Appendix C. Short Description of Selected Corporate Vehicles

Legal Persons

Before the 20th century, most business or commercial activity was undertaken by sole proprietorships or partnerships. They remain a significant feature of the 21st century economic landscape.

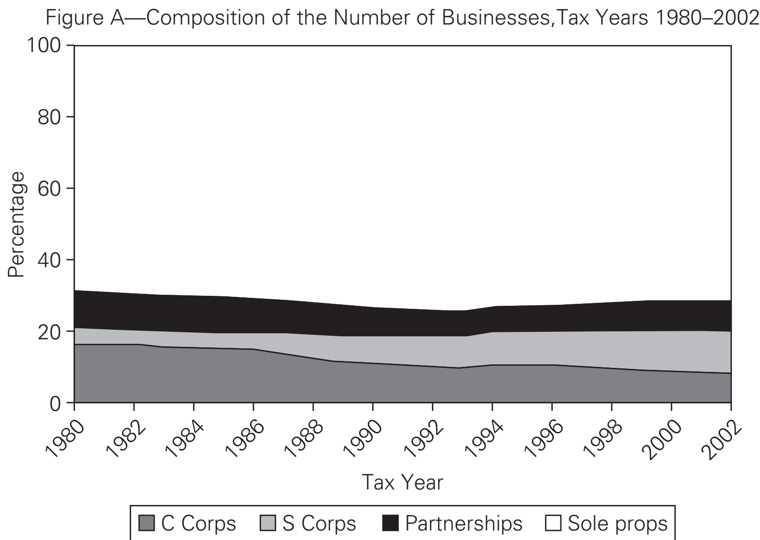
The sole proprietorship is the legal recognition of an individual conducting economic activity, such as providing a service or product to a purchaser for remuneration, or investing to generate income, without the need to create a formal entity structure or to engage in legal arrangements such as a trust. A sole proprietorship represents the simplest way of conducting business—the individual has no formal registration requirements or filing fees, does not need to create an operating agreement or to be held accountable to anyone, and files taxes as a part of personal duties.

General Partnerships

General partnerships are formed when an association of more than one person agrees to come together to pursue a business activity. This agreement is usually the determining feature that dictates whether a court will acknowledge the existence of partnership. Many jurisdictions allow for the existence of a partnership to be (a) predicated on an expressed acknowledgment on the part of partners to enter into the joint undertaking or (b) based on inference derived from actions taken. This means that a partnership may be found to exist without any documentation or admission on the part of partners to confirm this. Global laws lack uniformity dictating what independent legal personality a partnership may have, distinct from its individual partners. From one jurisdiction to the next, or even between different types of partnerships in the same jurisdiction, any given statute-specific partnership form may be recognized in law as, variously, (a) a legal person, (b) a legal relationship between individuals, or (c) a hybrid of the two, that is, a legal relationship that allows possession of an "incomplete legal personality"—an incomplete set of those capacities that are usually reserved for legal persons (for example, the right to own property, to sue or be sued, and so on).[102]

102. Due to space limitations, readers are referred to a joint report by The Law Commission of England & Wales and The Scottish Law Commission (advocating an attempt at reconciling the contradictory partnership laws of their different jurisdictions) for the issues surrounding the legal makeup of partnerships, comprehensively approached in a practical and jurisdiction-specific context. The Law Commission and The Scottish Law Commission. (LAW COM No 283) (SCOT LAW COM No 192). *Partnership Law. Report*

FIGURE C.1 Composition of Economic Activity Undertaken in the United States as Ascertained by Internal Revenue Service Tax Data[a]



Source: Graphic from Tom Petska, Michael Parisi, Kelly Luttrell, Lucy Davitian, and Matt Scoffic, *An Analysis of Business Organizational Structure and Activity from Tax Data,* U.S. Internal Revenue Service, http://www.irs.gov/pub/irs-soi/05petska.pdf (accessed on August 15, 2010).
Note: The "C corp" is a company that is taxed at the company level and again at the member level when distributions are made; the "S corp" is a company that has pass-through taxation, that is, only the member is taxed; the U.S. Internal Revenue Service does not formally acknowledge limited liability companies (LLCs), so they may be classed (at the discretion of the filer, subject to restriction) as either an "S corp" or a disregarded entity (In the case of single-member LLCs, the member files tax returns as would an individual in a sole proprietorship, while in multiple-member LLCs, the members each file tax returns as would partners in a partnership.)

