WORLD TRADE ORGANIZATION

WT/DS453/1
G/L/1019
S/L/396
19 December 2012

(12-6963)

Original: Spanish

ARGENTINA - MEASURES RELATING TO TRADE IN GOODS AND SERVICES

Request for Consultations by Panama

The following communication, dated 12 December 2012, from the delegation of Panama to the delegation of Argentina and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with Argentina pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), Article XXII of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) and Article XXII of the *General Agreement on Trade in Services* (GATS) with respect to certain measures imposed by Argentina that affect trade in goods and services. These measures apply only to trade conducted with specific countries listed in Decree 1344/98[1] as amended by Decree 1037/00, which include Panama (hereinafter "listed countries").

In accordance with Article 4.4 of the DSU, the reasons for this request, including identification of the measures at issue and an indication of the legal basis for the complaint, are set out below.

1. Discriminatory assessment of profits tax (*impuesto a las ganancias)* depending on the origin or place of residence of the foreign service supplier

Argentina establishes different percentages of presumed net profit in respect of the payment of interest or remuneration to foreign-based creditors depending on their country of residence. The presumed net profit is 100% when the creditor is a banking or financial institution based in certain listed countries, while the presumed net profit is 43% when the creditor is a banking or financial institution based in any other country. Although the same rate of 35% is applied to both payments, because of the different percentages of presumed net profit for the determination of the tax base, each will face a different tax burden, amounting to 35% and 15.05% respectively.

Panama believes that the measure in question is contained, *inter alia*, in the following provisions: (i) Article 93(c)1 and 2 of the Income/Profits Tax Law (*Ley de Impuesto a las Ganancias* - Law 20.628); (ii) Decree 1344/98; (iii) Decree 1037/00.

[1] Regulations to the Income/Profits Tax Law (*Ley de Impuesto a las Ganancias*).

Under this measure, financial services provided by financial service suppliers of certain listed-country Members are subject to treatment less favourable than that accorded to financial services provided by financial service suppliers in any other country. Consequently, for Panama this measure appears to be inconsistent with Article II:1 of the GATS. Moreover, in the context of financial leasing connected with the importation of products, the measure in question accords certain products from certain listed-country Members less favourable treatment than that accorded to products from other countries, in a manner that is inconsistent with Article I:1 of the GATT 1994.

2. Discriminatory measures based on an alleged unjustified increase in wealth

Argentina presumes that the entry of funds from the listed countries, including payments for exports of goods and services and the transfer of funds in connection with the supply of services, constitutes an "unjustified" increase in wealth for the recipients of the funds in Argentina. As a result of this presumption, the funds are considered to be a "net profit". For the purposes of determining the tax base for the profits tax, the total funds are taken into account, plus a 10% increase for income disposed of or consumed. To that tax base, Argentina applies the tax of 35%.[2]

On the other hand, goods and services transactions conducted by persons from or residing in territories other than the listed countries, including transactions involving goods and services of national origin, are not subject to the presumption of net profit or to the 10% increase in the tax base.

Panama believes that this measure is contained, *inter alia*, in the following provisions: (i) Article without number following Article 18 of the Law on Tax Procedure (Law 11683), as amended by Law 25.795; (ii) Article 15 of the Income/Profits Tax Law (Law 20.628); (iii) Decree 1344/98; (iv) Decree 1037/00.

This measure appears to be inconsistent with the following provisions:

- Article II:1 of the GATS, given that in the context of financial services involving a transfer of funds that would result in the presumption of increased wealth, Argentina accords to services and service suppliers from listed-country Members treatment less favourable than it accords to services and service suppliers from other territories;

- Article XI of the GATS, since by presuming a net profit and increasing the tax base by 10%, Argentina is applying restrictions on international transfers and payments for current transactions relating to Argentina's specific commitments in services;

- Article XVI and footnote 8 of the GATS, since: (i) Argentina limits the cross-border movement of capital in respect of its market access commitments in relation to the supply of a service through cross-border trade in which the cross-border movement of capital is an essential part of the service itself; (ii) Argentina limits transfers of capital into its territory in respect of its market access commitments in relation to the supply of a service through commercial presence;

[2] Panama notes that these funds are also subject to value added tax (VAT) and internal taxes calculated using the same tax base as the profits tax, so that the complaints raised under this section are also valid as regards the assessment of VAT and internal taxes applicable to those transactions.

