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

AB-2015-8

*Report of the Appellate Body*

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**Table of Contents**

<b>1</b>	<b>INTRODUCTION .....</b>	<b>10</b>
<b>2</b>	<b>ARGUMENTS OF THE PARTICIPANTS.....</b>	<b>15</b>
<b>3</b>	<b>ARGUMENTS OF THE THIRD PARTICIPANTS.....</b>	<b>15</b>
<b>4</b>	<b>ISSUES RAISED IN THIS APPEAL .....</b>	<b>15</b>
<b>5</b>	<b>OVERVIEW OF THE MEASURES AT ISSUE .....</b>	<b>16</b>
5.1	The distinction between cooperative and non-cooperative countries.....	16
5.2	Measure 1: Withholding tax on payments of interest or remuneration.....	17
5.3	Measure 2: Presumption of unjustified increase in wealth.....	18
5.4	Measure 3: Transaction valuation based on transfer pricing.....	19
5.5	Measure 4: Rule on the allocation of expenditure.....	19
5.6	Measure 5: Requirements relating to reinsurance services .....	20
5.7	Measure 6: Requirements for access to the Argentine capital market.....	21
5.8	Measure 7: Requirements for the registration of branches.....	21
5.9	Measure 8: Foreign exchange authorization requirement .....	22
5.10	The measures challenged by Panama.....	23
5.11	International instruments relevant to Argentina's defence .....	24
<b>6</b>	<b>ANALYSIS OF THE APPELLATE BODY.....</b>	<b>25</b>
<b>6.1</b>	<b>Article II:1 and Article XVII of the GATS – "Likeness" .....</b>	<b>25</b>
6.1.1	The Panel's findings under Article II:1 of the GATS .....	25
6.1.2	The Panel's findings under Article XVII of the GATS.....	27
6.1.3	Claims and arguments on appeal.....	27
6.1.4	"Likeness" under Article II:1 and Article XVII of the GATS.....	28
6.1.5	Presumption of "likeness".....	32
6.1.6	Argentina's claims on appeal .....	34
6.1.6.1	Whether the Panel erred in its interpretation and application of Article II:1 of the GATS.....	35
6.1.6.2	Whether the Panel erred in its interpretation and application of Article XVII:1 of the GATS.....	39
6.1.6.3	Whether the Panel acted inconsistently with Article 11 of the DSU.....	40
<b>6.2</b>	<b>Article II:1 and Article XVII of the GATS – "Treatment no less favourable" .....</b>	<b>41</b>
6.2.1	The Panel's findings under Article II:1 of the GATS .....	41
6.2.2	The Panel's findings under Article XVII of the GATS.....	43
6.2.3	Claims and arguments on appeal.....	43
6.2.4	Whether the Panel erred in its interpretation of the term "treatment no less favourable" in Article II:1 and Article XVII of the GATS.....	44
6.2.4.1	Whether the Panel erred in its articulation of the legal standard of "treatment no less favourable" .....	45
6.2.4.2	Whether the Panel employed an erroneous legal standard in applying Article II:1 and Article XVII of the GATS.....	52

6.2.5	Whether the Panel erred in its application of Article XVII of the GATS .....	58
6.2.6	Conclusion .....	58
<b>6.3</b>	<b>Article XIV(c) of the GATS .....</b>	<b>59</b>
6.3.1	Introduction .....	59
6.3.2	Whether the Panel erred by failing to focus its analysis on the relevant aspects of the measures that gave rise to the findings of inconsistency with Article II:1 of the GATS .....	61
6.3.2.1	The appropriate focus in the analysis of the "measures" under Article XIV(c) of the GATS .....	62
6.3.2.2	The relevant aspects of measures 1, 2, 3, 4, 7, and 8 examined by the Panel under Article II:1 and Article XIV(c) of the GATS .....	63
6.3.2.3	Conclusion .....	65
6.3.3	Necessary to secure compliance with laws or regulations .....	65
6.3.3.1	The Panel's findings.....	65
6.3.3.2	Whether the Panel erred in finding that the measures are designed to secure compliance with laws or regulations.....	69
6.3.3.3	Whether the Panel erred in finding that the measures are "necessary" to secure compliance with the relevant laws or regulations .....	74
6.3.4	Overall conclusion on Article XIV(c) of the GATS.....	79
<b>6.4</b>	<b>Paragraph 2(a) of the GATS Annex on Financial Services .....</b>	<b>80</b>
6.4.1	Introduction .....	80
6.4.2	Claims and arguments on appeal.....	81
6.4.3	The scope of paragraph 2(a) of the Annex on Financial Services .....	82
6.4.4	Specific errors alleged by Panama in the Panel's interpretation of paragraph 2(a) of the Annex on Financial Services.....	84
6.4.5	Conclusion .....	87
<b>7</b>	<b>FINDINGS AND CONCLUSIONS .....</b>	<b>87</b>
<b>APPENDIX</b>	<b>.....</b>	<b>89</b>

### ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AFIP	Federal Administration of Public Revenue
AFIP Resolution No. 3.576/2013	General Resolution No. 3.576 of the Federal Administration of Public Revenue (AFIP) of 27 December 2013
Argentina's Constitution	Constitution of the Republic of Argentina
Argentine Central Bank	Central Bank of the Argentine Republic
Commercial Companies Law	Law No. 19.550 on Commercial Companies of 3 April 1972
Communication "A" No. 4662	Communication "A" No. 4662 of the Central Bank of the Argentine Republic of 11 May 2007
Communication "A" No. 4692	Communication "A" No. 4692 of the Central Bank of the Argentine Republic of 31 July 2007
Communication "A" No. 4940	Communication "A" No. 4940 of the Central Bank of the Argentine Republic of 12 May 2009
cooperative countries	countries that Argentina classifies as "countries cooperating for tax transparency purposes"
CPC	UN Central Product Classification
Criminal Tax Law	Criminal Tax Law No. 24.769
Decree No. 589/2013	Decree No. 589 of the Federal Administration of Public Revenue (AFIP) of 27 May 2013
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FATF	Financial Action Task Force
G-20	Group of Twenty
Gains Tax Law	Law No. 20.628 on Gains Tax of 29 December 1973
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
Global Forum	Global Forum on Transparency and Exchange of Information for Tax Purposes
Law against Money Laundering	Law No. 25.246 of 5 May 2000 on Concealment and Laundering of Money of Criminal Origin
Law on Tax Procedure	Law No. 11.683, consolidated text of 1978, and amendments thereto, approved by Decree No. 821/1998 of 13 July 1998, published in the <i>Official Journal of the Argentine Republic</i> on 20 July 1998
non-cooperative countries	countries that Argentina classifies as "countries not cooperating for tax transparency purposes"
OECD	Organisation for Economic Co-operation and Development
Panel Report	Panel Report, <i>Argentina – Measures Relating to Trade in Goods and Services</i> , WT/DS453/R
Resolution on Companies Incorporated Abroad	General Resolution No. 7 of the General Justice Inspectorate (IGJ) of 25 August 2005, as modified by General Resolution No. 1/2014 of the General Justice Inspectorate (IGJ) of 8 April 2014
Rules of the National Securities Commission	Rules of the National Securities Commission, New Text 2013 (Title XI), approved by General Resolution No. 622

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Abbreviation	Description
SSN	National Insurance Supervisory Authority
SSN Resolution No. 35.615/2011	Resolution No. 35.615 of the National Insurance Supervisory Authority (SSN) of 11 February 2011, amended by Article 4 of SSN Resolution No. 35.794/2011 and Articles 1 and 2 of SSN Resolution No. 38.284/2014
SSN Resolution No. 35.794/2011	Resolution No. 35.794 of the National Insurance Supervisory Authority (SSN) of 19 May 2011
SSN Resolution No. 38.284/2014	Resolution No. 38.284 of the National Insurance Supervisory Authority (SSN) of 21 March 2014
TBT Agreement	Agreement on Technical Barriers to Trade
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization

**PANEL EXHIBITS CITED IN THIS REPORT**

<b>Panel Exhibit(s)</b>	<b>Description</b>
ARG-22	OECD Report, <i>Addressing Base Erosion and Profit Shifting</i> (2013)
ARG-25	Financial Action Task Force (FATF) Recommendations, International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (February 2012)
ARG-27	Resolution No. 35.615 of the National Insurance Supervisory Authority (SSN) of 11 February 2011, as amended by Article 4 of SSN Resolution No. 35.794/2011 and Articles 1 and 2 of SSN Resolution No. 38.284/2014
ARG-31 / PAN-71	Communication "A" No. 4940 of the Central Bank of the Argentine Republic of 12 May 2009
ARG-32	Law No. 25.246 of 5 May 2000 on Concealment and Laundering of Money of Criminal Origin
ARG-33 / PAN-62	General Resolution No. 7 of the General Justice Inspectorate (IGJ) of 25 August 2005, as modified by General Resolution No. 1/2014 of the General Justice Inspectorate (IGJ) of 8 April 2014
ARG-35 / PAN-3	Decree No. 589 of the Federal Administration of Public Revenue (AFIP) of 27 May 2013
ARG-37 / PAN-3	General Resolution No. 3.576 of the Federal Administration of Public Revenue (AFIP) of 27 December 2013
ARG-41	Global Forum on Transparency and Exchange of Information, <i>Tax Co-operation 2009: Towards a Level Playing Field</i> (OECD, 2009)
ARG-42 / PAN-4	Law No. 20.628 on Gains Tax of 29 December 1973
ARG-43 / PAN-34	Law No. 19.550 on Commercial Companies of 3 April 1972
ARG-45 / PAN-9	Law No. 11.683, consolidated text of 1978, and amendments thereto, approved by Decree No. 821/1998 of 13 July 1998, published in the <i>Official Journal of the Argentine Republic</i> on 20 July 1998
ARG-47	Resolution No. 38.284 of the National Insurance Supervisory Authority (SSN) of 21 March 2014
ARG-48 / PAN-40	Resolution No. 35.794 of the National Insurance Supervisory Authority (SSN) of 19 May 2011
ARG-50 / PAN-58	Rules of the National Securities Commission, New Text 2013 (Title XI), approved by General Resolution No. 622
ARG-69 / PAN-67	Communication "A" No. 4662 of the Central Bank of the Argentine Republic of 11 May 2007
ARG-70 / PAN-68	Communication "A" No. 4692 of the Central Bank of the Argentine Republic of 31 July 2007
ARG-135	Resolution No. 38.708 of the National Insurance Supervisory Authority (SSN) of 6 November 2014, and Annex thereto (General Regulation for Insurance Activities)
PAN-7	Notarized sworn statement of 14 March 2014 prepared by a legal expert on banking matters
PAN-36	Resolution No. 35.615 of the National Insurance Supervisory Authority (SSN) of 11 February 2011, as amended by Article 4 of SSN Resolution No. 35.794/2011
PAN-72	Communication "B" No. 7953 of the Central Bank of the Argentine Republic of 15 August 2003

## CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
<i>Argentina – Import Measures</i>	Panel Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
<i>Canada – Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, p. 2817
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R, Add.1 and Add.2 / WT/DS340/R, Add.1 and Add.2 / WT/DS342/R, Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, p. 119
<i>China – Electronic Payment Services</i>	Panel Report, <i>China – Certain Measures Affecting Electronic Payment Services</i> , WT/DS413/R and Add.1, adopted 31 August 2012, DSR 2012:X, p. 5305
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
<i>EC – Bananas III (Ecuador)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador</i> , WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:III, p. 1085
<i>EC – Bananas III (Article 21.5 – Ecuador)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/RW/ECU, adopted 6 May 1999, DSR 1999:II, p. 803

Short Title	Full Case Title and Citation
<i>EC – Countervailing Measures on DRAM Chips</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, p. 8671
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
<i>EC – Tariff Preferences</i>	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, p. 925
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>Korea – Various Measures on Beef</i>	Panel Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, p. 59
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Mexico – Taxes on Soft Drinks</i>	Appellate Body Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
<i>Thailand – Cigarettes (Philippines)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
<i>Turkey – Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, p. 2151
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI, p. 5751
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
<i>US – FSC (Article 21.5 – EC)</i>	Panel Report, <i>United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, p. 119
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)



Short Title	Full Case Title and Citation
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
<i>US – Shrimp (Thailand)</i>	Panel Report, <i>United States – Measures Relating to Shrimp from Thailand</i> , WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R, DSR 2008:VII, p. 2539
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**Argentina – Measures Relating to Trade in Goods and Services**

Panama, *Appellant/Appellee*  
Argentina, *Other Appellant/Appellee*

Australia, *Third Participant*  
Brazil, *Third Participant*  
China, *Third Participant*  
Ecuador, *Third Participant*  
European Union, *Third Participant*  
Guatemala, *Third Participant*  
Honduras, *Third Participant*  
India, *Third Participant*  
Oman, *Third Participant*  
Saudi Arabia, *Third Participant*  
Singapore, *Third Participant*  
United States, *Third Participant*

AB-2015-8

Appellate Body Division:

Chang, Presiding Member  
Bhatia, Member  
Zhang, Member

## 1 INTRODUCTION

1.1. Panama and Argentina each appeals certain issues of law and legal interpretations developed in the Panel Report, *Argentina – Measures Relating to Trade in Goods and Services*<sup>1</sup> (Panel Report). The Panel was established on 25 June 2013 to consider a complaint by Panama<sup>2</sup> with respect to certain financial, taxation, foreign exchange, and registration measures adopted by Argentina, each distinguishing between "countries cooperating for tax transparency purposes" (cooperative countries) and "countries not cooperating for tax transparency purposes" (non-cooperative countries) in accordance with Decree No. 589/2013<sup>3</sup> of Argentina's Federal Administration of Public Revenue (AFIP). In particular, Panama challenged the following eight measures<sup>4</sup>:

Measure 1: An irrebuttable presumption that payments made by Argentine consumers to creditors located in non-cooperative countries in certain transactions represent a net gain of 100% for the purpose of determining the tax base for gains tax, applied pursuant to Article 93(c) of the Gains Tax Law<sup>5</sup> (withholding tax on payments of interest or remuneration);

Measure 2: A rebuttable presumption of unjustified increase in wealth applicable to any entry of funds – for the benefit of Argentine taxpayers – from non-cooperative countries in the context of an *ex officio* determination of the taxable subject matter by the AFIP for the purpose of gains tax, applied pursuant to the unnumbered provision added after Article 18 of the Law on Tax Procedure<sup>6</sup> (presumption of unjustified increase in wealth);

Measure 3: The obligation to apply valuation methods based on transfer pricing to transactions between Argentine taxpayers and persons of non-cooperative countries for the purpose of determining the tax base for gains tax, applied pursuant to Article 8, fifth paragraph, and Article 15, second paragraph, of the Gains Tax Law (transaction valuation based on transfer pricing);

<sup>1</sup> WT/DS453/R, 30 September 2015.

<sup>2</sup> Request for the Establishment of a Panel by Panama, WT/DS453/4, 13 May 2013.

<sup>3</sup> Decree No. 589 of the Federal Administration of Public Revenue (AFIP) of 27 May 2013 (Decree No. 589/2013) (Panel Exhibits ARG-35 and PAN-3).

<sup>4</sup> In section 5 of this Report, we provide a more detailed description of these measures.

<sup>5</sup> Law No. 20.628 on Gains Tax of 29 December 1973 (Gains Tax Law) (Panel Exhibits ARG-42 and PAN-4).

<sup>6</sup> Law No. 11.683, consolidated text of 1978, and amendments thereto, approved by Decree No. 821/1998 of 13 July 1998, published in the *Official Journal of the Argentine Republic* on 20 July 1998 (Law on Tax Procedure) (Panel Exhibits ARG-45 and PAN-9).

Measure 4: The allocation of expenditure for transactions between Argentine taxpayers and persons of non-cooperative countries to the fiscal years in which payment for the transactions actually takes place for the purpose of determining the tax base for gains tax, applied pursuant to the last paragraph of Article 18 of the Gains Tax Law (rule on the allocation of expenditure);

Measure 5: Certain requirements that service suppliers of non-cooperative countries must meet in order to gain access to Argentina's reinsurance services market, applied pursuant to SSN Resolution No. 35.615/2011<sup>7</sup>, as amended by Article 4 of SSN Resolution No. 35.794/2011<sup>8</sup> and SSN Resolution No. 38.284/2014<sup>9</sup> (requirements relating to reinsurance services);

Measure 6: Certain requirements that stock market intermediaries<sup>10</sup> must fulfil in order to engage in transactions ordered by persons of non-cooperative countries, applied pursuant to Title XI ("Prevention of money laundering and financing of terrorism"), Section III, Article 5 of the Rules of the National Securities Commission<sup>11</sup> (requirements for access to the Argentine capital market);

Measure 7: Certain requirements with which companies of non-cooperative countries must comply in order to register branches in the Public Trade Register of the Autonomous City of Buenos Aires, applied pursuant to Article 192 of the Resolution on Companies Incorporated Abroad<sup>12</sup> (requirements for the registration of branches); and

Measure 8: A requirement to obtain prior authorization from the Central Bank of the Argentine Republic (Argentine Central Bank) to access the Single Free Foreign Exchange Market in order to purchase foreign currency for the repatriation of direct and portfolio investments when the beneficiary abroad is residing, incorporated, or domiciled in a non-cooperative country, applied pursuant to Communication "A" No. 4940<sup>13</sup>, Section I, of the Argentine Central Bank (foreign exchange authorization requirement).

1.2. With respect to Argentina's obligations under the General Agreement on Trade in Services (GATS), Panama claimed before the Panel that all eight challenged measures are inconsistent with Article II:1 of the GATS because these measures accord less favourable treatment to services and service suppliers of non-cooperative countries than that accorded to like services and service suppliers of cooperative countries.<sup>14</sup> Panama also claimed that measures 2, 3, and 4 are inconsistent with Article XVII of the GATS because these measures accord less favourable treatment to services and service suppliers of non-cooperative countries than that accorded to like

<sup>7</sup> Resolution No. 35.615 of the National Insurance Supervisory Authority (SSN) of 11 February 2011 (SSN Resolution No. 35.615/2011) (Panel Exhibits ARG-27 and PAN-36).

<sup>8</sup> Resolution No. 35.794 of the National Insurance Supervisory Authority (SSN) of 19 May 2011 (SSN Resolution No. 35.794/2011) (Panel Exhibits ARG-48 and PAN-40). Article 4 of this resolution develops point 19 of Annex I to SSN Resolution No. 35.615/2011. (Panel Report, para. 2.24)

<sup>9</sup> Resolution No. 38.284 of the National Insurance Supervisory Authority (SSN) of 21 March 2014 (SSN Resolution No. 38.284/2014) (Panel Exhibit ARG-47). This Resolution replaces points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011. (Panel Report, para. 2.24) Although SSN Resolution 35.794/2011 and SSN Resolution No. 38.284/2014 were not mentioned in the panel request, the Panel identified these two legal instruments as forming part of its terms of reference. (Panel Report, para. 7.20) At the same time, the Panel found that a further amendment to SSN Resolution No. 35.615/2011 – made by means of Resolution No. 38.708 of the National Insurance Supervisory Authority (SSN) of 6 November 2014, and Annex thereto: General Regulation for Insurance Activities (Panel Exhibit ARG-135) – was not within its terms of reference, and decided that it would therefore not consider the amendment contained in that Resolution in its analysis of measure 5. (Panel Report, para. 7.19)

<sup>10</sup> "Stock market intermediaries" means the persons indicated in Article 1 of the Rules of the National Securities Commission, including "bargaining agents, liquidation and compensation agents, distribution and placement agents, and collective investment management agents". (Panel Report, fn 53 to para. 2.35 (referring to Rules of the National Securities Commission, *infra*, fn 11))

<sup>11</sup> Rules of the National Securities Commission, New Text 2013 (Title XI), approved by General Resolution No. 622 (Rules of the National Securities Commission) (Panel Exhibits ARG-50 and PAN-58).

<sup>12</sup> General Resolution No.7 of the General Justice Inspectorate (IGJ) of 25 August 2005 (Resolution on Companies Incorporated Abroad) (Panel Exhibits ARG-33 and PAN-62).

<sup>13</sup> Communication "A" No. 4940 of the Central Bank of the Argentine Republic of 12 May 2009 (Communication "A" No. 4940) (Panel Exhibits ARG-31 and PAN-71).

<sup>14</sup> Panel Report, para. 3.1.a-h.

domestic services and service suppliers.<sup>15</sup> With respect to measure 5, Panama further claimed that this 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 favourable than that specified in its Schedule of Commitments.<sup>16</sup>

1.3. With respect to Argentina's obligations under the General Agreement on Tariffs and Trade 1994 (GATT 1994), Panama claimed that measures 2 and 3 are inconsistent with Article I:1 of the GATT 1994 because an advantage, favour, privilege, or immunity granted to products from cooperative countries is not accorded to like products from non-cooperative countries.<sup>17</sup> Panama also claimed that measure 3 is inconsistent with Article III:4 of the GATT 1994 because it places products imported from non-cooperative countries in a less favourable position than that of like domestic products.<sup>18</sup> Alternatively to its claim under Article III:4, Panama claimed that measure 3 is inconsistent with Article XI:1 of the GATT 1994 because this measure establishes limiting conditions on the import/export of products from/to non-cooperative countries.<sup>19</sup>

1.4. Argentina requested that the Panel reject Panama's claims in their entirety.<sup>20</sup> In the alternative, in the event that the Panel were to find that these measures are inconsistent with the GATS provisions cited by Panama, Argentina invoked: Article XIV(c) of the GATS with respect to measures 1, 2, 3, 4, 7, and 8<sup>21</sup>; Article XIV(d) of the GATS with respect to measures 2, 3, and 4<sup>22</sup>; and paragraph 2(a) of the GATS Annex on Financial Services with respect to measures 5 and 6.<sup>23</sup> Moreover, in the event that the Panel were to find that Argentina acted inconsistently with Articles I:1, III:4, and XI:1 of the GATT 1994 with respect to the measures in question, Argentina argued that these measures are justified pursuant to Article XX(d) of the GATT 1994.<sup>24</sup> Argentina maintained that the measures at issue are defensive tax measures that are in line with the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum), and that they serve to protect Argentina's tax base by preventing tax evasion, tax avoidance, and fraud.<sup>25</sup> Argentina further contended that these measures serve to prevent concealment and laundering of money of criminal origin, that they are in line with the framework of the Financial Action Task Force (FATF)<sup>26</sup>, and that they serve to protect investors and the soundness of the Argentine financial system.<sup>27</sup>

1.5. The Panel Report was circulated to Members of the World Trade Organization (WTO) on 30 September 2015. With respect to Panama's claims under the GATS, the Panel found that:

- a. the GATS is applicable to all eight measures because there is trade in services, and the eight measures at issue are measures affecting trade in services within the meaning of Article I:1 of the GATS<sup>28</sup>;
- b. all eight 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 favourable than that which they accord to like services and service suppliers of cooperative countries<sup>29</sup>;
- c. measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS because they accord to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like Argentine services and service suppliers,

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<sup>15</sup> Panel Report, para. 3.1.b-d.

<sup>16</sup> Panel Report, para. 3.1.e.

<sup>17</sup> Panel Report, para. 3.1.b-c.

<sup>18</sup> Panel Report, para. 3.1.c.

<sup>19</sup> Panel Report, para. 3.1.c.

<sup>20</sup> Panel Report, para. 3.3.

<sup>21</sup> Panel Report, para. 7.526.

<sup>22</sup> Panel Report, para. 7.765.

<sup>23</sup> Panel Report, para. 7.781.

<sup>24</sup> Panel Report, para. 7.1070.

<sup>25</sup> Panel Report, paras. 7.527 and 7.534.

<sup>26</sup> Panel Report, para. 7.534.

<sup>27</sup> Panel Report, paras. 7.786 and 7.789.

<sup>28</sup> Panel Report, para. 8.2.a.

<sup>29</sup> Panel Report, para. 8.2.b.

in the relevant services and modes of supply in which Argentina has undertaken specific commitments<sup>30</sup>;

- d. measures 1, 2, 3, 4, 7, and 8 "are not covered under the exception of Article XIV(c) of the GATS because their application constitutes arbitrary and unjustifiable discrimination within the meaning of the *chapeau* of Article XIV of the GATS"<sup>31</sup>; and
- e. 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 within the meaning of that provision".<sup>32</sup>

1.6. Further, with respect to measure 5, the Panel rejected Panama's claims under Article XVI:2(a) and Article XVI:1 of the GATS, finding, respectively, that this measure is not covered by Article XVI:2(a)<sup>33</sup> and that Panama had failed to establish a *prima facie* case of inconsistency in this respect.<sup>34</sup> With respect to measures 2, 3, and 4, as the Panel had found that these measures are not inconsistent with Article XVII of the GATS, the Panel refrained from ruling on whether these measures are covered under the exception provided for in Article XIV(d) of the GATS.<sup>35</sup>

1.7. Regarding Panama's claims under the GATT 1994 with respect to measures 2 and 3, the Panel rejected Panama's claims under Article I:1.<sup>36</sup> The Panel found that Panama had failed to demonstrate that measure 2 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.<sup>37</sup> The Panel also found that Panama had failed to demonstrate that measure 3 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.<sup>38</sup> With respect to measure 3, the Panel rejected Panama's claims under Article III:4 and Article XI:1 of the GATT 1994 because, respectively, Panama had failed to demonstrate that the measure is a matter referred to in Article III:4 of the GATT 1994<sup>39</sup>, and the measure, being fiscal in nature, is not covered by Article XI:1 of the GATT 1994.<sup>40</sup> Finally, having rejected Panama's claims under Articles I:1, III:4, and XI:1 of the GATT 1994, the Panel refrained from ruling on whether these measures are covered by the exception provided for in Article XX(d) of the GATT 1994.<sup>41</sup>

1.8. On 27 October 2015, Panama notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), of its intention to appeal certain issues of law covered in the Panel Report, and certain legal interpretations developed by the Panel, and filed a Notice of Appeal and appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>42</sup> (Working Procedures). On 2 November 2015, Argentina notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report, and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal and other appellant's submission pursuant to Rule 23 of the Working Procedures. On 16 November 2015, Argentina and Panama each filed an appellee's submission.<sup>43</sup> On 19 November 2015, Australia, Brazil, the European Union, Guatemala, and the United States each filed a third participant's submission.<sup>44</sup> On the same day, Singapore notified its intention to appear at the oral hearing as a third participant.<sup>45</sup> Subsequently, China, Ecuador, Honduras, India,

<sup>30</sup> Panel Report, para. 8.2.c.

<sup>31</sup> Panel Report, para. 8.2.d.

<sup>32</sup> Panel Report, para. 8.2.e.

<sup>33</sup> Panel Report, para. 8.3.

<sup>34</sup> Panel Report, para. 8.4.

<sup>35</sup> Panel Report, para. 8.5.

<sup>36</sup> Panel Report, para. 8.6.a-b.

<sup>37</sup> Panel Report, para. 8.6.a.

<sup>38</sup> Panel Report, para. 8.6.b.

<sup>39</sup> Panel Report, para. 8.6.c.

<sup>40</sup> Panel Report, para. 8.6.d.

<sup>41</sup> Panel Report, para. 8.7.

<sup>42</sup> WT/AB/WP/6, 16 August 2010.

<sup>43</sup> Pursuant to Rules 22 and 23(4) of the Working Procedures.

<sup>44</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>45</sup> Pursuant to Rule 24(2) of the Working Procedures.

Oman, and Saudi Arabia each notified its intention to appear at the oral hearing as a third participant.<sup>46</sup>

1.9. On 19 November 2015, just prior to the 5 p.m. deadline set out in the Working Schedule for Appeal for filing third participants' submissions and executive summaries, Australia sent an e-mail communication to the Appellate Body and the participants and third participants in this appeal indicating that it had omitted to include the executive summary of its third participant's written submission, and that it would endeavour to send the executive summary the following morning. On 20 November 2015, Australia filed an executive summary of its third participant's submission. On the same day, the Appellate Body Division hearing this appeal sent a letter to Australia, informing it that the executive summary had not been filed in accordance with the official Working Schedule. The Division invited Australia to file a written request explaining why the executive summary should nonetheless be included in the Addendum<sup>47</sup> to the Appellate Body Report in these proceedings.

1.10. On 24 November 2015, Australia filed a request that the executive summary of its third participant's submission be included in the Addendum to the Appellate Body Report should the Division consider that there was no unfairness to any of the participants in this appeal, and taking account of the short length and limited scope of its written submission, and that the absence of an executive summary had been rectified as quickly as possible. On 25 November 2015, the Division invited the participants and third participants to comment on this issue in writing. Brazil, the European Union, and the United States each submitted comments. The European Union noted that, while Rule 18(1) of the Working Procedures should, in principle, be strictly enforced, the Division's decision should take into account the particular mitigating circumstances of the present case, including that Australia had informed the Appellate Body and all participants of the oversight prior to the deadline and the nature of the document. Brazil and the United States considered that there was no reason for the Division not to accept Australia's request in the particular circumstances, as, in their view, no participant had suffered any prejudice due to Australia's delayed submission of the executive summary of its written submission.

1.11. We note that the Appellate Body has held that compliance with established time periods by all participants regarding the filing of submissions is an important element of due process of law and "a matter of fairness and orderly procedure", which are referred to in Rule 16(1) of the Working Procedures.<sup>48</sup> These considerations are also valid with respect to executive summaries of written submissions. In the particular circumstances of this case, we have accepted Australia's request to include the executive summary of its third participant's written submission in the Addendum to this Appellate Body Report.

