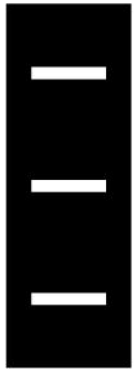


TRANSNATIONAL TAXATION NETWORK

Austin – May 27, 2022

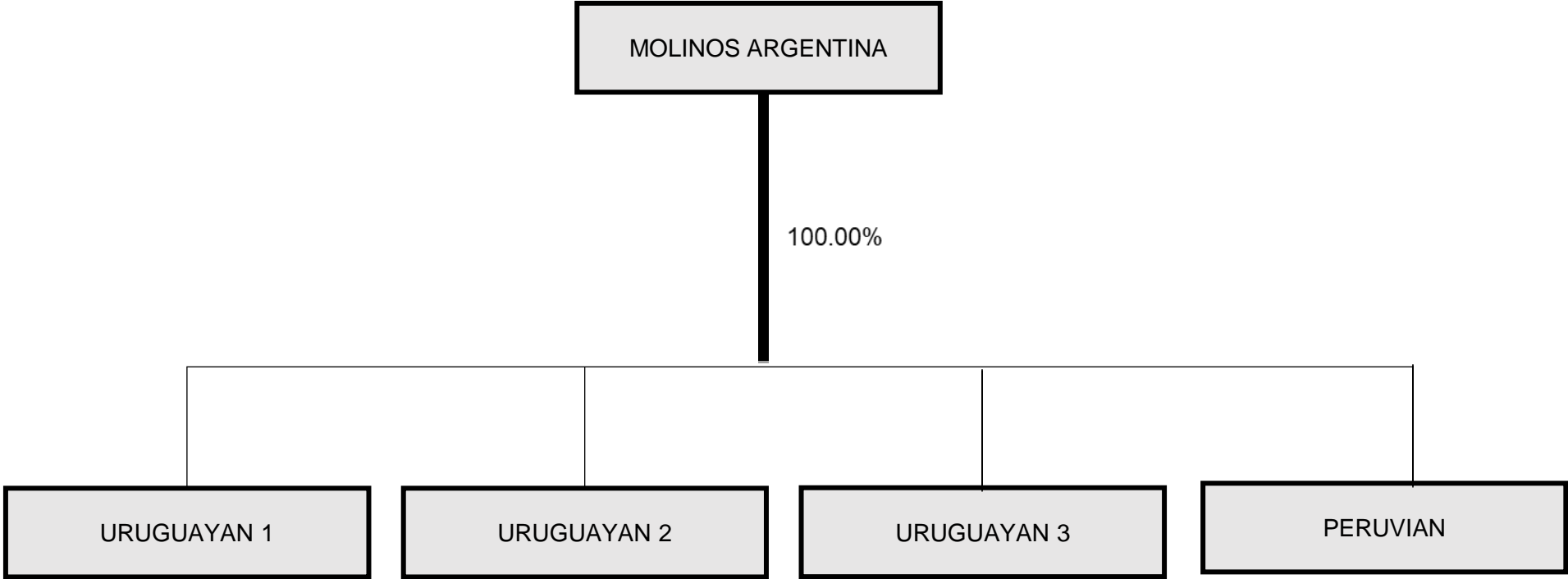
Walter Keiniger (Argentina)

