

ARGENTINA

LEGAL ASPECTS OF AN STRUCTURED FINANCE OPERATION OF A PROVINCE IN ARGENTINA

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1. The Decision of Indebtedness

In the initial stage of any finance operation, it is advisable to analyze the legal aspects regarding the necessary authorizations to issue a structured security and the related activity of the supervisory bodies.

1.1. At the Provincial Level:.

- Who decides the operation? Who is entitled to perform it?

Provincial Constitutions generally determine that it is the Legislative Branch who empowers the Executive Branch to undertake financial operations of indebtedness, either in a direct way, or by means of the pledge of property of the provincial state as a guarantee or as a source of repayment of the borrowings. The difference is that in the first alternative the Province shall pay the debt with its own resources and, subsidiarily, in case of default, the collateral assets shall be executed. On the second alternative, the assets are transferred to be used as the source of payment of the creditor.

- How is said decision taken?

The decision to incur in indebtedness must be embodied in a particular administrative act. Generally, a Law has to be passed so that. Provincial Constitutions may establish particular procedures in order to pass this kind of laws, requiring the existence of specific majorities. After the Legislative Branch passes the law, the Executive Branch may undertake said financial operation by issuing the respective Decrees.



- Are there any existing contracting rules in effect?

Each Province has its own laws regarding the administration and transfer of provincial assets. These rules establish specific procedures to be followed in any contract involving provincial assets, generally a public bidding process. However, the Province can enter into direct contracts in case of urgency, due to the specialty of the subject of the contract or when the amount involved in the contract is very low. Therefore, a national or international public bidding is generally the procedure used to evaluate and select those entities that will be in charge of organizing the financial transaction. The participating Financial Institution must have been selected according to the contracting rules in force.

- Does any supervisory body have to take part in the process?

Any act in which the Provincial Government takes part, in connection with any financial operation, shall be supervised by an Auditing Body, pursuant to what is established in each Provincial Constitution. This body supervises and decides upon the legality of all the acts performed by a Provincial Government in the exercise of its duties. Thus, both the bidding procedure and any further contract shall have the respective approval of the corresponding Provincial Auditing Bodies.

Furthermore, all payments for debt service and amortization of structured securities shall be included in the budget for the current financial year, enacted by the Provincial Legislature upon the proposal of the Provincial Executive Branch.

1.2. At the Federal Government Level

- Is the Federal Government approval necessary?

Argentine legislation establishes a system by which the Federal Government controls and authorizes indebtedness of the Provinces and the Municipality of the City of Buenos Aires (hereinafter the Municipality), as provided in Law 24.156, Decree 684/95 and Resolutions 1075/93 and 722/95 of Ministerio de Economía Obras y Servicios Públicos among others.

According to these laws, the Federal Government (Secretary of Finance) must approve any transaction on indebtedness entered into by Provinces or the Municipality when it generates obligations in foreign currency. Likewise, it is provided that the Nation shall not transfer any fund pledged to cancel said obligations, so long as the approval procedure has not been completed. Furthermore, the Provinces and the Municipality shall inform the Secretary of Finance, on a monthly basis about the evolution of the domestic and foreign indebtedness of the non-financial public sector.

Furthermore, under this system the Argentine Central Bank must give an opinion on the impact that the financial transaction would have in the balance of payments of the country. Therefore, approval on the part of the National Government is mandatory.



2. - The Underlying Asset. Its Transference

Either co-participation payments or oil royalties assets used by the provinces to secure structured transactions are generally future receivables. These assets will be created in the future but are transferred and used in advance, as collateral. For this reason, it is not only important to choose the safest way to transfer the assets- as it is when we are considering the case of existing assets- but also to guarantee that these future receivables will be properly isolated and not subject to any action from the Province that originates the assets or its creditors.

- **Is it possible to make proper assignments/sales of the relevant assets to an appropriate trustee?**
- **Does this sale meet the legal, accounting, tax and regulatory requirements of a true sale?**

In order to meet all the above mentioned requirements **fiduciary transfer** should be adopted as the legal structure for a transaction.

In this case the Argentine law considers that a true sale has been performed. The fiduciary transfer removes the underlying assets and the rights on those assets from the seller's ownership, and legal title to these assets is acquired.

Law 24.441, enacted in 1995, establishes that a trust ("fideicomiso") shall exist when a person (creator) conveys the fiduciary ownership of specific property to another

(trustee) that binds himself/herself to hold it for the benefit of the person specified in the contract (beneficiary) (Section 1). In a securitization process, the beneficiaries are the holders of certificates of participation in the ownership of the title to the trust estate or of instruments evidencing a debt secured by the property so transferred (Section 19).