1.12. By letter of 22 December 2015, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.<sup>49</sup> The Chair of the Appellate Body explained that this was due to a number of factors, including the number and complexity of the issues raised in this and concurrent proceedings, the demands on the WTO Secretariat's translation services, the shortage of staff in the Appellate Body Secretariat, the intervening holiday period, as well as the scheduling difficulties arising from a substantial workload, overlaps in the composition of the Divisions hearing appeals concurrently pending before the Appellate Body, and constraints resulting from the need for Spanish-speaking staff of which the Appellate Body Secretariat has only a limited number. On 22 February 2016, the Chair of the Appellate Body informed the Chair of the DSB that the Report in these proceedings would be circulated no later than 19 April 2016.<sup>50</sup>

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<sup>46</sup> On 21 January 2016, China, India, Oman, and Saudi Arabia each submitted its delegation list for the oral hearing; on 22 January 2016, Ecuador submitted its delegation list for the oral hearing; and on 25 January 2016, Honduras submitted its delegation list for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. For purposes of this appeal, we have interpreted these actions as notifications expressing the intention to attend the oral hearing as a third participant pursuant to Rule 24(4) of the Working Procedures.

<sup>47</sup> In accordance with the Appellate Body's communication of 11 March 2015, contained in document WT/AB/23.

<sup>48</sup> See Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 164.

<sup>49</sup> WT/DS453/9.

<sup>50</sup> WT/DS453/10.

1.13. The oral hearing in this appeal was held on 28-29 January 2016. The participants and eight third participants (Australia, Brazil, China, the European Union, Guatemala, Honduras, Oman, and the United States) made opening and/or closing statements. The participants and third participants responded to questions posed by the Members of the Division hearing the appeal.

## 2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.<sup>51</sup> The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to this Report, WT/DS453/AB/R/Add.1.

## 3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of those third participants that filed a third participant's submission are reflected in the executive summaries of their written submissions provided to the Appellate Body<sup>52</sup>, and are contained in Annex C of the Addendum to this Report, WT/DS453/AB/R/Add.1.

## 4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

- a. with respect to Article II:1 of the GATS, whether the Panel erred in finding that measures 1 through 8 are inconsistent with Article II:1 of the GATS and, in particular:
  - i. whether the Panel erred in its interpretation and application of the term "like services and service suppliers" (raised by Argentina);
  - ii. whether the Panel erred in its allocation of the burden of proof (raised by Argentina);
  - iii. whether the Panel erred by making a *prima facie* case of "likeness" for Panama in the absence of evidence and legal argument (raised by Argentina);
  - iv. whether the Panel acted inconsistently with Article 11 of the DSU in finding that the services and service suppliers at issue are "like" (raised by Argentina); and
  - v. whether the Panel erred in its interpretation and application of the term "treatment no less favourable" (raised by Panama);
- b. with respect to Article XVII of the GATS, whether the Panel erred in finding that measures 2, 3, and 4 are not inconsistent with Article XVII:1 of the GATS and, in particular:
  - i. whether the Panel erred in relying upon its findings under Article II:1 in its analysis of "like services and service suppliers" under Article XVII:1 of the GATS (raised by Argentina);
  - ii. whether the Panel erred by making a *prima facie* case of "likeness" for Panama in the absence of evidence and legal argument (raised by Argentina);
  - iii. whether the Panel acted inconsistently with Article 11 of the DSU in finding that the services and service suppliers at issue are "like" under Article XVII:1 of the GATS (raised by Argentina); and

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<sup>51</sup> Pursuant to the Appellate Body communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings". (WT/AB/23, 11 March 2015)

<sup>52</sup> Pursuant to the Appellate Body communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings". (WT/AB/23, 11 March 2015)

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- iv. whether the Panel erred in its interpretation and application of the term "treatment no less favourable" (raised by Panama);
  - c. with respect to the Panel's application of Article XIV(c) of the GATS to measures 1, 2, 3, 4, 7, and 8:
    - i. whether the Panel erred by failing to focus its analysis on the relevant aspects of the measures that gave rise to the findings that these measures are inconsistent with Article II:1 of the GATS (raised by Panama);
    - ii. whether the Panel erred in finding that these measures are designed to secure compliance with the relevant Argentine laws or regulations (raised by Panama); and
    - iii. whether the Panel erred in finding that these measures are "necessary" to secure compliance with the relevant Argentine laws or regulations (raised by Panama); and
  - d. whether the Panel erred in its interpretation of paragraph 2(a) of the GATS Annex on Financial Services in finding that this provision covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a) of the Annex.

## 5 OVERVIEW OF THE MEASURES AT ISSUE

5.1. Before turning to the issues of law and legal interpretation raised in this appeal, we provide an overview of the eight measures at issue in this dispute. Before the Panel, Panama challenged four separate tax measures (measures 1, 2, 3, and 4) and four measures relating to, respectively, access to the reinsurance sector, access to the Argentine capital market, the registration of branches of foreign companies, and access to the foreign exchange market (measures 5 to 8). All of these measures are based on the distinction between "cooperative" countries and "non-cooperative" countries that is established in Decree No. 589/2013.<sup>53</sup>

5.2. We begin by describing the distinction between cooperative countries and non-cooperative countries underlying each of the eight measures challenged by Panama. Subsequently, we describe the eight specific measures at issue based on the Panel's factual findings.<sup>54</sup> Finally, we briefly address the international instruments relevant to Argentina's defence that have been developed by the Global Forum and the FATF. For more details regarding the Panel's understanding of these measures and their factual context, recourse should be had to the Panel Report.

### 5.1 The distinction between cooperative and non-cooperative countries

5.3. Argentina classifies countries as either "cooperative" or "non-cooperative" for tax transparency purposes. Argentina's Decree No. 589/2013 sets out the criteria and the process for classifying countries as cooperative or non-cooperative.<sup>55</sup> The Panel described Decree No. 589/2013 as the "key element" of the eight measures challenged by Panama, insofar as all eight measures refer to services and service suppliers of non-cooperative countries under the Decree.<sup>56</sup> Article 1 of the Decree lays down the requirements for Argentina to grant "cooperative" status to a country, dominion, jurisdiction, territory, associate State, or special tax regime.<sup>57</sup> To be granted cooperative status under Article 1 of the Decree, the country, dominion, jurisdiction, territory, associate State, or special tax regime must either (i) sign with Argentina an agreement on exchange of tax information or a convention on avoidance of international double taxation with a broad information exchange clause, provided that there is an effective exchange of information,

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<sup>53</sup> Panel Report, paras. 2.1-2.2.

<sup>54</sup> We understand that all of the relevant Argentine legal provisions underpinning the measures at issue are included in the Panel Report; however, for the convenience of the reader, we provide the relevant excerpts of these legal provisions in the attached Appendix.

<sup>55</sup> The relevant text of Decree No. 589/2013 is set out in the attached Appendix.

<sup>56</sup> Panel Report, para. 2.4.

<sup>57</sup> Decree No. 589/2013 replaces the references to "countries with low or no taxes" contained in the Gains Tax Law and in the regulation thereto with "countries not considered 'cooperative for tax transparency purposes'". (Panel Report, fn 14 to para. 2.5 (referring to Decree No. 589/2013 (Panel Exhibits ARG-35 and PAN-3))) See also Panel Report, paras. 7.5 and 7.15.



or (ii) initiate with Argentina the negotiations necessary for concluding such an agreement and/or convention.<sup>58</sup>

5.4. Article 2 of Decree No. 589/2013 authorizes the AFIP to draw up the list of countries considered to be cooperative for tax transparency purposes, and to keep the list up to date in accordance with the provisions of the Decree.<sup>59</sup> Argentina explained to the Panel that this list is updated annually at the beginning of each fiscal year.<sup>60</sup>

5.5. For many years, Panama was classified as a non-cooperative country. Following the establishment of the Panel, Panama was included in the list of cooperative countries<sup>61</sup>, even though it did not have in place a double taxation convention or an information exchange agreement with Argentina, and was not negotiating such a convention or agreement with Argentina.<sup>62</sup> At the second substantive meeting of the Panel, Argentina explained that the AFIP was reviewing whether to maintain Panama's status as a cooperative country.<sup>63</sup> As of the date on which the Panel Report was issued to the parties, Panama was included in the list of cooperative countries published by the AFIP.<sup>64</sup>

## 5.2 Measure 1: Withholding tax on payments of interest or remuneration

5.6. Measure 1 consists of an irrebuttable presumption that payments made by Argentine consumers to creditors located in non-cooperative countries, as consideration for the granting of credits or loans or the placement of funds in Argentina, represent a net gain of 100% for the purpose of determining the tax base for gains tax.<sup>65</sup> This measure, which is applied pursuant to Article 93(c) of the Gains Tax Law<sup>66</sup>, concerns situations in which a foreign supplier, such as a bank or financial institution, grants credits or loans or places funds in Argentina through cross-border supply.<sup>67</sup> In such situations, the foreign supplier is a "non-resident" that obtains income in the form of interest or remuneration paid by Argentine consumers for the granting of credits or loans or the placement of funds. For the purpose of Article 93(c), the foreign supplier constitutes a "beneficiary abroad" whose income, generated in Argentina, is subject to gains tax in

<sup>58</sup> Panel Report, para. 7.182 (referring to Decree No. 589/2013 (Panel Exhibits ARG-35 and PAN-3)).

<sup>59</sup> Panel Report, para. 2.6 (referring to Decree No. 589/2013 (Panel Exhibits ARG-35 and PAN-3)).

<sup>60</sup> Panel Report, para. 2.6 (referring to Argentina's response to Panel questions No. 9(b), para. 14, and No. 10(b)(ii); and opening statement at the second Panel meeting, para. 41). The Panel also found that AFIP Resolution No. 3.576/2013, adopted in the exercise of the powers conferred by Article 2(b) of Decree No. 589/2013, exhibits slight differences in comparison with the Decree. (General Resolution No. 3.576 of the Federal Administration of Public Revenue (AFIP) 27 December 2013 (AFIP Resolution No. 3.576/2013) (Panel Exhibits ARG-37 and PAN-3)) In particular, the Panel noted that AFIP Resolution No. 3.576/2013 classifies cooperative countries into three categories (rather than into two categories as in Decree No. 589/2013), namely: (i) cooperative countries that have signed a double taxation convention or information exchange agreement, with a positive assessment of effective exchange of information; (ii) cooperative countries with which a double taxation convention or information exchange agreement has been signed but it has not been possible to assess an effective exchange; and (iii) cooperative countries with which the process of negotiating or ratifying a double taxation convention or information exchange agreement has been initiated. (Panel Report, para. 2.8 and fn 357 to para. 7.182 (referring to AFIP Resolution No. 3.576/2013 (Panel Exhibits ARG-37 and PAN-3))) Moreover, with respect to category (iii), the Panel noted that AFIP Resolution No. 3.576/2013 refers to the "initiation" of the negotiation or ratification process, whereas Decree No. 589/2013 refers only to negotiation. (Panel Report, fn 357 to para. 7.182 (referring to AFIP Resolution No. 3.576/2013 (Panel Exhibits ARG-37 and PAN-3)))

<sup>61</sup> Executive summary of Panama's first written submission to the Panel (Panel Report, Annex B-1), para. 1.5.

<sup>62</sup> Panel Report, fn 16 to para. 2.6 and fn 469 to para. 7.291 (both quoting Argentina's opening statement at the second Panel meeting, paras. 42-43).

<sup>63</sup> Panel Report, fn 16 to para. 2.6 and fn 469 to para. 7.291 (both quoting Argentina's opening statement at the second Panel meeting, paras. 42-43).

<sup>64</sup> Panel Report, para. 2.7; Executive summary of Panama's first written submission to the Panel (Panel Report, Annex B-1), para. 1.5.

<sup>65</sup> Panel Report, paras. 2.13 and 7.237.

<sup>66</sup> The relevant text of Article 93(c) of the Gains Tax Law is set out in the attached Appendix.

<sup>67</sup> Panel Report, para. 7.237.

Argentina.<sup>68</sup> When the Argentine consumer pays interest or remuneration to the foreign supplier for its services, Argentine tax authorities collect the gains tax through withholding.<sup>69</sup>

5.7. Article 93(c) of the Gains Tax Law presumes, against any possibility of evidence to the contrary, a net gain for a beneficiary abroad when interest or remuneration is paid to this beneficiary on credits, loans, or placements of funds of any origin or type.<sup>70</sup> The provision establishes two different margins of presumed net gain depending upon whether the creditor is located in a cooperative country or a non-cooperative country.<sup>71</sup> For creditors located in cooperative countries, as provided under Article 93(c)(1) of the Gains Tax Law, the net gain is presumed to be 43%. However, for creditors located in non-cooperative countries, as provided under Article 93(c)(2) of the Gains Tax Law, the net gain is presumed to be 100%.<sup>72</sup> Argentina applies a tax rate of 35% in both cases.<sup>73</sup> This means that the interest or remuneration paid by a borrower in Argentina to a creditor abroad is subject to a 15.05% tax if the creditor is located in a cooperative country, and a 35% tax if the creditor is located in a non-cooperative country.<sup>74</sup>

### 5.3 Measure 2: Presumption of unjustified increase in wealth

5.8. Measure 2 consists of a rebuttable presumption of unjustified increase in wealth applicable to any entry of funds – for the benefit of Argentine taxpayers – from non-cooperative countries in the context of an *ex officio* determination of the taxable subject matter by the AFIP for the purpose of gains tax.<sup>75</sup> This measure is applied pursuant to the unnumbered provision added after Article 18 of the Law on Tax Procedure.<sup>76</sup>

5.9. According to Article 11 of the Law on Tax Procedure, Argentine taxpayers themselves will usually determine, through their sworn declarations, what is subject to taxation.<sup>77</sup> The AFIP will resort to an *ex officio* determination of what is subject to taxation, under Article 16 of the Law on Tax Procedure, only when the Argentine taxpayer has not submitted a sworn declaration, or when a submitted sworn declaration is contested.<sup>78</sup> The AFIP may make its *ex officio* determination directly, as a result of certain knowledge of the taxable subject matter, or by estimation.<sup>79</sup> When the AFIP makes an *ex officio* determination by estimation, it may apply the presumption of unjustified increase in wealth listed in Article 18(f) of the Law on Tax Procedure.<sup>80</sup>

5.10. For any entry of funds from non-cooperative countries, however, measure 2 provides that the AFIP will *automatically* determine the taxable subject matter *ex officio*, applying the presumption of unjustified increase in wealth to such entry of funds.<sup>81</sup> The presumption of unjustified increase in wealth applies to funds from non-cooperative countries "irrespective of their nature or purpose or the type of transaction involved".<sup>82</sup> Pursuant to Article 18 of the Law on Tax Procedure, the amount of such presumed unjustified increases in wealth, plus 10% falling under the heading of "income disposed of or consumed as non-deductible expenditure", represents net

<sup>68</sup> Argentina's response to questioning at the oral hearing; Panama's first written submission to the Panel, para. 4.4.

<sup>69</sup> Argentina's response to questioning at the oral hearing; Panama's first written submission to the Panel, para. 4.5.

<sup>70</sup> Panel Report, para. 2.14.

<sup>71</sup> Panel Report, paras. 2.14 and 7.690.

<sup>72</sup> Panel Report, paras. 2.14 and 7.690. The Panel found that the presumption of a net gain of 100% applies only when the recipient of the credit or loan or the investor of the funds is a person covered by Article 49 of the Gains Tax Law, a natural person, or an undivided estate, but not if it is a financial entity governed by Law No. 21.526. (Panel Report, para. 2.15)

<sup>73</sup> Panel Report, paras. 2.14, 7.238, and 7.690.

<sup>74</sup> Panel Report, para. 7.690. The 15.05% tax on interest or remuneration paid to a creditor in a cooperative country is calculated by multiplying the presumed net gain of 43% by the tax rate of 35%. Similarly, the 35% tax on interest or remuneration paid to a creditor in a non-cooperative country is calculated by multiplying the presumed net gain of 100% by the tax rate of 35%.

<sup>75</sup> Panel Report, paras. 2.17, 7.240, and 7.517.

<sup>76</sup> The relevant text of the unnumbered provision added after Article 18 of the Law on Tax Procedure is set out in the attached Appendix.

<sup>77</sup> Panel Report, para. 2.43 and fn 61 thereto.

<sup>78</sup> Panel Report, paras. 2.43, 7.243, and 7.496.

<sup>79</sup> Panel Report, para. 2.43.

<sup>80</sup> Panel Report, paras. 2.43 and 7.241.

<sup>81</sup> Panel Report, para. 7.243.

<sup>82</sup> Panel Report, para. 2.17 (quoting Law on Tax Procedure (Panel Exhibits ARG-45 and PAN-9)).

gains during the financial year in which they occur, for the purpose of determining the gains tax.<sup>83</sup> Accordingly, classifying an entry of funds as an unjustified increase in wealth automatically involves an increase in the tax base for gains tax.<sup>84</sup> The presumption of unjustified increase in wealth may be rebutted if the taxpayer conclusively proves that the funds originated from activities actually carried out by the taxpayer, or by a third party in the non-cooperative countries.<sup>85</sup>

#### 5.4 Measure 3: Transaction valuation based on transfer pricing

5.11. Measure 3 consists of the obligation to apply valuation methods based on transfer pricing for transactions between Argentine taxpayers and persons of non-cooperative countries for the purpose of determining the tax base for the gains tax payable by Argentine taxpayers.<sup>86</sup> This measure is applied pursuant to Article 8, fifth paragraph, and Article 15, second paragraph, of the Gains Tax Law.<sup>87</sup>

5.12. Article 14 of the Gains Tax Law establishes the rule that transactions between an Argentine taxpayer and an unrelated counterpart in a cooperative country shall be considered as arm's-length transactions "if their services and conditions are in line with normal arm's-length market practices".<sup>88</sup> The valuation of the transaction shall be based on the value agreed upon between the parties, unless the parties are related, in which case the transfer pricing regime applies.<sup>89</sup> This general rule applies both for transactions with persons of cooperative countries and for transactions with Argentine persons.<sup>90</sup>

5.13. With respect to transactions between Argentine taxpayers and persons domiciled, incorporated, or located in a non-cooperative country, however, measure 3 provides that such transactions shall not be considered to be consistent with normal arm's-length market practices or prices. Rather, the transactions shall be valued in accordance with the transfer pricing regime as though the transactions were conducted between related parties, irrespective of whether the parties are actually related.<sup>91</sup>

#### 5.5 Measure 4: Rule on the allocation of expenditure

5.14. Measure 4 concerns the allocation of expenditure for transactions between Argentine taxpayers and persons of non-cooperative countries.<sup>92</sup> This measure is applied pursuant to the last paragraph of Article 18 of the Gains Tax Law.<sup>93</sup>

5.15. An Argentine taxpayer may, pursuant to Article 80 of the Gains Tax Law, deduct expenditure of different types with a view to determining net profits.<sup>94</sup> In principle, both

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<sup>83</sup> Panel Report, para. 2.17 (quoting Law on Tax Procedure (Panel Exhibits ARG-45 and PAN-9)), fn 63 to para. 2.43, and para. 7.297.

<sup>84</sup> Panel Report, para. 7.297.

<sup>85</sup> Panel Report, paras. 2.18, 7.240, 7.297, and 7.517.

<sup>86</sup> Panel Report, paras. 2.19-2.20.

<sup>87</sup> The relevant text of Article 8, fifth paragraph, and Article 15, second paragraph, of the Gains Tax Law is set out in the attached Appendix.

<sup>88</sup> Panel Report, para. 7.245; Argentina's response to questioning at the oral hearing. The third paragraph of Article 14 of the Gains Tax Law provides as follows:

Transactions between a stable institution, as referred to in subparagraph (b) of Article 69, or a company or trust fund covered by subparagraphs (a) and (b) and the subparagraph added after subparagraph (d) of Article 49 – respectively, and related persons or entities incorporated, domiciled or located abroad shall, for all purposes, be considered as being between independent parties if their services and conditions are in line with normal arm's-length market practices, except in the cases covered by subparagraph (m) of Article 88. When such services and conditions are not in line with arm's-length market practices, they shall be adapted in accordance with the provisions of Article 15.

(Panel Report, fn 64 to para. 2.45 (quoting Gains Tax Law (Panel Exhibits ARG-42 and PAN-4)))

<sup>89</sup> Panel Report, paras. 7.306 and 7.497.

<sup>90</sup> Argentina's response to questioning at the oral hearing.

<sup>91</sup> Panel Report, paras. 2.19-2.20, 7.246, and 7.306.

<sup>92</sup> Panel Report, paras. 2.21-2.22.

<sup>93</sup> The relevant text of Article 18 of the Gains Tax Law is set out in the attached Appendix.

<sup>94</sup> Argentina's response to questioning at the oral hearing.

expenditure and profits shall be allocated to the fiscal year in which they accrue (accrual rule).<sup>95</sup> However, pursuant to measure 4, expenditure for transactions between an Argentine taxpayer and a person of a non-cooperative country must be allocated to the fiscal year in which payment for the transaction has been executed (payment received rule).<sup>96</sup> This allocation of expenditure does not necessarily occur in the same fiscal year as that in which the payment obligation accrues.<sup>97</sup>

5.16. While the expenditure incurred may be deducted from the taxpayer's tax base under both the accrual rule and the payment received rule, these rules differ with respect to the time at which such expenditure may be allocated and deducted, i.e. the time at which the expenditure has been accrued (accrual rule), on the one hand, or the time at which the payment has been executed (payment received rule), on the other hand.<sup>98</sup>

## 5.6 Measure 5: Requirements relating to reinsurance services

5.17. Measure 5 consists of certain requirements that service suppliers of non-cooperative countries must meet in order to gain access to Argentina's reinsurance services market. This measure is applied pursuant to points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011, and it has been amended on several occasions.<sup>99</sup>

5.18. SSN Resolution No. 35.615/2011 imposed a ban on the supply of reinsurance services by branches of companies in non-cooperative countries (point 18 of Annex I to the Resolution) and reinsurance establishments that deliver their services from their country of origin that is a non-cooperative country (point 20(f) of Annex I to the Resolution). Point 19 of Annex I to SSN Resolution No. 35.615/2011 provides, however, that the National Insurance Supervisory Authority may authorize reinsurance contracts with foreign reinsurance establishments that conduct their operations from their head office if the reinsurance operations cannot be covered on the national reinsurance market because of the scale or the characteristics of the risks ceded.<sup>100</sup>

5.19. Subsequently, on 25 March 2014, Argentina published SSN Resolution No. 38.284/2014, which replaced the text of points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011. The new text of points 18 and 20(f) lifts the ban on supplying reinsurance services through cross-border trade and commercial presence for entities of non-cooperative countries.<sup>101</sup> The new text provides for the possibility of supplying such services, provided that the parent companies of the branches of companies of non-cooperative countries, and the reinsurance entities that deliver their services directly from non-cooperative countries, comply with certain requirements.<sup>102</sup>

5.20. Following the amendment of 25 March 2014, points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011 provide that foreign suppliers of reinsurance services may be authorized to offer reinsurance operations from their country of origin (point 20(f)) or through a branch in Argentina (point 18) provided that they meet the following requirements: (i) prove that they have been incorporated and registered in a cooperative country (in the case of branches, this proof applies to the parent company)<sup>103</sup>; and (ii) prove that they have been incorporated and registered in countries that cooperate in the global fight against money laundering and terrorist

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<sup>95</sup> Panel Report, para. 2.48. Article 18 of the Gains Tax Law provides, in relevant part:

... the profits referred to in Article 49 shall be attributed to the tax year in which the accounting year in which they are accrued ends. ... The above provisions on the allocation of profits shall apply correlatively to the allocation of expenditure, unless otherwise provided.

(Panel Report, fn 66 to para. 2.48 (quoting Gains Tax Law (Panel Exhibits ARG-42 and PAN-4)))

<sup>96</sup> Panel Report, paras. 2.22, 7.250, and 7.311.

<sup>97</sup> Panel Report, para. 7.250.

<sup>98</sup> Panel Report, para. 7.314 (referring to Argentina's first written submission to the Panel, Explanatory Annex No. 1, para. 127) and para. 7.699 (referring to Argentina's first written submission to the Panel, para. 301).

<sup>99</sup> The relevant text of points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011, as amended, is set out in the attached Appendix.

<sup>100</sup> Panel Report, paras. 2.26-2.27.

<sup>101</sup> Panel Report, paras. 2.30 and 7.32.

<sup>102</sup> Panel Report, paras. 7.32.

<sup>103</sup> Panel Report, paras. 2.32 and 7.322.

financing offences in accordance with the criteria defined by the FATF (in the case of branches, such proof relates to the parent company).<sup>104</sup>

5.21. With respect to the first requirement above, if a foreign supplier of reinsurance services operating via supply mode 1 or 3 does not prove that it has been incorporated and registered in a cooperative country, points 18 and 20(f), as amended, provide that such supplier must prove that it is subject to the control and supervision of a body (i) that fulfils functions similar to those of the National Insurance Supervisory Authority and (ii) with which a memorandum of understanding on cooperation and exchange of information has been signed.<sup>105</sup> With regard to the second requirement referred to in paragraph 5.20 above, if a foreign supplier of reinsurance services via supply mode 1 or 3 does not prove that it has been incorporated and registered in a country collaborating in the global fight against money laundering and terrorism financing offences in accordance with the criteria defined by the FATF, points 18 and 20(f), as amended, provide that the assessment of the service supplier's request for authorization shall be subject to enhanced due diligence, proportionate to the risks, and that the counter-measures indicated in Recommendation 19 of the FATF and the Interpretive Note thereto may be applied.<sup>106</sup>

### 5.7 Measure 6: Requirements for access to the Argentine capital market

5.22. Measure 6 imposes requirements that stock market intermediaries<sup>107</sup> must fulfil in order to engage in transactions ordered by persons of non-cooperative countries.<sup>108</sup> The measure is applied pursuant to Title XI ("Prevention of money laundering and financing of terrorism"), Section III, Article 5 of the Rules of the National Securities Commission.<sup>109</sup> Pursuant to this provision, two requirements must be met for a stock market intermediary in Argentina to engage in transactions involving the public offering of negotiable securities, forward contracts, futures or options, or other financial instruments when conducted or ordered by persons incorporated, domiciled, or residing in non-cooperative countries. First, the persons incorporated, domiciled, or residing in non-cooperative countries that place the order with the stock market intermediary must have the status of intermediaries registered with an entity under the control and supervision of a body fulfilling functions similar to those of the Argentine National Securities Commission. Second, the body in question must have signed a memorandum of understanding on cooperation and exchange of information with the Argentine National Securities Commission.<sup>110</sup> Argentine stock market intermediaries are not subject to these requirements when they engage in transactions conducted or ordered by persons of cooperative countries.<sup>111</sup>

### 5.8 Measure 7: Requirements for the registration of branches

5.23. Measure 7 contains certain requirements with which companies of non-cooperative countries must comply in order to register branches in the Public Trade Register of the Autonomous City of Buenos Aires.<sup>112</sup> This measure does not apply to the registration of branches of companies of

<sup>104</sup> Panel Report, paras. 2.32 and 7.322.

<sup>105</sup> Panel Report, paras. 2.33, 7.254, and 7.323.

<sup>106</sup> Panel Report, para. 7.323. Recommendation 19 concerns "high-risk countries" and states, in part, that:

[f]inancial institutions should be required to apply enhanced due diligence measures to business relationships and transactions with natural and legal persons, and financial institutions, from countries for which this is called for by the FATF. The type of enhanced due diligence measures applied should be effective and proportionate to the risks.

(Panel Report, fn 885 to para. 7.724 (quoting Financial Action Task Force (FATF) Recommendations, International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (February 2012) (Panel Exhibit ARG-25), p. 20))

<sup>107</sup> "Stock market intermediaries" means the persons indicated in Article 1 of the Rules of the National Securities Commission, including "bargaining agents, liquidation and compensation agents, distribution and placement agents, and collective investment management agents". (Panel Report, fn 53 to para. 2.35 (referring to Rules of the National Securities Commission) (Panel Exhibits ARG-50 and PAN-58))

<sup>108</sup> Panel Report, para. 2.35.

<sup>109</sup> The relevant text of Title XI, Section III, Article 5 of the Rules of the National Securities Commission is set out in the attached Appendix.

<sup>110</sup> Panel Report, paras. 2.36 and 7.257.

<sup>111</sup> Panel Report, para. 7.257.

<sup>112</sup> Panel Report, para. 2.37.

cooperative countries.<sup>113</sup> Measure 7 is maintained pursuant to Article 192 of the Resolution on Companies Incorporated Abroad.<sup>114</sup>

5.24. Article 192 of the Resolution on Companies Incorporated Abroad stipulates that, in order to meet the requirements set forth in Article 118<sup>115</sup> and Article 188, subparagraphs 3(b) and 3(c) thereof<sup>116</sup>, branches of companies set up, registered, or incorporated in non-cooperative countries shall be required to prove "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".<sup>117</sup> The provision further stipulates that the General Justice Inspectorate may request additional documents from companies of non-cooperative countries, and that it may separately request information in order to verify the records of the companies' partners. The General Justice Inspectorate shall consider compliance with the requirements in Article 188 "restrictively" when a branch of a company of a non-cooperative country is being registered.<sup>118</sup>

### 5.9 Measure 8: Foreign exchange authorization requirement

5.25. Measure 8 requires prior authorization from the Argentine Central Bank to access the Single Free Foreign Exchange Market in order to purchase foreign currency for the repatriation of direct and portfolio investments when the beneficiary abroad is a natural or legal person residing, incorporated, or domiciled in a non-cooperative country.<sup>119</sup> This measure is applied pursuant to Section I of Communication "A" No. 4940 of the Argentine Central Bank.<sup>120</sup>

5.26. When a natural or legal person residing, incorporated, or domiciled in a non-cooperative country wishes to repatriate direct investment of the type indicated in point 1.13 of

<sup>113</sup> Panel Report, para. 7.266.