Tax Treaty abuse and a milestone decision of
the Argentine Supreme Court

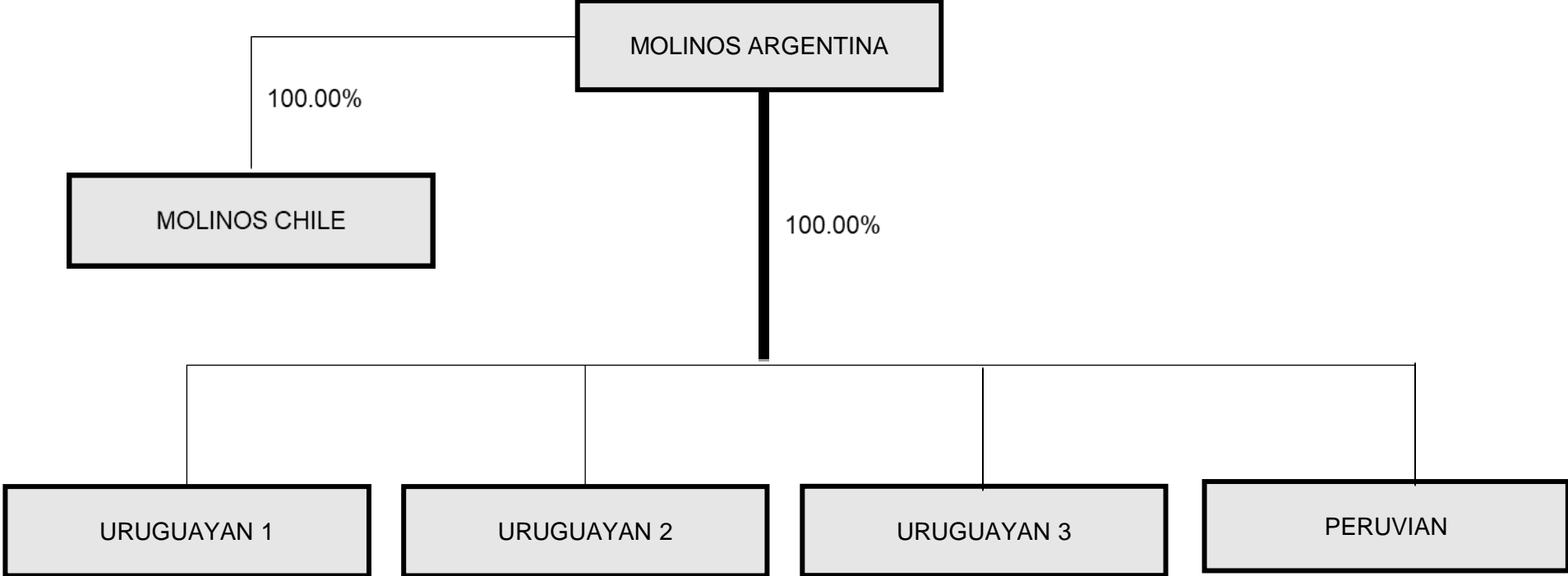


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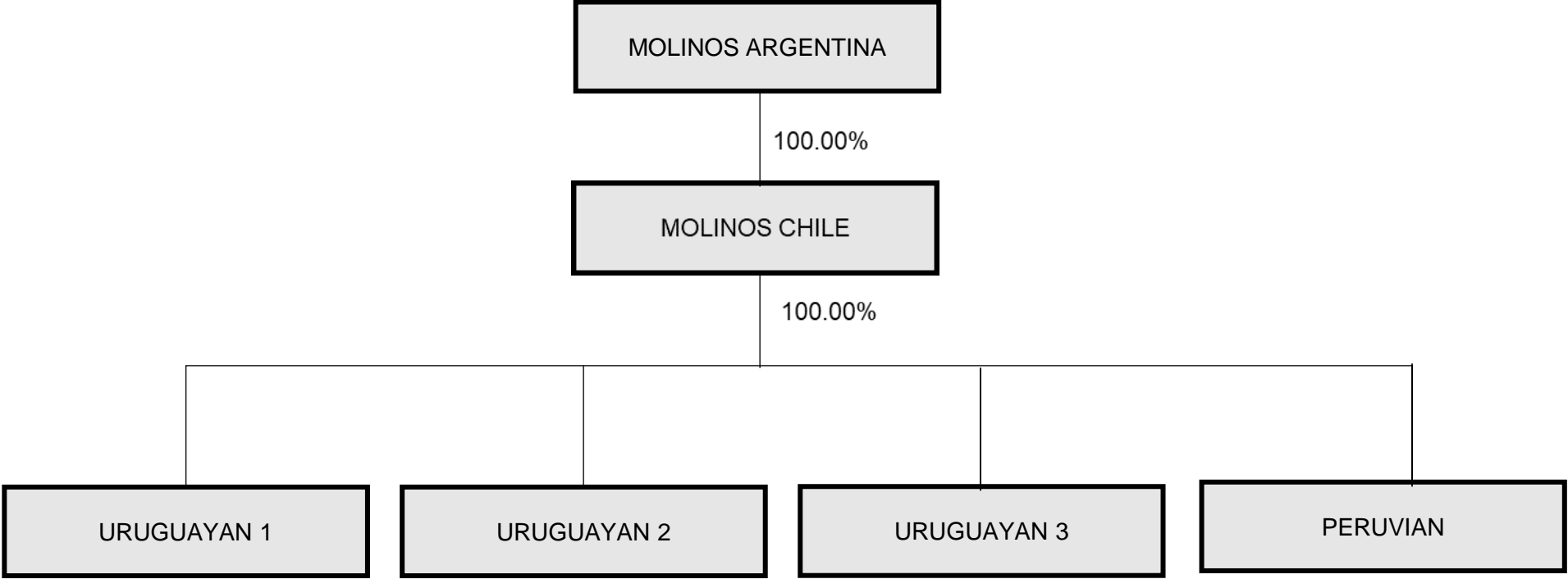
Starting point: no DTT applicable



