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A Pre-BEPS, long-expected Landmark Argentine Supreme Court Decision on DTA interpretation and Domestic GAAR Application in a treaty Setting

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Apropos Molinos Rio de la Plata SA

1. Background: Memorandum DNI 799/10

In Memorandum 799/10, the Argentine Competent Authority (Argentine Tax Directorate, *Dirección Nacional de Impuestos* or DNI) dealt with a DTA structured after the Andean Model Treaty (AMT) and the interposition of a Chilean holding company (Platform Company) by an Argentine ultimate corporate shareholder. [1]

In general terms, the AMT and the old (no longer in force) Chilean DTA patterned thereafter granted exclusive taxation rights to the source country, thus drastically deviating from the OECD MC. Alien to them also are other important developments built over and around the OECD MC, such as the concept of effective beneficiary, the shared aim of preventing double non-taxation, and the Principal Purpose Test (PPT) clause, expressly incorporated in the Preamble and Article 29, 9, respectively, of the OECD MC 2017 Model, following the recommendations of the 2015 BEPS Report on Action 6.

The facts dealt with in Memorandum 799/10 were as follows: (i) an Argentine parent company held an equity participation in second-tier operating subsidiaries domiciled in Latin American countries (Peru and Uruguay) having no DTA with Argentina, through a wholly owned Chilean holding which enjoyed a special (no-tax) holding regime in Chile; and (ii) by interposing the Chilean holding, the Argentine parent corporation avoided the impact of taxation on dividends in Argentina; dividends that were made up with profits coming from the second-tier operating subsidiaries –which would have otherwise been fully taxable in Argentina (i.e., if paid directly by the operating subsidiaries to the parent Argentina corporation)– were not taxed in Chile because of the Platform Company Regime, nor in Argentina because the DTA granted exclusive taxing rights on dividends to the country of residence of the distributing entity.

On the basis of the facts at hand, the DNI sustained that: (i) DTAs should not be utilized by taxpayers to ameliorate or eliminate the tax burden through legal forms

that would not be adopted but for the tax advantages deriving therefrom; (ii) domestic GAAR may and should be applied to avoid abusive schemes in a treaty setting; (iii) considering the Chilean Platform company regime and the DTA rules attributing tax jurisdiction to the parties thereto, the reason to interpose the holding was to deviate dividend income coming from Uruguay and Peru which would have otherwise been taxed in Argentina, with the end result of benefiting from a double non-taxation; (iv) double non-taxation obtained by interposing a Chilean Platform company contradicted the Chilean DTA and implied an abusive conduct which might be challenged under domestic GAAR; (v) from a different perspective, it was also sustained that DTAs are aimed at avoiding double taxation and to that end, treaty-partners should maintain an income tax of general application, and the Chilean Platform company regime was alien to the income system of general application in Chile; and (vi) for that very reason, in the DNI's opinion, the Platform company was beyond the scope of the Chilean DTA; it did not qualify under Article 1 of the DTA (taxes covered), as that article covers subsequent amendments and replacing taxes only to the extent that they use an analogous tax basis to the income tax of general application, and not to subsequent promotional regimes resulting in double non-taxation.

The DNI's opinion in Memorandum 799/10 gave rise to the Molinos Río de la Plata ("Molinos") case. The case started with an administrative tax assessment from the Argentine federal tax agency (AFIP), and a subsequent appeal against such assessment, first decided by the Tax Court eight year ago, and later by the Federal Court of Appeals (2016) and the Argentine Supreme Court (September 2, 2021). The initial AFIP's assessment was upheld in all three judicial instances.