- Article XVII of the GATS, since in relation to its specific commitments in the services area, Argentina accords to services and service suppliers from listed-country Members treatment less favourable than it accords to its own like services and service suppliers;

- Article I:1 of the GATT 1994, since in the context of export payments, Argentina grants an advantage, favour, privilege or immunity to products destined for any other country that is not accorded immediately and unconditionally to the like product destined for listed-country Members.[3]

3. Discrimination in the valuation of transactions with parties from the listed countries

For the purposes of calculating the profits tax, Argentina does not consider transactions conducted with persons incorporated or domiciled in the listed countries to be consistent with normal arms-length market practices or prices. Consequently, Argentina resorts to transfer pricing methods which result in significant costs, for example hiring an independent public accountant to certify certain information included by the taxpayer in the transfer pricing report provided for in General Resolution (AFIP)1122/01, and ultimately in the payment of higher taxes.[4] This practice (i) discourages the importation of goods and supply of services originating in or coming from listed-country Members in favour of the purchase of goods or supply of services of other origins, including goods and services of national origin; (ii) discourages exportation to the territory of listed-country Members in favour of exportation to other destinations.

Panama considers that this measure arises, *inter alia*, from the following provisions: (i) Articles 8 and 15 of the Income/Profits Tax Law; (ii) Decree 1344/98; (iii) Decree 1037/00, both from the text itself and from the way it is actually applied.

Consequently, Panama considers that the measure in question accords an advantage, favour, privilege or immunity to imported products not originating in the listed countries which is not accorded immediately and unconditionally to like products originating in the listed-country Members, in a manner that is inconsistent with Article I:1 of the GATT 1994.

Similarly, Panama considers that the measure in question accords imported products that do not originate in listed-country Members treatment less favourable than that accorded to like products of national origin. This would appear to be inconsistent with Article III:2 and III:4 of the GATT 1994.

Finally, Panama considers that the measure in question discourages the importation of goods originating in listed-country Members and the exportation of goods to the listed-country Members. Thus, the measure would qualify as a restriction on the importation of goods from listed-country Members, and as a restriction on the exportation of goods to the listed-country Members, in a manner that is inconsistent with Article XI:1 of the GATT 1994.

[3] Alternately, for Panama this measure appears to be inconsistent with: (i) Article XI:1 of the GATT 1994, in that it would constitute a restriction on the exportation or sale for export of products destined for the territories of the listed countries; and (ii) Article XIII:1 of the GATT 1994, since it would constitute a restriction on the exportation of products destined for the territories of the listed countries without Argentina similarly restricting the exportation of like products destined for the territories of non-listed countries.

[4] Panama notes that these rules and procedures would also apply to the calculation of VAT, so that the complaints raised under this section are also valid as regards VAT.

In the framework of trade and services, Panama believes that the measure in question accords to services and service suppliers of listed-country Members treatment less favourable than that accorded to the services and service suppliers of other countries, in a manner inconsistent with Article II:1 of the GATS.

This measure also appears to be inconsistent with Article XVII of the GATS in that, in respect of its specific commitments in services, Argentina accords the services and service suppliers from the listed-country Members treatment less favourable than that accorded to its own like services and services suppliers.

