in Argentina.[135] Unfortunately, our Courts agreed with the tax authorities' position,[136] which definitely forced the interpretation of the at-that-time current rules to tax B2B digital economy situations.

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133. This conclusion was arguable because the scenarios of control were considered simple presumptions and examples, not an exhaustive list.

134. Income Tax Regulatory Decree, *supra* note 125, art. 165(VI).8.

135. This concept is not even part of the income tax law, but a concept extracted from the value added tax law, applicable for import of services.

136. The *Amadeus* case includes several cases decided by the Tax Court and Federal Court of Appeals: Decision of the Tribunal Fiscal de la Nación, sala D, May 12, 2004 (case *Aerolíneas Argentinas SA*); Decision of

However, B2C digital economy situations were not aimed at by the tax authorities until very recent years, initially by provinces and finally by the federal government with the 2017 tax reform. Argentina amended its value added tax law to include a new taxable event with respect to digital services provided by a person resident or domiciled abroad, where effective use or exploitation is carried out in the country, as long as the user is not registered in the VAT. B2B transactions were already subject to VAT under the old law, considering that the application of the tax depended on the local person using the service to be registered.

In this sense, the law specifies that digital services are deemed, regardless of the device used for downloading, viewing, or using them, as those carried out through the internet or any adaptation or application of the protocols, the platforms, or the technology used by the internet, or another network through which equivalent services are provided, which by their nature, are basically automated and require minimal human intervention. Also included was a non-exhaustive list of the most common digital services and an exemption for the access and download of digital books. The law further explains that the VAT liability relies on the Argentine recipient or customers, who will be responsible for assessing and paying the tax on the net price of the transaction arising from the foreign provider's invoice, under the mechanism terms and conditions to be established by the tax authorities. In B2C transactions involving intermediaries who intervene in the payment of the service (e.g., banks, e-marketplaces), the law specifies that they will be obliged to act as withholding agents.

Regarding the determination of the jurisdiction of "effective use or exploitation" of the service, the law provides that the jurisdiction in which that occurs is "that in which the immediate use or the first act of disposition of the service by the customer occurs," even if the latter

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the Cámara Nacional de Apelaciones, sala I, Feb. 5, 2008 (case *Aerolíneas Argentinas SA*); Decision of the Tribunal Fiscal de la Nación, Sala A, Feb. 6, 2007 (case *Austral Líneas Aéreas Cielos del Sur SA*); Decision of the Cámara Nacional de Apelaciones, Sala V, June 2, 2009 (case *Austral Líneas Aéreas Cielos del Sur SA*). For an overview of these cases, see *Los Pagos Realizados en Concepto de Uso de Sistemas Automatizados de Reservas a Beneficiarios del Exterior*, El Cronista (Mar. 12, 2012), https://www.cronista.com/fiscal/Los-pagos-realizados-en-concepto-de-uso-de-sistemasautomatizados-de-reservas-a-beneficiarios-del-exterior-20120312-0013.html.

uses it for its consumption. It further establishes as a non-rebuttable presumption that there is an "effective use or exploitation" of the digital service in Argentina when either: (1) the IP address (for services received through computers, tablets) or the SIM card country code (services received through mobile phones) is located in Argentina; (2) the billing address of the client is in Argentina; (3) the bank account used for the payment or the issuing of the credit or debit card used to make the payment are located in Argentina. As to direct taxes, the draft bill of the 2017 tax reform included an article that expanded the source principle by taxing income derived from digital services provided through the internet or any adaptation or modification of the protocols platforms or technology used by the internet or another network through which equivalent services are provided, specifying these constitute net gain of Argentine source, when the service is economically used in the country.[137] This type of income was taxed at a 17.5% effective tax rate. This proposal was finally eliminated from the draft bill and no amendments were made to the income tax law.[138]

The permanent establishment article included in the income tax law was also amended and aligned with the OECD standard, but income derived from digital economy was not addressed. It could be argued that, as of 2019, Argentina does not impose direct taxes on income derived from digital economy. This criterion was confirmed in two cases in which the tax authorities were of the opinion that payments made by an Argentine resident for the use of servers abroad and for advertising services rendered from abroad were not subject to tax in Argentina.