2. The Tax Court's Decision[2]

In line with the DNI Memorandum, the Tax Court upheld AFIP's tax claim against Molinos arguing, *inter alia*, that: (i) there was an abuse of the treaty, so that AFIP's administrative tax assessment taxing dividends received by Molinos in Argentina had to be confirmed; (ii) to find the existence of an abuse, the Tax Court applied domestic GAAR and considered that the Chilean Platform Corporation was not the effective beneficiary of the dividend paid out by the operating subsidiaries; (iii) the Court found that a deemed "effective beneficiary" concept was built into the applicable GAAR; and, finally, (iv) the Court sustained that a DTA might be used to mitigate or reduce the tax burden, but not to eliminate the tax burden altogether (double non-taxation).

Critics against the Tax Court's decision were widespread at the time, and because mostly the same flawed law argument were used once again at the Argentine Supreme Court level to uphold AFIP's tax claim, most critics then advanced are equally applicable to the Supreme Court's majority and concurring votes (see 6.3. below).

3. The Federal Court of Appeal's Decision[3]

The Federal Court of Appeals affirmed the Tax Court's decision, considering that: (i) the Chilean holding has not been created –as argued by the taxpayer– with the purpose of carrying on the international expansion of the economic group led by the Argentine parent, but with the sole objective of obtaining tax benefits under the Chilean DTA, thus permitting to label the latter as a mere conduit; (ii) the taxpayer's

construction of the DTA contravenes the principle of good faith contemplated in the Vienna Convention; and (iii) the lack of anti-abuse clauses in the DTA allows the application of domestic GAAR.

4. The Prosecutor before the Supreme Court' Opinion

On November 28, 2018, the Prosecutor before the Supreme Court ruled in favor of the taxpayer arguing, *inter alia,* that the honest effort of the taxpayer to limits its taxes to the legal minimum is not reprehensible; that is to say, that a legitimate tax saving in itself is not questionable. In his opinion, the Prosecutor stated that the benefits of the old DTA with Chile were not subject to an "anti-abuse" clause that requires certain minimum substance in the distributing treaty company. In this sense, the opinion stated that the fact that Molinos Chile was a "conduit" company for the tax agency did not violate the DTA. The Prosecutor also rejected the application of GAAR not expressly contemplated in the DTA, since the latter holds a constitutional hierarchy superior to domestic laws. On that basis, the Prosecutor's opinion concluded that even in order to avoid a supposed double non-taxation, the tax administration´s assessment could not have relied on article 2, TPL, i.e., on the principle of economic reality (Argentine domestic GAAR).

5. The Argentine Scholars' Debate over the Application of GAAR to Treaties Preceding the Supreme Court Decision *in re* Molinos

Regarding the application of GAAR in the context of a DTA, absent an express treaty permission or prohibition, scholars have debated on the possible existence of constitutional or legal obstacles to apply them in connection with the interpretation of DTAs, or taxpayers' acts or situations subject to DTA provisions. [4]

As a general rule, and until recently, Argentine DTAs have not contained express anti-treaty shopping rules and have been silent on the possible application of the domestic GAAR of contracting states. Recently agreed upon DTAs already in force, and the signed but not yet ratified MLI do contain treaty GAAR and/or LoB provisions (notably the treaties with Spain, Chile, Mexico, United Arab Emirates and the amending protocol with Brazil).[5]

DTAs can be abused, either by treaty-partner residents, or by residents of third countries to whom, by their special personal scope, DTA rules are not intended to reach.

Additionally, DTAs may also be abused by the parties to the treaty themselves,[6] an idea that appears to fly over the Molinos' case each time the administrative or judicial argumentation line focuses on the domestic amendment of the Chilean tax law, subsequent to the signing of the DTA, by which the Platform Entity Regime was incorporated to Chilean law; thus, allegedly, allowing a situation of double non taxation to proliferate in practice. Of course, if that had been considered to be the case, remedies to Argentina would have been of a different nature, i.e., either renegotiation or termination of the DTA, but should not have affected a taxpayer's rights expressly afforded by the DTA design and shared purpose of the treaty.

Getting back to the hypothesis of treaty abuse by the taxpayers themselves, the issue

is whether a treaty-partner domestic GAAR may apply to its internal treaty interpretation, despite the fact that the DTA is silent on the matter, as was the case with most Argentine DTAs (including the old Chilean treaty) until recently.