4. Measures affecting trade in the reinsurance services sector

Under Resolution No. 35615/2011, the National Insurance Supervisory Authority (*Superintendencia de Seguros de la Nación* - SSN) prohibited foreign reinsurance services suppliers from providing their services to insurers in Argentina unless they had subsidiaries or branches in Argentina with a capital of at least Arg$20 million. At the same time, Panama understands that service suppliers from the listed countries have been denied the possibility of setting up subsidiaries or branches in Argentina. It appears to Panama that the general limitation and the minimum capital requirement for subsidiaries and branches of reinsurance services suppliers from listed-country Members are inconsistent with Article XVI:1 of the GATS and Argentina's specific market access commitments for that sector. Similarly, denial of the permission to set up subsidiaries or branches of reinsurance services suppliers from listed-country Members means according those Members treatment less favourable than that accorded to reinsurance services suppliers from other countries, which would appear to be inconsistent with Article II:1 of the GATS.

Furthermore, in spite of the general limitation, Articles 19 and 20 of Resolution No. 35615/2011 provide for a number of exceptions for cases in which, owing to the magnitude and nature of the risks, the reinsurance service cannot be covered by suppliers established in Argentina. In such cases, reinsurance services suppliers without commercial presence in Argentina may provide this type of service pending approval and registration of the foreign reinsurance company with the SSN. However, under SSN Resolution No. 35726/2011, reinsurance services suppliers incorporated or domiciled in the listed countries are denied that possibility. Panama considers that this measure accords less favourable treatment to reinsurance services and services suppliers from the listed-country Members, which appears to be inconsistent with Article II:1 of the GATS.[5]

5. Discriminatory requirements for the registration of companies, branches and shareholders from certain foreign service suppliers

Under Article 118 of the Law on Commercial Companies No. 19.550, the Argentine Office of Corporations (*Inspección General de Justicia* - IGJ) is responsible for public registration and inspection of companies incorporated in the territory of the Autonomous City of Buenos Aires[6], as well as companies incorporated abroad, that are seeking to exercise their usual activities and set up agencies, branches or permanent representations to be registered in that jurisdiction. In addition to the general requirements for the registration of foreign companies, including agencies, branches or permanent representations, Article 192 of IGJ General Resolution 7/2005 establishes certain

[5] Panama notes that by Resolution No. 36173/2011, the SSN cancelled the registration and licence of a services supplier from Panama because it "[had] its headquarters in the Republic of Panama", which, in line with the above, appears to be inconsistent with Article II:1 of the GATS.

[6] With the exception of those admitted to the public offering regime, which are subject to inspection by the National Securities Commission.

requirements, that apply only to companies from the listed countries, for entry in the register of the Autonomous City of Buenos Aires. These requirements include certification that the company is effectively engaged in economically significant business activities in the place where it was set up, registered or incorporated and/or in third countries, which requires the fulfilment of certain formalities. Moreover, Article 192 expressly stipulates that the IGJ will appraise compliance with the registration requirements restrictively in the case of the listed countries. On the other hand, foreign companies from other countries do not need to comply with the additional requirements contained in Article 192 of IGJ General Resolution 7/2005.

Panama considers that this measure accords to services and service suppliers of listed-country Members seeking to establish commercial presence in Argentina treatment less favourable than that accorded to services and service suppliers of other countries. This appears to be inconsistent with Article II:1 of the GATS.

Moreover, with respect to all of the sectors in which Argentina has undertaken specific commitments, Panama considers that Argentina is effectively limiting access to its markets for service suppliers from listed-country Members seeking to establish commercial presence in Argentina. This appears to be inconsistent with Article XVI:1 of the GATS.

6. Measures affecting the repatriation of investments

Communication "A" 4786 of the Central Bank of the Argentine Republic (BCRA) and its amendments regulate access to the single free exchange market (MULC) for the repatriation of investments abroad. Communication "A" 4786 stipulates that in order to purchase foreign exchange for the purpose of repatriating direct investments and portfolio investments, residents from the listed countries have to obtain prior authorization from the BCRA in order to have access to the MULC, while residents of non-listed countries do not require such authorization.

In Panama's view, this restriction implies less favourable treatment for services and service suppliers from listed-country Members that establish commercial presence in Argentina and seek to repatriate investments to their respective countries than for like services and service suppliers from other countries. This appears to be inconsistent with Article II:1 of the GATS.