Argentina is in the process of becoming a member of the OECD, so it has followed the recommendation of not adopting unilateral measures. This has been the position of the federal government. However, many Argentine provinces have acted differently.

The federal government and the provinces have a co-participation agreement by which they divide the tax revenue derived from income tax and VAT—and other taxes—imposed and collected by the federal government and, in turn, the provinces agree not to impose

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137. *See Law 27430: Reform del Sistema Trubutario Argentino, Debates de Law Leyes 27.001 a la Actualidad*, Gobierno Arg., https://www.diputados.gob.ar/secparl/dgral_info_parlamentaria/dip/debates/leyes_27000.html (downloadable zip folder containing all the congressional discussion, original draft, and changes to Law 27430).

138. Law 27430, *supra* note 120.

taxes similar to those. This agreement does not leave room for provinces to do much, but they have proven to be very creative. The gross turnover tax, together with the property tax, account for most of the provinces' tax revenues. In this context, many provinces have attempted to tax digital economy with the gross turnover tax. The main challenges that the gross turnover tax, pretending to tax digital economy, will face are: (1) constitutional interpretation of the territoriality or nexus principle, (2) characteristics of the gross turnover tax agreed in the co-participation law, and (3) prohibition of analogy agreed in the co-participation law.

A first group of provinces[139] has tried to tax digital services with their traditional gross turnover tax, just by including digital services provided by a foreign person in the taxable event. A second group of provinces[140] has included the place of effective use or consumption as nexus or connection point. A third group of provinces[141] has included a concept of significant digital presence as nexus or connection point.

VI. Conclusions

In recent years Argentina has been an excellent student and has followed all OECD and G20 recommendations. The attitude of the provinces are the exception, but, of course, the federal government has limited power to force them to be aligned. Considering the economic and fiscal crisis that Argentina is facing, the federal government has no room to bargain with the provinces.

The expansion of the tax treaty network and alignment with OECD recommendations has not resulted in any immediate benefit to Argentina. But, as discussed in depth by some authors, the relationship

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139. The city of Buenos Aires (assimilated to a province in the Constitution) and Santa Fe. Código Fiscal 2019 art. 177 bis, http://www2.cedom.gob.ar/es/legislacion/normas/codigos/fiscal/index3.html (Buenos Aires); Impuesto Sobre los Ingresos Brutos art. 177, https://www.santafe.gov.ar/index.php/web/content/download/213216/1105413/file/Impuesto%20sobre%20los%20Ingresos%20Brutos%20_T%C3%ADtulo%20Segundo_%20_Art.%20174%20a%20219_.pdf (Santa Fe).

140. La Pampa, Salta, Tucuman, Mendoza, San Juan, Chaco, Neuquen, San Luis, and Jujuy (text of provisions on file with the author).

141. Cordoba and Buenos Aires (text of provisions on file with the author).

between tax treaties and increased foreign investment is not proven.[142] Following the international agreed standards on information exchange and transparency has definitely paid off for Argentina. It is impossible to scientifically prove it, but we are certain that the result of the 2016 tax amnesty would have been quite different if the menace of automatic information exchange was not imminent.

The implementation of new and thorough CFC Rules was a reasonable measure taking into account the successful result of the 2017 tax amnesty. However, the practical consequences will be seen in the near future. As to Argentina's approach toward digital economy, doing nothing as to direct taxes supports the trend of following OECD recommendation. The attitude of the provinces serves as an advance of what may occur with a, most likely, new federal government in 2020.

142. Eric Neumayer, *Do Double Taxation Treaties Increase Foreign Direct Investment to Developing Countries?*, 43 J. Dev. Studies 1501 (2007); Michael Lang & Jeffrey P. Owens, *The Role of Tax Treaties in Facilitating Development and Protecting the Tax Base* (WU Int'l Tax Research Paper No. 2014-03, 2014), http://ssrn.com/abstract=2398438.