The case for the application of these rules in a treaty setting might be supported by the following reasoning: (i) GAAR are an interpretative device aimed at making other rules (whether taxing rules or rules limiting tax benefits) to be applied to the true extent intended for by the legislator, or in accordance with the shared expectations of the treaty-partners concerned; (ii) since other States also have an interest in avoiding the unintended application of treaty benefits, the application of such rules would be legitimated by general customary principles of international law; and (iii) to the extent that a DTA recognizes a contracting state's right to tax a particular item of income, general principles would allow the taxing state's domestic rules (including GAAR) to apply when the latter exercises its taxing rights under the DTA, unless expressly forbidden thereunder.

No matter how appealing the reasoning appears thus far, some connected legal issues should be addressed before concluding on the matter. These issues are: (i) whether the interpretation provisions of the Vienna Convention, to which Argentina is a party, allow to sustain the subsidiary application of GAAR in a treaty setting; (ii) if so, whether the prevalence of DTAs over domestic law pursuant to the Argentine Constitution makes a difference, thus potentially preventing domestic GAAR from being applied to DTAs; and finally, (iii) if no authority preventing domestic GAAR's application to DTAs is found, whether some other conditions or limitations are to be considered for the application of domestic GAAR not to be judged by the other treaty-partner as a breach of the DTA itself and/or not to be deemed contrary to the general rules of application contemplated under the domestic law of the applying jurisdiction.

Assuming that the application of GAAR does not conflict with the Vienna Convention because its clauses do allow deviance from a strict textualism when the shared intent of the treaty-partners is not manifest in the text, one may take the position that GAAR might only contradict a particular DTA, depending on its wording and the facts and circumstances under which GAAR are intended to be applied. This position is based on the premise that the rule *pacta sunt servanda* does not solely require a literal interpretation of a DTA.

Moreover, the constitutional prevalence of DTAs over domestic legislation under Argentine law would not be, by itself, a decisive feature that prevent GAAR from being applied in a treaty setting either, as long as that application –generally allowed under a broad construction of section 3, 2 of Argentine DTAs– does not imply a violation of the treaty text and purpose, and/or obligations of the taxing jurisdiction under the DTA.

In addition to the foregoing, it appears reasonable to sustain that a functional harmonization between a DTA's provisions and the domestic tax laws of the contracting parties –the preservation of which should be viewed as forming part of the contracting parties' intent, unless otherwise expressly provided in the DTA–also endorses GAAR application to the same extent as authorized by the parties' domestic rules.

Within this view, it appears to be clear that the state of residence under a OECD designed DTA, retains full jurisdiction to take measures if one of its residents makes an abusive use of a DTA which impacts (affects) taxation at residence. This would be the case, for example, if under a OECD designed DTA, an Argentine resident channeled back foreign funds to Argentina through an intermediate (phantom) entity domiciled in a treaty-partner jurisdiction, thus availing himself of a preferential treatment only available to true treaty-partner source income. For this rule to apply, however, the country of residence should have kept taxation rights under the treaty umbrella (as it happens under OECD/UN Model DTAs), i.e., it should have not relinquished taxing rights in its entirety in favor of the source country, as under treaties modelled after the Andean Pack, including the old Chilean DTA.

In the same setting (OECD/UN designed treaties) source states should be allowed to apply domestic GAAR to deny treaty benefits to a resident of the other contracting state in more limited circumstances. This is the Argentine position, as reflected in the regulations issued by the tax agency, which rely on the other contracting state's competent authority declaration of residence to recognize treaty benefits afforded under a DTA to the residents of the treaty-partner jurisdiction.

However, no similar limitation should apply to the source jurisdiction to re-characterize a transaction under domestic GAAR, unless such a re-characterization is contrary to the DTA's definitions or the parties' shared intent (as reflected in the DTA), in full accordance with section 3, 2 of the OECD MC and similar provisions of Argentine DTAs.

