WTO Panel Rejects Argentina's Tax Transparency Penalties

Before a World Trade Organization ("WTO") dispute settlement panel, Panama challenged Argentina's imposition of certain tax measures against services and service suppliers from countries deemed "not cooperating for tax transparency purposes" by the Argentine government under Decree No. 589/2013. While Panama did not challenge the Decree directly, it challenged eight of the retaliatory measures imposed by Argentina against countries designated "non-cooperating" under the Decree. The panel ultimately held that Argentina's measures are inconsistent with its WTO obligations under the General Agreement on Trade in Services ("GATS").

The decision is significant for a number of reasons: (i) it is the first time that a WTO panel has analyzed the exception from non-discrimination commitments for prudential measures regulating financial services; (ii) the panel conducted an extensive examination of the exception from GATS obligations for measures necessary to secure compliance with laws or regulations that are not inconsistent with the GATS; and (iii) the panel held that a facially discriminatory measure could be found non-discriminatory based on regulatory differences between the foreign service supplier and the Argentine service supplier.

1. Withholding Tax on Payments of Interest or Remuneration (i.e., Capital Gains)

The Argentine tax authority applies a legal presumption that payments made to creditors located in non-cooperative countries represent a net gain of 100 percent for the purpose of determining the tax base for tax on gains. The rule presumes a net gain in the case of interest or remuneration paid on credits, loans or placements of funds of any origin or type obtained abroad, against any possibility of evidence to the contrary.

Panama argued that this measure is inconsistent with Argentina's obligations under Article II:1 of the GATS because it alters the conditions of competition between like services and service suppliers by according less favorable treatment to services and service suppliers of non-cooperating countries.

2. Presumption of Unjustified Increase in Wealth on Entry of Funds From Non-Cooperative Countries

The Argentine tax authority presumes an unjustified increase in wealth applicable to any entry of funds from non-cooperative countries when calculating tax on gains. The presumption affects gains irrespective of their nature or the purpose of the transaction involved, and may be rebutted by the taxpayer only if it conclusively proves that the funds originated from activities carried out by the taxpayer or by a third party in those countries or from placements of duly declared funds.

Panama argued that this measure is inconsistent with Articles II:1 and XVII of the GATS because it constitutes a disincentive to contracting services that imply a transfer of funds from non-cooperating countries, thus modifying the conditions of competition and according less favorable treatment to services and service suppliers of non-cooperating countries than that granted to like services and service suppliers of cooperating countries. Additionally, Panama argued that the measure violates Article I:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") because the advantage, favor, privilege or immunity accorded to payments received from cooperating countries for exports to those countries is not accorded to exports of like products to non-cooperating countries (that entail payments from non-cooperating countries).

3. Transaction Valuation Based on Transfer Prices

The Argentine tax authority values transactions between Argentine taxpayers and persons from non-cooperative countries based on transfer prices in order to determine the tax on gains payable by Argentine taxpayers. This method applies regardless of whether the transaction is between related parties.

Panama argued that this measure is inconsistent with Articles II:1 and XVII of the GATS because it creates disincentives that imply less favorable treatment for services and service suppliers from non-cooperating countries than like domestic suppliers. Additionally, Panama argued that the measure is inconsistent with Article I:1 of the GATT 1994 because imports/exports of products from/to cooperative countries may be valued as transactions in line with normal market practices or prices, unlike imports and exports to/from non-cooperating countries, which are subject to the transfer pricing valuation regime. Panama also argued that the measure is inconsistent with Article III:4 of the GATT 1994 because it places products imported from non-cooperative countries in a less favorable position than that of like domestic products. Alternatively, Panama argued that the measure is inconsistent with Article XI:1 of the GATT 1994 because it establishes limiting conditions on the import/export of products from/to non-cooperating countries.

4. Payment Received Rule for the Allocation of Expenditure

This measure also concerns the determination of the tax base for gains tax payable by Argentine taxpayers. In this instance, the Argentine tax authority applies the rule of "payment received" when allocating expenditures for transactions between Argentine taxpayers and persons in non-cooperating countries. Thus, outlays by Argentine entities that constitute profits having an Argentine source for persons located, incorporated, based or domiciled in non-cooperative countries shall be allocated to the fiscal year in which payment for the transaction actually takes place.

Panama argued that the measure is inconsistent with Argentina's obligations under Article II:1 of the GATS because it limits the possibility of deducting payments for services provided by service suppliers of non-cooperating countries, according them less favorable treatment than that accorded to like service suppliers of cooperative countries. Additionally, Panama argued that the measure is inconsistent with Article XVII of the GATS because, with regard to the full commitments made by Argentina on national treatment, the current restriction on deducting payments for services provided by service suppliers from non-cooperative countries accords them less favorable treatment than that accorded to domestic like services and service suppliers.