<sup>114</sup> The relevant text of Article 192 of the Resolution on Companies Incorporated Abroad is set out in the attached Appendix.

<sup>115</sup> The requirements for the registration of branches of all companies incorporated abroad (in cooperative and in non-cooperative countries) are set out in Article 118 of the Commercial Companies Law. These requirements are as follows: (i) to prove the existence of the company in accordance with its country's legislation; (ii) to establish a domicile in Argentina, complying with the publication and registration required by law for companies incorporated in Argentina; and (iii) to justify the decision to establish the representative office and designate the person to be responsible for it. In the case of branches, the assigned capital must also be specified, if this is required by special laws. (Panel Report, para. 2.50 and fn 69 thereto (referring to Law No. 19.550 on Commercial Companies of 3 April 1972 (Commercial Companies Law) (Panel Exhibits ARG-43 and PAN-34)))

<sup>116</sup> Panel Report, para. 7.265. Article 188, subparagraphs 3(b) and 3(c) of the Resolution on Companies Incorporated Abroad provide as follows:

The following shall be submitted for the purpose of the registration provided for in Article 118, third paragraph, of [the Commercial Companies Law]:

...

3. The documents from abroad drawn up by an official of the company whose representative authority must be attested therein and authenticated by a notary or government official, certifying: ...

...

(b) That it has one or more agencies, branches or representative offices operating outside the Republic and/or non-current (fixed) assets or operating rights in such assets belonging to third parties and/or holdings in other companies not subject to public offering and/or habitually conducts investment transactions on stock exchanges or securities markets as provided for in its corporate purpose;

(c) Particulars of the persons who are partners at the time of the decision to request registration, indicating for each partner as a minimum their first name and surname or title, domicile or head office, identity card or passport number or registration, authorization or incorporation details, and the number of shares and votes and their percentage of the registered capital. This documentation need not be submitted if the personal particulars of the partners are in line with the requirement in subparagraph 2(a) and are accompanied by a statement of their means of livelihood by the company official referred to at the beginning of this subparagraph.

(Panel Report, fn 57 to para. 2.37 (quoting Resolution on Companies Incorporated Abroad (Panel Exhibits ARG-33 and PAN-62)))

<sup>117</sup> Panel Report, paras. 2.38 and 7.701.

<sup>118</sup> Panel Report, paras. 2.38 and 7.701.

<sup>119</sup> Panel Report, paras. 2.39, 2.40 and 7.270. See also para. 7.723.

<sup>120</sup> The relevant text of Section I of Communication "A" No. 4940 of the Argentine Central Bank is set out in the attached Appendix.

Communication "A" No. 4662<sup>121</sup>, it must obtain prior authorization from the Argentine Central Bank, irrespective of compliance with the relevant requirements in Argentine legislation. This is not the case for repatriation of direct investment by natural or legal persons residing, incorporated, or domiciled in a cooperative country, which, in principle, need not obtain prior authorization from the Argentine Central Bank so long as they comply with the requirements laid down in Argentine law.<sup>122</sup>

### 5.10 The measures challenged by Panama

5.27. The table below sets out the eight specific measures at issue in this dispute and the claims raised by the parties on appeal with respect to each measure.

Measure	Description	Claims and defences on appeal
1	Withholding tax on payments of interest or remuneration	- Article II:1 of the GATS - Article XIV(c) of the GATS
2	Presumption of unjustified increase in wealth	- Article II:1 of the GATS - Article XVII of the GATS - Article XIV(c) of the GATS
3	Transaction valuation based on transfer pricing	- Article II:1 of the GATS - Article XVII of the GATS - Article XIV(c) of the GATS
4	Rule on the allocation of expenditure	- Article II:1 of the GATS - Article XVII of the GATS - Article XIV(c) of the GATS
5	Requirements relating to reinsurance services	- Article II:1 of the GATS - Paragraph 2(a) of the GATS Annex on Financial Services
6	Requirements for access to the Argentine capital market	- Article II:1 of the GATS - Paragraph 2(a) of the GATS Annex on Financial Services
7	Requirements for the registration of branches	- Article II:1 of the GATS - Article XIV(c) of the GATS
8	Foreign exchange authorization requirement	- Article II:1 of the GATS - Article XIV(c) of the GATS

<sup>121</sup> Point 1.13 of the above-mentioned Communication provides that repatriation of direct investment could occur in the following circumstances: (i) sale of the direct investment; (ii) definitive liquidation of the direct investment; (iii) capital reduction decided by the local company; and (iv) the refund of irrevocable contributions by the local company. (Panel Report, fn 78 to para. 2.52 (referring to Communication "A" No. 4662 of the Central Bank of the Argentine Republic of 11 May 2007 (Panel Exhibits ARG-69 and PAN-67), as amended by Communication "A" No. 4692 of the Central Bank of the Argentine Republic of 31 July 2007 (Panel Exhibits ARG-70 and PAN-68)))

<sup>122</sup> The Panel explained that there are additional requirements that must be met by entities authorized to deal in foreign exchange before they can engage in transactions exempt from prior authorization. (See Panel Report, para. 7.270)

### 5.11 International instruments relevant to Argentina's defence

5.28. In the event that the Panel were to find the measures at issue to be inconsistent with the provisions of the GATS cited by Panama, Argentina invoked Article XIV(c) thereof and paragraph 2(a) of the GATS Annex on Financial Services to justify these measures.<sup>123</sup> Argentina invoked the exception in Article XIV(c) of the GATS to justify measures 1, 2, 3, 4, 7, and 8<sup>124</sup>, maintaining that these measures are "necessary to secure compliance" with Argentina's tax laws or regulations within the meaning of Article XIV(c), including the "prevention of deceptive and fraudulent practices" under subparagraph (i) commonly associated with transactions with non-cooperative countries.<sup>125</sup> Specifically, Argentina stated before the Panel that its measures were taken to counter harmful tax practices, such as tax evasion, tax avoidance, fraud, concealment and laundering of money of criminal origin, and terrorist financing.<sup>126</sup> Argentina invoked paragraph 2(a) of the GATS Annex on Financial Services to justify measures 5 and 6<sup>127</sup>, maintaining that these measures had been taken for prudential reasons, including the protection of financial consumers and investors from the distortions, manipulations, and abusive situations arising out of a lack of an effective exchange of information, as well as the preservation of the integrity and smooth functioning of the Argentine financial system and capital market.<sup>128</sup>

5.29. Argentina maintains that it has followed the recommendations of the Global Forum of the Organisation for Economic Co-operation and Development (OECD) in establishing a comprehensive regulatory framework addressing the risks posed by harmful tax competition to the integrity and stability of its tax system.<sup>129</sup> Argentina also maintains that it has adopted certain measures pursuant to the provisions of the FATF.<sup>130</sup> In the context of Article XIV(c) of the GATS, Argentina explained to the Panel that, while the measures at issue seek to ensure compliance with Argentine laws or regulations, these are, in turn, in line with the international instruments of the Global Forum and the FATF.<sup>131</sup> The Panel provides more detailed information about the Global Forum and the FATF in sections 2.4.3 and 2.4.4 of its Report.<sup>132</sup>

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<sup>123</sup> Before the Panel, Panama claimed that: (i) measures 1 to 8 are inconsistent with Article II:1 of the GATS; (ii) measures 2 to 4 are also inconsistent with Article XVII of the GATS; and (iii) measure 5 is also inconsistent with Articles XVI:1 and XVI:2(a) of the GATS. (Panel Report, para. 3.1) Before the Panel, Argentina also invoked Article XIV(d) of the GATS as an alternative to its principal defence presented under Article XIV(c) with respect to Panama's claims under Article XVII concerning measures 2, 3, and 4. (Panel Report, para. 7.779) The Panel exercised judicial economy with respect to Argentina's defence under Article XIV(d). (Panel Report, para. 7.780)

<sup>124</sup> Panel Report, para. 7.526.

<sup>125</sup> Panel Report, para. 7.527.

<sup>126</sup> See Panel Report, paras. 7.534-7.535.

<sup>127</sup> Panel Report, para. 7.781.

<sup>128</sup> Panel Report, paras. 7.893 and 7.921.

<sup>129</sup> Panel Report, para. 7.527.

<sup>130</sup> See Panel Report, paras. 2.23-2.34, 7.534, and 7.935-7.936.

<sup>131</sup> See Panel Report, para. 7.597.

<sup>132</sup> See Panel Report, paras. 2.55-2.62.



## 6 ANALYSIS OF THE APPELLATE BODY

### 6.1 Article II:1 and Article XVII of the GATS – "Likeness"

6.1. Argentina appeals the Panel's findings that the services and service suppliers at issue are "like" under both Article II:1 and Article XVII of the GATS. With respect to Article II:1, Argentina requests us to reverse the Panel's finding that services and service suppliers located in non-cooperative countries are "like" services and service suppliers located in cooperative countries<sup>133</sup>, and, consequently, to reverse the Panel's conclusion that measures 1-8 are inconsistent with Article II:1 of the GATS.<sup>134</sup> With respect to Article XVII, Argentina requests us to reverse the Panel's finding that services and service suppliers located in non-cooperative countries are "like" services and service suppliers of Argentine origin<sup>135</sup>, and, consequently, to modify the legal basis for the Panel's conclusion that measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS.<sup>136</sup>

#### 6.1.1 The Panel's findings under Article II:1 of the GATS

6.2. Before the Panel, Panama alleged that all eight measures at issue are inconsistent with Article II:1 of the GATS. Panama argued that the measures provide for a distinction based exclusively on the origin of the service supplier, and that, therefore, there was no need for a casuistic demonstration that the services and/or service suppliers are "like", and that "likeness" could be presumed.<sup>137</sup> The Panel began its analysis of whether the services and service suppliers of cooperative countries and non-cooperative countries are "like" by reviewing the interpretation by previous panels of the phrase "like services and service suppliers" in Articles II:1 and XVII:1 of the GATS. In particular, the Panel referred to the following statement of the panel in *China – Publications and Audiovisual Products*:

When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the "like service suppliers" requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin.<sup>138</sup>

6.3. The Panel further noted another statement by the same panel that:

... where a difference of treatment is *not* exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis would probably be required to determine whether service suppliers on either side of the dividing line are, or are not, "like".<sup>139</sup>

6.4. The Panel then explained that the panel in *China – Electronic Payment Services* had addressed a measure that accorded differential treatment that was *not* exclusively linked to the origin of the service suppliers, and that the panel in that dispute had concluded, in the context of Article XVII of the GATS, that "like services are services that are in a competitive relationship with each other".<sup>140</sup> The Panel further explained that it saw no obstacle in using, in its analysis under Article II of the GATS, the same "likeness" interpretation as the panel in *China – Electronic Payment Services* did under Article XVII, because "the likeness analysis under Article II of the

<sup>133</sup> Argentina's other appellant's submission, para. 131 (referring to Panel Report, paras. 7.185-7.186).

<sup>134</sup> Argentina's other appellant's submission, para. 131 (referring to Panel Report, paras. 7.365, 7.367, and 8.2.b).

<sup>135</sup> Argentina's other appellant's submission, para. 131 (referring to Panel Report, paras. 7.488-7.489).

<sup>136</sup> Argentina's other appellant's submission, para. 131 (referring to Panel Report, paras. 7.523-7.525 and 8.2.c).

<sup>137</sup> Panel Report, para. 7.153.

<sup>138</sup> Panel Report, para. 7.156 (quoting Panel Report, *China – Publications and Audiovisual Products*, para. 7.975, in turn referring to Panel Reports, *Canada – Wheat Exports and Grain Imports*, paras. 6.164-6.167; and *Argentina – Hides and Leather*, paras. 11.168-11.169).

<sup>139</sup> Panel Report, para. 7.158 (quoting Panel Report, *China – Publications and Audiovisual Products*, para. 7.975). (emphasis added)

<sup>140</sup> Panel Report, para. 7.159 (quoting Panel Report, *China – Electronic Payment Services*, para. 7.700).

GATS does not differ from the likeness analysis under Article XVII of the GATS in the sense that it requires an approach based on the competitive relationship."<sup>141</sup>

6.5. The Panel explained that it would take as a starting point the competitive relationship between services and service suppliers of non-cooperative countries, on the one hand, and services and service suppliers of cooperative countries, on the other hand. The Panel noted that the distinction between non-cooperative countries and cooperative countries was reflected in each of the eight measures at issue by virtue of the provisions of Decree No. 589/2013.<sup>142</sup> The Panel then noted that the parties disagreed as to whether the presumption of likeness based on origin that had been applied by panels under the GATT 1994 could also be applied under the GATS. The Panel considered that, in order to apply this presumption under the GATS, it should first examine "whether the difference in treatment between cooperative and non-cooperative countries is due to origin".<sup>143</sup> If it concluded that this difference "is not due exclusively to origin", it would continue its analysis by examining "whether there is also another factor or 'other factors' linked to the difference in treatment between services and service suppliers of non-cooperative countries and services and service suppliers of cooperative countries".<sup>144</sup> The Panel reasoned:

[T]he mere fact that differential treatment is accorded depending on whether or not a country is included in a list is closely linked to origin. This implies that any service supplier based in Panama – or in any other country considered by the Argentine authorities to be a cooperative country – is subject to the same treatment because it is based in that country. We therefore consider that the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is due to origin. However, even though the origin rule is applied in the form of a list of cooperative countries, it is not origin *per se* which determines that certain countries are on the list and others not, but the regulatory framework inextricably linked to such origin. This raises a doubt as to whether the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is based *exclusively* on origin, as asserted by Panama, or whether there is also some "other factor" explaining the difference in treatment, as we shall consider below.<sup>145</sup>

6.6. The Panel stated that, given that there were doubts regarding the existence of "other factors", it would consider whether there were such other factors relevant to the examination of the likeness of the services and service suppliers in this dispute.<sup>146</sup> In particular, the Panel considered the possibility of Argentina having access to tax information on foreign suppliers as an "other factor" in this dispute and set out to assess whether this had an impact on the competitive relationship of the services and service suppliers concerned.<sup>147</sup> The Panel further held that it was for Argentina to prove that this "other factor" affects the competitive relationship between services and service suppliers, for example, by showing its effect on the characteristics of the service and on consumers' preferences.<sup>148</sup>

6.7. Next, the Panel assessed how the differentiation between cooperative and non-cooperative countries had been implemented in practice, and noted that the list of cooperative countries published by the AFIP "includes countries that have not signed a double taxation convention or an information exchange agreement and with which there is no exchange of tax information, as well as countries which have in fact concluded such conventions or agreements and which, therefore, exchange tax information."<sup>149</sup> The Panel found that "[t]his factual situation [made] it extremely difficult" for it to make the comparison it needed to make for an examination of "likeness", and concluded that it was impossible to compare relevant services and service suppliers in order to evaluate the relevant "other factor".<sup>150</sup> The Panel then held:

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<sup>141</sup> Panel Report, para. 7.161.

<sup>142</sup> Panel Report, para. 7.163.

<sup>143</sup> Panel Report, para. 7.165.

<sup>144</sup> Panel Report, para. 7.165.

<sup>145</sup> Panel Report, para. 7.166. (emphasis original)

<sup>146</sup> Panel Report, para. 7.168.

<sup>147</sup> Panel Report, para. 7.173.

<sup>148</sup> Panel Report, para. 7.179.

<sup>149</sup> Panel Report, para. 7.183.

<sup>150</sup> Panel Report, para. 7.184.

Accordingly, having concluded that the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is due to origin, we consider that Panama has proved that services and service suppliers of cooperative and non-cooperative countries are like by reason of origin.<sup>151</sup>

6.8. On that basis, the Panel found that, for purposes of Panama's claims under Article II:1 of the GATS, the services and service suppliers of cooperative countries are "like" the services and service suppliers of non-cooperative countries.<sup>152</sup>

### 6.1.2 The Panel's findings under Article XVII of the GATS

6.9. With respect to Article XVII of the GATS, Panama alleged that measures 2, 3, and 4 are inconsistent with Article XVII because they accord services and service suppliers of non-cooperative countries treatment less favourable than that accorded by Argentina to its domestic like services and service suppliers. Argentina did not present specific arguments in relation to Article XVII, but referred to its arguments presented under Article II:1 of the GATS.<sup>153</sup>

6.10. Having found that Argentina has assumed specific commitments in the sectors and modes of supply cited by Panama in respect of measures 2, 3, and 4<sup>154</sup>, and that these measures affect the supply of services, the Panel turned to consider whether the relevant services and service suppliers of non-cooperative countries are like Argentine services and service suppliers. In that respect, the Panel noted that both Argentina and Panama had indicated that their arguments on "likeness" developed under Article II:1 were also relevant under Article XVII of the GATS.

6.11. At the outset of its analysis, the Panel recalled its conclusion under Article II:1 that the services and service suppliers of cooperative countries are like the services and service suppliers of non-cooperative countries.<sup>155</sup> The Panel further noted that, while under Article II:1 the services and service suppliers being compared are those of cooperative and non-cooperative countries, in the case of Article XVII, the appropriate comparison for determining "likeness" must be made between Argentine services and service suppliers, on the one hand, and services and service suppliers of non-cooperative countries, on the other hand.<sup>156</sup>

6.12. The Panel then noted that the treatment provided for in the relevant measures is the same for transactions between Argentine taxpayers and Argentine service suppliers as it is for transactions between Argentine taxpayers and service suppliers in cooperative countries<sup>157</sup>, and that Argentina had agreed that Argentine services and service suppliers are comparable to services and service suppliers of cooperative countries.<sup>158</sup> The Panel then referred back to its finding under Article II:1 that services and service suppliers of cooperative countries are like those of non-cooperative countries, and held that this finding could be transposed to Article XVII. On this basis, the Panel concluded that Argentine services and service suppliers are "like" the services and service suppliers of non-cooperative countries for purposes of the analysis under Article XVII of the GATS.<sup>159</sup>

### 6.1.3 Claims and arguments on appeal

6.13. With respect to the Panel's finding of "likeness" under Article II:1 of the GATS, Argentina alleges that the Panel erred in its interpretation of Article II:1 in finding that services and service suppliers may be considered "like" when a measure provides for differential treatment "exclusively on the basis of origin".<sup>160</sup> Moreover, Argentina raises, as an independent basis on which we should reverse the Panel's finding of inconsistency with Article II:1, the claim that the Panel erred by

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<sup>151</sup> Panel Report, para. 7.185.

<sup>152</sup> Panel Report, para. 7.186.

<sup>153</sup> Panel Report, para. 7.444.

<sup>154</sup> Panel Report, para. 7.470.

<sup>155</sup> Panel Report, para. 7.482 (referring to Panel Report, paras. 7.185-7.186).

<sup>156</sup> Panel Report, para. 7.483.

<sup>157</sup> Panel Report, para. 7.486.

<sup>158</sup> Panel Report, para. 7.487.

<sup>159</sup> Panel Report, para. 7.489.

<sup>160</sup> Argentina's other appellant's submission, paras. 50-63.

making a *prima facie* case of "likeness" under Article II:1 of the GATS for Panama in the absence of evidence and legal argument presented by Panama.<sup>161</sup>

6.14. Alternatively, in the event that we consider that a presumption of likeness is warranted when a measure provides for differential treatment "exclusively on the basis of origin", Argentina alleges that the Panel erred in finding that the services and service suppliers at issue are "like" in the absence of a finding that the measures at issue provide for differential treatment "exclusively on the basis of origin".<sup>162</sup> In that event, Argentina further alleges, first, that the Panel erred in placing the burden on Argentina to demonstrate that the services and service suppliers at issue were *not* "like", rather than holding Panama to its burden of establishing that the services and service suppliers at issue are "like"<sup>163</sup>; and, second, that the Panel acted inconsistently with Article 11 of the DSU in finding that the services and service suppliers at issue are "like" under Article II:1 of the GATS. In the event that we find that the Panel failed to undertake an objective assessment of the matter as required under Article 11 of the DSU, Argentina also requests us to complete the legal analysis and find, on the basis of the Panel's factual findings and uncontested evidence on the Panel record, that the services and service suppliers at issue are *not* "like" under Article II:1 of the GATS.<sup>164</sup>

6.15. With regard to the Panel's finding of "likeness" under Article XVII of the GATS, Argentina alleges that the Panel erred in relying upon its "likeness" findings under Article II:1 in finding that the services and service suppliers at issue are "like" "by reason of origin" for purposes of Article XVII of the GATS.<sup>165</sup> In addition, Argentina alleges that the Panel committed legal error by making a *prima facie* case of "likeness" under Article XVII for Panama in the absence of evidence and legal argument.<sup>166</sup>

6.16. Argentina further alleges that the Panel failed to make an objective assessment of the matter, as required under Article 11 of the DSU, by ignoring uncontested evidence on the record demonstrating that the services and service suppliers at issue are not "like". Argentina raises this claim only in the event that we find that Argentina bore the burden of proving "likeness" under Articles II:1 and XVII of the GATS, or that Panama had otherwise established a *prima facie* case of "likeness".<sup>167</sup> Further, in the event that we find that the Panel failed to undertake an objective assessment of the matter as required under Article 11 of the DSU, Argentina requests us to complete the legal analysis and find that the services and service suppliers at issue are *not* "like" under Article XVII of the GATS.<sup>168</sup>

6.17. Panama requests us to: (i) uphold the Panel's conclusion under Article II:1 of the GATS that the services and service suppliers located in non-cooperative countries are "like" the services and service suppliers located in cooperative countries<sup>169</sup>; (ii) uphold the Panel's conclusion under Article XVII of the GATS that services and service suppliers located in non-cooperative countries are "like" the services and service suppliers of Argentine origin<sup>170</sup>; and (iii) find that the Panel did not fail to undertake an objective assessment of the matter as required under Article 11 of the DSU.<sup>171</sup>

#### 6.1.4 "Likeness" under Article II:1 and Article XVII of the GATS

6.18. Argentina's appeal calls for us to consider certain issues relating to the interpretation of the phrase "like services and service suppliers" in Article II:1 and Article XVII of the GATS. We begin by setting out our understanding of the phrase "like services and service suppliers" in Articles II:1 and XVII:1 of the GATS. Article II:1 of the GATS provides:

<sup>161</sup> Argentina's other appellant's submission, paras. 94-99.

<sup>162</sup> Argentina's other appellant's submission, paras. 66-67.

<sup>163</sup> Argentina's other appellant's submission, paras. 68-79.

<sup>164</sup> Argentina's other appellant's submission, para. 125.

<sup>165</sup> Argentina's other appellant's submission, paras. 80-93.

<sup>166</sup> Argentina's other appellant's submission, paras. 94-99.

<sup>167</sup> Executive summary of Argentina's other appellant's submission, Annex B-2 to this Report, para. 12; see also Argentina's other appellant's submission, para 101 and fn 91 thereto.

<sup>168</sup> Argentina's other appellant's submission, para. 125.

<sup>169</sup> Panama's appellee's submission, para. 7.1 (referring to Panel Report, paras. 7.185-7.186).

<sup>170</sup> Panama's appellee's submission, para. 7.1 (referring to Panel Report, paras. 7.488-7.489).

<sup>171</sup> Panama's appellee's submission, para. 7.1.

Article II  
*Most-Favoured-Nation Treatment*

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

6.19. Article XVII:1 of the GATS provides:

Article XVII  
*National Treatment*

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.<sup>172</sup>

6.20. The concept of "likeness" is a key concept that appears in several provisions of the covered agreements, and it has been addressed extensively by GATT and WTO panels and the Appellate Body, primarily in the context of trade in goods. The Appellate Body has clarified that the term "like" must be interpreted in the light of its context and the object and purpose of the agreement in which the relevant provision appears.<sup>173</sup>

6.21. The Appellate Body has considered that the word "like" refers to something sharing a number of identical or similar characteristics or qualities.<sup>174</sup> Furthermore, the Appellate Body has held that the term "similar" as a synonym of "like" echoes the language of the French version of these provisions, "*produits similaires*", and the Spanish version, "*productos similares*".<sup>175</sup> These terms imply some kind of comparison. While what is being compared is different in the context of trade in goods and trade in services, we consider that, in the context of both trade in goods and trade in services, "likeness" refers to something that is similar.

6.22. This raises the question of what degree or extent of similarity is required in order for services and service suppliers to be considered "like".<sup>176</sup> In this respect, we turn to consider the context in which the word "like" appears in the provisions of Articles II:1 and XVII:1 of the GATS. We note that both Article II:1 and Article XVII:1 further refer to "treatment no less favourable" of like services and service suppliers, and that Article XVII:3 provides that "treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of [one] Member compared to like services or service suppliers of any other Member." This demonstrates that Article XVII is concerned with competitive opportunities for like services and service suppliers of another Member.

6.23. In this vein, the panel in *China – Electronic Payment Services* held that Article XVII seeks to ensure equal competitive opportunities for like services of other Members, and that services are therefore "like" when they are in a competitive relationship with each other. That panel further reasoned that a measure of a Member can modify the conditions of competition, and thus be inconsistent with Article XVII:1, only if the foreign and domestic services at issue are indeed in a competitive relationship.<sup>177</sup> In other words, if the services being compared are not in a competitive relationship, the conditions of competition cannot be affected.

6.24. We turn next to consider the obligation to accord most-favoured-nation treatment to like services and service suppliers of any other Member. While Article II:1 refers to "treatment no less

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<sup>172</sup> Fn omitted.

<sup>173</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 18-19 and 21, DSR 1996:I, pp. 111-112 and 114.

<sup>174</sup> Appellate Body Report, *EC – Asbestos*, para. 91.

<sup>175</sup> Appellate Body Report, *EC – Asbestos*, para. 91.

<sup>176</sup> See also Appellate Body Report, *EC – Asbestos*, para. 92.

<sup>177</sup> Panel Report, *China – Electronic Payment Services*, para. 7.700.

favourable", we note that Article II:3 refers to "advantages".<sup>178</sup> An "advantage" is "[t]he fact or state of being in a better position with respect to another".<sup>179</sup> Being in a better position as compared to another is closely related to the concept of competition. This suggests that, also in the context of Article II of the GATS, the determination of "likeness" of services and service suppliers must focus on the competitive relationship of the services and service suppliers at issue. We note that, similarly, with regard to Articles I:1 and III:4 of the GATT 1994, the Appellate Body has held that, notwithstanding their textual differences, both of these provisions are concerned with "prohibiting discriminatory measures" and ensuring "equality of competitive opportunities" between products that are in a competitive relationship.<sup>180</sup>

6.25. Thus, we consider that the concept of "likeness" of services and service suppliers under Articles II:1 and XVII:1 of the GATS is concerned with the competitive relationship of services and service suppliers. This is consonant with the Appellate Body's understanding of "likeness" in the ambit of trade in goods. In *EC – Asbestos*, the Appellate Body held that the word "like" in Article III:4 of the GATT 1994 is to be interpreted as applying to products that are in a competitive relationship, and that therefore a determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.<sup>181</sup> As the Appellate Body noted, "[i]f there is – or could be – *no* competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic production."<sup>182</sup>

6.26. Further, in the context of trade in goods, the Appellate Body noted that there is a spectrum of degrees of "competitiveness" or "substitutability" of products in the marketplace.<sup>183</sup> The assessment of such a competitive relationship requires a market-based analysis. The Appellate Body also stated that not all products that are in some competitive relationship are "like products", and that it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word "like" falls.<sup>184</sup> In our view, the same is true with respect to "like services and service suppliers", and, thus, the likeness of services and service suppliers can only be determined on a case-by-case basis, taking into account the specific circumstances of the particular case.

6.27. We note that what is being compared for "likeness" is different in the context of trade in goods and trade in services. Articles II:1 and XVII:1 of the GATS refer to "like services and service suppliers". In contrast, Articles I:1, III:2, and III:4 of the GATT 1994, for instance, refer to "like products", but they do not include a reference to "like producers". The term "service supplier" is defined in Article XXVIII(g) of the GATS as "any person that supplies a service". With respect to the "supply of a service", Article XXVIII(b) stipulates that it "includes the production, distribution, marketing, sale and delivery of a service". Accordingly, this term covers a broad array of service-related activities. The word "service" is not defined in the GATS itself.<sup>185</sup>

6.28. Next, we consider the reference to "services and service suppliers". We note that the panel in *EC – Bananas III* addressed this reference and held that "to the extent that entities provide

<sup>178</sup> We note that, similarly, Article I:1 of the GATT 1994 also refers to "any advantage".

<sup>179</sup> Oxford English Dictionary online, definition of "advantage", <<http://www.oed.com/view/Entry/2895>>.

<sup>180</sup> Appellate Body Report, *EC – Seal Products*, para. 5.82.

<sup>181</sup> Appellate Body Report, *EC – Asbestos*, para. 99.

<sup>182</sup> Appellate Body Report, *EC – Asbestos*, para. 117. (emphasis original)

<sup>183</sup> Appellate Body Report, *EC – Asbestos*, para. 99. We note that while Article III:4 of the GATT 1994 refers to "like" products, the first and second sentences of Article III:2 (read in the light of the *Ad Article III*, paragraph 2) refer to "like" and "directly competitive or substitutable product[s]", respectively.

<sup>184</sup> Appellate Body Report, *EC – Asbestos*, para. 99.