6. The Argentine Supreme Court's Decision of the Molinos case[7]

On September 2, 2021, The Argentine Supreme Court finally decided the Molinos case upholding AFIP's position, in a split 3 to 1 decision. The majority was made by the joint vote of Judges Maqueda and Rosatti, with the concurring separate vote of Judge Lorenzetti, while judge Rosenkrantz dissented, and upheld the taxpayer's position.

6.1 The Joint Vote of Judges Maqueda and Rosatti

This vote is based on the following line of arguments:

- no international treaty may be invoked abusively regardless of the existence of an anti-abuse rule in the treaty itself;
- pursuant to the Vienna Convention on the Law of Treaties, approved by Argentine Law 19,865, treaties must be construed in good faith (article 26); domestic rules may not be resorted to justify non-fulfilment (article 27); and the apparent textualism provided in Article 31, 1 does not prevent from recurring to complementary interpretation means whenever a strict application of the principle of *pacta sun servanda* leads to an absurd or unreasonable result. In this sense, article 11 of the old Chilean DTA (dividend taxation) –affording exclusive taxation to the source country– must be understood and apply only with the aim of avoiding double taxation;
- based on the foregoing, the unilateral amendment of the Chilean tax law –subsequent to the effective date of the treaty– which created the platform (exempt)

entities, made clear that the taxpayer sought a double non-taxation which was beyond the material scope of the DTA construed in good faith;

- Argentine GAAR (economic reality principle) allows to disregard the legal forms utilized by the taxpayers and to consider the actual economic situation pursued under the legal forms which private law would have applied, whenever there is a manifest discrepancy between the economic substance and the legal forms chosen by the taxpayers;
- At this point it is worth mentioning that aside the case of arbitrariness which was not found in the construction of facts made by the Tax Court and the Court of appeals in Molinos, the Supreme Court does not cross-check the fact findings of the lower tribunals. That it is the reason why in Recital 15, third paragraph, of the joint vote it is expressed that … *in the case, the disregard of the legal form used by the taxpayer, made by AFIP and based on various evidences of the case, was reviewed by the National Tax Court and the Federal Court of Appeals, contentious administrative Chamber which reached conclusions that are not shown unfunded nor unreasonable in this instance;*
- The facts that were deemed relevant in that sense by the lower tribunals, as expressly recognized by the joint vote, were the following: a) Molinos Chile was set up a year after the Chilean legislative amendment impacted the original dynamics of the DTA by approving the Platform Entity Regime (Law 19,840); b) Molinos Chile remitted to the parent Argentine entity, as dividends, the income originated in the Uruguayan and Peruvian operating entities right after receiving it, so that such income did not remain in the equity of the Chilean holding company, to the point that — it has been argued — the income was not mainly destined to fulfill its corporate purpose; c) there was no double taxation agreement between Argentina and the countries from where the income came from (Uruguay and Peru); d) even though the Chilean holding participated in the equity of other second-tier entities domiciled in third countries (Switzerland, Italy, the United States, and Spain), the dividend stream in the years concerned came mostly from one of the Uruguayan companies (Molinos Overseas S.A.) and there was no substantial income from Chilean source;
- A harmonious confluence of the principle of reasonableness (article 27 of the Argentine Constitution), the interpretation in good faith and in accordance with the objectives of a treaty (article 31 of the Vienna Convention), and the principle of economic reality (domestic GAAR, article 2, Law 11,683), in the context of the application of Article 11 of the Chilean DTA, do not validate the use of platform companies under Chilean law to avoid paying income tax in Argentina.

6.2 The Concurring Vote, by its Own Terms, of Judge Lorenzetti

This vote repeated most of the arguments already advanced and articulated by the joint vote of judges Maqueda and Lorenzetti on the law principles that should control the interpretation of article 11 of the DTA, and the taxpayer's behavior, including the principles of good faith and prohibition of the abuse of law which in Judge Lorenzetti's understanding warrant even a finalist reading of the said article conditioning its application to the situations where a double taxation is verified, as if this general objective of the DTA were built into the text of the dividend clause and though, in fact, it was not.

