

Multinational

WTO Rejects Panama's Appeal of Argentine Blacklist Measures

Argentina did not violate WTO rules when it implemented special tax rules for blacklisted jurisdictions, including Panama, according to an April 14 finding by a WTO appellate body.

Panama filed a protest against the special rules in 2013, claiming that Argentina violated its obligations under the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services (GATS) by imposing impermissible burdens for cross-border transactions involving blacklisted countries. Those burdens include increased tax base presumptions, gross-ups, special valuation provisions, and restrictions on the recognition of expenses, Panama said.

A WTO dispute resolution panel largely accepted Panama's complaint on September 30, 2015, finding that the measures violate the most favored nation provision of GATS, which prohibits one WTO member from discriminating among other WTO members. The panel determined that the special rules discriminate between WTO members that Argentina considers cooperative and those that it finds noncooperative.

While some of the Argentine measures violate the country's commitments under GATS, they still fall within general exceptions provided for under the agreement because they are necessary to ensure compliance with laws and regulations concerning the prevention of deceptive and fraudulent practices, the panel said. Despite that determination, however, the dispute panel said Argentina's implementation of the special measures was arbitrary and constitutes unjustifiable discrimination.

Mark Warner of MAAW Law in Toronto said the arbitrary treatment cited by the panel occurred, in part, when Argentina removed Panama from its blacklist in 2013 after the two countries opened negotiations on a tax cooperation agreement. The dispute panel said Argentina weakened its sanctions by taking Panama off the blacklist, thereby preventing the Argentine government from relying on the general exceptions under GATS as a permissible justification for applying the measures to Panama.

Panama Sought More Conclusive Ruling

Warner said that despite its apparent victory before the dispute resolution panel, Panama appealed to the WTO appellate body for a more conclusive determination that would be harder for Argentina to remedy. The appellate body found that Panama had not established that the Argentine distinction between cooperative and noncooperative countries was based exclusively on ori-

gin, Warner said in an email. Further, while the dispute panel undertook an analysis of "likeness," it did not consider the competitive relationship of the services and service suppliers of cooperative and noncooperative countries, Warner said. Because of the appellate body's reversal of the panel's likeness findings, there remains no finding of inconsistency with the GATS, Warner said. The appellate body stressed that it had "taken no view on whether the services and service suppliers of cooperative countries are 'like' the services and service suppliers of non-cooperative countries, or 'like' Argentine services and service suppliers."

Warner suggested that the appellate body's decision "leaves open the possibility for another tax haven to try to establish that similar 'defensive measures' provide for a distinction based exclusively on origin and, if successful, to try to prove discrimination under the GATS that might not be saved by the general exceptions."

The appellate body didn't have to analyze the relevance of the exceptions to GATS to make its decision because it had determined that there was no violation of the agreement in the first place, Warner said. "If there is no violation, why go into all that analysis?" he asked. "Why not let a future panel develop the legal reasoning on a more complete record that would put the appellate body in a better position to evaluate the applicability of the exceptions to the facts in a relevant case?"

Although the appellate body did not specifically hold that the disputed Argentine measures were allowable under WTO rules, one lawyer said that such affirmative findings are rare. "In practice, the [appellate body's] finding makes it very unlikely that defensive tax measures would be deemed WTO-inconsistent in the future," said the lawyer, who asked not to be identified.

Appeal Improbable

The lawyer said that if the decision had gone against Argentina, it would have made it more difficult for countries to take effective countermeasures against the practices described in the Panama Papers. (Prior coverage: *Tax Notes Int'l*, Apr. 11, 2016, p. 103.) "Panama's case was a collateral attack on initiatives such as the global forum and the [Financial Action Task Force], which combat tax evasion and money laundering," the lawyer said.

The Global Forum on Transparency and Exchange of Information for Tax Purposes is an initiative of the OECD that addresses the risks to tax compliance posed by noncooperative jurisdictions. The Financial Action Task Force is an intergovernmental body dedicated to combating money laundering and terrorism financing.

While the appellate body's decisions are subject to the approval of the WTO's dispute settlement board, the only way a determination can be blocked is if all members represented at the relevant meeting agree to

reject adoption. Because at least one of the parties represented in a meeting always prevails, it is unlikely that the board will agree to block adoption of the decision. “Thus, rejection by (negative) consensus is more theoretical than real, and has never occurred in the WTO practice to date,” the WTO said in an explanation of the process on its website.

Panama’s Ministry of Finance did not respond by press time to a request for comment on the appellate board’s decision.

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