5. Requirements Relating To Reinsurance and Retrocession Services

Argentina imposes requirements on foreign service suppliers in non-cooperative countries in order to gain access to Argentina's reinsurance market. As of March 2014, foreign reinsurance suppliers are authorized to provide reinsurance services either from their country of origin or through a branch located in Argentina, provided they are incorporated and registered in cooperating countries (in the case of branches, this applies to the parent company).

Panama argued that this measure is inconsistent with Argentina's obligations under Article II:1 of the GATS because access to the Argentine reinsurance market for suppliers of non-cooperative countries is subject to compliance with conditions, and this gives rise to uncertainty that alters the conditions of competition between reinsurance service suppliers of non-cooperating countries and those of cooperating countries. Panama also argued that the measure is inconsistent with Articles XVI:1 and XVI:2(a) of the GATS because Argentina restricts the number of foreign service suppliers and accords them treatment less favorable than that specified in its Schedule of Commitments.

6. Requirements Affecting Trade in Financial Instruments and Access to the Argentine Capital Market

Argentina imposes requirements for stock market intermediaries from non-cooperating countries in order to engage in transactions involving the public offering of negotiable securities, forward contracts or options, or other financial instruments or products. Specifically, these intermediaries must be registered with an entity under the control and supervision of a body that functions similar to the Argentine National Securities Commission ("CNV") that has signed a memorandum of understanding on cooperation and exchange of information with the Argentine CNV.

Panama argued that this measure is inconsistent with Argentina's obligations under Article II:1 of the GATS because it accords less favorable treatment to service suppliers of non-cooperating countries seeking access to the Argentine capital market than that accorded to like service suppliers of cooperating countries.

7. Requirements for the Registration of Branches

Aside from the normal requirements applicable to all companies that set up branches in Argentina, branches of companies located in non-cooperating countries must prove where they engage in economically significant business activities. Such companies may be required to provide additional documentation to the General Justice Inspectorate ("IGJ") verifying the records of the company's activities.

Panama argued that the requirements for the registration of branches is inconsistent with Argentina's obligations under Article II:1 of the GATS because it establishes additional requirements that alter the conditions of competition and accords less favorable treatment to service suppliers of non-cooperating countries compared to service suppliers of cooperating countries.

8. Foreign Exchange Authorization Requirements

Argentina requires service suppliers from non-cooperating countries to obtain prior authorization from the Central Bank of the Argentine Republic ("BCRA") in order to repatriate their direct investments.

Panama argued that this measure is inconsistent with Argentina's obligations under Article II:1 of the GATS because it accords service suppliers of non-cooperating countries seeking to repatriate their investments in Argentina less favorable

treatment than that accorded to like service suppliers of cooperating countries.

Argentina's Defenses

In its defense of its measures, Argentina argued that in the event that the panel found six of the eight measures (Measures 1 through 4, 7 and 8) to be inconsistent with the GATS provisions cited by Panama, the exception found in Article XIV(c) of the GATS should apply. That provision states that WTO Members may implement measures that are otherwise inconsistent with the requirements of the GATS that are "necessary to secure compliance with laws or regulations," provided they are applied in a non-discriminatory manner. Additionally, Argentina invoked the exception for measures "necessary to secure compliance with laws or regulations" under Article XX(d) of the GATT 1994 with respect to Measures 2 and 3.

Argentina also invoked the exception under Article XIV(d) of the GATS with respect to Measures 2, 3 and 4. That exception provides that measures that are inconsistent with Article XVII of the GATS (i.e., measures that provide less favorable treatment to foreign suppliers than to domestic suppliers) are permitted so long as the difference in treatment is "aimed at ensuring the equitable or effective imposition or collection of direct taxes."

Finally, with respect to Measures 5 and 6, Argentina invoked paragraph 2(a) of the GATS Annex on Financial Services as a defense to Panama's claims under the GATS. Paragraph 2(a) provides that WTO Members "shall not be prevented from taking measures for prudential reasons" so long as such measures are not used as a means of avoiding the obligations of the GATS.