In Judge Lorenzetti's opinion, article 11 of the DTA in conjunction with the utilization of the Chilean Platform Company Regime approved after the signing of the DTA allowed the setting up of entities whose sole connection with Chile was its formal residence, and, in the case, permitted Molinos to obtain a double non taxation which is a hypothesis beyond the reach of the material scope of the DTA.

Judge Lorenzetti found his understanding to be endorsed by three concurring elements of judgement: (i) the allowable application of domestic GAAR as a tool to fight abusive practices by taxpayers in a treaty setting; (ii) a purposely shared understanding of the DTA by Chile which through a *Servicio de Impuestos Internos* or SII's interpretation (Circular 57/09) internalized the OECD concept of beneficial owner as a means to prevent the use of conduit companies in treaties patterned after the OECD Model Convention. In this document conduit companies, as described, are excluded from the concept of beneficial owner in the following terms: *A conduit company cannot be deemed a beneficial owner when, despite being the formal owner of the income, it has restricted powers over it that make it a mere agent, fiduciary or administrator acting on behalf of third parties* and that *for these purposes a conduit entity is a company that resides in one of the Contracting States and that acts by channeling certain income to a person from a third State, which by virtue of such operation improperly benefits from a DTA*. In the same sense, the opinion added that since Chilean DTAs followed the OECD Model, the Commentaries on beneficial ownership may be used as a complementary means of interpretation in accordance with article 32 of the Vienna Convention; and (iii) Argentina unilaterally denounced the old DTA with Chile in 2012, due to certain unfavorable aspect to the Argentine Revenue and the parties replaced it with a new DTA signed on May 15, 2015. The new agreement is accompanied by a Memorandum of Understanding (MoU) which contemplated a PPT clause, the effective beneficiary concept, and an express allowance to apply domestic GAAR to prevent tax evasion. The content of the MoU to the new DTA encourages the Judge to sustain that: *A consistent analysis of the denounce and signature of a new international instrument –far from being a recognition by the Argentine State of an interpretation contrary to the purposes of the DTA and its principles of public law– supports the conclusion that a reading in good faith did not allow for interpretations that would have led to denature the matrix that supported the old DTA: Avoid double taxation*.

6.3 Evaluation and Criticism of the Joint and Concurring Votes

The first two argument of the joint vote [see 6.1. (i) and (ii), above] are *dicta* or general statements of law absolutely dissociated with the decision of the case, where the taxpayer's right to be afforded the dividends treatment contemplated in article 11 of the DTA was discussed [somehow a similar criticism can be made to the argument of the concurring vote described in 6.2, (vii) above].

The principles of international law codified in the Vienna Convention, and described in the joint vote are, by their nature, mandates imposed on the parties to the treaty; in the case of the DTA at stake, Argentina and Chile. They must apply the DTA in good faith, and avoid nonfulfillment based on the application of domestic rules, including domestic GAAR whenever their application may contradict the clear text of a treaty clause (e.g., article 11). Besides, a double non-taxation result under the DTA with

Chile is not an absurd or unreasonable result beyond the parties' shared intent that should have been avoided by setting aside a strict observation of the *pacta sum servanda;* it was an expectable, direct by-product of the treaty design followed by the parties to the treaty. By attributing exclusive taxation rights to the source country, the share intention of the parties admits that the source country may exercise that right to the full extent, even to exempt items of income that fall within its scope of application. In other words, that possibility was not beyond the treaty-partners' expectation upon execution of the treaty, nor may be deemed (for the same reason) tacitly forbidden or contrary to the objective of avoiding double taxation. This last objective is always served, regardless of the fact that one party might not have been subsequently prepared to tolerate the "double dipping," in which case the remedies available to that party in international law are always the same: either renegotiation or earlier termination of the agreement. In this sense, it is worth adding that, as expressed in Judge Rosenkrantz's dissenting vote, in 2003 Argentina and Chile executed and additional protocol to the treaty (concerning wealth taxation on equity participations which from there on passed to be taxed at the residence country of the holder), and though the protocol was negotiated and signed after the enactment of the Platform Entity regime in Chile, Argentina did not use that opportunity to neutralize the effect of such Chilean reform by a similar change from source to residence in the income tax.

