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ARGENTINA – MEASURES RELATING TO TRADE IN GOODS AND SERVICES

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY PANAMA

The following communication, dated 13 May 2013, from the delegation of Panama to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

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On 12 December 2012, Panama requested 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 between Argentina and specific countries listed in Decree No.1344/98, as amended by Decree No.1037/00, including Panama (hereinafter "listed countries").[1]

Consultations were held in Geneva on 5 February 2013, but did not settle the dispute. Consequently, pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT 1994 and Article XXII of the GATS, Panama requests the DSU to establish a panel to examine the matters described below.

1. Less favourable tax treatment in the collection of profits tax on certain transactions involving the listed countries

When assessing profits tax, Argentina accords certain transactions between Argentine residents and persons based in the listed countries tax treatment less favourable than that accorded to like transactions between Argentine residents and persons based in other countries. As can be seen from Article 93 of Law No.20.628 (*Ley de Impuesto a las Ganancias* - "Income/Profits Tax Law"), with regard to credit, loans or placement of funds, when the creditor is a banking or financial institution based abroad[2], Argentina presumes that the creditor's net profit is 43% of the payments corresponding to interest or remuneration. On the other hand, if the creditor is a banking or financial institution based in one of the listed countries, Argentina presumes against all evidence to the contrary that the creditor's net profit is 100% of such payments.

By imposing the 35% rate on the net profit thus determined, Argentina taxes transactions with persons based in the listed countries at a higher rate (i.e. 35% of the amount of each payment) than transactions with persons based in other countries (i.e. 15.05% of the amount of each payment). If it is sought to transfer the tax burden to the Argentine resident, the actual rate increases, initially up to 53.85% and 17.72% on the amount of each payment, respectively. The tax is applied in the form of a withholding at the time at which the Argentine resident pays for the service.

[1] The listed countries include Members and countries or territories that are not Members of the WTO. In this request, the reference to "listed countries" should be interpreted to mean those listed countries that are WTO Members.

[2] Subject to supervision by its respective central bank or equivalent institution in accordance with the relevant provision in the Income/Profits Tax Law.

Panama understands that Argentina applies this measure pursuant to:

(i) the Income/Profits Tax Law, in particular Articles 15, 91, 92 and 93;

(ii) Decree No.1344/98, in particular the seventh unnumbered article that follows Article 21;

(iii) Decree No.1037/00; and

(iv) Resolution No.739 of the Federal Administration of Public Revenue ("AFIP").

In Panama's opinion, this tax discrimination impairs the conditions of competition between like services and foreign suppliers of like services by according less favourable treatment to the services and service suppliers of the listed countries, in a manner inconsistent with GATS Article II:1.

2. Tax treatment imposed on entry of funds from the listed countries

Argentina applies special tax treatment to the entry of funds from the listed countries, thereby affecting international trade transactions from and to these countries. When funds enter from a foreign country in general there are no tax implications in Argentina. However, pursuant to the unnumbered article that follows Article 18 of Law No.11683 ("Law on Tax Procedure"), if the funds enter from any of the listed countries, their entry is deemed to be an "unjustified" increase in wealth and is subject to payment of profits tax, value added tax and the applicable domestic taxes. Argentina taxes these funds by increasing the amount entering by 10% and applying to this taxable base the rates corresponding to each of these taxes.

Although this payment is based on a voluntary declaration by the person receiving the funds, the regulations provide for several negative consequences if a proper declaration is not submitted or, where it is sought to justify the funds entering, in the event of failure to convince the tax administration that the entry is not unjustified. The consequential effects provided in the legislation include tax adjustments in the form of taxes to be paid, fines for fraud, payment of compensatory interest and, if applicable, payment of penalty interest or a term of imprisonment of two to nine years depending on the amount of tax evaded.

Panama understands that Argentina applies this measure pursuant to:

(i) the Law on Tax Procedure, in particular Article 18 and the unnumbered article added after Article 18, and, in relation to the consequences, Articles 37, 38, the unnumbered article added to Article 38, Article 39, the unnumbered article added to Article 39, Articles 46 and 52;

(ii) the Income/Profits Tax Law, in particular Article 15;

(iii) Decree No.1344/98, in particular the seventh unnumbered article that follows Article 21, and Article 27;

(iv) Decree No.1037/00; and

(v) Law No.24.769 ("Criminal Tax Law") with regard to the possible offence of tax evasion.