<sup>185</sup> We note that, with regard to the national treatment obligation, Members' Schedules of Commitments define the scope of service transactions and sectors that are subject to the obligation. We further note that, in trade in services, the classification and description of services is based mainly on two instruments: (i) the Services Sectoral Classification List, established by the WTO Secretariat in 1991; and (ii) the UN Central Product Classification (CPC). The Services Sectoral Classification List was based on the 1991 provisional UN CPC. The most recent UN CPC (Ver.2.1) was released on 11 August 2015, and is available at: <<http://unstats.un.org/unsd/cr/registry/cpc-21.asp>>.

these like services, they are like service suppliers."<sup>186</sup> The panel in *China – Electronic Payment Services* considered that, while this may be so in some cases, in other cases an inquiry into the likeness of service suppliers may be called for, and that panel indeed assessed likeness with respect to both the services<sup>187</sup> and the service suppliers at issue.<sup>188</sup>

6.29. In our view, the reference to "services and service suppliers" indicates that considerations relating to both the service and the service supplier are relevant for determining "likeness" under Articles II:1 and XVII:1 of the GATS. The assessment of likeness of services should not be undertaken in isolation from considerations relating to the service suppliers, and, conversely, the assessment of likeness of service suppliers should not be undertaken in isolation from considerations relating to the likeness of the services they provide. We see the phrase "like services *and* service suppliers"<sup>189</sup> as an integrated element for the likeness analysis under Articles II:1 and XVII:1, respectively. Accordingly, separate findings with respect to the "likeness" of services, on the one hand, and the "likeness" of service suppliers, on the other hand, are not required. Because the "likeness" analysis serves to assess the competitive relationship of the "services *and* service suppliers"<sup>190</sup> at issue, the particular features of that competitive relationship, in the circumstances of any specific case, will determine the relative weight to be accorded in the analysis of "likeness" to considerations relating to the service and the service supplier, respectively. In any event, in a holistic analysis of "likeness", considerations relating to both the service and the service supplier will be relevant, albeit to varying degrees, depending on the circumstances of each case.

6.30. We now turn to the question of how a panel should proceed in determining "likeness". We note that, with regard to Article III:4 of the GATT 1994, the Appellate Body in *EC – Asbestos* referred to the GATT working party report on *Border Tax Adjustments*, which employed four general criteria for analysing "likeness" in the context of trade in goods: (i) the properties, nature, and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits or consumers' perceptions and behaviour in respect of the products; and (iv) the tariff classification of the products.<sup>191</sup> In addition, the Appellate Body noted that, although each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are interrelated.<sup>192</sup> Furthermore, the Appellate Body held that the criteria for analysing "likeness" are analytical tools to assist in the task of examining the relevant evidence, and that they are "neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products".<sup>193</sup> The Appellate Body also clarified that no evidence should be *a priori* excluded from a panel's analysis of likeness.<sup>194</sup>

6.31. With these considerations in mind, we consider how a panel should proceed in assessing the "likeness" of services and service suppliers in the particular context of Article II:1 and

<sup>186</sup> Panel Report, *EC – Bananas III (Ecuador)*, para. 7.322 reads:

[I]n our view, the nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are "like" when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the different service activities taken individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed. Similarly, in our view, to the extent that entities provide these like services, they are like service suppliers.

See also para. 7.346.

<sup>187</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.698-7.704

<sup>188</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.705-7.709.

<sup>189</sup> Emphasis added.

<sup>190</sup> Emphasis added.

<sup>191</sup> Appellate Body Report, *EC – Asbestos*, para. 101.

<sup>192</sup> Appellate Body Report, *EC – Asbestos*, para. 102. The Appellate Body noted that, for instance, "the physical properties of a product shape and limit the end-uses to which the products can be devoted. Consumer perceptions may similarly influence – modify or even render obsolete – traditional uses of the products. Tariff classification clearly reflects the physical properties of a product." (Ibid.)

<sup>193</sup> Appellate Body Report, *EC – Asbestos*, para. 102.

<sup>194</sup> Appellate Body Report, *EC – Asbestos*, para. 113. In this respect, the Appellate Body explained that, for instance, risks posed by a product to human health may be pertinent in an examination of "likeness" under Article III:4 of the GATT 1994, as it may affect the competitive relationship in the marketplace between allegedly "like" products, and that such risks need not be examined under a separate criterion, as they can be evaluated under the existing criteria of physical properties and of consumers' tastes and habits. (Ibid.)

Article XVII:1 of the GATS. We recall that the Appellate Body has clarified that the term "like" must be interpreted in the light of its context and the object and purpose of the agreement in which the relevant provision appears.<sup>195</sup> As we have set out above, we consider that the analysis of "likeness" serves the same purpose in the context of both trade in goods and trade in services, namely, to determine whether the products or services and service suppliers, respectively, are in a competitive relationship with each other. Thus, to the extent that the criteria for assessing "likeness" traditionally employed as analytical tools in the context of trade in goods are relevant for assessing the competitive relationship of services and service suppliers, these criteria may be employed also in assessing "likeness" in the context of trade in services, provided that they are adapted as appropriate to account for the specific characteristics of trade in services. In particular, we note that Articles II:1 and XVII:1 of the GATS refer to likeness of "services and service suppliers", and, accordingly, these criteria may be applied both in regard to the service and in regard to the service supplier in a holistic analysis as indicated above.

6.32. For example, the characteristics of services and service suppliers or consumers' preferences in respect of services and service suppliers may be relevant for determining "likeness" under the GATS. We note that, in this vein, the panel in *EC – Bananas III* considered the "nature and the characteristics"<sup>196</sup> of the service transactions at issue, which may be seen as an adaptation of the original criterion in *Border Tax Adjustments* – namely, properties, nature and quality. Furthermore, with respect to the criterion of tariff classification, the classification and description of services under, for instance, the UN Central Product Classification (CPC) could be relevant.<sup>197</sup> The panel in *China – Electronic Payment Services* undertook another such adaptation in considering evidence that the service suppliers at issue "describe[d] their business scope in very similar terms", and that this suggested that "these suppliers compete[d] with each other in the same business sector".<sup>198</sup> This may be seen as adaptations of the criteria of "properties, nature and quality", "end-use", and/or "consumer preferences". As in the context of trade in goods, however, we equally consider that the criteria for analysing "likeness" of services and service suppliers are simply analytical tools to assist in the task of examining the relevant evidence, and that they are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of services and service suppliers as "like".<sup>199</sup>

6.33. We further note that different modes of supply as defined in Article I:2 exist only in trade in services under the GATS, and not in trade in goods under the GATT 1994, and, accordingly, the analysis of "likeness" of services and service suppliers may require additional considerations of whether or how this analysis is affected by the mode(s) of service supply.<sup>200</sup> Having said that, we also note that we are not called upon to pronounce in this appeal on the relevance and weight of specific criteria for determining whether service suppliers and the services provided are "like".

6.34. While the criteria for analysing "likeness" must be adapted to the particular context of Articles II:1 and XVII:1 of the GATS in accordance with the above considerations, this does not change the fundamental purpose of the comparison to be undertaken in order to determine "likeness" in the context of trade in services, namely, to assess whether and to what extent the services and service suppliers at issue are in a competitive relationship. The existence of a competitive relationship is a precondition for the subsequent analysis under the requirement of "treatment no less favourable"<sup>201</sup> of whether the conditions of competition have been modified.

### 6.1.5 Presumption of "likeness"

6.35. This appeal raises a further question with respect to the interpretation of "likeness" in Articles II:1 and XVII:1 of the GATS, namely, whether, in order to establish "likeness", a complainant must always have recourse to the relevant criteria for establishing "likeness" set out

<sup>195</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 18-19 and 21, DSR 1996:I, pp. 111-112 and 114.

<sup>196</sup> Panel Report, *EC – Bananas III (Ecuador)*, para. 7.322.

<sup>197</sup> The Panel in *EC – Bananas III (Ecuador)* referred to the CPC and relevant headnotes in addressing the nature and characteristics of wholesale service transactions, as well as different subordinated services mentioned in the headnote to section 6 of the CPC. (Panel Report, *EC – Bananas III (Ecuador)*, paras. 7.322 and 7.346)

<sup>198</sup> Panel Report, *China – Electronic Payment Services*, para. 7.706.

<sup>199</sup> See Appellate Body Report, *EC – Asbestos*, para. 102.

<sup>200</sup> See Panel Report, *China – Electronic Payment Services*, paras. 7.704 and 7.706.

<sup>201</sup> See section 6.2 of this Report.



above, or whether a complainant may establish "likeness" by demonstrating that the measure at issue makes a distinction between services and service suppliers based exclusively on origin (we refer below to the latter as the "presumption approach").

6.36. In the context of trade in goods, several panels have found that, when a measure makes a distinction between products based exclusively on the origin of the product, the likeness of such products can be presumed. Panels have applied such a "presumption" of likeness with respect to Article III:2 of the GATT 1994<sup>202</sup>, Article III:4 of the GATT 1994<sup>203</sup>, and Article I:1 of the GATT 1994<sup>204</sup>. Panels have held that, rather than invariably establishing "likeness" on the basis of the relevant criteria, a complainant may establish "likeness" by demonstrating that the measure at issue makes a distinction based exclusively on the origin of the product.<sup>205</sup> In this respect, we note that measures allowing the application of a presumption of "likeness" will typically be measures involving a *de jure* distinction between products of different origin.

6.37. With respect to trade in services, we note that the measure at issue in *China – Publications and Audiovisual Products*, for instance, prohibited "foreign-invested enterprises" from engaging in the business of wholesale of imported reading materials, while permitting wholly Chinese-owned enterprises to engage in the supply of this service.<sup>206</sup> With respect to that measure, the panel in that dispute found:

When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the "like service suppliers" requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin. We note that similar conclusions have been reached by previous panels. We observe that in cases where a difference of treatment is not exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis would probably be required to determine whether service suppliers on either side of the dividing line are, or are not, "like".<sup>207</sup>

6.38. In our view, where a measure provides for a distinction based exclusively on origin, there will or can be services and service suppliers that are the same in all respects except for origin and, accordingly, "likeness" can be presumed and the complainant is not required to establish "likeness" on the basis of the relevant criteria set out above. Accordingly, we consider that, under Articles II:1 and XVII:1 of the GATS, a complainant is not required in all cases to establish "likeness" of services and service suppliers on the basis of the relevant criteria for establishing "likeness". Rather, in principle, a complainant may establish "likeness" by demonstrating that the measure at issue makes a distinction between services and service suppliers based exclusively on origin. However, we consider that, compared to trade in goods, the scope for such a presumption under the GATS would be more limited, and establishing "likeness" based on the presumption may often involve greater complexity in trade in services, due to the following reasons.

6.39. First, we have found above that the determination of "likeness" under Articles II:1 and XVII:1 involves consideration of both the service and the service supplier. Accordingly, depending on the circumstances of the particular case, an origin-based distinction in the measure at issue would have to be assessed not only with respect to the services at issue, but also with regard to the service suppliers involved. Such consideration of both the services and the service

<sup>202</sup> Panel Reports, *Argentina – Hides and Leather*, para. 11.168; *China – Auto Parts*, para. 7.216.

<sup>203</sup> Panel Reports, *Argentina – Import Measures*, para. 6.274; *Canada – Autos*, para. 10.74; *Canada – Wheat Exports and Grain Imports*, para. 6.164; *China – Publications and Audiovisual Products*, para. 7.1447; *India – Autos*, para. 7.174; *Thailand – Cigarettes (Philippines)*, para. 7.661; *Turkey – Rice*, paras. 7.214-7.216; *US – FSC (Article 21.5 – EC)*, paras. 8.132-8.135.

<sup>204</sup> Panel Reports, *Colombia – Ports of Entry*, paras. 7.355-7.356; *US – Poultry (China)*, paras. 7.424-7.432.

<sup>205</sup> See e.g. Panel Report, *China – Publications and Audiovisual Products*, paras. 7.1446-7.1447.

<sup>206</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.975.

<sup>207</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.975 (referring to Panel Reports, *Canada – Wheat Exports and Grain Imports*, paras. 6.164-6.167; and *Argentina – Hides and Leather*, paras. 11.168-11.169). (fn omitted) We note that, in this vein, the panel in *China – Electronic Payment Services* determined that the distinction between the services and service suppliers at issue in that dispute was not based exclusively on origin and thus assessed "likeness" on the basis of several relevant criteria. (See Panel Report, *China – Electronic Payment Services*, para. 7.697)

suppliers may render more complex the analysis of whether or not a distinction is based exclusively on origin, in particular, due to the role that domestic regulation may play in shaping, for example, the characteristics of services and service suppliers and consumers' preferences.

6.40. In addition, we note the principles for determining origin set out in Article XXVIII of the GATS. The definitions of the various terms set out in Article XXVIII(f), (g), and (k) through (n) of the GATS provide an indication of the possible complexities of determining origin and whether a distinction is based exclusively on origin in the context of trade in services.<sup>208</sup> An additional layer of complexity stems from the existence of different modes of supply and their implications for the determination of the origin of services and service suppliers.

6.41. While these complexities do not, as a matter of principle, render the presumption approach inapplicable in the context of trade in services, the scope of this presumption is more limited than in trade in goods. Whether and to what extent such complexities have an impact on the determination of whether a distinction is based exclusively on origin in a particular case will depend on the nature, configuration, and operation of the measure at issue and the particular claims raised.

6.42. Regarding the burden of proof in establishing "likeness" relying on the presumption approach, we note that, in keeping with the general rule that the burden of proof rests upon the party that asserts the affirmative of a particular claim<sup>209</sup>, the complainant bears the burden of making a *prima facie* case that a measure draws a distinction between services and service suppliers based exclusively on origin. In this regard, a panel is required to assess objectively the evidence and arguments forming the basis of such a contention.

6.43. If a panel finds that the complainant has failed to make a *prima facie* case that a measure provides for differential treatment based exclusively on origin, then the panel must engage in an analysis of "likeness" of services and service suppliers on the basis of the relevant criteria adapted to trade in services, as addressed above, before it may proceed to the analysis of less favourable treatment.

6.44. In contrast, if a complainant succeeds in making a *prima facie* case that a measure draws a distinction between services and service suppliers based exclusively on origin, and this is not rebutted by the respondent, the services and service suppliers at issue may be presumed to be "like", and a panel may proceed with the analysis of less favourable treatment without the need to assess the competitive relationship of the services and service suppliers at issue based on the relevant criteria as adapted to trade in services.

6.45. Once a complainant has made a *prima facie* case that a measure draws a distinction between services and service suppliers based exclusively on origin, the respondent may rebut this by demonstrating that origin is indeed not the exclusive basis for the distinction drawn by the measure between the services and service suppliers at issue. Alternatively, or in addition, a respondent may seek to rebut the *prima facie* case based on the presumption approach by introducing arguments and evidence relating to the criteria for determining "likeness" adapted to trade in services, as explained above, demonstrating that a certain factor affects the relevant criteria for establishing "likeness", and that it therefore has an impact on the competitive relationship between the services and service suppliers. In the event of a successful rebuttal based on either option above, a panel cannot proceed to a finding of "likeness" on the basis of such a presumption. Rather, it must engage in an analysis of "likeness" considering the relevant criteria in order to determine whether the services and service suppliers at issue are "like" before proceeding to an analysis of less favourable treatment.

#### 6.1.6 Argentina's claims on appeal

6.46. With respect to Article II:1 of the GATS, Argentina requests us to reverse the Panel's finding that services and service suppliers located in non-cooperative countries are "like" services and

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<sup>208</sup> See Article XXVIII of the GATS defining, *inter alia*, the terms "service of another Member", "service supplier", "natural person of another Member", "juridical person", and "juridical person of another Member".

<sup>209</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, p. 335.

service suppliers located in cooperative countries<sup>210</sup> and, consequently, to reverse the Panel's conclusion that measures 1-8 are inconsistent with Article II:1 of the GATS.<sup>211</sup>

6.47. With respect to Article XVII of the GATS, Argentina requests us to reverse the Panel's finding that services and service suppliers located in non-cooperative countries are "like" services and service suppliers of Argentine origin<sup>212</sup> and, consequently, to modify the legal basis for the Panel's conclusion that measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS.<sup>213</sup>

6.48. We begin by considering Argentina's claims relating to the Panel's finding under Article II:1 of the GATS. Thereafter, we turn to Argentina's claims relating to the Panel's finding under Article XVII of the GATS.

#### **6.1.6.1 Whether the Panel erred in its interpretation and application of Article II:1 of the GATS**

6.49. With regard to the Panel's analysis under Article II:1 of the GATS, Argentina alleges that the Panel erred in its interpretation of Article II:1 in finding that services and service suppliers may be considered "like" when a measure provides for differential treatment "exclusively on the basis of origin".<sup>214</sup> Alternatively, in the event that we consider that a presumption of "likeness" is warranted when a measure provides for differential treatment "exclusively on the basis of origin", Argentina claims that the Panel erred in finding that the services and service suppliers at issue are "like" in the absence of a finding that the measures at issue provide for differential treatment "exclusively on the basis of origin".<sup>215</sup> In that event, Argentina further claims that the Panel erred in placing the burden on Argentina to demonstrate that the services and service suppliers at issue are *not* "like", rather than holding Panama to its burden of establishing that the services and service suppliers at issue are "like"<sup>216</sup>, and that the Panel acted inconsistently with Article 11 of the DSU in finding that the services and service suppliers at issue are "like" for purposes of Article II:1 of the GATS.<sup>217</sup>

6.50. We begin by considering Argentina's first claim of error, namely, that the Panel erred in its interpretation of Article II:1 of the GATS in finding that services and service suppliers can be considered "like" when a measure draws a distinction between services and service suppliers based exclusively on origin.<sup>218</sup> For Argentina, the fact that a measure affecting trade in services provides for such a distinction is an insufficient basis for a finding that the services and service suppliers are "like". Argentina argues that there is an important difference between the GATS and the GATT 1994, in that the characteristics of a good are usually intrinsic to the good itself, while the characteristics of services are often inseparable from the characteristics of the service suppliers.<sup>219</sup>

6.51. Panama disagrees with Argentina that "likeness" cannot be presumed where a measure draws a distinction between services and service suppliers based exclusively on origin, and requests us to affirm the Panel's finding in this regard. Panama submits that the Panel was correct in concluding that the distinction drawn by the eight measures at issue between cooperative and non-cooperative countries is due to origin, and that the services and service suppliers of cooperative and non-cooperative countries are therefore "like" by reason of origin.<sup>220</sup>

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<sup>210</sup> Panel Report, paras. 7.185-7.186.

<sup>211</sup> Panel Report, paras. 7.365, 7.367, and 8.2.b.

<sup>212</sup> Panel Report, paras. 7.488-7.489.

<sup>213</sup> Panel Report, paras. 7.523-7.525 and 8.2.c.

<sup>214</sup> Argentina's other appellant's submission, paras. 50-63.

<sup>215</sup> Argentina's other appellant's submission, paras. 66-67.

<sup>216</sup> Argentina's other appellant's submission, paras. 68-79.

<sup>217</sup> Argentina's other appellant's submission, paras. 101-123.

<sup>218</sup> Argentina's other appellant's submission, para. 56.

<sup>219</sup> Argentina's other appellant's submission, para. 58.

<sup>220</sup> Panama's appellee's submission, para. 5.16.

6.52. We are not persuaded by Argentina's contention that the relevance of criteria associated with service suppliers in the determination of "likeness" in trade in services<sup>221</sup> compels the conclusion that the presumption approach cannot be applied in trade in services. We have found above that, under Articles II:1 and XVII:1 of the GATS, a complainant is not required, in all cases, to establish "likeness" of services and service suppliers on the basis of an assessment of the criteria for establishing "likeness" set out above. Instead, "likeness" may be presumed where the complainant demonstrates that the measure at issue makes a distinction between services and service suppliers based exclusively on origin. We have found that, while the analysis of whether or not a distinction is based exclusively on origin is more complex in the context of trade in services, this does not render the presumption approach inapplicable in trade in services. In the light of these considerations, we find that the Panel did not err merely by employing the presumption approach.<sup>222</sup>

6.53. We now turn to Argentina's second claim of error. Argentina contends that the Panel erred in its application of Article II:1 of the GATS in finding that the services and service suppliers at issue are "like" in the absence of a finding that the measures at issue provide for differential treatment "exclusively on the basis of origin".<sup>223</sup>

6.54. In examining this allegation of error raised by Argentina, we first review whether the Panel indeed failed to make a finding that the distinctions in treatment under the measures at issue between services and service suppliers of cooperative countries and of non-cooperative countries are based *exclusively* on origin.

6.55. We note that the Panel reasoned, in paragraph 7.166:

As regards the origin rule, as we have already mentioned, the eight measures challenged by Panama distinguish between services and service suppliers of cooperative and non-cooperative countries. In our view, the mere fact that differential treatment is accorded depending on whether or not a country is included in a list is closely linked to origin. This implies that any service supplier based in Panama – or in any other country considered by the Argentine authorities to be a cooperative country – is subject to the same treatment because it is based in that country. We therefore consider that the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is due to origin. However, even though the origin rule is applied in the form of a list of cooperative countries, it is not origin *per se* which determines that certain countries are on the list and others not, but the regulatory framework inextricably linked to such origin. This raises a doubt as to whether the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is based *exclusively* on origin, as asserted by Panama, or whether there is also some "other factor" explaining the difference in treatment, as we shall consider below.<sup>224</sup>

6.56. Thus, while the Panel noted that "the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is due to origin", it did not make a finding that the difference in treatment is based *exclusively* on origin. On the contrary, having stated that the difference in treatment is "due to origin", the Panel immediately attenuated this statement by observing that the classification of a country as cooperative or non-cooperative is not based on "origin *per se*", but on "the regulatory framework inextricably linked to such origin". For the Panel, this raised a doubt as to whether the difference in treatment between cooperative and

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<sup>221</sup> In particular, Argentina argues that the criteria for determining "likeness" in trade in services, relating to the service supplier, include factors such as: (i) whether the service supplier has particular skills, certifications, or licences; (ii) the legal form of the service supplier (e.g. whether the service supplier is a natural or juridical person); (iii) the commercial characteristics of the service supplier (e.g. assets, number of employees, and prior experience supplying the service); and (iv) the manner and extent to which the service supplier is subject to government regulation and oversight in its supply of the service. (Argentina's other appellant's submission, para. 58)

<sup>222</sup> Panel Report, para. 7.165.

<sup>223</sup> Argentina's other appellant's submission, paras. 64-67.

<sup>224</sup> Panel Report, para. 7.166. (emphasis original)

non-cooperative countries inherent in the eight measures at issue is based *exclusively* on origin, or "whether there is also some 'other factor' explaining the difference in treatment".<sup>225</sup>

6.57. Furthermore, the Panel considered that the possibility for Argentina to have access to tax information could be taken into account in the Panel's "likeness" analysis, "provided that it is reflected in the competitive relationship between services and service suppliers of cooperative and non-cooperative countries".<sup>226</sup> The Panel stated that it was for Argentina to prove that "this 'other factor' affects the competitive relationship between services and service suppliers, for example, by showing its effect on the characteristics of the service and consumers' preferences".<sup>227</sup>

6.58. Ultimately, the Panel considered that the factual situation in the present case made it extremely difficult to undertake the required analysis of "likeness" considering also the possibility for Argentina to have access to tax information. The Panel considered that the circumstances of the case made it "impossible for [the Panel] to compare relevant services and service suppliers" for the purpose of examining "likeness".<sup>228</sup> The Panel then held, in paragraph 7.185:

[H]aving concluded that the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is due to origin, we consider that Panama has proved that services and service suppliers of cooperative and non-cooperative countries are like by reason of origin.<sup>229</sup>

6.59. This finding provided the basis for the Panel's conclusion that, "for the purposes of the claims made by Panama under Article II:1 of the GATS, the services and service suppliers of cooperative countries are like the services and service suppliers of non-cooperative countries."<sup>230</sup>

6.60. We understand the Panel's finding in paragraph 7.185 cited above ("having concluded that the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is due to origin") to refer back to its statement in paragraph 7.166. However, as we have noted above, the Panel did not make a finding, in paragraph 7.166, that the distinction in the measures at issue is based *exclusively* on origin. Accordingly, paragraph 7.166 cannot serve as the basis for a conclusion that the distinction between cooperative and non-cooperative countries in the measures at issue is based exclusively on origin. Indeed, in paragraph 7.185, the Panel referred only to a difference in treatment between cooperative and non-cooperative countries "due to origin", rather than one due *exclusively* to origin.

6.61. As we have explained above, the application of the presumption of "likeness" requires a finding that a measure provides for a distinction based exclusively on origin. In the absence of such a finding, the Panel was required to undertake an analysis of "likeness", considering various criteria relevant for an assessment of the competitive relationship of the services and service suppliers of cooperative and non-cooperative countries as set out above. In this respect, we note that, while in its first written submission Panama relied primarily on the proposition that the measures at issue make a distinction based exclusively on origin, Panama presented arguments and evidence with respect to various criteria for establishing "likeness" in relation to the relevant services and service suppliers under the measures at issue in its second written submission.<sup>231</sup> In the absence of a finding that the measures at issue provide for a distinction based exclusively on origin, and by failing to conduct an analysis of "likeness" on the basis of the arguments and evidence presented by Panama with respect to the "likeness" criteria, the Panel erred in finding "likeness" "by reason of origin".<sup>232</sup>

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<sup>225</sup> Panel Report, para. 7.166.

<sup>226</sup> Panel Report, para. 7.179.

<sup>227</sup> Panel Report, para. 7.179.

<sup>228</sup> Panel Report, para. 7.184.

<sup>229</sup> Panel Report, para. 7.185.

<sup>230</sup> Panel Report, para. 7.186.

<sup>231</sup> In particular, Panama submitted before the Panel that the "likeness" criteria traditionally employed in the context of trade in goods could be applied *mutatis mutandis* to determine "likeness" of services and service suppliers, namely: (i) the nature of the services; (ii) the end use of the services; (iii) consumer preferences for such services; and (iv) any possible government classification that could give an indication of likeness.

(Panama's second written submission to the Panel, paras. 2.131, 2.276, 2.421, 2.423, 2.524, 2.604, 2.736; Panel Exhibit PAN-86)

<sup>232</sup> Panel Report, para. 7.185.

6.62. We note Panama's additional argument that the possibility of Argentina having access to tax information on foreign suppliers was merely the "reason" underlying the distinction drawn on the basis of origin. Panama contends that there will always be a reason why Members differentiate in their laws or regulations between services and service suppliers of different origin.<sup>233</sup> Panama further argues that the existence of policy rationales underlying origin-based distinctions does not alter the fact that the measures on their face differentiate exclusively on the basis of origin.<sup>234</sup>

6.63. Assuming *arguendo* that, as Panama suggests, Panama indeed made a *prima facie* case that the distinction between cooperative and non-cooperative countries in the measures at issue is based exclusively on origin, we consider that, because Argentina had introduced arguments and evidence in order to demonstrate that the possibility of access to tax information had an impact on the competitive relationship, the Panel would have been required to assess whether Argentina had thus successfully rebutted such *prima facie* case based on the presumption approach. In this respect, we note that Argentina had presented to the Panel arguments and evidence in support of its contention that the possibility of access to tax information affected the criteria for establishing "likeness", in particular consumers' preferences, in a way that had an impact on the competitive relationship of services and service suppliers in the market.<sup>235</sup>

6.64. We note that the Panel set out to assess whether the possibility of access to tax information indeed affected the criteria for establishing "likeness" and, thus, had an impact on the competitive relationship. The Panel stated that it would assess whether Argentina had established that access to tax information on foreign suppliers affected the competitive relationship between services and service suppliers, for example, by showing its effect on the characteristics of the services and consumers' preferences.<sup>236</sup> However, the Panel ceased that analysis without reaching a conclusion, stating merely that it was impossible for the Panel to compare relevant services and service suppliers for purposes of examining "likeness".<sup>237</sup> Because Argentina had argued that access to tax information on foreign suppliers affected the competitive relationship between services and service suppliers and had presented evidence to that effect, the Panel was required to examine this evidence and assess whether Argentina had indeed met its burden of showing that the possibility of access to tax information on foreign suppliers had an impact on the competitive relationship. The Panel did not do so. Moreover, if Argentina had met its burden, then the Panel should have conducted a "likeness" analysis on the basis of the relevant criteria.

6.65. This brings us to Argentina's third claim, namely, that the Panel erred in its allocation of the burden of proof by requiring Argentina to demonstrate that the services and service suppliers at issue are not "like".<sup>238</sup> Argentina asserts that Panama rested its case on the proposition that "likeness" can be presumed when differential treatment is accorded exclusively on the basis of origin. While Argentina disagrees with this proposition, it also submits that Panama failed to establish that the measures at issue provide for differential treatment exclusively on the basis of origin.<sup>239</sup> Argentina argues that the Panel erred in stating that it lies with Argentina to prove that the possibility to access tax information "affects the competitive relationship between services and service suppliers, for example, by showing its effect on the characteristics of the service and consumers' preferences".<sup>240</sup>

6.66. Panama responds that the Panel did not err in the allocation of the burden of proof under Article II:1 of the GATS. Panama asserts that, to the extent it bore the burden of making a *prima facie* showing of "likeness", it discharged this burden by showing that Argentina's measures differentiate between services and service suppliers *only* on the basis of origin and that the services and service suppliers covered by the measures are therefore "like" except for origin. If Argentina wished to assert that there were "other factors" that were relevant to the determination,

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<sup>233</sup> Panama's appellee's submission, para. 5.22.

<sup>234</sup> Panama's appellee's submission, para. 5.23.