7. Measures affecting trade in financial instruments

According to the consolidated text of regulatory provisions of the National Securities Commission as approved by General Resolution No. 368 and updated by General Resolution No. 611, certain financial agents and securities dealers cannot carry out transactions involving negotiable securities, forward contracts, futures or options of any nature, or other financial instruments or products, if such transactions are conducted or ordered by persons incorporated, domiciled or residing in the listed countries. On the other hand, this prohibition does not apply to any transactions conducted or ordered by persons incorporated, domiciled or residing in other countries.

In Panama's opinion, by limiting the ability of the service suppliers of the listed countries to access the Argentine securities market, Argentina is according to services and service suppliers of the listed countries treatment less favourable than that accorded to the services and service suppliers of other countries. This appears to be inconsistent with Article II:1 of the GATS.

8. Discriminatory criteria with respect to deductions for the cost of goods or services provided by residents abroad

For profits tax purposes, Argentina establishes different criteria with respect to the deduction that residents of Argentina are allowed to make for the cost of goods or services supplied by residents abroad. These criteria vary according to the country of residence of the foreign supplier. If the supplier of the goods or services resides in one of the listed countries, the Argentine resident may deduct the cost of the goods or services received only if that cost has been paid prior to the deadline for submitting the corresponding tax declaration.

On the other hand, if the supplier of the goods or services resides in a non-listed country, including Argentina, the Argentine resident may make the deduction even if the cost of the goods or services has not been paid prior to the deadline for submitting the corresponding tax declaration.

Panama believes that this measure is contained, *inter alia*, in the following provisions: (i) Article 18 of the Income/Profits Tax Law (Law 20.628); (ii) Decree 1344/98; (iii) Decree 1037/00.

In Panama's view, this measure appears to be inconsistent with Article II:1 of the GATS because, in respect of the determination of the profits tax, Argentina is according services and service suppliers from listed-country Members treatment less favourable than that accorded to services and service suppliers from other countries. Similarly, with respect to the specific sectors in which Argentina has undertaken commitments, this measure accords foreign suppliers treatment less favourable than that accorded to national suppliers, in a manner which appears to be inconsistent with Article XVII of the GATS.

In respect of the determination of the profits tax, the measure in question also appears to be inconsistent with Article I:1 of the GATT 1994, since it constitutes an advantage, favour, privilege or immunity granted to products originating in the non-listed countries which is not accorded immediately and unconditionally to the like product originating in the listed countries. Furthermore, the measure in question would appear to be inconsistent with Article III:4 of the GATT 1994, since the imported products that originate in the listed countries are accorded treatment less favourable than that accorded to the like products of national origin.

9. Denial of rebates and drawbacks in relation to VAT

With respect to exports destined for the listed countries, Argentina denies rebates and drawbacks in relation to VAT. On the other hand, if the exports are destined for any other country, Argentina does provide exporters with such rebates and drawbacks.

In Panama's view, Argentina is granting products destined for certain territories an advantage, favour, privilege, or immunity that is not accorded immediately and unconditionally to the like product destined for the listed-country Members. In Panama's view, the measure in question therefore appears to be inconsistent with Article I:1 of the GATT 1994.

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Without prejudice to the measures identified herein, the requested consultations also concern any other regulatory instrument, guidelines, practices, decisions or administrative and/or judicial acts that regulate or implement the measures in question, including those that could formally amend them and that were not mentioned previously, as well as specific instances of application.

Panama also informs Argentina that in the course of the consultations it may be necessary to discuss other factual or legal points linked to the measures in question and/or raise other issues under the WTO covered agreements that have not been referred to in this request, including (but not limited to) Articles I:1, III:2 and III:4 of the GATT 1994 and/or Articles II:2 and XVII of the GATS.

I look forward to receiving your reply to this request for consultations as soon as possible. I propose that the date and venue of these consultations be agreed between our two Missions.