In Panama's view, the measure in question is inconsistent with:

(i) Article II:1 of the GATS, inasmuch as it constitutes a disincentive to contracting services that imply a transfer of funds from the listed countries (e.g. loan services, money transfers, insurance), thus distorting the conditions of competition with like services and service suppliers from other countries. The measure accords services and service suppliers in the listed countries treatment less favourable than that accorded to like services and service suppliers from other countries;

(ii) Article XVI of the GATS, the second sentence of footnote 8 to the GATS and Argentina's Schedule of Commitments, inasmuch as for the specific commitments on the supply of services through commercial presence in the financial sector (e.g. accepting deposits; all types of loan; monetary payments and transfers; trade in money market instruments, transferable securities and other negotiable financial instruments and assets; foreign exchange brokerage; and portfolio management) and non-financial services (e.g. legal, accounting, informatics, construction for buildings, advertising and postal services, wholesale and retail trade services, franchising services, hotels and restaurants and travel agencies), this measure accords less favourable treatment than that provided in Argentina's Schedule of Commitments and imposes a restriction on the transfer of capital from a parent company based in a listed country to the establishment with a commercial presence in Argentina;

(iii) Article XVII of the GATS, inasmuch as, with regard Argentina's specific commitments without limitation on national treatment, this measure constitutes a disincentive to contracting services that might involve any type of transfer of funds from the listed countries (e.g. reinsurance or retrocession services), thereby distorting the conditions of competition between services and service suppliers from the listed countries and Argentine like services and service suppliers. Moreover, with regard to the commercial presence's financing options, this measure places service suppliers of the listed countries with a commercial presence in Argentina in a situation less favourable than that of Argentine suppliers of like services;

(iv) Article I:1 of the GATT 1994, inasmuch as Argentina does not apply the measure to payments received from non-listed countries in connection with exports to those countries. This advantage, benefit, privilege or immunity is not granted for exports of like products to listed countries (giving rise to payments from listed countries).

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

For profits-tax purposes, when transactions between an Argentine resident and another person (whether or not domiciled in Argentina) are reported, Argentina considers that the transactions are in line with normal arms-length market practices or prices unless the relationship between the parties is such as to raise doubts concerning the real value of the transactions. In the case of transactions between Argentine residents and persons domiciled, incorporated or residing in the listed countries, however, as can be seen from Articles 8 and 15 of the Income/Profits Tax Law and Article 21 of Decree No.1344/98, Argentina does not consider that these transactions are in any case in line with normal arms-length market practices or prices, and requires them to be valued in accordance with the pricing methods for transfers between related parties.

Compliance with this requirement by taxpayers or those liable to tax in Argentina implies a significant monetary and administrative burden. For example, determining the value of an operation on the basis of alternative prices derived from transfer pricing methods requires the submission of detailed information on the amount of each transaction, together with an estimate of alternative values derived from applying the various valuation methods set out in Article 15 of the Income/Profits Tax Law and developed in various articles of Decree No.1344/98. This will very probably mean hiring an expert. Moreover, as well as the annual supplementary sworn declaration that has to be submitted, Article 6(b) of AFIP's General Resolution No.1122 requires the submission of a report setting out as a minimum the extensive detailed information listed in Annex II of the Resolution. This report has to be signed by an independent chartered accountant, whose signature has to be authenticated by the professional council or association or body with which the accountant is registered.[3]

It should be noted that under Argentine law failure to submit the sworn declaration and the required information, incomplete submission or substantiation thereof, or a different opinion on the part of the tax administration regarding the values submitted may give rise to administrative, and, ultimately, criminal penalties.

[3] Panama points out that these rules and procedures also apply to calculation of value added tax, so the claims in this section also apply to the collection of VAT.

Panama understands that Argentina applies this measure pursuant to:

(i) the Income/Profits Tax Law, in particular Articles 8 and 15;

(ii) Decree No.1344/98, in particular Article 21 and the unnumbered articles following Article 21 (before Article 22);

(iii) General Resolution No.1122 of the AFIP;

(iv) Decree No.1037/00;

(v) the Law on Tax Procedure, as far as the negative consequences are concerned, and in particular Articles 37 and 38, unnumbered continuation of Article 38, Article 39, unnumbered continuation of Article 39, Articles 46 and 52; and

(vi) the Criminal Tax Law regarding the possible offence of tax evasion;

In Panama's opinion, this situation is inconsistent with:

