

The background features abstract, overlapping green geometric shapes in various shades, including light lime green, medium green, and dark forest green. These shapes are primarily located on the left and right sides of the slide, framing the central white area where the text is placed.

# Implications of trade and investment treaties for the application of domestic tax provisions

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# Agenda

- ▶ Interface between tax and trade and investment
  - ▶ Argentina Financial-Services
  - ▶ Micula
- ▶ Fragmented frameworks

# Argentina - Financial Services



- ▶ GF standards on Eol
- ▶ Backing of the G20: threat of sanctions for non-cooperative jurisdictions
- ▶ Defensive measures tool-box includes tax measures
  - ▶ Withholding taxes in respect of a wide variety of payments;
  - ▶ Denying deductions in respect of expense payments to payees resident in a noncooperative jurisdiction;

- ▶ **Excurs:** 2016 Commission’s Communication on an External Strategy for Effective Taxation
  - ▶ Defensive measures *“would make it much less attractive for companies to invest or do business in these jurisdictions, as the administrative burden and risk of double taxation would be higher”*

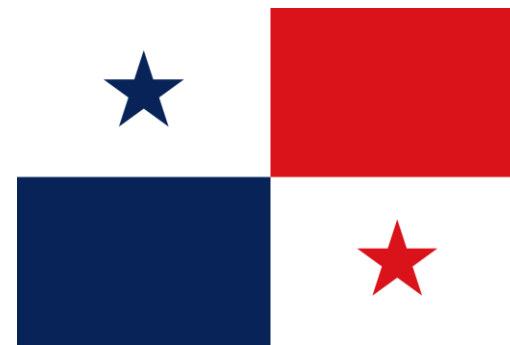


# Argentina - Financial Services



- ▶ Defensive measures targeting jurisdictions with which Argentina had no basis for Eol, and absent negotiations to that end
- ▶ Defensive measures included tax measures
  - ▶ Irrebuttable presumption that loan repayments represent a net gain of 100% (as opposed to 43% for creditors located in cooperative jurisdictions)

- ▶ Challenge of the Argentinian defensive measures on the basis of the GATS NT and MFN obligations
- ▶ \* scope of the GATS
  - ▶ MFN exemptions
  - ▶ NT commitments with possible limitations



# Argentina - Financial Services

- ▶ NT: no less favourable treatment than that accorded to its own like services
- ▶ “like” services
  - ▶ Discrimination based “exclusively” on the basis of origin?
  - ▶ Panel confirmed the discrimination, but could not determine whether there were other contributing factors
  - ▶ AB decided that the uncertainty regarding other factors prevented the finding of likeness
- ▶ “no less favourable treatment”
  - ▶ Panel found no violation because the defensive measures promoted a level playing field
  - ▶ AB sees no basis to allow a discriminatory measure that neutralizes a regulatory advantage. No justification based on a level playing field

# Argentina - Financial Services

- ▶ Exceptions
  - ▶ Measures that are *necessary* to secure compliance with laws or regulations
  - ▶ Measures aimed at ensuring the equitable or effective imposition or collection of direct taxes
- ▶ Necessary dialogue of international tax policy standard setters and the trade and investment standards

# Micula



- ▶ Withdrawal of tax incentives in the context of the accession to the EU
  - ▶ BIT with Sweden: breach of FET?
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- ▶ “Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof, as well as the acquisition of goods and services or the sale of their production, through unreasonable or discriminatory measure”

# Micula

- ▶ FET does not give a right to regulatory stability per se, but protects legitimate expectations
  - ▶ Occidental Exploration and Petroleum Company v Ecuador (regarding VAT credits and refunds): relevant factors include the stability of the legal and business framework (changes in the tax laws and the administrative conduct of the tax authority)
- ▶ Excurs: expropriation clause for more severe cases - eg Yukos
  - ▶ Difficult to separate the natural consequence of taxation from actual regulatory expropriation
  - ▶ MAI (never concluded): excessive taxation is not indicative of expropriation, specially in case it is in line with internationally recognized tax practices and generally applied to all taxpayers



# Micula



- ▶ Commission: arbitral award = State aid
- ▶ General Court: not State aid bc events precede the accession to the EU

- ▶ Consequences moving forward?
  - ▶ Could a recovery of State aid advantage granted by a MS be found to breach a BIT (with a third country)? Eg novel interpretation of the ALS, in contradiction to APA
  - ▶ Would the arbitral award constitute new aid?
- ▶ Judicial dialogue?
- ▶ Policy dialogue?



# Sum-up

- ▶ Trade and investment provisions with tax implications
  - ▶ NT/MFN, FET, Expropriation
  - ▶ Subsidy/state aid, transfer of capital
- ▶ Domestic tax provisions potentially impacted
  - ▶ Tax incentives, withholding taxes
  - ▶ Deductibility rules, aggressive transfer pricing practices, CFC rules (...)
- ▶ Challenge: different frameworks and standards

# Q&A



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