The Panel Report

On 30 September 2015 the WTO panel issued its final opinion. With respect to Panama's claims under the GATS, the panel held as follows:

- The panel found that all of the above-mentioned measures are inconsistent with Article II:1 of the GATS because they do not accord, immediately and unconditionally, to services and service suppliers of non-cooperative countries treatment no less favorable than that which they accord to like services and service suppliers of cooperative countries. Specifically, this is because Argentina treats certain WTO members as "cooperating countries" in spite of their not having actually completed an information exchange agreement with Argentina (generally because they have opened, but not completed, negotiations to do so), while penalizing other countries who are similarly situated.
- The panel found that Measure 2 (presumption of unjustified increase in wealth), Measure 3 (transaction valuation based on transfer prices) and Measure 4 (payment received rule for the allocation of expenditure) are not inconsistent with Article XVII of the GATS because they accord to services and service suppliers of non-cooperative countries treatment no less favorable than that which they accord to like Argentine services and service suppliers, in the relevant services and modes in which Argentina has undertaken specific commitments. The panel held as a preliminary matter that these measures discriminated against some foreign service providers. However, when taking into account the regulatory differences between the foreign service supplier and the Argentine service supplier, the panel held instead that the measures "leveled the playing field" rather than created conditions less favorable. The panel therefore refrained from making a determination regarding Argentina's defense under Article XIV(d) of the GATS, the exception for measures that aim to ensure the effective collection of direct taxes.
- The panel found that Measures 1 through 4, 7 and 8 are not covered under the exception

invoked by Argentina under Article XIV(c) of the GATS; that is, the exception for measures that are necessary to secure compliance with laws or regulations that are not inconsistent with the GATS, because their application constitutes arbitrary and unjustifiable discrimination; namely, the disparate treatment between countries who do not have information agreements with Argentina.

- The panel dismissed Panama's claim under Article XVI:2(a) of the GATS because Measure 5 (requirements relating to reinsurance services) is not covered by that provision, inasmuch as it does not regulate service suppliers within the meaning of Article XVI:2(a) of the GATS.
- The panel also dismissed Panama's claim under Article XVI:1 of the GATS with respect to Measure 5 (requirements relating to reinsurance services) because Panama failed to establish a *prima facie* case of inconsistency in this respect.
- The panel found that Measures 5 and 6 are not covered by paragraph 2(a) of the Annex on Financial Services because they were not taken for prudential reasons, and therefore dismissed Argentina's defense under that provision. Specifically, the panel developed a rule that "prudential reasons" refer to those that motivate financial sector regulators to act to prevent a risk, injury or danger that does not necessarily have to be imminent. Moreover, the panel held that a measure is taken "for" prudential reasons when its design, structure or architecture shows that there is a rational relationship of cause and effect between the measure it seeks to justify and the prudential reason provided. Applying that test, the panel held that Measures 5 and 6 failed to be taken "for" prudential reasons because they did not apply to persons from countries that are officially cooperative but have not concluded an information exchange agreement or effectively exchanged information; thus, the measures did not have a rational relationship of cause and effect with the prudential reasons identified by Argentina.

With respect to Panama's claims under the GATT 1994, the panel held as follows:

- The panel dismissed Panama's claim under Article I:1 of the GATT 1994, because Panama failed to demonstrate that Measure 2 (presumption of unjustified increase in wealth) constitutes a "rule and formality in connection with exportation" or "a charge imposed on the international transfer of payments for … exports" within the meaning of Article I:1 of the GATT 1994.
- The panel also dismissed Panama's claim under Article I:1 of the GATT 1994, because Panama failed to demonstrate that Measure 3 (transaction valuation based on transfer prices) constitutes "a matter referred to in Article III:4 "or"a rule and formality in connection with exportation or importation" within the meaning of Article I:1 of the GATT 1994.
- Likewise, the panel dismissed Panama's claim under Article III:4 of the GATT 1994 because Panama failed to demonstrate that Measure 3 (transaction valuation based on transfer prices) is a matter referred to in Article III:4 of the GATT 1994.
- The panel also dismissed Panama's claim under Article XI:1 of the GATT 1994, because Measure 3 (transaction valuation based on transfer prices), being fiscal in nature, is not covered by that provision.
- Finally, having dismissed Panama's claims under Article I:1 of the GATT 1994 (in relation to Measure 2 – presumption of unjustified increase in wealth – and Measure 3 – transaction valuation based on transfer prices) and Articles III:4 and XI:1 of the GATT 1994 (in relation to Measure 3 – transaction valuation based on transfer prices), the panel refrained from ruling on whether these measures are covered under

the exception provided for in Article XX(d) of the GATT 1994.

The panel concluded by recommending that the WTO Dispute Settlement Body ("DSB") request Argentina to bring its measures into conformity with its obligations under the GATS. Either party may appeal the panel's decision to the WTO's Appellate Body anytime before the report's adoption by the DSB, typically between 20 and 60 days from the date of the panel's report.

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