(i) Article I:1 of the GATT 1994, inasmuch as Argentina accords imports of products from any non-listed country the possibility of being valued as transactions in line with normal market practices or prices without making them subject to determination of transfer prices, whereas the same advantage, immunity, benefit or privilege is not extended immediately and unconditionally to imports of like products from listed countries. Likewise, Argentina accords exports of products to any non-listed country the possibility of being valued as transactions in line with normal market practices or prices without making them subject to this measure, whereas the same advantage, immunity, benefit or privilege is not extended immediately and unconditionally to exports of like products to listed countries;

(ii) Article III:4 of the GATT 1994, inasmuch as this measure lays down rules and requirements that place products imported from listed countries in a situation less favourable than that applicable to domestic like products, to which the requirements in question do not apply;

(iii) Article XI:1 of the GATT 1994, inasmuch as this measure lays down criteria that restrict the import of products from listed countries. Likewise, this measure imposes restrictive conditions on exports to listed countries;

(iv) Article II:2 of the GATS, inasmuch as this measure leads to disincentives that accord to services and service suppliers domiciled, incorporated or based in the listed countries treatment less favourable than that accorded to like services and service suppliers in other countries; and

(v) Article XVII of the GATS, inasmuch as, with regard to Argentina's specific commitments without limitation on national treatment for financial services (e.g. insurance and retrocession services, consultancy and transfer of financial information services) and non-financial services (e.g. legal and accounting services, wholesale trade services), this measure constitutes a disincentive to purchasing services or contracting suppliers domiciled, incorporated or located in the listed countries, thereby placing them in a situation less favourable than that applicable to like domestic services and like domestic suppliers.

4. Discriminatory criteria with respect to deductions

For the purposes of profits tax, Argentina establishes different criteria concerning the possibility given to taxpayers or those liable for tax to deduct expenses incurred in transactions with parties abroad. In general terms, these deductions should be governed by the "accrual" rule at the time at which the underlying obligation is contracted. According to Article 18, last paragraph, of the Income/Profits Tax Law, however, if the counterpart is a resident of or incorporated, based or domiciled in a listed country, the deduction cannot be made in accordance with the accrual rule but according to the time at which payment of the obligation is actually

made. The same restriction does not exist in the case of deductions for transactions with other parties abroad.

Panama understands that this measure arises from:

(i) the Income/Profits Tax Law, in particular Article 18;

(ii) Decree No.1344/98; and

(iii) Decree No.1037/00.

In Panama's opinion, this measure is inconsistent with:

(i) Article II:1 of the GATS, inasmuch as, by limiting the possibility of being able to deduct payment for services provided by suppliers from the listed countries, this measure accords these and their services treatment less favourable than that accorded to like services and service suppliers from other countries; and

(ii) Article XVII of the GATS, inasmuch as, with regard to Argentina's specific commitments without limitation on national treatment (e.g. legal, accounting and financial consultancy services), the limitation on the possibility of being able to deduct payment for services provided by suppliers from listed countries accords these suppliers and their services treatment less favourable than that accorded to like domestic services and service suppliers.

5. Measures affecting trade in the reinsurance and retrocession services sector

Despite having bound the reinsurance and retrocession services sector in the cross-border trade mode, without market access limitation, under Resolution No.35615/2011 of the National Insurance Supervisory Authority ("SSN"), Argentina does not allow foreign suppliers to provide such services under this mode. Argentina does allow foreign suppliers to provide such services through a subsidiary or branch duly established in Argentine territory, but excludes suppliers of reinsurance services in listed countries from this possibility.

Furthermore, despite the general limitation, Argentina provides that in certain cases, because of the extent and the particular features of the prevailing risks, reinsurance services may be provided by foreign suppliers without a commercial presence in Argentina, subject to prior approval and registration of the foreign reinsurer by the SSN. This possibility is, however, denied to suppliers of reinsurance services incorporated or domiciled in the listed countries.

One example of these measures is that pursuant to Resolution No.36173/2011 the SSN cancelled the registration and licence of a Panamanian services supplier simply because it "has its headquarters in the Republic of Panama".

Panama understands that Argentina applies these measures pursuant to Resolution No.35615/2011 of the SSN.