These unincorporated forms of business activity necessarily vest both ownership and control of business assets in the partners, unless contracts with third parties (creditors) determine otherwise.[103] With respect to partnerships, a contract among the partners divides the relative rights of each partner to ownership and control. Partners, however, need not be physical persons. Common law countries do not require business partnerships to register with a government entity or court or to commit the governing contract to a written document. Civil law countries, by contrast, generally require both. Although a review of both partnership agreements and any contracts with third parties can help determine ownership and control among partners and creditors, in common law jurisdictions, these documents normally are not publicly

on a Reference under Section 3(1)(e) of the Law Commissions Act 1965. Presented to the Parliament of the United Kingdom by the Lord High Chancellor by Command of Her Majesty. Laid before the Scottish Parliament by the Scottish Ministers November 2003. http://www.lawcom.gov.uk/docs/lc283.pdf (accessed on August 1, 2010).

103. In most common law jurisdictions, partnerships, although not separate legal persons, are deemed to be separate "entities" in that they may hold assets and make contracts in their own name rather than in just the names of the partners themselves. This creates additional problems for determining ownership and control in that "ABC Partnership" may hold legal title to the assets, with the operation of law extending that ownership to the partners themselves.

available, if they exist at all. Historically, these forms of business did not limit the liability of proprietors or partners to the business's creditors, which created a disincentive to investment. In response, the original French Commercial Code of 1807 created a new form of partnership that allowed for a general partner (with general liability to creditors) and limited partners (whose liability was limited to the amount of their investment). The code, however, significantly restricted the control rights of limited partners. In most cases of modern limited partnerships, the general partner is a company with few attachable assets as a protection against any creditor litigation. Because of the liability issues inherent to sole proprietorships or partnerships, many persons engaged in business sought to establish companies.

Limited Partnerships

Limited partnerships (LPs) are partnerships in which limited liability is granted to certain partners and not others. This statutory partnership form, which can only be brought into existence through a formal process that includes the creation of a written partnership agreement, is most useful as a way to encourage silent investment partners (those persons who contribute capital to an endeavor but do not meaningfully act in its management or operations). This limited liability is conditional, as limited partners who take too active a role in the partnership business can be found to have breached their limited status and be held jointly and severally liable, along with the general partners, to settle creditor obligations occasioned by criminal, tort, or other civil actions. In most jurisdictions, limited liability partnerships (LLPs) convey limited liability status on all partners.[104] Unlike general partnerships, for which nations have little consistency as to whether a distinct legal entity is created, LPs and LLPs have complete independent legal personality from their owners. The attractiveness of this liability shield comes at the cost of anonymity, however; these partnerships are subject to registration and supervisory regimes that are quite similar in scope to those for companies. In the Grand Corruption Database Project (see appendix B), these partnership forms were not found to have been used specifically achieve opacity of beneficial ownership.

Companies

Companies are the primary engine of economic activity in the world. Every jurisdiction in the world provides for one or more domestic company types in one form or another. As mentioned as a key consideration in the design of the Trust and Company Service Providers (TCSP) Project (see appendix C), companies exist in numbers of an order of magnitude greater than all other forms of legal persons. Panama's estimated 26,000 foundations (already almost the largest number of that entity type in any given jurisdiction) pale before its 320,000 total active companies. Legal arrangements such as trusts

104. Arthur O' Sullivan and Steven M. Sheffrin, *Economics: Principles in Action* (Upper Saddle River, NJ: Pearson Prentice Hall, 2003), p. 190.

may be as prevalent as companies, but because virtually no country in the world registers those, we do not have a precise way to determine their total number.

Companies were originally envisioned with the intention of protecting investors and creditors. The legal separation of the individual from the assets vested to a company was a means to achieve this protection. In the twenty-first century, this separation of asset from individual has become an end in itself, sought after not for protection of interest but for camouflage. Companies are the most significantly misused vehicle documented within this study. Because so much can be said about their misuse, those issues that deal with companies have been divided into two categories: one dealing with public companies and the other dealing with private companies. For the purposes of this report, the limited liability company (LLC) will be included in that latter category. In its report of 2001, the Organisation for Economic Co-operation and Development (OECD)[105] dismissed LLCs with a brief mention that they were at the time of writing a recent, spreading phenomenon, presenting the potential for misuse in the furtherance of anonymity. Now, 10 years later, the significant presence of LLCs in the database of grand corruption schemes confirms this potential (see appendix B).