<sup>235</sup> In particular, Argentina had submitted to the Panel that, when traditional tax havens enter into tax information exchange agreements, they lose business to the jurisdictions that have not entered into such agreements. (Argentina's first written submission to the Panel, paras. 211-213; second written submission to the Panel, paras. 48-50) In support of its contention, Argentina referred to three exhibits: Panel Exhibits ARG-80, ARG-81, and ARG-129.

<sup>236</sup> Panel Report, para. 7.179.

<sup>237</sup> Panel Report, para. 7.184.

<sup>238</sup> Argentina's other appellant's submission, para. 68.

<sup>239</sup> Argentina's other appellant's submission, para. 69 (referring to Panel Report, para. 7.166).

<sup>240</sup> Argentina's other appellant's submission, para. 72 (quoting Panel Report, para. 7.179).

or that countered Panama's *prima facie* showing of "likeness", it was for Argentina to establish what those "other factors" were, and how they would undermine Panama's showing of "likeness".<sup>241</sup>

6.67. We have addressed above the allocation of the burden of proof under the presumption approach. In the light of our previous finding that the Panel erred in its "likeness" analysis, we consider it unnecessary to address separately Argentina's claim regarding the burden of proof.

6.68. Argentina further claims that the Panel committed legal error by making a *prima facie* case of "likeness" for Panama under Article II:1 in the absence of evidence and legal argument.<sup>242</sup> For Argentina, this constitutes an independent basis to reverse the Panel's finding of inconsistency with Article II:1.<sup>243</sup>

6.69. We have found above that the Panel erred in its "likeness" analysis, and we therefore consider it unnecessary to address separately Argentina's claim that the Panel erred by making a *prima facie* case of "likeness" for Panama in the absence of evidence and legal argument presented by Panama under Article II:1 of the GATS.

6.70. Based on the considerations set out above, we reverse the Panel's finding, in paragraph 7.186 of its Report, that services and service suppliers of cooperative countries are like services and service suppliers of non-cooperative countries.

6.71. Because the Panel's conclusion that measures 1-8 are inconsistent with Article II:1 of the GATS was based on the Panel's finding in paragraph 7.186, we also reverse this conclusion of the Panel in paragraphs 7.367 and 8.2.b of its Report.

#### **6.1.6.2 Whether the Panel erred in its interpretation and application of Article XVII:1 of the GATS**

6.72. With respect to Article XVII:1 of the GATS, Argentina requests us to find that the Panel erred by relying upon its "likeness" findings under Article II:1 of the GATS in its analysis of "likeness" under Article XVII:1<sup>244</sup>, and to sustain, on the basis of modified reasoning, the Panel's conclusion that measures 2, 3, and 4 are not inconsistent with Article XVII:1 of the GATS.

6.73. Argentina submits that the Panel's reliance upon its "likeness" findings under Article II:1 in its "likeness" analysis under Article XVII:1 constitutes legal error, because the findings under Article II:1 are themselves in error.<sup>245</sup> Argentina alleges that the Panel further erred in relying on these findings because they were not relevant to the Panel's analysis under Article XVII:1. Argentina explains that, in its "likeness" analysis under Article II:1, the Panel compared services and service suppliers in cooperative and non-cooperative countries, and that this comparison has no bearing on the "likeness" analysis under Article XVII:1, which requires a comparison of services and service suppliers in non-cooperative countries with Argentine services and service suppliers.<sup>246</sup>

6.74. Panama, for its part, submits the same arguments with respect to Argentina's allegation of error relating to the Panel's analysis under both Article II:1 and Article XVII:1 of the GATS. Panama does not respond separately to arguments raised by Argentina specifically with respect to the Panel's analysis under Article XVII:1.

6.75. We note that the Panel's conclusion under Article XVII:1 – that Argentine services and service suppliers are like the services and service suppliers of non-cooperative countries<sup>247</sup> – was based on the Panel's earlier finding of the likeness of services and service suppliers of cooperative and of non-cooperative countries under Article II:1. Indeed, the Panel considered that its

<sup>241</sup> Panama's appellee's submission, para. 5.45.

<sup>242</sup> Argentina's other appellant's submission, para. 98.

<sup>243</sup> Argentina's other appellant's submission, para. 99.

<sup>244</sup> Argentina's other appellant's submission, paras. 1 and 93.

<sup>245</sup> Argentina's other appellant's submission, para. 85.

<sup>246</sup> Argentina's other appellant's submission, para. 87.

<sup>247</sup> Panel Report, para. 7.489.

"likeness" finding under Article II:1 of the GATS "can be transposed to the scope of Article XVII of the GATS".<sup>248</sup>

6.76. We have found above that the Panel erred in finding that the services and service suppliers of cooperative countries are like the services and service suppliers of non-cooperative countries for purposes of Article II:1, and we have reversed this finding. This also removes the basis of the Panel's finding that Argentine services and service suppliers are like the services and service suppliers of non-cooperative countries for purposes of Article XVII, because that finding was dependent on the Panel's earlier finding of "likeness" under Article II:1. Accordingly, we reverse the Panel's finding, in paragraph 7.489 of its Report, that "Argentine services and service suppliers are like the services and service suppliers of non-cooperative countries for the purposes of [its] analysis of Article XVII of the GATS."

6.77. Argentina further claims that the Panel committed legal error by making a *prima facie* case of "likeness" for Panama under Article XVII in the absence of evidence and legal argument.<sup>249</sup> For Argentina, this constitutes an independent basis for us to modify the legal basis of the Panel's conclusion that measures 2, 3, and 4 are not inconsistent with Article XVII.<sup>250</sup>

6.78. We have found above that the Panel erred in its "likeness" analysis and we therefore consider it unnecessary to address separately Argentina's claim that the Panel erred by making a *prima facie* case of "likeness" for Panama in the absence of evidence and legal argument presented by Panama under Article XVII of the GATS.

6.79. We have reversed the Panel's finding, in paragraph 7.489 of its Report, that Argentine services and service suppliers are like the services and service suppliers of non-cooperative countries. Because the Panel's conclusion that measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS was based on this finding, we also reverse this conclusion of the Panel in paragraphs 7.525 and 8.2.c of its Report.

6.80. Finally, we wish to emphasize that, while we have reversed the Panel's findings of "likeness" under Articles II:1 and XVII of the GATS for the reasons set out above, we have 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.

#### 6.1.6.3 Whether the Panel acted inconsistently with Article 11 of the DSU

6.81. Argentina alleges that the Panel failed to make an objective assessment of the matter, as required under Article 11 of the DSU, by ignoring uncontested evidence on the record demonstrating that the services and service suppliers at issue are not "like". Argentina raises this claim only in the event that we find that Argentina bore the burden of proving "likeness" under Articles II:1 and XVII of the GATS, or that Panama had otherwise established a *prima facie* case of "likeness".<sup>251</sup>

6.82. We have found above that the Panel erred in its analysis of "likeness" and, consequently, we have reversed the Panel's finding that the services and service suppliers of cooperative countries are "like" the services and service suppliers of non-cooperative countries, as well as the Panel's finding that the services and service suppliers of cooperative countries are "like" Argentine services and service suppliers. We neither found that Argentina bore the burden of proving "likeness" under Articles II:1 and XVII of the GATS, nor that Panama had established a *prima facie* case of "likeness".<sup>252</sup> Consequently, the condition upon which Argentina's claim under Article 11 rests is

<sup>248</sup> Panel Report, para. 7.488.

<sup>249</sup> Argentina's other appellant's submission, para. 98.

<sup>250</sup> Argentina's other appellant's submission, para. 99.

<sup>251</sup> Executive summary of Argentina's other appellant's submission, Annex B-2 to this Report, para. 12; see also Argentina's other appellant's submission, para 101 and fn 91 thereto. Argentina submits that, in particular, the condition of its claim under Article 11 of the DSU would be fulfilled if we were to find that a presumption of "likeness" was warranted because the measures at issue provide for differential treatment on the basis of origin, or if we were to find, on any other basis, that Panama had established a *prima facie* case of "likeness" before the Panel, thus requiring a rebuttal from Argentina.

<sup>252</sup> We have addressed the latter situation above in paragraph 6.63, albeit on an *arguendo* basis.



not met. Therefore, neither this claim nor Argentina's request that we complete the legal analysis is before us, and we make no findings in this respect.

6.83. We have found that the Panel's analysis was in error, and we have thus reversed the Panel's finding that the services and service suppliers of cooperative countries are "like" the services and service suppliers of non-cooperative countries under Article II:1 of the GATS. We have also reversed the Panel's finding that Argentine services and service suppliers are "like" the services and service suppliers of non-cooperative countries under Article XVII of the GATS. Our reversal of these findings means that the Panel's findings on "treatment no less favourable" are moot because they were based on the Panel's findings that the relevant services and service suppliers are "like". Moreover, as a consequence of our reversal of the Panel's "likeness" findings, there remains no finding of inconsistency with the GATS. This, in turn, renders moot the Panel's analysis of whether measures 1, 2, 3, 4, 7, and 8 may be justified pursuant to Article XIV(c) of the GATS and whether measures 5 and 6 may be justified pursuant to paragraph 2(a) of the GATS Annex on Financial Services.

6.84. At the same time, we note that, for the most part, the claims of error raised by Panama regarding the Panel's findings on "treatment no less favourable", as well as the Panel's findings under Article XIV(c) and paragraph 2(a) of the Annex on Financial Services, concern "issues of law covered in the panel report and legal interpretations developed by the panel", and hence fall within the scope of appellate review under Article 17.6 of the DSU. Moreover, several of the issues raised in Panama's appeal have implications for the interpretation of provisions of the GATS. With these considerations in mind, we turn to address the issues raised in Panama's appeal.

## 6.2 Article II:1 and Article XVII of the GATS – "Treatment no less favourable"

6.85. Panama claims that the Panel erred in its interpretation of the term "treatment no less favourable" under Articles II:1 and XVII of the GATS<sup>253</sup>, and also erred in its application of the term "treatment no less favourable" under Article XVII of the GATS.<sup>254</sup> Panama requests us to sustain the Panel's finding that the measures at issue are inconsistent with Article II:1 of the GATS on the basis of the Panel's preliminary findings under that provision. Panama further requests us to reverse the Panel's finding that measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS and find, instead, that these measures are inconsistent with that provision.<sup>255</sup>

6.86. Before analysing Panama's appeal, we consider it useful to begin by briefly setting out an overview of the relevant findings of the Panel and the participants' claims and arguments on appeal. Subsequently, we set out our interpretation of the term "treatment no less favourable" in Articles II:1 and XVII of the GATS, and address the alleged interpretive errors by the Panel in the light of our interpretation, before addressing the errors of application alleged by Panama.

### 6.2.1 The Panel's findings under Article II:1 of the GATS

6.87. As a starting point for discerning the ordinary meaning of the term "treatment no less favourable" in Article II:1 of the GATS, the Panel referred to several dictionary definitions of the words used in Article II:1.<sup>256</sup> The Panel further noted two aspects that it considered relevant to its interpretation, namely, the broad scope of the obligation under Article II of the GATS, and the reference in Article II:1 to "services and service suppliers". In particular, the Panel considered that the reference to "service suppliers" is linked to the nature of services and of trade in services, and highlighted "some very special features" of services that "differentiate them from goods".<sup>257</sup>

6.88. On this basis, the Panel considered that the regulatory framework in which service suppliers operate may in certain circumstances be relevant in the context of the GATS due to its "direct impact on the service".<sup>258</sup> In the Panel's view, Members' right to regulate the supply of services to

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<sup>253</sup> Panama's appellant's submission, paras. 3.2 and 4.2 (referring to Panel Report, paras. 7.235 and 7.494).

<sup>254</sup> Panama's appellant's submission, para. 4.33.

<sup>255</sup> Unlike its claim under Article II:1 of the GATS, which concerned the measures at issue, Panama's claim under Article XVII of the GATS concerned only measures 2, 3, and 4. (Panel Report, para. 7.436)

<sup>256</sup> Panel Report, para. 7.205.

<sup>257</sup> Panel Report, para. 7.212.

<sup>258</sup> Panel Report, para. 7.212.

meet national policy objectives, "as enshrined in the preamble to the GATS", confirms the relevance of the regulatory framework in the context of trade in services.<sup>259</sup>

6.89. The Panel went on to examine the context afforded by Article XVII:3 of the GATS<sup>260</sup>, and considered that the concept of "treatment no less favourable" under Article II:1 also hinges on the "conditions of competition". The Panel then reviewed the context provided by relevant provisions of the GATT 1994 and the Agreement on Technical Barriers to Trade (TBT Agreement), and reviewed the Appellate Body's interpretations of the term "treatment no less favourable" under those Agreements. The Panel further noted that there exist "some similarities between the GATS and the TBT Agreement"<sup>261</sup>, in that the preambles in both Agreements recognize Members' right to regulate with a view to achieving certain policy objectives. The Panel emphasized, however, that the reference to "service suppliers" differentiates the GATS from the other two Agreements, and explained that this reference "has a decisive influence" on the relevance of the Appellate Body's interpretations to the Panel's interpretive exercise in this dispute.<sup>262</sup> In the Panel's view, therefore, the interpretations developed under Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement cannot be transposed directly to Article II:1 of the GATS.

6.90. On the basis of the above considerations, the Panel found, in its interpretation of the term "treatment no less favourable", that the reference to "service suppliers" in Article II:1 "might lead the interpreter" to take into account "the relevant regulatory aspects concerning service suppliers which have an impact on the conditions of competition".<sup>263</sup> In the Panel's view, "[c]onsideration of these regulatory aspects could ... mean that certain regulatory distinctions between service suppliers established by a Member do not necessarily constitute" less favourable treatment under Article II:1 of the GATS.<sup>264</sup>

6.91. Thus, the Panel explained its approach as follows: first, it would determine whether, for each of the eight measures at issue, Argentina accords *different* treatment to the two categories of services and service suppliers (cooperative and non-cooperative countries); then, it would examine whether the treatment is *less favourable* for services and service suppliers of non-cooperative countries. The Panel considered that, in order to determine whether treatment is less favourable, it was required to assess whether the measure modifies the conditions of competition. In addition, the Panel stated that this assessment had to "take into account regulatory aspects relating to services and service suppliers that may affect the conditions of competition; in particular, whether Argentina is able to have access to tax information on foreign suppliers".<sup>265</sup>

6.92. Following this approach, the Panel found, at the outset, that the treatment accorded to services and service suppliers of cooperative countries under each of the measures at issue is different from that accorded to like services and service suppliers of non-cooperative countries.<sup>266</sup> The Panel went on to find, as a preliminary matter, that each of the measures modifies the conditions of competition to the detriment of like services and service suppliers of non-cooperative countries.<sup>267</sup> The Panel then took into account the "regulatory aspects" in this dispute, namely, the possibility for Argentina to access tax information on foreign suppliers. The Panel found that, due to the design of Decree No. 589/2013, "the way in which Argentina classifies countries as cooperative or non-cooperative is not consistent with the possibility for Argentina to have access to tax information."<sup>268</sup>

6.93. On this basis, the Panel concluded that Panama had demonstrated that the measures at issue fail to accord "treatment no less favourable" to services and service suppliers of

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<sup>259</sup> Panel Report, para. 7.217.

<sup>260</sup> Panel Report, para. 7.220. Article XVII:3 of the GATS provides:

Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

<sup>261</sup> Panel Report, para. 7.230.

<sup>262</sup> Panel Report, para. 7.228.

<sup>263</sup> Panel Report, para. 7.232.

<sup>264</sup> Panel Report, para. 7.232.

<sup>265</sup> Panel Report, para. 7.235.

<sup>266</sup> Panel Report, paras. 7.237-7.273.

<sup>267</sup> Panel Report, paras. 7.282, 7.300, 7.308, 7.318, 7.328, 7.338, 7.350, and 7.359. For all but two measures (measures 4 and 6), the Panel's findings refer to "service suppliers" only.

<sup>268</sup> Panel Report, para. 7.290. See also paras. 7.301, 7.309, 7.319, 7.329, 7.339, 7.351, and 7.360.

non-cooperative countries as compared to that accorded to like services and service suppliers of cooperative countries.<sup>269</sup>

### 6.2.2 The Panel's findings under Article XVII of the GATS

6.94. The Panel considered that, like Article II of the GATS, Article XVII of the GATS refers not only to like *services*, but also to like *service suppliers*. The Panel then reached the same interpretation of "treatment no less favourable" under Article XVII as it did under Article II:1, and adopted the same analytical approach as the one adopted under Article II:1.<sup>270</sup> Following this approach, the Panel first found, on the basis of its findings under Article II:1, that measures 2, 3, and 4 establish different treatment for services and service suppliers of non-cooperative countries in comparison with that accorded to Argentine like services and service suppliers.<sup>271</sup> Similarly, the Panel referred to its "preliminary" conclusions of "treatment less favourable" under Article II:1<sup>272</sup> and found, "on a preliminary basis", that measures 2, 3, and 4 "do not accord treatment no less favourable to services and service suppliers of non-cooperative countries in comparison with that accorded to Argentine like services and service suppliers".<sup>273</sup>

6.95. The Panel proceeded to determine whether its preliminary conclusions on less favourable treatment could be confirmed after examining the impact on competitive conditions of the possibility of Argentina to access tax information on service suppliers. The Panel considered that measures 2, 3, and 4 are intended to "neutralize an 'unintended competitive advantage'" enjoyed by service suppliers of non-cooperative countries owing to the lack of exchange with Argentina of tax information on their suppliers.<sup>274</sup> Because this advantage is not available to Argentine service suppliers whose tax information can be obtained by the Argentine authorities, the Panel considered that none of these measures grants "favour" to Argentine services and service suppliers.<sup>275</sup> Rather, the Panel considered that measures 2, 3, and 4 are designed to guarantee that the competitive relationship between Argentine services and service suppliers and those of non-cooperative countries is "on an equal footing".<sup>276</sup> In the Panel's view, this is consistent with the objective of Article XVII of the GATS, that is, "to ensure equal conditions of competition" between foreign and domestic services and service suppliers.<sup>277</sup>

6.96. On this basis, the Panel found that Panama had not proved that measures 2, 3, and 4 accord less favourable treatment to services and service suppliers of non-cooperative countries in comparison with that accorded to Argentine like services and service suppliers.<sup>278</sup>

### 6.2.3 Claims and arguments on appeal

6.97. Panama claims that the Panel erred in its interpretation of the term "treatment no less favourable" in Articles II:1 and XVII of the GATS in finding that the assessment of whether a measure modifies the conditions of competition under these provisions in this dispute also "has to take into account regulatory aspects relating to services and service suppliers that may affect the conditions of competition", that is, "whether Argentina is able to have access to tax information on foreign suppliers."<sup>279</sup> Panama maintains that, in the context of both the GATT 1994 and the GATS, WTO panels and the Appellate Body have consistently found that a measure accords "less favourable treatment" when it modifies the conditions of competition in the relevant market without taking into account any regulatory aspects. Panama contends that the Panel's interpretation of the term "treatment no less favourable" in Article II:1 is erroneous, because the

<sup>269</sup> Panel Report, para. 7.362. Having reached this conclusion, the Panel found it unnecessary "to pursue [its] analysis by addressing the question of whether non-existent 'treatment no less favourable' is accorded immediately and unconditionally to like services and service suppliers". (Ibid., para. 7.363)

<sup>270</sup> See *supra*, paras. 6.90-6.91.

<sup>271</sup> Panel Report, para. 7.499.

<sup>272</sup> Panel Report, paras. 7.501-7.503.

<sup>273</sup> Panel Report, para. 7.504. See also paras. 7.500-7.503.

<sup>274</sup> Panel Report, para. 7.515 (quoting OECD Report (2013), *Addressing Base Erosion and Profit Shifting* (Panel Exhibit ARG-22), p. 39).

<sup>275</sup> Panel Report, para. 7.516.

<sup>276</sup> Panel Report, para. 7.521.

<sup>277</sup> Panel Report, para. 7.520.

<sup>278</sup> Panel Report, para. 7.522.

<sup>279</sup> Panama's appellant's submission, paras. 3.2 and 4.2; Panel Report, para. 7.235. See also Panel Report, para. 7.494.

Panel misinterpreted the context of this term, misunderstood the object and purpose of the GATS, and failed to take into account the relevant jurisprudence. Panama further submits that the Panel's ultimate conclusion under Article II:1 should have been based entirely on its preliminary finding that the measures at issue modify the conditions of competition to the detriment of services and service suppliers of non-cooperative countries.<sup>280</sup>

6.98. With respect to Article XVII of the GATS, Panama maintains that the Panel erred in its interpretation of the term "treatment no less favourable" for the same reasons as those set out in Panama's appeal under Article II:1. Panama adds that, in applying Article XVII to measures 2, 3, and 4, the Panel "spelled out in somewhat more detail how regulatory aspects should be approached when assessing 'less favourable treatment'".<sup>281</sup> More specifically, the Panel employed an erroneous legal standard whereby, if a regulatory aspect provides an "unintended competitive advantage" to services or service suppliers of certain foreign origins, Members can impose higher burdens or additional requirements on these services or service suppliers in order to "neutralize" such an unintended competitive advantage.<sup>282</sup> Panama further contends that, in applying an incorrect legal standard under Article XVII:1 to measures 2, 3, and 4, the Panel relied on unsubstantiated assumptions and provided unreasoned and self-contradictory conclusions. On this basis, Panama requests us to reverse the Panel's finding under Article XVII of the GATS, and to complete the legal analysis and find that measures 2, 3, and 4 are inconsistent with Article XVII of the GATS.<sup>283</sup>

6.99. On appeal, Argentina submits no substantive arguments regarding the interpretation and application of the term "treatment no less favourable" in Articles II:1 and XVII of the GATS. Rather, Argentina contends that Panama's appeal, as well as Argentina's other appeal, should be resolved on the grounds of "likeness". According to Argentina, the Panel did not err in its findings concerning the importance of regulatory distinctions to a proper interpretation of Articles II:1 and XVII of the GATS. However, Argentina contends that regulatory differences that affect competitive relationships among services and service suppliers should properly be examined, in the first instance, as part of the evaluation of whether the services and service suppliers at issue may be considered "like". To the extent they cannot be considered "like", the question of "less favourable treatment" does not arise.<sup>284</sup>

6.100. Argentina further contends that, had the Panel held Panama to its burden of proof in the context of the "likeness" analysis, the Panel would have properly concluded that Panama had failed to establish a *prima facie* case of "likeness". Thus, referring to the reasons set forth in its other appellant's submission, Argentina requests us to reverse or modify the Panel's ultimate conclusions under Articles II:1 and XVII of the GATS without the need to address Panama's claims of error concerning the Panel's interpretation and application of the term "treatment no less favourable".<sup>285</sup>

#### **6.2.4 Whether the Panel erred in its interpretation of the term "treatment no less favourable" in Article II:1 and Article XVII of the GATS**

6.101. In this section, we set out our interpretation of the term "treatment no less favourable" in Articles II:1 and XVII of the GATS, and review the alleged interpretive errors of the Panel in the light of our interpretation. In reviewing the Panel's findings, we begin with the Panel's articulation of its legal standard on the basis of its interpretation of Articles II:1 and XVII, including its analysis of their text and context, as well as the object and purpose of the GATS.<sup>286</sup> Moreover, we note that the Panel further elaborated on its approach to assessing "treatment no less favourable" in its application of Articles II:1 and XVII to the facts of the case, and that, according to Panama, parts of this application also reflect the Panel's alleged interpretive errors. In our analysis below, therefore, we also examine the Panel's relevant findings in the application of Articles II:1 and XVII, in order to examine the Panel's alleged errors of interpretation as manifested in such application.

<sup>280</sup> Panama's appellant's submission, paras. 3.31-3.68.

<sup>281</sup> Panama's appellant's submission, para. 4.25.

<sup>282</sup> Panama's appellant's submission, paras. 4.13 and 4.41.a (referring to Panel Report, paras. 7.514-7.516 and 7.520-7.521).

<sup>283</sup> Panama's appellant's submission, para. 4.41.

<sup>284</sup> Argentina's appellee's submission, paras. 39 and 45.

<sup>285</sup> Argentina's appellee's submission, paras. 42 and 44.

<sup>286</sup> Because the Panel's interpretation of the term "treatment no less favourable" in Article XVII is, to a large extent, based on the same reasons it set out in interpreting the same term in Article II:1, our review of the Panel's interpretation refers primarily to the Panel's relevant findings in relation to Article II:1 of the GATS.

### 6.2.4.1 Whether the Panel erred in its articulation of the legal standard of "treatment no less favourable"

6.102. Articles II:1 and XVII of the GATS state:

*Article II*  
*Most-Favoured-Nation Treatment*

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

*Article XVII*  
*National Treatment*

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[\*]

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

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[\*fn original] <sup>10</sup> Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

6.103. Examining the text of these provisions, we note that the second and third paragraph of Article XVII elaborate on the meaning of a Member's obligation to grant "treatment no less favourable" pursuant to Article XVII:1. Specifically, Article XVII:2 recognizes that a Member may meet this requirement by according to services and service suppliers "either formally identical treatment or formally different treatment". Article XVII:3 stipulates that "[f]ormally identical or formally different treatment shall be considered to be less favourable *if it modifies the conditions of competition* in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member."<sup>287</sup> In our view, while Article XVII:3 refers to the modification of conditions of competition *in favour of* domestic services or service suppliers, the legal standard set out in Article XVII:3 calls for an examination of whether a measure modifies the conditions of competition to *the detriment of* services or service suppliers of any other Member. Less favourable treatment of foreign services or service suppliers and more favourable treatment of like domestic services or service suppliers are flip-sides of the same coin.

6.104. Footnote 10 to Article XVII:1 provides further insight as to the meaning of the obligation to accord "treatment no less favourable" under Article XVII:1. Footnote 10 stipulates that specific commitments assumed under Article XVII:1 "shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers". As its text indicates, the "inherent competitive disadvantages" referred to in footnote 10 result from the "foreign character" of the relevant services or service suppliers, rather than from the contested measure adopted by the importing

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<sup>287</sup> Emphasis added.

Member.<sup>288</sup> The "inherent competitive disadvantages" under footnote 10, therefore, must be distinguished from the measure's impact on the conditions of competition in the marketplace. By stating that a Member is not required to "compensate for" such "inherent competitive disadvantages", footnote 10 thus makes clear that the national treatment obligation under Article XVII:1 is not about the relative competitive advantages or disadvantages of the services and service suppliers that are *not* caused by the contested measure. Rather, the standard of "treatment no less favourable" must be based on the impact on the conditions of competition that *results from* the contested measure.<sup>289</sup>

6.105. Turning to Article II:1 of the GATS, we note that this provision does not further define the term "treatment no less favourable". Furthermore, we recall that Article XVII:1 contains a national treatment obligation, whereas Article II:1 contains a most-favoured-nation obligation. Nonetheless, the operative parts of these provisions are similarly worded, in that a Member is required to accord "treatment no less favourable" to "services and service suppliers of any other Member". Both provisions serve the function of prohibiting discrimination against foreign services and service suppliers *vis-à-vis* like services and service suppliers. Although the immediate context of this term in Articles II:1 and XVII:1 is not expressed in identical words, and Article II does not contain the elaboration of the "less favourable treatment" standard found in Articles XVII:2 and 3, the Appellate Body has found that both provisions share the essential nature of anti-discrimination provisions, and cover both *de jure* and *de facto* discrimination.<sup>290</sup> Thus, the elaboration on the meaning of the term "treatment no less favourable" contained in Article XVII, and in particular in Article XVII:3, should also be pertinent context to the meaning of the same term in Article II:1.

6.106. We note that, in *EC – Bananas III*, the Appellate Body upheld the panel's finding that the EC licensing procedures in that dispute conferred less favourable treatment under both Article II and Article XVII of the GATS. In so doing, the Appellate Body based its findings under both provisions on the same notion of "less favourable treatment". Specifically, the Appellate Body agreed with the panel that various aspects of the EC licensing procedures at issue created less favourable conditions of competition for service suppliers of the complainants' origin.<sup>291</sup> The Appellate Body's findings indicate that, on substance, the concept of "treatment no less favourable" under both the most-favoured-nation and national treatment provisions of the GATS is focused on a measure's modification of the conditions of competition. This legal standard does not contemplate a separate and additional inquiry into the regulatory objective of, or the regulatory concerns underlying, the contested measure. Indeed, in prior disputes, the fact that a measure modified the conditions of competition to the detriment of services or service suppliers of any other Member was, in itself, sufficient for a finding of less favourable treatment under Articles II:1 and XVII of the GATS.<sup>292</sup>

6.107. In the present dispute, the Panel also drew on the definition of "less favourable" treatment in Article XVII:3 when interpreting the term "treatment no less favourable" in Article II:1, and

<sup>288</sup> With regard to what may constitute such "inherent competitive disadvantages", the panel in *Canada – Autos* noted that the supply of some repair and maintenance services on machinery and equipment through supply modes 1 and 2 might not have been technically feasible for foreign suppliers, as they require the physical presence of the supplier. (See Panel Report, *Canada – Autos*, para. 10.300)

<sup>289</sup> See also *infra*, para. 6.146.

<sup>290</sup> Appellate Body Report, *EC – Bananas III*, para. 233.