Incorporation of Chilean entity



Contribution of LATAM companies



Facts and relevant provisions

- Chilean entity: incorporated in 2003 under Chilean holding regime (“sociedades de plataforma”)
- Chilean holding regime:
 - ✓ Law passed in 2002
 - ✓ No tax on income from foreign sources
 - ✓ No tax on dividends paid abroad if profits came from foreign sources
- DTT between Argentina and Chile then in place:
 - ✓ Taxation at source country
 - ✓ Dividends paid from Chile to Argentina were non-taxable in Argentina
 - ✓ DTT terminated by Argentina in June 2012
 - ✓ New DTT: 2015 (with LOB provisions)
- Under the structure, profits from Uruguay and Peru received “through” Chile were non-taxable in Argentina

Tax authorities

- Argued “treaty abuse” resulting in “double non-taxation”
- Based on the so-called “principle of economic reality” of Argentine Tax Procedure Law (similar to the US “substance over form” principle), the tax authorities contended that Molinos had abused the DTT by creating a “conduit company”
- The Chilean (conduit) company had the sole purpose of circumventing taxation in both Argentina and Chile of the dividends received from Uruguay and Peru
- Chilean company had no real connection w/Uruguayan and Peruvian entities and no business purpose
- This position was upheld by Tax Court and Chambers of Appeals

Argentine Supreme Court (Sept 2, 2021)

Judges Maqueda and Rosatti:

- ✓ Argentine legal system is composed of different laws, decrees, regulations that must be applied reasonably
- ✓ No right can be applied abusively
- ✓ International treaties could never be applied abusively regardless of whether they expressly include an anti-avoidance provision
- ✓ International treaties must be applied in good faith
- ✓ DTT had a purpose: to avoid double taxation
- ✓ The structure of the taxpayer had a different goal: to obtain double non-taxation
- ✓ The new DTT included this understanding expressly but it was implicitly accepted in the “old treaty”
- ✓ Economic reality: (i) Chilean entity was incorporated one year after the holding regime was created, and (ii) immediate repayment of dividends received from Uruguay and Peru

Judge Lorenzetti

- ✓ Similar arguments but stressed the fact that the purpose of the DTT was to avoid double taxation and should not lead to double non-taxation

Argentine Supreme Court: confirmed

Judge Rosenkrantz: (in favor of taxpayer!)

- ✓ DTT clearly granted taxing power to the source country, and there are no difficulties in the wording of the DTT
- ✓ Benefits of the DTT were applicable even if the source country decided not to tax
- ✓ Courts must refrain from making distinctions where the laws do not make them
- ✓ if the intent had been that one country gets the right to tax where the other decides not to do it, that should have been included in the DTT
- ✓ Double non-taxation was a potential result of the DTT and that must be respected
- ✓ To ignore the wording of the DTT invoking internal law would involve a violation of the principle of “good faith”
- ✓ Double non-taxation does not entail any problem within Argentine Constitution and if that was the potential result of the decision of Congress, it must be respected



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