Although different jurisdictions have different company laws (and related securities laws), they share a number of similar key elements with respect to ownership and control.

All jurisdictions require companies to register with a government agency or court. In general, basic company law separates ownership (through shares) and control (through a board of directors). Jurisdictions typically require a certain minimum number of directors. Shares come in two basic types: those that carry votes and those that do not. Voting shares may be split into different categories, with shares in different categories carrying different voting rights. Generally, voting shareholders elect directors to serve for a fixed period, typically between one and three years. The directors set general policies for the company and select company officers, who manage the day-to-day operations of the company. Although shareholders may serve as directors and officers, in many common law jurisdictions, controlling shareholders may not, because this would breach the separation of ownership and control. Certain key decisions—typically including mergers, divisions, windings-up, and sometimes dividend payments—must be ratified by a majority of shareholder votes. In the vast majority of jurisdictions, companies are required to keep a share register so that they may consult shareholders when required and so that they may know to whom to pay dividends when declared. In some cases, pure bearer shares are allowed (that is, in cases in which they do not need to be "immobilized" in the hands of a custodian); here, shareholders must approach the company to exercise any shareholder rights. Most company laws require that shares be freely transferable, meaning that shareholders may not form agreements that would deny free

105. See Organisation for Economic Co-operation and Development (OECD), *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* (Paris: OECD, 2001), p. 23.

transferability. Laws also require that certain information, such as the names of board members and officers, be made available to shareholders.

Civil law jurisdictions typically divide companies into two types: (a) those that are public, usually defined as exceeding a minimum number of shareholders, and (b) those that are private. For public companies, certain additional rules apply, the most important of which are securities laws and stock exchange rules that are designed to protect the interests of the investing public. Among these are requirements that shareholders voluntarily disclose when they control a certain percentage of the total voting rights of the company or when they make tender offers (offers to buy all shares) to any remaining shareholders. Common law countries do not typically distinguish between public or private at the company level, but rather they do so based on whether share offerings are made to the general public.

In most jurisdictions (those that do not allow pure bearer shares), it is easy to determine if any single shareholder of record has sufficient votes to control board elections and to approve (or veto) major company decisions, as well as to determine board and officer composition, by inspection of share registers and board or officer lists. Such examination, however, will not identify who the ultimate physical person is who controls the vote of voting shares because the vast majority of company shares are held by other legal persons or arrangements, including other companies, trusts, and foundations. As a result, it is impossible for any company to know for certain who the ultimate physical persons are who control the voting shares of the company unless shareholders have so informed the company. Even if one were to identify the physical person who commands a voting share majority, shareholders, directors, and officers may be severely constrained in their decision-making power. Companies may cede much of their authority to third parties via contract. A typical example involves company finance: Loan covenants often restrict what companies may do to guarantee debt repayment. Therefore, to determine the extent of control of a shareholder, director, or officer, it is necessary to determine whether any such covenants cede control to a third party. Such documentation is not normally available to shareholders because it is deemed to constitute matters of "control" rather than "ownership."

In all jurisdictions, the ownership of company assets belongs to the company as a separate legal person. Persons with claims on the company (such as creditors) have first claim to those assets up to the amount of the claim: If a creditor has a security interest, its claim comes before the claims of other creditors (often with some public policy exceptions for the government or employees). Directors may make payments to shareholders in the form of dividends or share repurchases, although some jurisdictions restrict such payments to accumulated profits or those profits plus a percentage of unimpaired (that is, unsecured) property. Different categories of shareholders may have different rights to payment of profits or other property. In the event of dissolution or winding-up, most jurisdictions require that creditors be paid before any residual property is distributed to shareholders.

Limited Liability Company

The LLC is rapidly replacing partnerships and LPs. The typical LLC adopts the basic rule of partnerships—ownership and control rights are determined by a contract, often referred to as the operating agreement—with limited liability for equity investors, who are known as members. Unlike typical common law partnerships, however, LLCs must be registered with a government agency and are separate legal persons from their members. As with partnerships, members may be physical or legal persons.