In Panama's opinion, these measures are inconsistent with:

(i) Article II:1 of the GATS, inasmuch as by eliminating both the possibility of establishing subsidiaries or branches in Argentina and that of providing reinsurance or retrocession services on an exceptional basis without a commercial presence in Argentina, the latter accords service suppliers of listed countries treatment less favourable than that accorded to like suppliers of reinsurance or retrocession services from other countries;

(ii) Article XVI:1 of the GATS, in conjunction with Article XVI.2(a) and Argentina's Schedule of Commitments, inasmuch as by not allowing foreign suppliers to provide reinsurance services through cross-border trade Argentina accords them treatment less favourable than that set out in its Schedule of Commitments;

(iii) Article XVI:1, in conjunction with Article XVI:2(e) and Argentina's Schedule of Commitments, inasmuch as the requirement that foreign suppliers should establish branches in Argentina in order to be able to provide the service in question through cross-border trade is a market access restriction not specified in Argentina's Schedule of Commitments; and

(iv) Article XVI:1, in conjunction with Article XVI:2(a) and Argentina's Schedule of Commitments, inasmuch as by prohibiting reinsurance service suppliers from listed countries from setting up subsidiaries or branches in Argentina the latter accords these suppliers treatment less favourable than that accorded in its Schedule of Commitments in respect of market access under mode 3.

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

Argentina imposes a series of registration requirements for foreign companies wishing to set up a branch in the Autonomous City of Buenos Aires. If the foreign company is from a listed country, however, pursuant to Article 192 of General Resolution No.7/2005 of the Argentine Office of Corporations (*Inspección General de Justicia* - "IGJ"), the requirements are even more stringent. These 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, this rule expressly stipulates that the IGJ will appraise compliance with the registration requirements restrictively in the case of companies from the listed countries. On the other hand, foreign companies from other countries do not need to comply with these additional requirements.

Panama understands that Argentina applies this measure pursuant to:

(i) Law No.19.550 on commercial companies, in particular Article 118; and

(ii) General Resolution No.7/2005 of the IGJ, in particular Article 192.

In Panama's opinion, the additional requirements for listing in the companies register of the Autonomous City of Buenos Aires impair the conditions of competition between foreign suppliers of like services and accord less favourable treatment to suppliers of like services from listed countries, contrary to Article II:1 of the GATS.

7. Measures affecting the repatriation of investments

According to Communication "A" 4662 of the Central Bank of the Argentine Republic ("Central Bank"), Argentina has exempted from the prior authorization requirement for the purchase of foreign exchange on its single free exchange market the repatriation of direct investments by the non-financial sector and portfolio investments of non-residents of Argentina. According to Communication "A" 4940 of the Central Bank, however, Argentina imposes this requirement if the beneficiary of the repatriation is a party incorporated or domiciled in the listed countries.

Panama understands that Argentina applies this measure by means of Communication "A" 4940, as amended by Communication "A" 4692 of the Central Bank.

In Panama's opinion, this measure is inconsistent with Article II:1 of the GATS, inasmuch as it accords foreign service suppliers in listed countries seeking to repatriate investments made in Argentina treatment less favourable than that accorded to like service suppliers from other countries.

8. Measures affecting trade in financial instruments

According to General Resolution No.368 of the Argentine National Securities Commission, certain financial agents and securities dealers may not 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.

Panama understands that Argentina applies this measure pursuant to the consolidated text of the National Securities Commission's rules, as approved by General Resolution No.368 and updated by General Resolutions Nos.602 and 604.

In Panama's opinion, this measure is inconsistent with Article II:1 of the GATS inasmuch as it accords service suppliers in the listed countries seeking access to the Argentine capital market in order effectively to provide their services treatment less favourable than that accorded to other like service suppliers from other countries.

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Panama has identified the rules or acts which, in its opinion, underpin the various measures in question. Nevertheless, this list is without prejudice to any other regulatory instruments, administrative or legal decisions, acts, practices, guidance or guidelines issued by Argentina that may be relevant in examining this dispute. Accordingly, the scope of the request for the establishment of a panel covers all the aforementioned actions as well as any possible amendments, extensions or additions where applicable.

Given the inconsistencies described above, pursuant to Article 3.8 of the DSU, Panama considers that the measures at issue nullify or impair the advantages accruing to Panama under the various provisions mentioned in this request.

Panama requests that, pursuant to Article 6 of the DSU, the DSB establish a panel to examine this matter. Panama also requests that the panel be given the standard terms of reference provided in Article 7.1 of the DSU.

Panama asks that this request for the establishment of a panel be included in the agenda of the DSB meeting planned for 24 May 2013.

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