<sup>291</sup> Appellate Body Report, *EC – Bananas III*, paras. 240-248. In that dispute, the Appellate Body stated that the relevant findings under the most-favoured-nation obligation in Article I of the GATT 1994 would be of greater pertinence in interpreting the most-favoured-nation obligation in Article II of the GATS. (See *ibid.*, para. 231)

<sup>292</sup> This is demonstrated by the panel and Appellate Body findings in *EC – Bananas III*, as discussed above. (See Panel Report, *EC – Bananas III (Ecuador)*, paras. 7.341, 7.353, 7.368, 7.380, 7.385, 7.393, and 7.397; and Appellate Body Report, *EC – Bananas III*, paras. 244, 246, and 248) In addition, the panel in *EC – Bananas III (Article 21.5 – Ecuador)* found that the import licensing measures at issue were inconsistent with Article II:1 of the GATS because the complainant had shown that its service suppliers did not have opportunities to obtain access to import licences on terms equal to those enjoyed by service suppliers of EC/ACP origin. (See Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.133) Following the definition of less favourable treatment provided in Article XVII:3, the panels in both *China – Electronic Payment Services* and *China – Publications and Audiovisual Products* found that certain measures by China modified the conditions of competition to the detriment of like suppliers of other Members, and hence were inconsistent with Article XVII:1 of the GATS. (See Panel Reports, *China – Publications and Audiovisual Products*, para. 7.979; and *China – Electronic Payment Services*, paras. 7.712 and 7.714)

found "no impediment to using" that definition in the context of Article II:1.<sup>293</sup> The Panel thus considered that the concept of "treatment no less favourable" in Article II:1 "also hinges on the 'conditions of competition'".<sup>294</sup> This element of the Panel's interpretation comports with our analysis above, and with findings of panels and the Appellate Body in prior disputes in respect of Articles II:1 and XVII of the GATS.<sup>295</sup> Besides the definition contained in Article XVII:3, however, the Panel further found "two aspects in particular" in the text of Article II:1 to be relevant to its interpretation of the term "treatment no less favourable".<sup>296</sup> As noted above, these aspects are the broad scope of the obligation under Article II:1 and the reference to "services and service suppliers".

6.108. Regarding the broad scope of the obligation under Article II:1, the Panel observed that this provision applies with respect to "any measure covered by this Agreement", which is in turn defined under Article I:1 as "measures by Members affecting trade in services".<sup>297</sup> The Panel further noted that the word "affecting" "indicates a broad scope of application"<sup>298</sup>, and highlighted the broad definition of the word "measure" in Article XXVIII(a) of the GATS. According to the Panel, the broad scope of the GATS is also reflected in the fact that trade in services is defined as the supply of a service through four modes, and that, under the first two modes, the service supplier "may be located outside the territory of the Member 'importing' the service".<sup>299</sup> Beyond these observations, however, the Panel did not elaborate on how the broad scope of the obligation under Article II:1 informs the interpretation of the term "treatment no less favourable".<sup>300</sup>

6.109. In our view, the fact that a provision has a potentially broad scope of application is not unique to Article II:1 or Article XVII of the GATS. As Panama rightly points out, Article III:4 of the GATT 1994 also has an extensive scope of application, covering "all laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use" of the products at issue.<sup>301</sup> The word "affecting" in both Article III:4 of the GATT 1994 and Article I:1 of the GATS has been interpreted to mean that these provisions have a "broad scope of application".<sup>302</sup> The broad scope of Article III:4 of the GATT 1994 is also reflected in the fact that it covers measures affecting the "internal sale, offering for sale, purchase, transportation, distribution, or use" of products, thereby including measures affecting not only products themselves but also producers or suppliers of goods. Nevertheless, the broad scope of Article III:4 of the GATT 1994 has not been perceived as a reason for requiring an analysis as to the "regulatory aspects" relating to the products. Rather, pursuant to the legal standard for "treatment no less favourable" under Article III:4 of the GATT 1994, the fact that a measure modifies the conditions of competition to the detriment of imported products is, in itself, sufficient for a finding that the measure confers "less favourable treatment".<sup>303</sup>

6.110. With respect to the reference to "services and service suppliers", the Panel found this aspect "particularly significant", especially in comparison with "other agreements such as the GATT 1994 or the TBT Agreement, which only refer to products and not to producers".<sup>304</sup> The Panel reasoned that "[t]heir intangible nature, and the relationship established between the consumer and the supplier of the service and, in turn, between the service and its supplier, give services some *very special features* which differentiate them from goods and which, in our opinion, have a decisive influence on their production, marketing and use."<sup>305</sup> The Panel referred to the "very special features" of services, but did not elaborate on how they affect the meaning of "treatment no less favourable". Instead, having made the above observation, the Panel stated:

<sup>293</sup> Panel Report, para. 7.220.

<sup>294</sup> Panel Report, para. 7.220.

<sup>295</sup> See Panel Reports, *EC – Bananas III (Ecuador)*, paras. 7.341, 7.353, 7.368, 7.380, 7.385, 7.393, and 7.397; *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.133; *China – Electronic Payment Services*, paras. 7.712 and 7.714; and *China – Publications and Audiovisual Products*, para. 7.979. See also Appellate Body Report, *EC – Bananas III*, paras. 234, 244, 246, and 248.

<sup>296</sup> Panel Report, para. 7.209. See also para. 7.493.

<sup>297</sup> Panel Report, paras. 7.209-7.210.

<sup>298</sup> Panel Report, para. 7.210 (referring to Appellate Body Report, *EC – Bananas III*, para. 220).

<sup>299</sup> Panel Report, para. 7.210. (fn omitted)

<sup>300</sup> See also Panama's appellant's submission, para. 3.35.

<sup>301</sup> See Panama's appellant's submission, para. 3.36.

<sup>302</sup> Appellate Body Reports, *US – FSC (Article 21.5 – EC)*, paras. 208-210; *EC – Bananas III*, para. 220.

<sup>303</sup> See *infra*, para. 6.119.

<sup>304</sup> Panel Report, para. 7.211.

<sup>305</sup> Panel Report, para. 7.212. (emphasis added)

[T]his immediate context afforded by the actual text of Article II:1 of the GATS, in the light of the special features of services and the importance given to suppliers of services, appears to indicate that the regulatory framework in which service suppliers operate may in certain circumstances be relevant in the context of the GATS since it has a direct impact on the service through the natural or legal person supplying the service. In this respect, it appears to us that the determination of the specific aspects of the regulatory framework to be considered when examining "treatment no less favourable" can only be made on a case-by-case basis.<sup>306</sup>

6.111. We note that the reference to "service suppliers" is a particular feature of the GATS. This can be seen from Article I:2, which defines "trade in services" as "the supply of a service" by a supplier through four modes of supply. The definition of "trade in services" makes clear that the supply of a service is inextricably linked with the service suppliers. Nonetheless, we do not see how the mere reference to "service suppliers" in the GATS could alter the legal standard of "treatment no less favourable", that is, whether the measure modifies the conditions of competition to the detriment of like services or service suppliers of any other Member.<sup>307</sup> Specifically, as further discussed below, this legal standard does not contemplate a separate step of analysis regarding whether the "regulatory aspects" relating to service suppliers could "convert[]" the measure's detrimental impact on the conditions of competition into "treatment no less favourable".<sup>308</sup>

6.112. Our above interpretation of the legal standard of "treatment no less favourable", on the basis of the text of Articles II:1 and XVII of the GATS, is also supported by the structure of the GATS. Under this structure, Members can utilize certain flexibilities, available to them uniquely under the GATS, when undertaking their GATS commitments, and their obligations are qualified by exceptions or other derogations contained in the GATS and its Annexes. More specifically, pursuant to Article XX of the GATS, a Member may undertake specific market access commitments and national treatment obligations only in service sectors or subsectors, and only with respect to the modes of supply that it wishes to liberalize and inscribe in its Schedule of GATS Commitments. In the sectors and modes of supply that a Member chooses to include in its GATS Schedule, such Member is permitted to subject national treatment obligations to conditions and qualifications, and market access commitments to terms, limitations, and conditions.<sup>309</sup>

6.113. Furthermore, the GATS sets out general exceptions and security exceptions from obligations under that Agreement in the same manner as does the GATT 1994. In particular, both Article XIV of the GATS and Article XX of the GATT 1994 affirm the right of Members to pursue various regulatory objectives identified in the paragraphs of these provisions even if, in doing so, Members act inconsistently with obligations set out in other provisions of the respective Agreements. Some of these objectives are the same under both provisions, such as protection of public morals, protection of human, animal or plant life or health, and securing compliance with WTO-consistent laws and regulations.<sup>310</sup> Article XIV of the GATS also contains exceptions not found in the GATT 1994, covering measures "necessary ... to maintain public order", "aimed at ensuring the equitable or effective imposition or collection of direct taxes", and resulting from "an agreement on the avoidance of double taxation".<sup>311</sup> The two exceptions relating to taxation, in particular, reflect the fact that the GATS covers service suppliers, as the imposition of direct taxes and agreements on the avoidance of double taxation are particularly relevant for juridical and natural persons, and thus service suppliers. In addition, the various Annexes to the GATS also contain mechanisms that could allow for certain deviations from a Member's obligations, such as paragraph 2(a) of the Annex on Financial Services.

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<sup>306</sup> Panel Report, para. 7.212. (fn omitted)

<sup>307</sup> Furthermore, as noted above, the fact that Article III:4 of the GATT 1994 covers measures affecting the "internal sale, offering for sale, purchase, transportation, distribution, or use" of products indicates that this provision also covers measures affecting producers or suppliers of goods. (See *supra*, para. 6.109)

<sup>308</sup> Panel Report, para. 7.514.

<sup>309</sup> We also note that the most-favoured-nation obligation under the GATS is subject to the Annex on Article II Exemptions, although the Annex on Article II Exemptions does not allow for the scheduling of additional exemptions after the entry into force of the Agreement for a Member.

<sup>310</sup> See Article XIV(a), (b), and (c) of the GATS and Article XX(a), (b), and (d) of the GATT 1994, respectively.

<sup>311</sup> Article XIV(a), (d) (fn omitted), and (e) of the GATS, respectively. In particular, Article XIV(d) allows for derogation from the national treatment obligation in Article XVII of the GATS, while Article XIV(e) allows for derogation from the most-favoured-nation obligation in Article II of the GATS.



6.114. Through these flexibilities and exceptions, the GATS seeks to strike a balance between a Member's obligations assumed under the Agreement and that Member's right to pursue national policy objectives. A Member's right to pursue national policy objectives is recognized in the preamble of the GATS, including the third and fourth recitals. The term "national policy objectives" in the preamble, which is general and undefined, may cover a wide array of objectives, and Members retain various means to pursue these objectives. To begin with, measures pursuing national policy objectives may be taken outside the sectors or supply modes covered by GATS Schedules. Furthermore, a Member may pursue a wide range of policy objectives while acting consistently with its obligations or commitments assumed under the GATS. Indeed, a Member's commitments under the GATS could in some cases serve to further its national policy objectives. Where measures are found to be *inconsistent* with a Member's obligations or commitments under the GATS, the GATS provides for various mechanisms, such as Article XIV, which take account of policy objectives underlying such measures.

6.115. This balance, too, reinforces the established legal standard for "treatment no less favourable" under the non-discrimination provisions of the GATS, that is, whether a measure modifies the conditions of competition to the detriment of like services or service suppliers of any other Member. Where a measure is inconsistent with the non-discrimination provisions, regulatory aspects or concerns that could potentially justify such a measure are more appropriately addressed in the context of the relevant exceptions. Addressing them in the context of the non-discrimination provisions would upset the existing balance under the GATS.

6.116. The Panel observed that the third and fourth recitals of the preamble recognize Members' right to regulate trade in services in order to meet "national policy objectives", but that the preamble does not define or enumerate the "national policy objectives". The Panel further stated that the preamble does not reflect the "relatively few" exceptions contained in Article XIV<sup>312</sup>, or the other exceptions contained in the GATS, including Article XIV *bis* and paragraph 2(a) of the Annex on Financial Services. The Panel expressed the concern that "equating the national policy objectives ... with the situations covered by the few general exceptions would mean that any regulation adopted 'in order to meet national policy objectives' would necessarily be a violation of the basic principle of non-discrimination and would require justification under Articles XIV and XIV bis."<sup>313</sup> The Panel therefore considered that the national policy objectives mentioned in the preamble should not be "confined" to the situations covered by the "few general exceptions" under Article XIV of the GATS and other provisions of the GATS that provide for exceptions.<sup>314</sup> On this basis, the Panel stated:

It is our understanding that Members' right to regulate in accordance with their national policy objectives, as enshrined in the preamble to the GATS, confirms the relevance of the regulatory framework established to meet these objectives in the area of trade in services.<sup>315</sup>

6.117. As indicated above<sup>316</sup>, we agree that the scope of the "national policy objectives" referred to in the preamble is broader than the objectives listed in the exceptions. As long as Members comply with their GATS obligations and commitments, they are free to pursue national policy objectives that they consider appropriate. In this regard, Panama is correct in stating that "Members, on a daily basis, regulate services sectors and pursue a wide range of national policy objectives without violating their obligations under the GATS", and that they only act inconsistently

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<sup>312</sup> Panel Report, para. 7.215. The Panel observed that the list of exceptions in Article XX of the GATT 1994 is "much longer" than the "few" exceptions contained in Article XIV of the GATS, and that "fewer exceptions are listed under Article XIV of the GATS than under Article XX of the GATT 1994". (Ibid., fn 403 to para. 7.215, and para. 7.229) A comparison between the lists under Article XIV of the GATS and Article XX of the GATT 1994 shows that the latter is longer in terms of the number of paragraphs it contains, and covers exceptions relating to tangible goods, which are, by definition, relevant only to the GATT context. At the same time, the Panel did not mention that the list in Article XIV of the GATS covers items not contained in Article XX of the GATT 1994, such as those contained in paragraphs (d) and (e), which relate to taxation and are particularly relevant to service suppliers.

<sup>313</sup> Panel Report, para. 7.215.

<sup>314</sup> Panel Report, paras. 7.215-7.216. These other provisions include Article XIV *bis* of the GATS regarding security exceptions, and paragraph 2(a) of the GATS Annex on Financial Services concerning the "prudential exception". (Ibid., para. 7.215)

<sup>315</sup> Panel Report, para. 7.217.

<sup>316</sup> See *supra*, para. 6.114.

with their non-discrimination obligations when they pursue policy objectives pursuant to regulations that discriminate between like services or service suppliers.<sup>317</sup> The exceptions contained in the GATS recognize a limited number of policy objectives that, under certain conditions, may be pursued by measures that are otherwise *inconsistent* with the GATS. In other words, the pursuit of a Member's national policy objectives is not equivalent to violation of a Member's GATS obligations, and can be accommodated without the need to invoke exceptions. Only when a Member, in pursuing its objectives, imposes measures that are inconsistent with its GATS obligations – e.g. by modifying the conditions of competition to the detriment of like services or service suppliers of any other Member – would the need to invoke exceptions arise.

6.118. Therefore, an interpretation of the term "treatment no less favourable" that is based on a measure's detrimental impact on the conditions of competition does *not* prevent a Member from pursuing a wide range of national policy objectives beyond those identified in the exceptions. Moreover, a Member's right to pursue national policy objectives does not, as the Panel seemed to suggest, confirm "the relevance of the regulatory framework established to meet these objectives" for the purpose of analysing "treatment no less favourable".<sup>318</sup> For these reasons, we also disagree with the Panel that the relevance of the "regulatory aspects concerning service suppliers" is "confirmed by the object and purpose of the GATS".<sup>319</sup>

6.119. Turning to the context provided by the non-discrimination provisions of the GATT 1994 and the TBT Agreement, we note that our interpretation of Articles II:1 and XVII of the GATS chimes with the Appellate Body's interpretation of the most-favoured-nation and national treatment obligations in the context of the GATT 1994. As the Appellate Body found in *EC – Seal Products*, the most-favoured-nation obligation in Article I:1 of the GATT 1994 prohibits measures that "modif[y] the conditions of competition between like imported products to the detriment of the third-country imported products at issue".<sup>320</sup> Furthermore, the Appellate Body found that it is well established in the jurisprudence that, if a measure "has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is 'less favourable' within the meaning of Article III:4" of the GATT 1994.<sup>321</sup>

6.120. The Appellate Body has adopted a different approach to the relevance of regulatory concerns in determining "treatment no less favourable" under Article 2.1 of the TBT Agreement. Article 2.1 of the TBT Agreement requires Members to ensure that, in respect of technical regulations, "products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country." The Appellate Body has identified a two-step legal test for determining whether a technical regulation is inconsistent with the non-discrimination obligation contained therein. The Appellate Body has held that, as a first step, "a panel examining a claim of violation under Article 2.1 should seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like domestic products."<sup>322</sup> As a second step, "a panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."<sup>323</sup>

6.121. The Appellate Body explained in *EC – Seal Products* its reasons for finding that the two-step analysis developed under Article 2.1 of the TBT Agreement does not form part of the legal standard under Article III:4 of the GATT 1994.<sup>324</sup> One of the reasons identified by the Appellate Body was that, whereas the obligations assumed by Members under Articles I:1 and III:4 of the GATT 1994 are balanced by a Member's right to regulate in a manner consistent with the requirements of the exceptions contained in Article XX, the TBT Agreement does not contain

<sup>317</sup> Panama's appellant's submission, para. 3.55.

<sup>318</sup> Panel Report, para. 7.217.

<sup>319</sup> Panel Report, paras. 7.232 and 7.233, respectively.

<sup>320</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.90. See also paras. 5.87-5.88.

<sup>321</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.101 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 179; *China – Publications and Audiovisual Products*, para. 305; *Korea – Various Measures on Beef*, para. 137; and *Thailand – Cigarettes (Philippines)*, para. 128).

<sup>322</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 180.

<sup>323</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 182. See also para. 215.

<sup>324</sup> See Appellate Body Reports, *EC – Seal Products*, paras. 5.121-5.125.

such general exceptions.<sup>325</sup> This observation by the Appellate Body, in our view, has particular resonance in the context of the GATS, where a Member's obligations are not only qualified by the various exceptions listed therein, but also circumscribed by the flexibilities unique to the GATS. Thus, in the context of both the GATT 1994 and the GATS, an interpretation of the term "treatment no less favourable" that does not contemplate a separate inquiry into the regulatory objectives of a measure sits well within the general structure of the respective Agreement.

6.122. In examining the context provided by the non-discrimination obligations in the GATT 1994 and the TBT Agreement, the Panel summarized the Appellate Body's interpretations of the term "treatment no less favourable" in Article III:4 of the GATT and Article 2.1 of the TBT Agreement developed in *Thailand – Cigarettes (Philippines)*, *EC – Seal Products*, and *US – Clove Cigarettes*.<sup>326</sup> Although the Panel noted briefly that both the GATT 1994 and the GATS contain exception clauses, whereas the TBT Agreement does not, and that this was "one of the aspects taken into account by the Appellate Body" when interpreting Article 2.1 of the TBT Agreement<sup>327</sup>, the Panel did not further analyse the relevance of this aspect to its interpretive task. Also omitted from the Panel's analysis were several cases involving Articles II:1 and XVII of the GATS, in which panels and the Appellate Body have found less favourable treatment when a measure modifies the conditions of competition to the detriment of services or service suppliers of any other Member, without analysing any "regulatory aspects" of the measure.<sup>328</sup> The Panel did not engage with such past jurisprudence even though the jurisprudence concerns the same provisions and the same legal issues.

6.123. At the end of its analysis, the Panel reached the following conclusion regarding the interpretation of "treatment no less favourable" in Article II:1 of the GATS:

7.232. We realize that the mention of service suppliers might lead the interpreter, in the light of the specific circumstances of each dispute, to take other aspects into account in its interpretation of "treatment no less favourable", for example, the relevant regulatory aspects concerning service suppliers which have an impact on the conditions of competition. Consideration of these regulatory aspects could, depending on the case, mean that certain regulatory distinctions between service suppliers established by a Member do not necessarily constitute "treatment ... less favourable" within the meaning of Article II:1 of the GATS.

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7.234. We consider likewise that *the element concerning the conditions of competition should also be taken into account* in our interpretation of "treatment no less favourable" under Article II:1 of the GATS, just as it is present in Article XVII of the GATS and in Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement.

7.235. Below, we shall transpose this approach to the circumstances of the case before us ... . In this connection, we consider that, in order to determine whether treatment is less favourable, it must be assessed whether the measure modifies the conditions of competition. *We also consider that, in this particular case, such an assessment has to take into account regulatory aspects relating to services and service suppliers that may affect the conditions of competition; in particular, whether Argentina is able to have access to tax information on foreign suppliers.* ...<sup>329</sup>

As noted above, the Panel reached a similar interpretation in the context of Article XVII, after referring to its interpretation under Article II:1.<sup>330</sup>

<sup>325</sup> See Appellate Body Reports, *EC – Seal Products*, paras. 5.124-5.125.

<sup>326</sup> Panel Report, paras. 7.221-7.227.

<sup>327</sup> Panel Report, para. 7.229.

<sup>328</sup> See e.g. Appellate Body Report, *EC – Bananas III*, paras. 244, 246, and 248; and Panel Reports, *EC – Bananas III (Ecuador)*, paras. 7.302, 7.341, 7.353, 7.368, 7.393, and 7.397; *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.133; *China – Electronic Payment Services*, paras. 7.712 and 7.714; and *China – Publications and Audiovisual Products*, para. 7.979.

<sup>329</sup> Emphasis added.

<sup>330</sup> Panel Report, paras. 7.493-7.494. See also *supra*, para. 6.94.

6.124. In our view, the Panel's articulation of its legal standard is ambiguous as to what role precisely the "regulatory aspects" play in an analysis of "treatment no less favourable". For example, in paragraph 7.232 of its Report, the Panel specified that the regulatory aspects that may be relevant under its legal standard are those "concerning service suppliers *which have an impact on the conditions of competition*".<sup>331</sup> In addition, the Panel stated in paragraph 7.235 that, in this dispute, "such an assessment" – that is, an assessment as to whether the measure modifies the conditions of competition – "has to take into account regulatory aspects relating to services and service suppliers that may affect the conditions of competition". These statements appear to suggest that, under the Panel's legal standard for "treatment no less favourable", consideration of the regulatory aspects forms part of the examination of whether the measure modifies the conditions of competition.

6.125. At the same time, the Panel stated, in paragraph 7.232, that "[c]onsideration of these regulatory aspects could ... mean that certain regulatory distinctions between service suppliers established by a Member do not necessarily constitute" less favourable treatment. Subsequently, in paragraph 7.234, the Panel stated that "the element concerning *the conditions of competition should also* be taken into account in our interpretation of 'treatment no less favourable' under Article II:1 of the GATS".<sup>332</sup> The words "should also" appear to suggest that evaluation of the conditions of competition is separate from consideration of the regulatory aspects referred to in paragraph 7.232. These statements of the Panel thus seem to indicate that consideration of the regulatory aspects does *not* form part of the inquiry into whether the measure modifies the conditions of competition, but, rather, constitutes a separate step in the analysis. The statements further imply that, under this separate step, an analysis of the "regulatory aspects" could potentially render a measure consistent with Articles II:1 and XVII, even if the measure modifies the conditions of competition to the detriment of like services or service suppliers of any other Member. If this is what the Panel meant, it would constitute an erroneous legal standard.

6.126. Furthermore, the Panel's articulation of its legal interpretation, when read together with its application of Articles II:1 and XVII, makes clear to us that the Panel indeed employed such an erroneous legal standard. As discussed in the next section, when applying Articles II:1 and XVII to the facts of the case, the Panel further elaborated on the role of the regulatory aspects in assessing "treatment no less favourable" within the meaning of these provisions. The Panel's application of Articles II:1 and XVII shows that the Panel effectively employed an erroneous standard whereby certain regulatory aspects can "convert" "less favourable treatment" into "treatment no less favourable".<sup>333</sup> However, neither the text and context of Articles II:1 and XVII of the GATS, nor the object and purpose of the GATS, provide a basis for such a legal standard.

6.127. Finally, we wish to point out that our analysis does not suggest that any evidence relating to the regulatory aspects must *a priori* be excluded. Consistent with the established approach to assessing "less favourable treatment" under the GATT 1994, an assessment of whether a measure modifies the conditions of competition to the detriment of like services or service suppliers of any other Member "must begin with careful scrutiny of the measure, including consideration of the design, structure, and expected operation of the measure at issue".<sup>334</sup> In such assessment, to the extent that evidence relating to the regulatory aspects has a bearing on the conditions of competition, it might be taken into account, subject to the particular circumstances of a case, and as an integral part of a panel's analysis of whether *the measure at issue* modifies the conditions of competition to the detriment of like services or service suppliers of any other Member.

#### **6.2.4.2 Whether the Panel employed an erroneous legal standard in applying Article II:1 and Article XVII of the GATS**

6.128. Following the approach set out in paragraph 7.235 of its Report, as quoted above, the Panel analysed whether, under Article II:1 of the GATS, each of the eight measures at issue accords "treatment no less favourable" to like services and service suppliers of non-cooperative

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<sup>331</sup> Emphasis added. See also Panel Report, para. 7.493.

<sup>332</sup> Emphasis added.

<sup>333</sup> Panel Report, para. 7.514.

<sup>334</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134.

countries.<sup>335</sup> For each of the measures, the Panel first found that it imposes a heavier burden or additional requirements, or mandates stricter conditions, on services and service suppliers of non-cooperative countries in comparison to like services and service suppliers of cooperative countries.<sup>336</sup>

6.129. In the light of these findings, the Panel reached the "preliminary" conclusions that all of the measures at issue either modify or alter the conditions of competition (measures 1, 3, 5, 7, and 8) to the detriment of service suppliers of non-cooperative countries, or accord them less favourable treatment (measures 2, 4, and 6).<sup>337</sup> This suggests to us that, for purposes of its preliminary conclusions under Article II:1, the Panel regarded as interchangeable the concepts of modifying the conditions of competition to the detriment of the relevant service suppliers, on the one hand, and according less favourable treatment to such suppliers, on the other hand. This, in our view, is consistent with a correct interpretation of the term "treatment no less favourable", whereby a measure accords less favourable treatment if it modifies the conditions of competition to the detriment of like services or service suppliers of any other Member.

6.130. Similarly, in examining Panama's claims under Article XVII, the Panel referred to its preliminary conclusions of treatment less favourable under Article II:1<sup>338</sup>, in particular, the findings on the additional burden imposed under measures 2, 3, and 4 in cases of service suppliers of non-cooperative countries. The Panel further found that no additional burden is imposed on Argentine taxpayers when they contract with Argentine service suppliers. On this basis, the Panel found, "on a preliminary basis", that measures 2, 3, and 4 "do not accord treatment no less favourable to services and service suppliers of non-cooperative countries in comparison with that accorded to Argentine like services and service suppliers".<sup>339</sup>

6.131. Thus, for Panama's claims under both Article II:1 and Article XVII of the GATS, the Panel came to the "preliminary" conclusions that all of the relevant measures modify the conditions of competition to the detriment of like service suppliers of non-cooperative countries and that, consequently, they fail to accord "treatment no less favourable" to such service suppliers. Nonetheless, the Panel did not stop its analysis here. Rather, under both Article II:1 and Article XVII, the Panel went on to conduct an additional step of analysis regarding the "regulatory aspects" in this dispute, that is, "the possibility for Argentina to have access to tax information on foreign suppliers providing services in Argentina".<sup>340</sup> As our review below indicates, in this additional step of analysis, the Panel did not actually examine the regulatory aspects for purposes of assessing how the measures modify the conditions of competition, but effectively employed an erroneous legal standard under which the regulatory aspects could justify the detrimental impact that it had already found in its preliminary conclusions described above.

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<sup>335</sup> Before this analysis, the Panel had first examined each of the eight measures in turn and found that the treatment accorded to services and service suppliers of cooperative countries is different from that accorded to like services and service suppliers of non-cooperative countries. (See Panel Report, paras. 7.237-7.273) The Panel did not explain why it considered it necessary to conduct this first step of analysis in which it examined whether "different" treatment is accorded to relevant services and service suppliers. In any event, we do not consider that the legal standard of "treatment no less favourable" under Article II:1 of the GATS imposes the requirement to examine, as a first and separate step, whether the relevant treatment under the measure is "different".

<sup>336</sup> See Panel Report, paras. 7.282, 7.299, 7.307-7.308, 7.318, 7.328, 7.336, 7.348, and 7.356-7.357.

<sup>337</sup> Panel Report, paras. 7.282, 7.300, 7.308, 7.318, 7.328, 7.338, 7.350, and 7.359. With the exception of measures 4 and 6, the Panel's preliminary conclusion refers only to "service suppliers", and does not mention "services".

<sup>338</sup> Panel Report, para. 7.501. See also paras. 7.502-7.503. Before this finding, the Panel had considered that its findings of different treatment under Article II:1 also applied under Article XVII, because the treatment of Argentine services and service suppliers is the same as that accorded to services and service suppliers of cooperative countries. Therefore, based on its findings under Article II:1, the Panel concluded that measures 2, 3, and 4 establish different treatment for services and service suppliers of non-cooperative countries in comparison with that accorded to Argentine like services and service suppliers. (See *ibid.*, para. 7.499) As noted in fn 335 above, we do not consider that the legal standard of "treatment no less favourable" under Article XVII imposes the requirement to examine, as a first and separate step, whether the relevant treatment under the measure is "different".

<sup>339</sup> Panel Report, para. 7.504.

<sup>340</sup> Panel Report, para. 7.283. See also para. 7.505.