An LLC can be organized as either member managed (the members jointly operate the LLC, as in a typical partnership) or manager managed (the members select managers similar to the way company shareholders select boards of directors). The most important feature of the LLC is that it is a creature of contract. That contract—the operating agreement—defines the rights and responsibilities of its members. This has given the members of an LLC extraordinary latitude in determining how the LLC should divide ownership and control among them. Operating agreements may be brief or may be hundreds of pages long; they may make simple distinctions regarding ownership and control or may define such relationships in exquisite detail. Of course, ownership and control matters may be further complicated by third-party creditor agreements that are not a part of the operating agreement.

LLCs are used for many legitimate purposes. In addition to organizing a business that has limited liability but retains flexibility with respect to management and benefits, LLCs are often used to effectuate particular business transactions and reorganizations. LLCs are also used to, in effect, extend limited liability to individuals. For example, physicians in tort-plaintiff-friendly jurisdictions in the United States often use LLCs to protect their assets from satisfaction of tort judgments beyond what is provided by liability insurance. In effect, they transfer assets that would normally be held directly (for example, residence, investments) to the LLC. In general, U.S. laws restrict such transfers once a tort has occurred and the legal process has begun, but they do not restrict transfer earlier.

The U.S. state of Delaware is rapidly becoming the most important jurisdiction in the United States for forming LLCs. The general rules regarding the centrality of the operating agreement are the same in Delaware as in most jurisdictions. It is, however, especially inexpensive and easy to create and maintain an LLC in Delaware. The initial fee is $90 with a $250 annual fee, and registration can be completed online with approval granted in less than 24 hours. Although Delaware requires the disclosure of an agent for service of process, it does not require the disclosure of member or manager names. In fact, Delaware law specifically states that the names of members or managers may be included in LLC registration, but they are not required.[106] In addition, agents are not required to keep any information on the members or beneficial owners of an LLC, and Delaware does not require that the beneficial owner's identity be disclosed to the agent.

106. Delaware Limited Liability Company Act, sections 18–102.

Foundations

A foundation (based on the Roman law *universitas rerum*) is the civil law equivalent to a common law trust, in that it may be used for similar purposes. A foundation traditionally requires property from a donor dedicated to a particular purpose or purposes for an undetermined period of time. Typically, the income derived from the principal assets (as opposed to the assets themselves) is used to fulfill the statutory purpose. A foundation is a legal entity and, as such, may engage in and conduct business. It is controlled by a board of directors and has no owners. In most jurisdictions, a foundation's purpose must be public. In certain jurisdictions, however, foundations may be created for private purposes. Different legal definitions reflect either common law traditions with an emphasis on trusteeship, or civil law traditions and the distinction between membership and non-membership-based entities (see box C.1 and C.2 for examples in Liechtenstein and Panama).

Legal Arrangements

The term "corporate vehicles" in this report is used to refer to all possible legal constructs that can engage in business, that is, in Financial Action Task Force on Money Laundering (FATF) terms, "legal arrangements" and "legal persons":

> "Legal arrangements" refers to express trusts or other similar legal arrangements . . . including *fiducie*, *treuhand* and *fideicommiso*. "Legal persons" refers to bodies corporate, foundations, *Anstalten*, partnerships, or associations, or any similar bodies that can establish a permanent customer relationship with a financial institution or otherwise own property.[107]

The distinctive difference between the two is the fact that the legal person can engage in business on its own behalf and be the holder of rights and obligations, whereas a legal arrangement, as the term suggests, is rather a relationship between different people, the essential characteristic being that one person holds the legal title while another holds a beneficial title. A *fideicommiso*, for instance, is an arrangement of Roman law extraction used, in testate law, to leave an estate to one person, entrusting him to pass it on to another person. A *usufruct* achieves something similar, often used to allow a surviving spouse the full benefit of an estate, while the title rests with the children. The most typical and certainly most discussed legal arrangement when it comes to the use of corporate vehicles for illicit purposes is the trust.

The Trusts

The trust relationship was originally created by the English Court of Equity. In a typical trust, a grantor or settlor transfers the legal title to property (the right to control

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107. See *Methodology for Assessing Compliance with the FATF 40 Recommendations* and the *FATF 9 Special Recommendations*, p. 67, available at http://www.fatf-gafi.org/dataoecd/16/54/40339628.pdf.