Any kind of property may be transferred to a trust, including credit rights, among which we can name futures receivables of oil and gas royalties and "Federal Tax Coparticipation Payments". By way of a fiduciary transfer, the future receivables are completely isolated from any risk that may affect the transferor and the transferee (Fiduciario), since the law establishes that their creditors can not affect them.

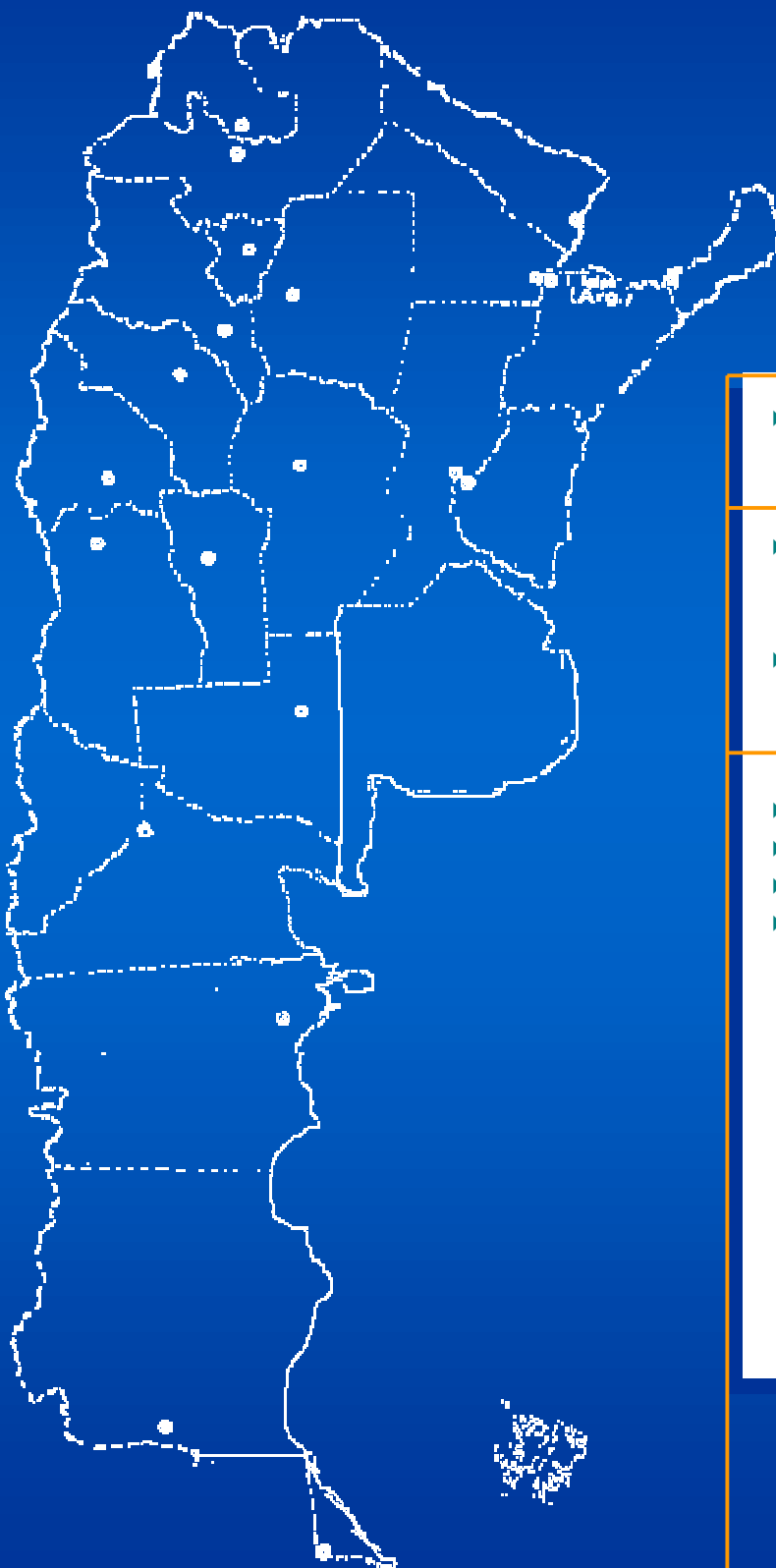
Using the legal figure of Trust (the so called Fideicomiso), the assets may be removed from the public provincial domain, in such a way that they no longer belong to the Province; thus, the Province can not interfere with something that it is not longer under their ownership.