The following argument in the joint vote turns to the application of Argentine GAAR, which pursuant to Argentine law has a twofold function; it is an interpretation tool of (i) the treaty clause at stake (article 11), and (ii) the taxpayer's acts within the DTA umbrella. As regards the first aspect, it is worth mentioning that the Supreme Court has repeatedly and consistently sustained that the domestic GAAR principle (*principio de la realidad económica*) may not imply or result in a violation of the principle of reserve or legality by contradicting the clear text of the interpreted domestic stature. The same principle applies to international conventional rules such as the DTA with Chile; firstly, because they are similarly ratified by laws enacted by Congress, and, secondly, because the *pacta sum servanda* principle contained in the Vienna Convention prevent from leaving aside a clear treaty wording such as that of Article 11 of the Chilean DTA. It is for these very reason that Judge Lorenzetti's argument in the sense that article 11 should be conditioned upon the actual occurrence of double taxation –as if this condition were actually written in said rule—is absolutely unwarranted, and unduly curtails the treaty will, as clearly expressed in the DTA wording (see 6.2, par. 1, above).

As regards GAAR as applied to the construction of the taxpayers' acts, the remaining aspect under the DTA in which the joint vote dives, a number of considerations need to be made.

The joint vote expressly recognized that the fact pattern on which the opinion is built comes from the evidence produced at the administrative level, and revised by the lower courts [see 6.1, (iv) above]. Arguably, these facts endorsed the position that there is a manifest discrepancy between the economic substance and the legal form chosen by the taxpayer, i.e., the basic statutory condition of application of the domestic GAAR [see 6.1, (iv) and (v) above]. Paragraph (vi) of the same point 6.1, above, enumerates the facts pattern the joint vote deemed diriment to its finding of a

manifest discrepancy between the economic substance and the legal form chosen by Molinos. However, only half of the singled out facts slightly touch the core of the issue and deserve a minimal discussion; the remaining half is absolutely irrelevant.

According to one of the facts considered, Molinos Chile remitted to the parent Argentine entity, as dividends, the income originated in the Uruguayan and Peruvian operating entities right after receiving it, so that such income did not remain in the equity of the Chilean holding company. This is not, *per se*, a practice which may prove a lack of legal substance in Molinos Chile. Nothing was said nor evidenced throughout the judicial file on whether Molinos Chile was legally or contractually constrained to pass the dividends received on to the parent company, and on whether Molinos Chile lacked control over the disposition of the income. Likewise, it is not proved that Molinos Chile was a phantom entity which exercised no effective management or administration of its holdings. In fact, the entity did exercise that administration, so that if at certain point in time the dividends received had been needed to fund an investment in existing or newly created subsidiaries, Molinos Chile would have been able to do so in the pursuing of its corporate purpose. The years assessed represented a short period compared with the corporate circle so that the circumstance that this did not actually happened in that period does not allow to presume otherwise. The same can be said on the apparent irrelevance of the dividend stream coming from other subsidiaries, as compared to the Peruvian and Uruguayan entities, in the years concerned.

In other words, the application of GAAR should not have resulted in a successful challenge of the Platform Company under the fact and circumstances of the case since there was no apparent manifest distortion of the legal form utilized by the taxpayer.