BOX C.1 The Liechtenstein *Anstalt*

The *Anstalt* (Establishment) is a flexible corporate form particular to Liechtenstein, where it is closely related to the trust enterprise (*Treuunternehmen*) but distinct from a foundation (*Stiftung*) or trust (*Treuhanderschaft*). Unusual for a civil law jurisdiction, it has a relatively long history in the Principality dating back to 1928.

Unlike a trust, an *Anstalt* has a legal personality like a company or foundation. Its capital may be divided into shares; however, because this incurs a withholding tax liability, it is rare. An *Anstalt* can be formed in three to five days when the founder, who may be a legal or natural person, transfers rights to assets to a board of directors by an act of assignment. Capital of at least either CHF 30,000 or US$30,000 must be paid up, with the *Anstalt* created by entry into the Public Register. The board, which may only have one member, administers the *Anstalt*, subject to the bylaws of the *Anstalt*. The bylaws do not have to be registered, and they may be revoked or modified by the founder, who is also the beneficiary unless the bylaws specify otherwise. Historically, *Anstalten* could be used for either commercial or noncommercial purposes, although recently the former purpose has been restricted. Since 1980, *Anstalten* pursuing commercial activity have had to lodge annual audited accounts. Those used like a holding company must also have a local representative in Liechtenstein, who usually is the board member, although the representative may be a local company. Often an individual from the TCSP creating the *Anstalt* will be both the sole board member and representative. TCSPs charge in the order of CHF5,000 to form an *Anstalt*, plus CHF3,000 annually for administration. The *Anstalt* is taxed annually at 0.1 percent of capital, or CHF1,000, whichever is the greater.

Source: Adapted from *ATU Allgemeines Treuunternehmen* (international trust company) specialist brochure, "Forms of companies in the Principality of Liechtenstein" (Liechtenstein, 2010) and Caroline Doggart, *Tax Havens and Their Uses* (London: Economic Intelligence Unit, 2002).

BOX C.2 The Panamanian Foundation

The Panamanian Foundation (formally the Panama Private Interest Foundation) was established by legislation in 1995, being jointly modeled on the Liechtenstein foundation, the Panamanian corporation, and the common law trust. Rather than commercial operations, Foundations are designed for use in estate planning, holding shares and property, asset protection, or charitable purposes. A foundation is established when the founder transfers assets to the foundation, which becomes the legal owner of these assets. The founder specifies the purposes of the foundation in a charter (a public document) or in bylaws (which are private). A foundation council carries out administration of the assets. The charter or bylaws specify one or more beneficiaries, which may include the founder. In

(continued next page)

BOX C.2 *(continued)*

its founder-foundation-council-beneficiary structure, the foundation resembles a common law trust, with its settler-trustee-beneficiary arrangement. Unlike trusts, however, foundations are, like companies, legal persons.

While separating the founder from legal ownership of the assets transferred to the foundation, this vehicle also combines a high level of practical control with tight confidentiality. Founders, foundation council members, and beneficiaries may be corporate entities from any jurisdiction, any of which may be controlled by the founder. Furthermore, it is common to use nominee founders (usually a law firm in Panama, which must act as the registered agent), so that the identity of the original founder, which would otherwise be included in the public charter document, remains unregistered. Aside from setting the rules governing the foundation through the charter and bylaws, the founder may be a member of the foundation council, or a beneficiary, or a protector, the latter who may be empowered to veto certain decisions of the foundation council. The foundation pays no tax in Panama and is specifically not covered by foreign inheritance laws.

the property) to a trustee, and the equitable title (the right to enjoy the benefits of the property) to beneficiaries. The terms of such transfer are set out in the trust instrument. If the trustee and beneficiary are the same, legal and equitable title are said to merge and the trust ceases to exist. As a general rule (but see below, discussion on some exceptions), the separation of legal and beneficial interests prevents creditors of the beneficiary from seizing trust assets in satisfaction of claims.