The security interest on the receivables must be perfected, by giving notice to the parties generating those resources: the Federal Government and its paying agent - Banco de la Nación Argentina-,s, for the royalties, so that it can proceed to send the payments directly to the new fiduciary holder. In this sense it is advisable to request an answer from the notified parties indicating that they have received it and that no obstacle exists that may prevent the compliance thereof



ARGENTINA

Co - Participation Tax Revenue Sharing System
Law 23.548 and Fiscal Pact 1993



▶ 23 Provinces
23 Provinces

▶ \$ 740 millions
Monthly guaranteed payment

▶ \$ 8.88 billions
Annual guaranteed payment

▶ 1996 - \$ 8.87
▶ 1997 - \$ 10.06
▶ 1998 - \$ 10.71
▶ 1999 - \$ 10.40
billions amount distributed

Revenues Encumbered to support
other financings (all provinces)

•1996 - 29.53 %
•1997 - 26.90 %



■ **Can the security interest be released for the benefit of a third party?**

Under the Argentine Trust Law, the assets transferred to the trust constitute an estate independent from the property of the trustee and the creator (in this case, the Province) (Section 14), and are exempted from individual or collective claims of creditors of the trustee and of the creator (Section 15) Constituting an independent property means that a specific purpose has been assigned to the assets transferred to the trust and that the law has privileged said assignment over the right that the parties to the transfer or their creditors may claim thereon. In this case, the Province or the nation, or the hydrocarbon companies, or the trust or its respective creditors cannot bring any kind of administrative or judicial action whatsoever against said assets. The designated beneficiaries - in this case the investors on securities issued - are the only persons entitled to a priority rights thereon and on their products. Likewise, the fiduciary assignment of rights in Coparticipation payments, or in oil or gas royalties must be irrevocable and unconditional. In this way, said property shall not be affected in the future by any reverse condition or any sovereignty act since they are already outside of the public domain of the Province.

In the face of danger that the seller of said assets becomes bankrupt, the law considers these transfers valid and, therefore, an action cannot be brought to include the transferred assets in the judicial reorganization or bankruptcy proceedings. As in most foreign legislations, the creditors may only resort to action for fraud against the seller. This situation does not imply any risk whatsoever for the Provinces since they cannot become bankrupt.

3. - Sovereign Risk and emergency situations

Emerging market transactions may be organized as a domestic transaction –even though it might include an offshore facility-, or a cross border transaction (generally the kind of domestic assets/offshore investors). In the latter case we will face more than one operative legal framework, foreign exchange exposure, currency convertibility, devaluation and transfer risk.

These risks are present in any transaction involving an Argentine province, but they also add a new sovereign risk, that of the provincial state.

During the last years, Argentine provinces have resorted to different systems for the consolidation of its debts, passing laws of



Economic Emergency. Actually, this implies a call for all its creditors to justify their rights offering the cancellation of debts by a partial release, a financing plan, the delivery of public bonds, or all of them together.

This means that there is a risk that the resources to be used for the payments to investors - federal coparticipation or hydrocarbon royalties- might be affected by the passing of an emergency regulation.

Notwithstanding the above, most emergency regulations have been oriented to rescheduling the maturity dates of that provincial debt having no security whatsoever. On the other hand, the assignment of Federal Coparticipation involves the creation of a security, which is constantly supervised by the Federal Government. Therefore, any action directed to stop payments of interests and amortization of a bond secured by Federal Coparticipation resources would be considered highly prejudicial, not only for the rest of the Provinces which attempt to enter into the capital market, but also for the Federal Government itself since the country risk may be affected and, accordingly, its financing cost.

4. - Federal Coparticipation of Fiscal Revenues

- **May Federal Co-Participation percentages be modified?**



It is necessary to check periodically if the parameters of the Federal Coparticipation in force have been changed, since the new Constitution, enacted in 1994, establishes that a new law, must be passed and a new supervisory body (the so called Comisión Revisora) must be created. Furthermore, the 1993 Fiscal Covenant, now in force, in which the distribution percentages between the Provinces and the Federal Government were determined, shall expire on December 31, 1998 (Law 24. 699). The term of the Fiscal Covenant was extended and the assured amount of money to be distributed among de Provinces was rised to \$ 1.350 millions per month (at a rate of one peso = one dollar)

Any change made to the Coparticipation must result from an Agreement-Act passed by the National Congress (Section 75, subsection 2 of the National Constitution). For that purpose a simple majority in both chambers is required as well as further approval by the provinces. This means, and it is expressly so established in the National Constitution, that any modification unilaterally incorporated would be unconstitutional and also any kind of regulation thereof.

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