

***ARGENTINA – MEASURES RELATING TO
TRADE IN GOODS AND SERVICES***

(WT/DS453)

**THIRD PARTY ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT
THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES**

September 24, 2014

I. Introduction

Mr. Chairman, members of the Panel:

1. On behalf of the United States, I would like to thank you, as well as the Secretariat, for your work in this dispute. In this statement, the United States would like to address the interpretation of the two exceptions that Argentina raised under Article XIV of the *General Agreement on Trade in Services* (GATS). First, we will discuss the interpretation of Article XIV(c) of the GATS, and in particular, the kind of measures for which a Member may invoke that exception. Second, we will address the interpretation of Article XIV(d), which applies only to measures that have been found to be inconsistent with the national treatment obligation in Article XVII.

II. Article XIV(c)

2. Article XIV(c) of the GATS allows Members to take measures that would otherwise be inconsistent with the GATS, if those measures are necessary to secure compliance with laws or regulations that are not themselves inconsistent with GATS. The GATS-consistent laws and regulations, with which a Member is seeking to ensure compliance, include measures relating to:

- (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
- (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
- (iii) safety.

3. In its third party submission, the European Union states that “[s]ubparagraphs (i) to (iii) in Article XIV(c) appear to specify measures posing concerns to the users of the services in question”, such that the exception “would appear to permit measures to secure compliance with law or regulations that address concerns from the perspective of the *service user*.”¹ “In this respect”, the European Union concludes, “a measure that only addresses concerns of the tax authorities to collect revenue would not appear to fall under the scope of this provision.”²

4. The United States does not consider that the text of Article XIV(c) of the GATS supports the interpretation proposed by the European Union. While each of the concerns listed in the subparagraphs of Article XIV(c) would *include* concerns relating to the users of services, nothing in the text of the provision suggests that these concerns would be *limited* to services users only. Indeed, Article XIV(c) does not mention “users” or “consumers” in any of its subparagraphs, including subparagraph (i).

5. Under subparagraph (i), which includes measures relating to “the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts”, one can imagine deceptive or fraudulent practices that would harm service suppliers as well as services consumers, such as the fraudulent use of an individual’s credit or debit account information. Where banks bear the burden of such fraud, its prevention would be just as much of a concern to the bank as it would be to the banking consumer whose credit information had been stolen. For that matter, this or other instances of deceptive or fraudulent practices often could harm the general public, the integrity of the market, or a government’s interest in collecting accurate

¹ European Union Third Party Written Submission, para. 115 (original emphasis).

² European Union Third Party Written Submission, para. 115.

information, ensuring appropriate use of public goods or administering its tax system. Indeed, the fact that the provision focuses on harmful practices – without enumerating the potential targets of such practices – reflects the reality that the resulting harm is not necessarily limited to the immediate victim.

6. Similarly, measures relating to “safety”, as provided in subparagraph (iii), can be understood to encompass safety measures intended to protect services suppliers, such as construction workers, just as easily as it can be understood to encompass measures concerned with the safety of services consumers, such as airline passengers.

7. Therefore, in determining whether a measure relates to “the prevention of deceptive and fraudulent practices”, the Panel’s analysis should not depend on the intended target of such practices. Rather, findings under Article XIV(c) should rest solely on whether the underlying measure is WTO-consistent, without regard to who the measure protects.

III. Article XIV(d)

8. Article XIV(d) of the GATS provides an exception to the national treatment obligation of Article XVII for measures “aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other members.” Argentina invokes this exception as an alternative to its defense under Article XIV(c) regarding measures necessary to secure compliance with laws or regulations that are not inconsistent with the GATS.

However, as we understand its submission, Argentina transposes many of the arguments made under Article XIV(c) to Article XIV(d), including, for example, arguments relating to

“necessity”. In the U.S. view, Articles XIV(c) and XIV(d) have important differences that should be taken into account by the Panel in its interpretation and application of Article XIV(d).

9. Article XIV(d) states that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective* imposition or collection of direct taxes in respect of services or service suppliers of other Members.

10. “Provided” means “on the condition, supposition, or understanding that.” Therefore, by using the phrase “provided that,” Article XIV(d) conditions the application of the exception on the satisfaction of certain conditions.³ It states that an exception to the national treatment obligation will only be allowed if “the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members.” Footnote 6 then provides a list of illustrative measures that would satisfy that condition. Therefore, any measure found to be inconsistent with Article XVII must either fall into one of the measure descriptions in the footnote, or otherwise be “aimed at the equitable or effective imposition or collection of direct taxes.”

11. We also note that Article XIV(d) requires that the measure in question be “aimed at” the equitable or effective imposition or collection of direct taxes. “To aim” means to direct one’s course, make it one’s object to attain, intend, or try.⁴ The exception does not require that the measure be “necessary to” achieve the equitable or effective imposition or collection of direct taxes. Therefore, it is not necessary to demonstrate that no other less trade restrictive alternative

³ The New Shorter Oxford English Dictionary, Thumb Index Edition, Volume 2, pp. 2393.

⁴ The New Shorter Oxford English Dictionary, Thumb Index Edition, Volume 1, pp. 44.

measure is available. If the measure is in fact aimed at the equitable or effective imposition or collection of direct taxes within the meaning of footnote 6, the measure will satisfy the first step in the GATS Article XIV analysis, and a panel must then continue its analysis to determine compliance with the requirements of the chapeau.

12. The United States thanks the Panel and the parties' for their consideration of the U.S. statement, and looks forward to providing its answers to the Panel's advance questions, as well as providing written responses to any additional questions the Panel may have.