#### 6.2.4.2.1 The Panel's consideration of the "regulatory aspects" under Article II:1 of the GATS

6.132. In examining the "regulatory aspects" in the context of Panama's claims under Article II:1 of the GATS, the Panel recalled that Decree No. 589/2013 is the "key piece of legislation" establishing the conditions for a country to be considered cooperative.<sup>341</sup> The Panel recalled that, under this Decree, cooperative country status is granted not only to countries that have signed an agreement or convention with Argentina enabling the exchange of tax information, but also to countries that are still in the process of negotiating an agreement on the exchange of tax information. For the latter category of countries, Argentina does not have access to tax information. At the same time, countries that have not initiated negotiations on tax information exchange agreements are given non-cooperative country status.<sup>342</sup>

6.133. The Panel found that, because Decree No. 589/2013 grants cooperative country status to countries that have initiated negotiations but do not exchange tax information with Argentina, it gives rise to certain "lack of consistency"<sup>343</sup>, namely: (i) that Argentina treats countries that provide access to tax information in the same way as countries that do not provide access to tax information<sup>344</sup>; and (ii) that Argentina accords different treatment to countries with regard to which it has no access to tax information.<sup>345</sup> The Panel further noted that the fact that the list of cooperative countries is allegedly updated only once a year "may also cause distortion in the treatment accorded to certain countries compared to others in the same situation".<sup>346</sup>

6.134. In the Panel's view, therefore, "the design and operation of [the measures at issue], pursuant to Decree No. 589/2013, create distortions with regard to: (i) granting cooperative status to [countries] which have not signed an agreement and which, therefore, are not subject to the exchange of tax information with Argentina; and (ii) the updating of the list of cooperative countries."<sup>347</sup> The Panel thus considered:

[T]he design of [the measures at issue], pursuant to Decree No. 589/2013, establishes different treatment according to whether the services and service suppliers are from cooperative or non-cooperative countries. This difference in treatment is not based, as Argentina argues, on whether or not Argentina has access to tax information.<sup>348</sup>

6.135. On this basis, the Panel concluded:

[T]he design and operation of [the eight measures at issue], pursuant to Decree No. 589/2013, create distortions which *modify the conditions of competition* to the detriment of services and service suppliers of non-cooperative countries and, thus, accord them less favourable treatment than that accorded to like services and service suppliers of cooperative countries.<sup>349</sup>

6.136. In our view, although the Panel used the words "modify the conditions of competition" in the conclusion quoted above, the Panel's consideration of the relevant regulatory aspects does not

<sup>341</sup> Panel Report, para. 7.285.

<sup>342</sup> Panel Report, paras. 7.285-7.286.

<sup>343</sup> Panel Report, para. 7.290.

<sup>344</sup> The Panel noted e.g. that both Germany and Panama belong to the category of "cooperative countries". Argentina signed a double taxation agreement with Germany that has been in force since 25 November 1979, giving it access to tax information. In the case of Panama, however, Argentina has no access to tax information since it has not signed any agreement on exchange of tax information with Panama. (Panel Report, para. 7.289)

<sup>345</sup> The Panel noted e.g. that, according to Argentina, negotiations have begun on a double taxation convention or information exchange agreement with Panama and Hong Kong, China. As no agreement has been signed with these two jurisdictions, there is, in principle, no exchange of tax information between them and Argentina. Panama, however, has cooperative country status, whereas Hong Kong, China does not. (Panel Report, para. 7.288)

<sup>346</sup> Panel Report, para. 7.291. The Panel noted that the current list was published on 1 January 2014 and had not been updated as of the issuance of the final Panel Report to the parties on 30 June 2015. (Ibid.)

<sup>347</sup> Panel Report, para. 7.301. See also paras. 7.309, 7.319, 7.329, 7.339, 7.351, and 7.360.

<sup>348</sup> Panel Report, para. 7.292. See also paras. 7.301, 7.309, 7.319, 7.329, 7.339, 7.351, and 7.360.

<sup>349</sup> Panel Report, para. 7.293. (emphasis added) See also paras. 7.302, 7.310, 7.320, 7.330, 7.340, 7.352, and 7.361.

actually speak to the question of whether the measures at issue modify the conditions of competition to the detriment of services and service suppliers of non-cooperative countries. Indeed, as noted above, the Panel had already concluded that the measures at issue modify the conditions of competition in such a manner.<sup>350</sup> In the Panel's analysis of the "regulatory aspects", we do not find any assessment of the implications of these measures for the competitive opportunities of the services and service suppliers of non-cooperative countries *vis-à-vis* those of cooperative countries. Rather, in analysing the relevant "regulatory aspects", the Panel appears to have been looking at something akin to the second step of the analysis regarding "treatment no less favourable" under Article 2.1 of the TBT Agreement, as developed in the relevant jurisprudence. Although the Panel did not use such words to describe its analysis, statements made by the Panel indicate that the Panel was effectively looking at whether the detrimental impact on like services and service suppliers, which it had already established, "stems exclusively from a legitimate regulatory distinction"<sup>351</sup>, even though such an analytical step is not foreseen under the GATS non-discrimination clauses.

6.137. Specifically, the Panel stated that, pursuant to Decree No. 589/2013, "the way in which Argentina classifies countries as cooperative or non-cooperative is not consistent with the possibility for Argentina to have access to tax information"<sup>352</sup>, even though the possibility to have access to tax information is the "*raison d'être*" of all of the measures at issue.<sup>353</sup> Similarly, the Panel found that the "difference in treatment" under the measures at issue is not, as Argentina argued, based on whether Argentina has access to tax information.<sup>354</sup> Thus, the Panel was effectively reviewing whether the regulatory aspects in this dispute could somehow justify the detrimental impact that the Panel had already found, and could render the measure not inconsistent with Article II:1 of the GATS. Although the Panel ultimately concluded that the regulatory aspects in this dispute do not render the measures at issue consistent with Article II:1, this conclusion does not change the fact that the Panel erroneously conducted an additional step of inquiry not envisaged under the correct legal standard of "treatment no less favourable" under the GATS.

#### 6.2.4.2.2 The Panel's consideration of the "regulatory aspects" under Article XVII of the GATS

6.138. In examining the "regulatory aspects" under Article XVII of the GATS, the Panel noted Argentina's statement that measures 2, 3, and 4 are essential tools for equalizing the conditions of competition on the international market for financial and other services. In several documents of the G-20, the Global Forum, and the OECD, the Panel found support for Argentina's statement concerning the importance of access to tax information for equalizing the conditions of competition.<sup>355</sup> According to the Panel, the reference in these documents to "harmful *tax competition*" highlights the "obvious link" between access to tax information (tax transparency) and the conditions of competition.<sup>356</sup> On this basis, the Panel considered:

[A] central issue in this dispute is whether the exchange of tax information between Argentina and non-cooperative jurisdictions constitutes a regulatory aspect that modifies the conditions of competition on the Argentine market in such a way that it *converts different and, in principle, less favourable treatment into "treatment no less favourable"*.<sup>357</sup>

6.139. In our view, under Article XVII of the GATS, a measure either modifies the conditions of competition in the marketplace, thus according less favourable treatment, or it does not. However, with this statement, the Panel effectively employed a standard whereby certain regulatory aspects, as alleged by a Member in a particular dispute, could "convert" a measure that accords less favourable treatment, and is therefore inconsistent with Article XVII of the GATS, into a measure that is GATS-consistent. The Panel's statement confirms that it developed and applied an erroneous legal standard for "treatment no less favourable", as noted in paragraph 6.126 above.

<sup>350</sup> See *supra*, para. 6.129.

<sup>351</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 182. See also para. 215.

<sup>352</sup> Panel Report, para. 7.290.

<sup>353</sup> Panel Report, para. 7.286.

<sup>354</sup> Panel Report, para. 7.292.

<sup>355</sup> Panel Report, paras. 7.509-7.513.

<sup>356</sup> Panel Report, para. 7.513. (emphasis original)

<sup>357</sup> Panel Report, para. 7.514. (emphasis added)

6.140. Having set out "a central issue" for its analysis of whether measures 2, 3, and 4 are inconsistent with Article XVII of the GATS<sup>358</sup>, the Panel made an overall finding on the objective of all three measures, stating:

It is our understanding that measures 2, 3 and 4 are intended to "level a playing field" which, as confirmed by the OECD and the G-20, is "not level" because of the lack of tax transparency caused by the absence of exchange of tax information. From the pronouncements of the competent international fora, we understand that what measures 2, 3 and 4 do, rather than giving Argentine services and service suppliers an advantage, *is to neutralize an "unintended competitive advantage"* enjoyed by non-cooperative jurisdictions owing to the lack of exchange of tax information with Argentina on their suppliers. This advantage is not available to Argentine service suppliers, whose tax information can be obtained by the Argentine authorities.<sup>359</sup>

6.141. In these statements, the Panel identified the objective of measures 2, 3, and 4 while introducing certain concepts that are not defined in the WTO-context, including "a level playing field"<sup>360</sup>, and "unintended competitive advantages".<sup>361</sup> The Panel did not develop definitions of these concepts. The Panel went on to examine each of the three measures in turn, and found that none of these measures modifies the conditions of competition "in favour of" Argentine service suppliers, because the measures are designed to respond to risks perceived by Argentina to its tax collection system resulting from the lack of tax transparency in other countries.<sup>362</sup> As discussed above<sup>363</sup>, the *less favourable* treatment accorded to foreign services and service suppliers, on the one hand, and the *more favourable* treatment to domestic services and service suppliers, on the other hand, are flip-sides of the same coin under the legal standard of Article XVII. As a result of its erroneous legal standard, however, the Panel reached findings that are irreconcilable. Specifically, the Panel found that the measures accord "less favourable treatment" to services and service suppliers of non-cooperative countries.<sup>364</sup> At the same time, the Panel found that such measures do not accord "less favourable treatment" because they do not modify the conditions of competition "in favour of" domestic like services and service suppliers.<sup>365</sup>

6.142. The Panel further found the context afforded by Article III of the GATT 1994 to be "particularly relevant".<sup>366</sup> Specifically, the Panel referred to the Appellate Body's statement in *Japan – Alcoholic Beverages II* that "Article III protects expectations ... of the equal competitive relationship between imported and domestic products".<sup>367</sup> The Panel also referred to the Appellate Body's statement in *Canada – Periodicals* that the purpose of Article III of the GATT 1994 "is to ensure equality of competitive conditions between imported and like domestic products".<sup>368</sup> The Panel reasoned that, similarly, "the objective of Article XVII of the GATS is to ensure equal conditions of competition between Argentine services and service suppliers and those of non-cooperative countries".<sup>369</sup> The Panel then found:

In our view, measures 2, 3 and 4 *are designed precisely to guarantee that the competitive relationship between Argentine services and service suppliers and those of any other Member (in this case, non-cooperative countries) is on an equal footing.*<sup>370</sup>

<sup>358</sup> Panel Report, para. 7.514.

<sup>359</sup> Panel Report, para. 7.515. (emphasis added; fn omitted)

<sup>360</sup> Panel Report, para. 7.511 (quoting Global Forum on Transparency and Exchange Information, *Tax Cooperation 2009: Towards a Level Playing Field* (OECD, 2009) (Panel Exhibit ARG-41), p. 9).

<sup>361</sup> Panel Report, paras. 7.512 and 7.515 (both quoting OECD Report, *Addressing Base Erosion and Profit Shifting* (2013) (Panel Exhibit ARG-22)). Subsequently, the Panel referred to the term "unintended competitive advantages" again in analysing the objective pursued by measures 1, 2, 3, 4, and 7 under Article XIV(c) of the GATS. (Panel Report, para. 7.669)

<sup>362</sup> Panel Report, paras. 7.517-7.519.

<sup>363</sup> See *supra*, para. 6.103.

<sup>364</sup> Panel Report, para. 7.504.

<sup>365</sup> Panel Report, para. 7.521.

<sup>366</sup> Panel Report, para. 7.520.

<sup>367</sup> Panel Report, para. 7.520 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 15, DSR 1996:I, p. 110).

<sup>368</sup> Panel Report, para. 7.520 (quoting Appellate Body Report, *Canada – Periodicals*, p. 18, DSR 1997:1, p. 464).

<sup>369</sup> Panel Report, para. 7.520.

<sup>370</sup> Panel Report, para. 7.521. (emphasis added)



This finding echoes the Panel's earlier statement that the objective of measures 2, 3, 4 is to "level a playing field" and "to neutralize an 'unintended competitive advantage'".<sup>371</sup>

6.143. In its findings under Article XVII of the GATS, the Panel thus referred to the concepts of "a level playing field", "unintended competitive advantages", and competitive relationship "on an equal footing" in describing what it considered to be the objective of the measures at issue. Upon identifying the objective of the measures, the Panel also referred to the relevant jurisprudence under Article III of the GATT 1994 concerning the "equality of competitive conditions" in support of its findings regarding measures 2, 3, and 4. This suggests to us that the Panel considered that a measure that "neutralizes" an "unintended competitive advantage" is *not inconsistent* with Article XVII, because it ensures equality of competitive conditions.

6.144. However, ensuring equal competitive conditions, which is required by the legal standard of "treatment no less favourable", is *not* the same as guaranteeing that one group of services or products does not have any competitive advantage over another group. As Panama rightly points out, ensuring equal conditions of competition under the national treatment obligation means "to guarantee *equality of opportunities to compete* in the marketplace", rather than to guarantee that all like services and service suppliers are "*equally competitive*".<sup>372</sup>

6.145. Moreover, by specifying that a measure accords less favourable treatment when it "modifies the conditions of competition", Article XVII of the GATS indicates that the national treatment obligation requires a Member to refrain from upsetting or distorting the existing market conditions and opportunities in favour of domestic services and service suppliers. Read in this light, the Panel's references to the notion of "a level playing field" seem misguided<sup>373</sup>, as this would suggest that Article XVII allows a Member to pursue actively measures that redress certain perceived "unfair" competition in the market. Indeed, the legal standard developed by the Panel would seem to allow a discriminatory measure to "neutralize" a "regulatory" competitive advantage, namely, one that results from the regulatory framework in the country of origin of certain foreign service suppliers. Yet, we do not see Article XVII as providing the basis for permitting such discriminatory measures.

6.146. In its third participant's submission, the United States contends that, "supplying a service on terms that tax authorities will not be able to verify ... is a disadvantage from the perspective of law-abiding Argentine customers and Panamanian suppliers that seek to comply with Argentine laws."<sup>374</sup> Thus, pursuant to footnote 10 to Article XVII of the GATS, "Argentina would not be required to modify its tax measures to compensate for the competitive disadvantages of services or service suppliers" resulting from the level of tax transparency of their home regulatory regimes.<sup>375</sup> As discussed in our interpretation above<sup>376</sup>, however, by referring to "*inherent* competitive disadvantages which result from the foreign character", footnote 10 makes clear that such disadvantages must be "inherent" to the services and service suppliers owing to their foreign character, and must not be *caused* by the measure affecting trade in services *adopted by the importing Member*. As the Panel found, the measures at issue impose an additional burden or extra hurdles on services and service suppliers of non-cooperative countries *vis-à-vis* Argentine like services and service suppliers. The Panel's findings, which are not disputed, indicate that these foreign services and service suppliers are placed in a disadvantageous position *as a result of the measures at issue*. The "inherent competitive disadvantages" within the meaning of footnote 10 do not include, and should not mask, the detrimental impact that is genuinely attributable to the contested measure, such as what the Panel found in this dispute.

6.147. In sum, our review of the Panel's application of Article XVII of the GATS to the measures at issue confirms that the Panel employed an erroneous legal standard with regard to "treatment no less favourable". In its analysis regarding the "regulatory aspects", the Panel essentially relied on what it perceived to be the regulatory objective of measures 2, 3, and 4 to convert "less favourable treatment" under these measures into "treatment no less favourable". The Panel's

<sup>371</sup> Panel Report, para. 7.515. (fn omitted)

<sup>372</sup> Panama's appellant's submission, para. 4.26. (emphasis original)

<sup>373</sup> Panel Report, para. 7.511. See also paras. 7.510 and 7.515.

<sup>374</sup> United States' third participant's submission, para. 48.

<sup>375</sup> United States' third participant's submission, paras. 47 and 48.

<sup>376</sup> See *supra*, para. 6.104.

approach finds no basis in the text or Article XVII, its context, or the object and purpose of the GATS.

### 6.2.5 Whether the Panel erred in its application of Article XVII of the GATS

6.148. Panama submits that, in addition to adopting an incorrect legal standard, the Panel's application of Article XVII of the GATS to the measures at issue was based on "mere assumptions and unreasoned conclusions".<sup>377</sup> Panama further contends that the Panel made contradictory findings in concluding that the measures at issue do not favour Argentine services and service suppliers *vis-à-vis* like services and service suppliers of non-cooperative countries.

6.149. Specifically, Panama contends that the Panel's analysis of "the impact on the conditions of competition of Argentina's ability to access tax information of service suppliers" was "based on general, abstract, non-country-specific, and non-measure-specific policy statements derived from excerpts of OECD and G-20 reports", and that "there was no factual basis or reasoned hypotheses related to the particular conditions of competition prevailing in the Argentine market."<sup>378</sup> Panama further contends that the Panel reached two sets of contradictory findings. First, Panama maintains that, in its "likeness" analysis, the Panel found that the exchange of tax information does not affect the competitive relationship between services and service suppliers of different origin. Yet, in its "less favourable treatment" analysis under Article XVII, it considered that the exchange of tax information constitutes a regulatory aspect that modifies the conditions of competition in the Argentine market in such a way that it converts different and, in principle less favourable treatment into "treatment no less favourable".<sup>379</sup> According to Panama, these findings are "irreconcilable".<sup>380</sup> Second, Panama submits that the Panel's conclusions that measures 2, 3, and 4 do not favour Argentine services and service suppliers contradict its preliminary findings that these measures modify the conditions of competition to the detriment of like foreign services and service suppliers.<sup>381</sup>

6.150. Having found that the Panel employed an erroneous legal standard of "treatment no less favourable" under Article XVII, as manifested in both its interpretation and application of Articles II:1 and XVII of the GATS, we do not consider it necessary to address these additional allegations of errors regarding the Panel's application of its erroneous legal standard in this dispute.

### 6.2.6 Conclusion

6.151. Under Article II:1 and Article XVII of the GATS, a measure fails to confer "treatment no less favourable" if it modifies the conditions of competition to the detriment of services or service suppliers of any other Member in comparison to like services or service suppliers of, respectively, any other country or the Member imposing the contested measure. However, the Panel employed an erroneous legal standard of "treatment no less favourable" whereby, depending on the analysis of the "regulatory aspects", a measure that modifies the conditions of competition to the detriment of services or service suppliers of any other Member could nonetheless be found to confer "treatment no less favourable". In other words, under the Panel's standard, the "regulatory aspects" identified by the importing Member could convert "less favourable treatment" into "treatment no less favourable". The Panel's interpretive errors are manifested in both its articulation of the legal standard and its application of Articles II:1 and XVII to the facts of the case.

6.152. In the light of the Panel's analysis of the "regulatory aspects" under Article II:1<sup>382</sup>, therefore, we find that the Panel erred in finding, in paragraph 7.235 of its Report, that an assessment of "treatment no less favourable" under Article II:1 of the GATS in this dispute "has to take into account regulatory aspects relating to services and service suppliers that may affect the conditions of competition; in particular, whether Argentina is able to have access to tax

<sup>377</sup> Panama's appellant's submission, para. 4.33.

<sup>378</sup> Panama's appellant's submission, para. 4.37.

<sup>379</sup> Panama's appellant's submission, para. 4.36 (referring to Panel Report, para. 7.514).

<sup>380</sup> Panama's appellant's submission, para. 4.36.

<sup>381</sup> Panama's appellant's submission, para. 4.39.

<sup>382</sup> Panel Report, paras. 7.283-7.293, para. 7.300, second sentence, and paras. 7.301-7.302, 7.309-7.310, 7.319-7.320, 7.329-7.330, 7.339-7.340, 7.351-7.352, and 7.360-7.361.

information on foreign suppliers". Similarly, in the light of the Panel's analysis of the "regulatory aspects" under Article XVII<sup>383</sup>, we find that the Panel erred in finding, in paragraph 7.494 of its Report, that an assessment of "treatment no less favourable" under Article XVII of the GATS in this dispute "has to take into account regulatory aspects concerning the services and service suppliers that might affect the conditions of competition ... in particular ... the possibility for Argentina to access tax information on the relevant service suppliers".

6.153. As noted above, under both Article II:1 and Article XVII of the GATS, the Panel reached the preliminary findings that the measures modify the conditions of competition to the detriment of services and service suppliers of non-cooperative countries.<sup>384</sup> These preliminary findings are consistent with a correct interpretation of the term "treatment no less favourable". Thus, had "likeness" between services and service suppliers of cooperative and non-cooperative countries been established in this dispute, the preliminary findings under Article II:1 would, in themselves, be sufficient to sustain the Panel's conclusion that the measures at issue are inconsistent with Article II:1 of the GATS.<sup>385</sup> In the same vein, had "likeness" been established between services and service suppliers of non-cooperative countries and Argentine services and service suppliers, such preliminary findings could have led to the conclusion that measures 2, 3, and 4 are inconsistent with Article XVII of the GATS.

6.154. Nonetheless, the Panel's findings on "likeness" under both Article II:1 and Article XVII of the GATS supplied a key basis for the Panel's conclusions under those two provisions. As a consequence of our reversal of the Panel's findings on "likeness", the Panel's findings on "treatment no less favourable", set out in paragraphs 7.362 and 7.522 of its Report, lack a proper basis and cannot stand. For these reasons, we also reverse the Panel's conclusion, in paragraphs 7.367 and 8.2.b of its Report, that the eight measures at issue are inconsistent with Article II:1 of the GATS, as well as its conclusion, in paragraphs 7.525 and 8.2.c of its Report, that measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS.

### 6.3 Article XIV(c) of the GATS

#### 6.3.1 Introduction

6.155. Before the Panel, Argentina argued that, even if measures 1, 2, 3, 4, 7, or 8 were found to be inconsistent with Argentina's obligations under the GATS, these measures are justified under Article XIV(c) of the GATS because they are "necessary to secure compliance" with GATS-consistent Argentine laws or regulations. Having found each of these measures to be inconsistent with Article II:1 of the GATS, the Panel proceeded to consider Argentina's affirmative defence and found, on a preliminary basis, that the measures are "necessary to secure compliance with laws or regulations" within the meaning of Article XIV(c).<sup>386</sup> Ultimately, however, the Panel concluded that measures 1, 2, 3, 4, 7, and 8 are not justified under Article XIV(c) because "their application constitutes arbitrary and unjustifiable discrimination within the meaning of the *chapeau* of Article XIV of the GATS".<sup>387</sup>

6.156. Neither participant has appealed the Panel's analysis of the conformity of Argentina's measures with the chapeau of Article XIV of the GATS, nor the Panel's ultimate finding that Argentina had not made out its defence. Panama, however, alleges that the Panel erred in finding that measures 1, 2, 3, 4, 7, and 8 are provisionally justified under Article XIV(c).<sup>388</sup> For this reason, Panama requests us "to reverse the Panel's findings that measures 1, 2, 3, 4, 7, and 8 were 'designed', and are 'necessary', to secure compliance with laws and regulations of Argentina under Article XIV(c) of the GATS".<sup>389</sup> For its part, Argentina requests us to uphold the Panel's finding, at paragraph 7.740 of its Report, that these measures are "necessary to secure

<sup>383</sup> Panel Report, paras. 7.505-7.521.

<sup>384</sup> The preliminary findings under Article II:1 are contained in Panel Report, paras. 7.282, 7.300 (first sentence), 7.308, 7.318, 7.328, 7.338, 7.350, and 7.359. The preliminary findings under Article XVII are contained in Panel Report, paras. 7.500-7.504.

<sup>385</sup> Panel Report, paras. 7.367 and 8.2.b.

<sup>386</sup> Panel Report, para. 7.740.

<sup>387</sup> Panel Report, para. 8.2.d. See also para. 7.764.

<sup>388</sup> Panama's appellant's submission, paras. 5.2-5.3 and 5.75.

<sup>389</sup> Panama's appellant's submission, para. 7.1.c. See also paras. 5.147, 5.159, and 5.173. According to Panama, these findings are "reflected in paragraphs 7.637-7.642, 7.646-7.648, 7.692, 7.695, 7.700, 7.703, 7.705, 7.706-7.717, 7.720-7.728, and 7.737-7.740 of the [Panel] Report". (Ibid., para. 7.1.c)

compliance with laws or regulations which are not inconsistent" with the GATS within the meaning of Article XIV(c).<sup>390</sup>

6.157. Unlike its appeals relating to Articles II and XVII of the GATS and to paragraph 2(a) of the GATS Annex on Financial Services, Panama does not allege any interpretive error in connection with the Panel's analysis under Article XIV(c) of the GATS. For Panama, "there are well-developed legal standards for panels addressing defences raised under the exceptions contained in Article XX of the GATT 1994 and Article XIV of the GATS."<sup>391</sup> Panama does not argue that the Panel failed to identify these standards. In Panama's view, however, the Panel "failed to apply properly the relevant legal standard for an Article XIV(c) defence to the measures before it".<sup>392</sup>

6.158. We understand Panama's appeal to comprise the following main parts. First, Panama challenges the focus of the Panel's analysis of measures 1, 2, 3, 4, 7, and 8 under Article XIV(c) of the GATS as compared to the focus of its analysis of those same measures under Article II:1 of the GATS. In addition, Panama takes issue with certain aspects of the Panel's reasoning in reaching each of the following two sets of intermediate findings under Argentina's Article XIV(c) defence:

- a. The Panel's findings that measures 1, 2, 3, and 4 are designed "to secure compliance with" the relevant provisions of the Gains Tax Law, the Law on Tax Procedure, the Criminal Tax Law<sup>393</sup> and the Constitution of the Republic of Argentina (Argentina's Constitution); that measure 7 is designed to secure compliance with the relevant provisions of the Commercial Companies Law<sup>394</sup> and the Resolution on Companies Incorporated Abroad; and that measure 8 is designed to secure compliance with the relevant provisions of the Law against Money Laundering<sup>395</sup>; and
- b. the Panel's findings that measures 1, 2, 3, 4, 7, and 8 are "necessary" to secure compliance with these laws or regulations.<sup>396</sup>

6.159. Before turning to the specifics of Panama's appeal, we set out the text of Article XIV(c) of the GATS and briefly summarize the Panel's understanding of the legal standard to be applied pursuant to that provision.

6.160. Article XIV(c) of the GATS reads:

*Article XIV  
General Exceptions*

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

...

- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those 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;

<sup>390</sup> Argentina's appellee's submission, para. 159.a. See also paras. 6, 92, 133, 143, and 145-146.

<sup>391</sup> Panama's appellant's submission, para. 5.1.

<sup>392</sup> Panama's appellant's submission, para. 5.2.

<sup>393</sup> Law No. 24.769.

<sup>394</sup> Law No. 19.550 on Commercial Companies of 3 April 1972 (Panel Exhibits ARG-43 and PAN-34).

<sup>395</sup> Law No. 25.246 of 5 May 2000 on Concealment and Laundering of Money of Criminal Origin. See Panel Report, para. 7.655.

<sup>396</sup> Panel Report, para. 7.740.

6.161. The Panel began its analysis under Article XIV(c) of the GATS by recalling the Appellate Body's finding in *US – Gambling* that previous decisions under Article XX of the GATT 1994 are relevant to the analysis under Article XIV of the GATS.<sup>397</sup> The Panel considered that, similarly to Article XX of the GATT 1994, Article XIV of the GATS provides for an analysis in two stages: (i) whether the measure at issue is provisionally justified under one of the paragraphs of Article XIV; and (ii) in the event that the measure is provisionally justified under one of these paragraphs, whether the measure satisfies the requirements in the chapeau of Article XIV.<sup>398</sup>

6.162. The Panel considered the legal standard set forth by the Appellate Body in *Korea – Various Measures on Beef* in respect of Article XX(d) of the GATT 1994 to be relevant for its analysis of Argentina's defence under Article XIV(c) of the GATS.<sup>399</sup> Accordingly, the Panel explained that, in order to justify its measures under Article XIV(c), "Argentina should first demonstrate that measures 1, 2, 3, 4, 7 and 8 are designed to secure compliance with the relevant Argentine laws and regulations that are not in themselves inconsistent with the GATS; and secondly, that these measures are 'necessary' to secure such compliance."<sup>400</sup>

6.163. In the following sections, we address Panama's claims and arguments relating to the Panel's application of Article XIV(c) of the GATS to measures 1, 2, 3, 4, 7, and 8. To the extent that Panama's arguments touch on issues of interpretation, we will deal with them there. We begin by examining Panama's claim that the Panel erred by failing to focus its analysis on the relevant aspects of the measures that gave rise to its findings of inconsistency with Article II:1 of the GATS.<sup>401</sup> We then address, in turn, Panama's claims relating more specifically to the Panel's intermediate findings under Article XIV(c), namely: (i) that the Panel erred in finding that the measures are designed to secure compliance with the laws and regulations identified by Argentina<sup>402</sup>; and (ii) that the Panel erred in finding that the measures are "necessary" to secure such compliance.<sup>403</sup>

### **6.3.2 Whether the Panel erred by failing to focus its analysis on the relevant aspects of the measures that gave rise to the findings of inconsistency with Article II:1 of the GATS**

6.164. Panama argues that the Panel erred by failing to focus its analysis under Article XIV(c) of the GATS on the relevant aspects of measures 1, 2, 3, 4, 7, and 8 that gave rise to the findings of inconsistency with Article II:1 of the GATS.<sup>404</sup> According to Panama, in analysing whether these measures are designed and necessary to secure compliance with the relevant Argentine laws and regulations, the Panel did not examine "the differential treatment" accorded by Argentina to services and service suppliers of non-cooperative countries that formed the basis of each of its findings of inconsistency with Article II:1.<sup>405</sup> Panama relies, in particular, on the statement by the Appellate Body in *Thailand – Cigarettes (Philippines)* that "what must be shown to be 'necessary'" under Article XX(d) of the GATT 1994 "is the treatment giving rise to the finding of less favourable treatment".<sup>406</sup>

6.165. Argentina agrees with Panama that the term "measures" in the chapeau of Article XIV of the GATS directs panels to focus their analysis of a Member's defence on the particular aspects of the challenged measure that gave rise to the finding of inconsistency with the GATS.<sup>407</sup> However, Argentina contends that the Panel did focus its analysis on the aspects of the measures that gave rise to its findings of inconsistency with Article II:1 of the GATS and, in particular, on "the

<sup>397</sup> Panel Report, paras. 7.585 and 7.590 (referring to Appellate Body Report, *US – Gambling*, para. 291).