Trustees owe beneficiaries a duty of loyalty, meaning that with respect to the trust relationship, they must prefer the interests of the beneficiary over their own interests. A trust relationship may be created involuntarily in instances in which someone has a claim to property or its benefits but in which transfer of legal title is impossible for some reason. This is called a constructive trust. In most jurisdictions, the grantor may select the law that governs the operation of the trust. Although the trust is the product of the English Court of Equity, some civil law jurisdictions have adopted specific trust statutes. Most common law jurisdictions have modified trust law by statute.

Many jurisdictions have added to the role of trustee a type of "super" trustee known as the trust protector. In many cases, grantors choose professional managers as trustees, and the trust protector is a close friend or attorney of the trustee. Although not managing the day-to-day operations of the trust, the protector acts as a kind of overseer of the trust, and is often given the right to replace the trustee or to change the trust's governing law.

Trusts and similar legal arrangements (as a general rule) are distinguishable from other corporate vehicles in that they usually will not possess a separate legal personality like

a company or a civil law foundation. This means, among other things, that a trust cannot own property, engage in business, or be a party to contracts.

The vast majority of trusts are used for legitimate purposes, such as family estate planning, managing charitable donations, and various corporate functions (for example, a trust may be used to isolate the funding of an employee pension plans from the attachable assets of a business). Settlor, trustee, beneficiary, and assets may be companies or other corporate vehicles. Although many jurisdictions have moved toward greater levels of transparency in the arena of government (and often public) access to information on legal persons like corporations and LLCs, trusts have always been granted confidentiality. With one or two exceptions, no jurisdiction in the world currently requires trusts to register in a publicly accessible register. Many jurisdictions have enacted strict confidentiality laws, prohibiting the disclosure of any information regarding trusts. In Panama, for example, if a trustee, government agent, or any person transacting with the trust discloses information about the trust, except as required by law, then that person will be sanctioned with a penalty of up to six months in jail and a fine of up to US$50,000.[108]

Trust relationships are also used to protect an individual's assets from creditors. For example, many physicians have chosen to place their personal assets (for example, homes, investments) into a trust so that patients who receive a malpractice judgment that exceeds insurance cannot directly attach those assets in satisfaction of that judgment. Some trusts have been set up primarily to hold company stock with the specific intention of retaining control over a company either after the grantor has died or, if still alive, simultaneously to act as an asset protection trust. In jurisdictions that follow English law, this has created some difficulty. The duty to manage assets for the benefit of the beneficiary would suggest the sale of stock, for example, if the company were losing money, or voting the voting stock in ways that may be contrary to the wishes of the grantor, who may be the company director. In the United States, this is not a problem, because the courts follow the terms of the trust instrument over general fiduciary duty rules, which can require retention of stock or forbid voting the stock contrary to the grantor's wishes. A number of Commonwealth offshore centers (including many that are British dependencies or overseas territories) have adopted a similar rule by statute, creating the so-called Virgin Islands Special Trust Act (VISTA) trust (see box C.3).

Although the confidentiality of trusts serves many legitimate functions, it has led to a popular perception of trusts and similar legal arrangements as particularly useful instruments for illicit activities.[109] Broadly speaking, trusts can be used to assist in

108. Panama Law No. 1, Art. 37.

109. "[T]rusts which hide the identity of the grantors and the beneficiaries have become a standard part of money laundering arrangements." Jack A. Blum, Esq., Prof. Michael Levi, Prof. R. Thomas Naylor and Prof. Phil Williams, *Financial Havens, Banking Secrecy and Money Laundering,* United Nations Office for Drug Control and Crime Prevention, Global Programme Against Money Laundering (1998), p. 95. See also European Commission and Transcrime, University of Trento (Italy), *Euroshore: Protecting the EU financial system from the exploitation of financial centres and off-shore facilities by organized crime,* January 2000, p. 46 ("Trusts can be easily exploited for money laundering purposes, considering the rules

BOX C.3	The British Virgin Islands VISTA Trusts

Trusts established under the British Virgin Islands Special Trust Act of 2003 (referred to as VISTA trusts) provide a recent example of a sophisticated corporate structure. The main purpose of the VISTA trust is to provide the advantages of a conventional trust (such as asset protection and succession planning), while allowing the settlors more control over the business activities carried on within the structure than is possible within the bounds of a conventional trust.