Once more, it is worth recalling that the Argentine GAAR consist of a sham-type provision according to which whenever a manifest discrepancy exists between the legal form used and the economic substance of the transaction, the latter prevails to re-characterize the transaction or redefine the parties thereto for tax purposes.[8] If such a discrepancy exists, the legal forms are to be discarded, regardless of the intention of the taxpayer, i.e., regardless of whether the intention was to avoid taxes or to pursue a legitimate business purpose. On the contrary, if such a discrepancy does not exist, the legal transaction may not be challenged, whatever its purpose, unless it is evidenced that the taxpayer acted in fraud legis. Therefore, pursuing a tax advantage or benefit under the DTA (e.g., double non-taxation) was not*, per se,* enough to ignore the intermediate holding pursuant to Argentine GAAR, as argued in connection with the Chilean Platform company.

To legitimately challenge the structure under GAAR, the Supreme Court should have evidenced that the Chilean holding was not in control of the dividends received from the Peruvian and Uruguayan subsidiaries, and/or lacked economic substance (i.e., it was a paper company which exercised no effective management or administration of the holdings). None of that was undoubtedly evidenced in the case, but the mere fact that dividends received had been redistributed by the Chilean holding to the Argentine Parent Company in the assessed years.

If the preceding conditions were met (the Chilean Platform company used and enjoyed

the dividend income without a legal or contractual obligation to pass it over to the Argentine Parent, and managed the equity participations it held), the Chilean holding might have not been interposed in *fraus legis*, nor would have failed meeting the substance test. Again, it was not evidenced that dividends received by Molinos Chile were not its own. In that context, GAAR could not have been resorted to legitimately ignore the Chilean company as a treaty beneficiary, even if, as it appears to be the case, the structure had been designed to save taxes (i.e., it was a tax-geared structure). The taxpayers did not act in *fraud legis* and this was recognized by a decision in a separate, previous tax criminal proceeding issued by the Federal Court of Appeals of San Martín which sustained that *there is no fraudulent behavior capable of framing the business activities carried out as a tax offense*.

6.4 The dissenting vote of Judge Rosenkrantz

Allowable space for this contribution does not permit an extended analysis of the dissenting vote which should have made majority in Molinos but for the mistaken position deployed by the majority, which inadvertently dived far beyond the context of the precise conventional public law rules and principles within which the dispute unfelt and should have been decided. In any case judge Rosenkrantz's line of reasoning summarized herein fairly coincide with the criticism already advanced on the majority position: (i) the wording of article 11 of the DTA did not present interpretative complexities, thus forcing to conclude that Chile was the only State with the right to tax the dividends distributed by Molinos Chile; (ii) the DTA did not contemplate that subsequent amendment in the covered taxes by each party, such as that occurred under Chilean law, should have complied with any condition, and the DTA benefits applied regardless of a subsequent domestic legislative amendment which would imply that one of the parties waive its right to tax under the DTA. Moreover. Such waiver by a party to the DTA did not allow the other party to exercise its own; (iii) neither the Preamble of the DTA nor its particular clauses alluded to the fact that the parties would have pursued to prevent double non taxation; moreover, the source principle adopted by the parties to the treaty carried the possibility that neither of the contracting parties taxes an item of income; to that end, the fact that the source country decided to exempt the income would have sufficed; (iv) by not applying article 11 of the DTA to its full extent, the Argentine revenue contradicted the expectations originated in its own preceding acts as well as the principle of good faith in the application of treaties, particularly considering that Chile, through its SII had interpreted years before that the platform entities were benefitted by the DTA with Argentina; (v) the DTA lacked rules allowing to abrogate article 11, or to fight conduit companies though the beneficiary owner concept or a similar principle with the same aim; finally, (vi) the public law principles contemplated in the Argentine Constitution were not affected by the fact that the partner country had decided not to exercise the taxing rights that the DTA granted to it exclusively.

7. Final Comment

Argentina faces a new treaty environment today with a treaty network where all DTA but one (Bolivia) are patterned after the OECD MC. The Multilateral Instrument (MLI) principles reflecting the conclusions of BEPS Action 6 are now reflected in the Preamble and in the text of the OECD MC, primarily in articles 1 (Persons Covered)

and 29 (Entitlement to Benefits), and their Commentaries. Pending ratification of the MLI by the National Congress, much of these new rules are already embodied in the latest DTA signed by Argentina. International tax scholars have yet extensively explored the very nuances of the new treaty anti-abuse rules, as well as the potential conflicts of said rules with pre-existing domestic GAAR, so that a full new chapter in DTA application and interpretation is about to be written. The Argentine Judiciary should be prepared to apply them in the cases to be decided in the year to come.

[1] For a line of previous administrative precedents on the subject of improper use of tax treaties or treaty abuse in the pre-BEPS times, see, *inter alia,* AFIP Ruling 57/96; DNI Memorandum 3/06 (inbound transactions); and Memorandum 64/09 (outbound situation).

[2] Tax Court, Molinos Río de la Plata, August 14, 2013.

[3] Federal Court of Claims, Court Room I, May 19, 2016.

[4] In favor of GAAR's application see Vicchi, Interpretation of Double Taxation Conventions, LXXVIIIa Cahiers de Droit Fiscal International (1993), p. 161 ff., at p. 174, Tarsitano, Tax Treaties and Tax Avoidance: Application of Anti-Avoidance Provisions, LIXVa Cahiers de Droit Fiscal International, p. 59 ff. Teijeiro, *Abuso o uso impropio de tratados de doble imposición. Medidas unilaterales y bilaterales para prevenirlo. La experiencia en el derecho comparado y en la Argentina*, RDF 5/07, p. 205, ff, at 232/233, Lexis Nexis, November/December 2007; Teijeiro, *Seeking anti-avoidance measures of general nature and scope – GAAR and other rules,* Cahiers de Droit Fiscal International, 103a, 2018; against GAARs application, Diaz Sieiro, Argentine Report, Form and Substance in Tax Law, LXXXVIIa Cahiers de Droit Fiscal International, p. 71. Díaz Sieiro appears to sustain his opinion on the constitutional prevalence of DTAs over domestic rules according to the 1994 Argentine constitutional amendment.

[5] See Teijeiro, Argentine Anti-Avoidance Rules: Application under Domestic and International Conventional Law, Tax Notes International, October 2003, p. 89 ff; see also Teijeiro, The Argentine Tax Treaty Network: A Safe Harbor for Foreign Taxpayers, Tax Notes International, January 19, 1999, p. 287 ff. Teijeiro, LoB Clauses, PPT standard and the Latin American Treaty Network Choices, Kluwer International Tax Blog, June 5, 2015; Teijeiro, Argentine Treaty Network: Will the schoppable treaty soon became an extinct species, Kluwer International Tax Blog, February 29, 2016; Teijeiro*, Multilateral BEPS Convention opens choices to LATAM countries,* Kluwer International Tax Blog, December 5, 2016; Teijeiro, *MLI minimum standards on treaty shopping and mutual agreement procedure. LATAM countries' position,* Kluwer International Tax Blog, July 3, 2017. As an exception, limited in scope LoB clauses existed previously under the DTAs with Spain (the old treaty), the U.K. and Sweden.

[6] See Arruda Ferreira, *The Improper Use of Tax Treaties by Contracting States*, IBFD, 2021.

[7] Argentine Supreme Court, *Molinos Rio de la Plata SA v. Dirección General Impositiva,* September 2, 2021.

[8] Teijeiro, *Seeking anti-avoidance measures of general nature and scope – GAAR and other rules,* Cahiers de Droit Fiscal International, 103a, 2018; see also Teijeiro, *La legalidad y la Seguridad Jurídica en la Jurisprudencia Tributaria de la Corte Suprema de Justicia Argentina*, in Temas de Dereito Tributário, Em Homenagema Gilberto Ulhoa Canto. ABDF/Arraes, Belo Horizonte, 2020, volumen 1, p. 735 ff.

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