A VISTA trust structure must consist of at least two basic elements: (a) the trust itself, and (b) an underlying British Virgin Islands (BVI) company whose shares are owned entirely by the trust. The trustee of the VISTA trust must be a licensed service provider in the BVI. This service provider is responsible for collecting and retaining customer due diligence records. The settlors typically act as directors of the underlying company. These settlors retain business control, because the trustees are excused from the normal fiduciary duty to monitor the performance of the company owned by the trust, and the responsibility of maximizing the value of the company's shares (the "Prudent Man of Business" Rule). Trustees are thus disengaged from the actual management of the company, and the operational conduct of its business, even to the point of being prevented from changing company directors. Aside from their role as directors of the underlying company, settlors may retain control through appointing a protector, who may be able to veto certain decisions by the trustees, or even replace them.

Ownership of the underlying company remains vested with the trust, however, and the company is protected against attacks on its assets. These attacks might come in the form of a disputed inheritance or a commercial dispute with creditors. VISTA trusts might be particularly useful for the head of a family business who wants to plan ahead for succession while retaining practical control of operational activities in the meantime. They may be devoted to charitable purposes, in which case no beneficiary is named. VISTA trusts may be part of an overarching, more complex structure. For example, the underlying company owned by the VISTA trust may be a Private Trust Company that acts as trustee over one or more other normal, non-VISTA trusts, which in turn might hold the shares of other operational companies.

laundering the proceeds of corruption (or other crimes) in two main ways: (a) through camouflaging the existence of assets, and (b) through creating barriers to the recovery of these assets. By acknowledging the nature of a trust deed as a private document, allowing corporate vehicles to be parties to all aspects of trusts, and further having

governing them, such as those which do not require the disclosure of the identity of the beneficiary or of the settlor, those which do not require any governmental license to operate and those which allow for flee clauses pursuant to which a trustee is able to move the trust to a different jurisdiction in the event of a criminal investigation."). See also the FATF typologies report on the Misuse of Corporate Vehicles including Trust and Company Service Providers, October 13, 2006, p. 61: "Responses to the questionnaires [sent out for the purposes of this study] support the conclusion that Trusts and Private companies are the vehicles that are most susceptible to abuse."

often eschewed implementation of any requirement to register trust particulars, it often is difficult for a jurisdiction (and investigators in particular) to determine whether a trust exists at all, let alone the "who" and "what" with which it is concerned.[110] In such a situation, the assets are camouflaged, in that they appear to be the unqualified property of a trustee, who cannot volunteer the information that he is a trustee for any particular party, with no readily ascertainable link to the providers or enjoyers of the assets. In terms of creating barriers to asset recovery, once the trust has been formed, the trust assets legally do not belong to the settlor or to beneficiary parties, although the trustee has a fiduciary duty to manage the assets on behalf of another. Having split legal and beneficial ownership, it is difficult for other private or public parties to enforce claims against these assets, unless it can be shown that the trust was specifically set up to defeat legitimate claimants (for example, creditors).

Asset protection trusts do not always prevent action against the settlor or beneficiary. For example, courts may order the trustee to release assets to creditors if they find that the transfer of assets to the trust breached a specific statute or was otherwise a fraudulent attempt by the transferor to escape liability. To do so, however, the court must have jurisdiction over the trustee (or the protector, if he or she has such powers) to enforce asset release under threat of punishment for contempt of court. To guard against such possibilities, many trusts were created with specific flee clauses: In the event of litigation against the trust or trustee (typically on behalf of a creditor), a trustee is required to transfer those assets to another jurisdiction. Once such a transfer was made, the litigant would have to bring an action in the new location with jurisdiction over the new trustee. The development of the *Mareva* injunction (and similar techniques in the United States) made such flee clauses less effective. The *Mareva* injunction, whereby a court can order the trustees not to transfer or otherwise move assets, or the more recent "*Mareva* by letter," whereby a creditor puts the trustee on notice that they will seek court action declaring that a constructive trust in favor of creditors exists by automatic operation of law, has made flee clauses less effective. These injunctions can prevent asset transfer before legal requirements are completed. In many cases, flee clauses have been replaced with Protector Resettlement Clauses, which give the protector power to move assets in a manner that can be implemented more easily and quickly, and may make it easier to defeat *Mareva* actions.

110. Some qualifications to this statement are addressed more comprehensively in Part 4 of this study.