<sup>398</sup> Panel Report, para. 7.586 (referring to Appellate Body Report, *US – Gambling*, para. 292).

<sup>399</sup> Panel Report, paras. 7.591-7.592 (referring to Appellate Body Reports, *Korea – Various Measures on Beef*, para. 157; and *Thailand – Cigarettes (Philippines)*, para. 177).

<sup>400</sup> Panel Report, para. 7.593.

<sup>401</sup> Panama's appellant's submission, paras. 5.13-5.15, 5.77-5.80, 5.149-5.152, and 5.161-5.163.

<sup>402</sup> Panel Report, paras. 7.595-7.656; Panama's appellant's submission, paras. 5.16-5.24, 5.81-5.114, 5.153, and 5.164-5.166. See section 6.3.3.2 below.

<sup>403</sup> Panel Report, paras. 7.657-7.740; Panama's appellant's submission, paras. 5.25-5.37, 5.115-5.146, 5.154-5.158, and 5.167-5.172. See section 6.3.3.3 below.

<sup>404</sup> Panama's appellant's submission, paras. 5.13, 5.15, 5.77, and 5.151.

<sup>405</sup> Panama's appellant's submission, para. 5.77. See also paras. 5.78, 5.150, and 5.162.

<sup>406</sup> Panama's appellant's submission, para. 5.77 (quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177).

<sup>407</sup> Argentina's appellee's submission, para. 64; Panama's appellant's submission, paras. 5.13 and 5.75; Argentina's and Panama's responses to questioning at the oral hearing.

differential treatment accorded under measures 1 to 4, 7 and 8 to services and service suppliers of non-cooperative [countries]" as compared to that accorded to like services and service suppliers of cooperative countries.<sup>408</sup>

### 6.3.2.1 The appropriate focus in the analysis of the "measures" under Article XIV(c) of the GATS

6.166. We begin by recalling that, with respect to the relevant aspects of the measures to be examined under Article XIV(c) of the GATS, the Panel stated that, in applying Article XIV(c) to measures 1, 2, 3, 4, 7, and 8<sup>409</sup>, it would take into account the Appellate Body's observation in *EC – Seal Products* that, by virtue of the express text of the chapeau, the general exceptions of Article XX of the GATT 1994 apply to "measures", rather than to any inconsistency with the GATT 1994 that might arise from such measures.<sup>410</sup> The Panel also took note of the Appellate Body's explanation that the aspects of a measure to be provisionally justified under the paragraphs of Article XX "are those that give rise to the finding of inconsistency under the GATT 1994", and resolved to apply the same approach in its analysis under Article XIV(c) of the GATS.<sup>411</sup>

6.167. As already observed, Panama does not contest that the Panel correctly identified the approach to be taken in the assessment of whether the six measures could be provisionally justified under Article XIV(c) of the GATS. Panama's appeal alleges, instead, that, notwithstanding the Panel's statement that it would focus on the aspects of the measures that gave rise to the findings of inconsistency with Article II:1 of the GATS, the Panel erred by in fact focusing on different aspects of these measures in its Article XIV(c) analysis.

6.168. We note that the import of the statement made by the Appellate Body in *Thailand – Cigarettes (Philippines)*<sup>412</sup>, and relied on by Panama in its appeal, was already discussed, and clarified, by the Appellate Body in *EC – Seal Products*. In the latter dispute, the Appellate Body explained that the aspects of a measure to be provisionally justified under the paragraphs of Article XX "are those that give rise to the finding of inconsistency under the GATT 1994".<sup>413</sup> The relevant aspects of the measure are typically those that specify the treatment that such measure gives to imported goods or services in specific circumstances, often including in comparison to the treatment accorded to like goods or services. It is these aspects of the measure providing for differences in treatment that form the starting point of the analysis under, and ultimately lead to findings of inconsistency with, the GATT 1994 or the GATS. When analysing provisional justification under a general exception, the focus of the analysis should be on the relevant aspects of the measure itself, rather than on how, for example, the measure affects the conditions of competition in the relevant market.<sup>414</sup>

6.169. Indeed, in order for a panel properly to conduct its assessment under Article XIV of the GATS, it should be clear from the panel's analysis that, with respect to each individual measure, the aspects of the measure addressed are the same as those that gave rise to its earlier finding of inconsistency. This is because a respondent may not justify the inconsistency of a measure by basing its defence on aspects of that measure different from those that were found by the panel to be inconsistent with a provision of the GATS. At the same time, the mere fact that a panel does not repeat, in its Article XIV analysis, the entirety of its discussion of the measure from its inconsistency analysis does not, in itself, mean that that panel erred and based its assessment of the measure's justification under Article XIV on different aspects of the measure. Nor does such a conclusion necessarily follow from the mere fact that a panel's discussion of aspects of a measure in the course of its assessment of a defence includes more than the particular aspects that it discussed in reaching its finding of inconsistency. Indeed, it is normally to be expected that, when examining the claims and defences raised in respect of a measure, a panel's analysis in a later part of its report will build upon and reflect the analysis in earlier parts of its report dealing with the same measure. Therefore, on appeal, the burden will be on the party raising the claim of error to

<sup>408</sup> Argentina's appellee's submission, para. 63.

<sup>409</sup> Panel Report, para. 7.587.

<sup>410</sup> Panel Report, para. 7.588 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.185).

<sup>411</sup> Panel Report, para. 7.588 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.185).

<sup>412</sup> See para. 6.164 above.

<sup>413</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.185 (referring to Appellate Body Reports, *US – Gasoline*, pp. 13-14, DSR 1996:I, pp. 12-13; and *Thailand – Cigarettes (Philippines)*, para. 177).

<sup>414</sup> Appellate Body Report, *US – Gasoline*, pp. 13-14, DSR 1996:I, pp. 12-13.

demonstrate that the panel committed legal error. To discharge such burden, an appellant must establish that the panel's analysis reveals that the aspects of the measure that were the focus of the panel's Article XIV analysis are distinct from those that formed the basis of its finding of inconsistency.

6.170. We note that, in its appellant's submission, Panama does not identify clearly any specific part of the Panel's analysis under Article XIV(c) of the GATS where the Panel is alleged to have focused on different aspects of the relevant measures than those that formed the basis of its Article II:1 findings. Furthermore, while Panama raises this allegation of error with respect to the Panel's analysis of six individual measures, its submission contains only very brief supporting arguments.<sup>415</sup> Panama does not indicate, or provides only very limited explanations of, the aspects of the measures that the Panel should have examined under Article XIV(c), or how the aspects of the measures that the Panel did examine in its Article XIV analysis differ from the aspects it analysed under Article II:1 of the GATS.

6.171. Having expressed our concerns about the paucity of Panama's arguments in support of its allegation that the Panel erred by failing to focus properly in its analysis under Article XIV(c) of the GATS on the relevant aspects of the six measures, we nevertheless examine below the relevant parts of the Panel's analysis of the individual measures. We recall in this connection that it is the duty of a panel, in its analysis under a general exception, to address clearly the same aspects of each measure that formed the basis of its finding of inconsistency. With this consideration in mind, we proceed to examine the Panel's analysis of the individual measures and to compare, for each of the six measures, the aspects of the measure that the Panel identified as giving rise to its findings of inconsistency with Article II:1 of the GATS with the aspects of the measure it examined in the context of its Article XIV(c) analysis.

#### **6.3.2.2 The relevant aspects of measures 1, 2, 3, 4, 7, and 8 examined by the Panel under Article II:1 and Article XIV(c) of the GATS**

6.172. Panama contends that, in its application of Article XIV(c) of the GATS, the Panel failed to focus its analysis on the relevant aspects of the measures that gave rise to the findings that those measures are inconsistent with Article II:1 of the GATS.<sup>416</sup> Rather, in Panama's view, the Panel erroneously focused on: (i) the burdens imposed by measures 1, 2, 3, and 4<sup>417</sup>; (ii) the purpose and requirements of measure 7<sup>418</sup>; and (iii) the function and purpose of measure 8.<sup>419</sup> Argentina responds that the Panel examined the "additional information requirements" and more onerous tax and inspection burdens that apply exclusively to transactions with service suppliers of non-cooperative countries under the relevant measures, and thereby correctly focused on the aspects of the measures that gave rise to its findings of inconsistency with Article II:1.<sup>420</sup>

6.173. In analysing measure 1<sup>421</sup> under Article XIV(c) of the GATS, the Panel focused on the "higher tax" resulting from the irrebuttable presumption of a 100% net gain provided for in this measure.<sup>422</sup> We understand that the Panel focused on the same aspect of measure 1 in its Article XIV(c) analysis as it did in its Article II:1 analysis, namely, the "heavier tax burden" that has a negative impact on the profitability of service suppliers of non-cooperative countries in the Argentine market.<sup>423</sup>

6.174. In examining measure 2<sup>424</sup> under Article XIV(c) of the GATS, the Panel focused on the "additional information requirements" resulting from the rebuttable presumption of an unjustified increase in wealth provided for in that measure.<sup>425</sup> Thus, it seems that the Panel focused its

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<sup>415</sup> Panama dedicates just two paragraphs of its appellant's submission to this claim with respect to measures 1 to 4 (paras. 5.78-5.79), and another two paragraphs with respect to measure 7 (para. 5.150) and measure 8 (para. 5.162).

<sup>416</sup> Panama's appellant's submission, paras. 5.15 and 5.75.

<sup>417</sup> Panama's appellant's submission, para. 5.78 (referring to Panel Report, para. 7.637).

<sup>418</sup> Panama's appellant's submission, para. 5.150 (referring to Panel Report, para. 7.646).

<sup>419</sup> Panama's appellant's submission, paras. 5.161-5.162 (referring to Panel Report, para. 7.647).

<sup>420</sup> Argentina's appellee's submission, para. 70.

<sup>421</sup> Measure 1 is described in more detail in section 5.2 of this Report.

<sup>422</sup> Panel Report, para. 7.637.

<sup>423</sup> Panel Report, para. 7.282.

<sup>424</sup> Measure 2 is described in more detail in section 5.3 of this Report.

<sup>425</sup> Panel Report, para. 7.637.

analysis under Article XIV(c) on the same aspect of measure 2 that gave rise to its finding of inconsistency with Article II:1, namely, the "additional requirement" or "additional step" of having to rebut the legal presumption.<sup>426</sup> This consists, in essence, of an *additional requirement* imposed on Argentine taxpayers to provide certain *information* to the AFIP in order to prove conclusively that the entry of funds originated from activities actually carried out, or from placements of duly declared funds.<sup>427</sup>

6.175. In its analysis of measure 3<sup>428</sup> under Article XIV(c) of the GATS, the Panel focused on the "additional information requirements" associated with the application of the transfer pricing regime provided for in that measure.<sup>429</sup> We understand that the Panel focused its Article XIV(c) analysis on the same aspect of measure 3 that formed the basis of its Article II:1 finding, namely, the fact that the transfer pricing regime is "more burdensome" for the Argentine taxpayer because it "requires more work" and "involves higher costs".<sup>430</sup> This more burdensome and costly valuation method constitutes in essence an *additional requirement* imposed on taxpayers to provide the *information* that is required for purposes of complying with the rules and procedures on transfer pricing, and this allows the Argentine authorities to establish the value of the transactions and the legitimately tax-deductible expenses.<sup>431</sup>

6.176. In its examination of measure 4<sup>432</sup> under Article XIV(c) of the GATS, the Panel focused on the "additional information requirements" resulting from the application of the payment received rule.<sup>433</sup> It seems to us that the Panel looked at the same aspect of measure 4 in both its Article XIV(c) and Article II:1 analyses, namely, the fact that the measure entails a reduction in the real value of the expenditure deducted and may create an "additional burden" or "additional costs" for companies.<sup>434</sup> For the Panel, the additional burden imposed on Argentine taxpayers, and costs incurred thereby, aim to ensure that Argentine authorities have sufficient information concerning the authenticity of the transaction.<sup>435</sup> Thus, the "additional information requirement" is, in essence, the very *requirement* for taxpayers to apply the payment received rule, which, in turn, requires them to provide *information* about the payment that enables the authorities to ensure correspondence between the payment and the expenditure deducted by the Argentine taxpayer from its tax base. This also entails, as adverse consequences, the reduced value of the expenses deducted and possible additional costs.

6.177. In its analysis of measure 7<sup>436</sup> under Article XIV(c) of the GATS, the Panel focused on the "additional information" required of companies located in non-cooperative countries for purposes of registering a branch of a foreign company in Argentina.<sup>437</sup> This indicates to us that the Panel focused on the same aspect of the measure that gave rise to the finding of inconsistency with Article II:1 of the GATS, namely, the General Justice Inspectorate's mandate to assess compliance with a series of registration requirements "restrictively" in the case of companies of non-cooperative countries and to conduct "closer scrutiny", which could result in a requirement to submit "a larger number of documents".<sup>438</sup> We therefore consider it clear that the purpose of the General Justice Inspectorate's closer scrutiny is to gather and verify certain *additional information* related to the company's effective engagement in economic activities and its legitimate commercial purpose.

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<sup>426</sup> Panel Report, para. 7.298.

<sup>427</sup> Law on Tax Procedure (Panel Exhibits ARG-45 and PAN-9), Article 18, para. 3.

<sup>428</sup> Measure 3 is described in more detail in section 5.4 of this Report.

<sup>429</sup> Panel Report, para. 7.637.

<sup>430</sup> Panel Report, paras. 7.307-7.308 (referring to Argentina's first written submission to the Panel, para. 104; and Panama's first written submission to the Panel, paras. 4.218 and 4.238).

<sup>431</sup> See Panel Report, paras. 2.20, 7.306-7.308, and 7.696-7.697. Furthermore, Article 15, paragraph 3 of the Gains Tax Law sets out five transfer-price valuation methods, the application of any of which would require the Argentine taxpayer to provide certain additional information. (See Gains Tax Law (Panel Exhibits ARG-42 and PAN-4), Article 15, para. 3)

<sup>432</sup> Measure 4 is described in more detail in section 5.5 of this Report.

<sup>433</sup> Panel Report, para. 7.637. See *supra*, para. 5.15.

<sup>434</sup> Panel Report, paras. 7.317-7.318.

<sup>435</sup> See Panel Report, paras. 7.637, 7.698, 7.700, and 7.721.

<sup>436</sup> Measure 7 is described in more detail in section 5.8 of this Report.

<sup>437</sup> Panel Report, para. 7.646 (referring to Commercial Companies Law (Panel Exhibits ARG-43 and PAN-34), Article 118.3; and Resolution on Companies Incorporated Abroad (Panel Exhibits ARG-33 and PAN-62), Article 188).

<sup>438</sup> Panel Report, paras. 7.348-7.349.



6.178. In examining measure 8<sup>439</sup> under Article XIV(c) of the GATS, the Panel focused on the "closer scrutiny" given to the repatriation of direct investments in Argentina to service suppliers in non-cooperative countries that the measure requires from the Argentine Central Bank, and the "additional information requirements" enabling the Argentine authorities to verify that such repatriation of capital does not cover up a money laundering operation.<sup>440</sup> We understand that the Panel focused its Article XIV(c) analysis on the same aspect of the measure that formed the basis of its Article II:1 finding, namely, the fact that the prior authorization application that service suppliers in non-cooperative countries must complete and file with the Argentine Central Bank "in itself implies an additional administrative burden" and entails "a certain cost" in terms of the time required and "a risk" that it may ultimately be rejected.<sup>441</sup> The "additional information requirements" consist of the requirement for service providers of non-cooperative countries to communicate certain additional information to the Argentine Central Bank. This information, in turn, constitutes the "additional administrative burden" imposed on those service providers, involving time costs in terms of preparation, as well as risks of rejection.<sup>442</sup>

### 6.3.2.3 Conclusion

6.179. It is true that, in analysing measures 1, 2, 3, 4, 7, and 8 under Article XIV(c) of the GATS, the Panel's identification of the aspects of those measures that were relevant to its assessment was at times rather brief or imprecise, notably its across-the-board reference to "additional information requirements". Yet, overall, for the reasons set out above, we consider that the Panel did not fail to focus on the same aspects of measures 1, 2, 3, 4, 7, and 8 in both its Article II:1 and Article XIV(c) analyses.

### 6.3.3 Necessary to secure compliance with laws or regulations

6.180. We now turn to the two remaining alleged errors that Panama raises in connection with the Panel's findings that measures 1, 2, 3, 4, 7, and 8 are provisionally justified under Article XIV(c) of the GATS.<sup>443</sup> First, Panama contends that the Panel erred in finding that measures 1, 2, 3, 4, and 8 are designed to secure compliance with laws or regulations.<sup>444</sup> Second, Panama contends that the Panel erred in finding that measures 1, 2, 3, 4, 7, and 8 are "necessary" to secure compliance with such laws or regulations.<sup>445</sup> Below, we summarize the relevant Panel findings. Thereafter, we examine the various arguments raised by Panama in respect of each of these intermediate findings.

#### 6.3.3.1 The Panel's findings

6.181. According to the Panel, in order to establish successfully a defence under Article XIV(c) of the GATS, a respondent must demonstrate two elements.<sup>446</sup> First, a respondent must show that the measure at issue is designed "to secure compliance with laws or regulations which are not inconsistent" with the GATS, pursuant to the following legal standard:

[T]he Member invoking such a defence must (i) identify the laws and regulations with which the challenged measure is intended to secure compliance, and prove ... (ii) [that] those laws and regulations are not in themselves inconsistent with WTO

<sup>439</sup> Measure 8 is described in more detail in section 5.9 of this Report.

<sup>440</sup> Panel Report, para. 7.647.

<sup>441</sup> Panel Report, para. 7.357.

<sup>442</sup> Panel Report, para. 7.357. In this respect, as identified in Panama's first written submission to the Panel, the template for a request of prior authorization from the Argentine Central Bank lists the information that must be provided, including: identification of parties involved; details of the investment; and conditions of the repatriation. (Panama's first written submission to the Panel, para. 4.443; Annex to Communication "B" No. 7953 of the Central Bank of the Argentine Republic of 15 August 2003 (Panel Exhibit PAN-72))

<sup>443</sup> Panama's appellant's submission, paras. 5.2-5.3, 5.75, 5.148, and 5.160.

<sup>444</sup> Panama's appellant's submission, paras. 5.75, 5.93, and 5.147.a (measures 1-4), and paras. 5.160 and 5.173.a (measure 8).

<sup>445</sup> Panama's appellant's submission, paras. 5.75 and 5.147.b (measures 1-4), paras. 5.148 and 5.159.b (measure 7), and paras. 5.160 and 5.173.b (measure 8).

<sup>446</sup> Panel Report, paras. 7.591-7.593 (referring to Appellate Body Reports, *Korea – Various Measures on Beef*, para. 157; and *Thailand – Cigarettes (Philippines)*, para. 177; and Panel Report, *US – Gambling*, paras. 6.536-6.537 and fn 990 thereto).

law; and (iii) that the measure challenged is designed to secure compliance with those laws or regulations.<sup>447</sup>

6.182. Second, a respondent must demonstrate that the measure at issue is "necessary" to secure such compliance. In this regard, the Panel referred to the Appellate Body reports in *US – Gambling* and *EC – Seal Products*, and relied upon the following summary of the proper analysis of "necessity" set out in the latter report<sup>448</sup>:

As the Appellate Body has explained, a necessity analysis involves a process of "weighing and balancing" a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure. The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken.

As the Appellate Body has stated, "[i]t is on the basis of this 'weighing and balancing' and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is 'necessary' or, alternatively, whether another, WTO-consistent measure is 'reasonably available'". Such an analysis, the Appellate Body has observed, involves a "holistic" weighing and balancing exercise "that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement".<sup>449</sup>

6.183. The Panel then turned to apply this standard to measures 1, 2, 3, 4, 7, and 8. The Panel noted that Argentina had identified a number of "laws or regulations" for purposes of its defence under Article XIV(c) of the GATS. In its analysis, the Panel focused on the following:

- a. in connection with measures 1, 2, 3, and 4<sup>450</sup>:
  - i. Articles 1 and 5 of the Gains Tax Law;
  - ii. Article 46 of the Law on Tax Procedure;
  - iii. Article 1 of the Criminal Tax Law; and
  - iv. Article 16 of Argentina's Constitution;
- b. in connection with measure 7<sup>451</sup>:
  - i. Article 118.3 of the Commercial Companies Law; and
  - ii. Article 188 of the Resolution on Companies Incorporated Abroad; and
- c. in connection with measure 8<sup>452</sup>:
  - i. Articles 20, 20bis, and 21 of the Law against Money Laundering.

6.184. In examining whether the laws or regulations identified by Argentina are not in themselves inconsistent with the GATS, the Panel first noted that, while Argentina was responsible for establishing that the conditions for its defence were met, the legislation of a WTO Member is to be considered WTO-consistent until proven otherwise.<sup>453</sup> With respect to the Gains Tax Law, the Law

<sup>447</sup> Panel Report, paras. 7.595-7.596 (referring to Panel Reports, *Colombia – Ports of Entry*, para. 7.514; and *US – Shrimp (Thailand)*, para. 7.174; and Appellate Body Report, *Korea – Various Measures on Beef*, para. 157).

<sup>448</sup> Panel Report, paras. 7.658-7.661 (referring to Appellate Body Reports, *US – Gambling*, para. 304; and *EC – Seal Products*, paras. 5.169 and 5.214).

<sup>449</sup> Appellate Body Reports, *EC – Seal Products*, paras. 5.169 and 5.214. (fns omitted)

<sup>450</sup> We note that, before the Panel, Argentina also identified the following provisions as relevant for its defence under Article XIV(c) of the GATS: Articles 2, 17, 80, 91, 92, 127, and 129 of the Gains Tax Law (Panel Exhibits ARG-42 and PAN-4); Articles 33, 38, 39, and 45 of the Law on Tax Procedure (Panel Exhibits ARG-45 and PAN-9); and Articles 4, 17, and 75 (second paragraph) of Argentina's Constitution. (Panel Report, paras. 7.597, 7.608-7.610, 7.617, and 7.632-7.635)

<sup>451</sup> Panel Report, paras. 7.597, 7.612, 7.614-7.617, and 7.646.

<sup>452</sup> Panel Report, paras. 7.597, 7.613-7.617, and 7.647.

<sup>453</sup> Panel Report, paras. 7.620 and 7.625.

on Tax Procedure, and the Resolution on Companies Incorporated Abroad<sup>454</sup>, the Panel noted that measures 1, 2, 3, 4, and 7, which were found to be inconsistent with Article II:1 of the GATS, are themselves specific provisions of these same legal instruments that Argentina invoked as the GATS-consistent laws or regulations with which these measures secure compliance.<sup>455</sup> Nonetheless, the Panel observed that Panama had not challenged the GATS-consistency of these legal instruments as a whole. For the Panel, the GATS-inconsistency of certain provisions of these three legal instruments does not mean that their remaining provisions are also GATS-inconsistent.<sup>456</sup> Thus, the Panel concluded that, for purposes of its defence under Article XIV(c) of the GATS, Argentina had identified laws or regulations that are not inconsistent with the provisions of the GATS.<sup>457</sup>

6.185. The Panel found that measures 1, 2, 3, 4, 7, and 8 are designed to secure compliance with the laws or regulations identified by Argentina. In particular, the Panel found that, by making transactions with a high risk of tax evasion subject to additional information requirements (as per measures 2, 3, and 4) or a higher tax (as per measure 1), these measures discourage harmful tax practices and enable the authorities to ensure that Argentine residents are taxed on all their earnings (as provided for in Article 1 of the Gains Tax Law) and that earnings from activities performed in Argentina by domestic or foreign service suppliers are subject to taxation in Argentina (as provided for in Article 5 of the Gains Tax Law).<sup>458</sup>

6.186. With respect to measures 1, 2, 3, and 4, the Panel also found that these measures are designed to secure compliance with Article 46 of the Law on Tax Procedure and Article 1 of the Criminal Tax Law by enabling tax authorities to prevent the use of transactions with service suppliers of non-cooperative countries to defraud the treasury by means of misleading declarations or wilful concealment.<sup>459</sup> The Panel further found that these measures are designed to secure compliance with Article 16 of Argentina's Constitution, which provides that taxpayers with the same tax-paying capacity are to pay the same tax. The Panel considered that, by mitigating the risks of tax evasion, measures 1, 2, 3, and 4 contribute to ensuring that, given equal tax-paying capacity, honest taxpayers do not pay higher taxes than dishonest taxpayers.<sup>460</sup>

6.187. Turning to measure 7, the Panel recalled that this measure imposes additional information requirements on companies of non-cooperative countries intending to set up branches in the City of Buenos Aires. The Panel found that this additional information enables Argentine authorities to obtain the relevant information to apply the requirements to register branches of foreign companies in Argentina set forth in Article 118.3 of the Commercial Companies Law and Article 188 of the Resolution on Companies Incorporated Abroad. Thus, the Panel concluded that measure 7 is designed to secure compliance with these provisions of the Commercial Companies Law and the Resolution on Companies Incorporated Abroad.<sup>461</sup>

6.188. With respect to measure 8, the Panel noted that Articles 20, *20bis*, and 21 of the Law against Money Laundering set out the duty of certain entities, including the Argentine Central Bank, to provide information on any suspicious operation to the Financial Intelligence Unit. The Panel found that, by requiring the Argentine Central Bank to conduct closer scrutiny of transfers to non-cooperative countries so as to ensure that operations are of genuine origin, measure 8 is designed to secure compliance with these provisions of the Law against Money Laundering.<sup>462</sup>

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<sup>454</sup> The Panel observed that Panama did not assert the GATS-inconsistency of the Criminal Tax Law, Argentina's Constitution, the Commercial Companies Law, and the Law against Money Laundering. (Panel Report, paras. 7.621 and 7.623-7.624)

<sup>455</sup> Measures 1, 3, and 4 are applied and maintained pursuant to certain provisions of the Gains Tax Law; measure 2 is applied and maintained pursuant to a provision of the Law on Tax Procedure; and measure 7 is applied and maintained pursuant to a provision of the Resolution on Companies Incorporated Abroad.

<sup>456</sup> Panel Report, paras. 7.621-7.623 and 7.625.

<sup>457</sup> Panel Report, para. 7.626.

<sup>458</sup> Panel Report, para. 7.637.

<sup>459</sup> Panel Report, para. 7.638.

<sup>460</sup> Panel Report, para. 7.639.

<sup>461</sup> Panel Report, paras. 7.646 and 7.648.

<sup>462</sup> Panel Report, paras. 7.647-7.648.

6.189. The Panel next took into account the prevailing circumstances at the time that the measures were implemented.<sup>463</sup> The Panel accepted that the evidence submitted by Argentina demonstrates that transactions with entities of non-cooperative countries make tax evasion possible because the lack of transparency characterizing such countries facilitates fraudulent manoeuvres intended to evade Argentine taxes.<sup>464</sup> The Panel also took note of the evidence submitted by Argentina showing that the efficacy of defensive tax measures – such as those at issue in this dispute – in preserving the integrity of national tax systems has been recognized in relevant international fora, in particular, the OECD and the G-20.<sup>465</sup>

6.190. In the light of the foregoing, the Panel found that Argentina had demonstrated that measures 1, 2, 3, 4, 7, and 8 are designed to secure compliance with Argentine laws or regulations that are not in themselves inconsistent with the GATS.<sup>466</sup>

6.191. The Panel then turned to examine whether these measures are "necessary" to secure compliance with the laws or regulations identified by Argentina. With respect to the importance of the objective pursued by measures 1, 2, 3, 4, and 7, the Panel found that the objective "to protect the tax collection system against the risks posed by the harmful tax practices of jurisdictions that are non-cooperative for tax transparency purposes" is of vital importance.<sup>467</sup> With respect to measure 8, the Panel found that the protection of Argentina's tax collection system and the fight against harmful tax practices and money laundering are "objectives, interests or values of the utmost importance for Argentina".<sup>468</sup>

6.192. With respect to the contribution made by these six measures to the end pursued, the Panel explained that it would examine the design, structure, and operation of each of the measures, focusing in particular on determining whether there is an ends-and-means relationship between the objective pursued and the measure.<sup>469</sup> The Panel assessed the contribution made by each of measures 1, 2, 3, 4, and 7, and found that each measure individually contributes to protecting Argentina's tax collection system and ensuring the collection of taxes in accordance with the relevant laws or regulations.<sup>470</sup> The Panel also underlined the contribution made to these ends by measures 1, 2, 3, 4, and 7 operating in conjunction with each other in the context of a comprehensive tax collection policy. The Panel considered that the application of a single measure would not make sense in terms of combating harmful tax practices, given that these practices may utilize various channels, and that the "combined effect of the measures ... corresponds to more than the simple sum of [the effects of] each measure taken separately."<sup>471</sup> With respect to measure 8, the Panel found that it contributes to preventing money laundering operations inasmuch as the measure makes it compulsory to declare, *inter alia*, the origin of the funds to be repatriated for the purpose of preventing such operations.<sup>472</sup>

6.193. The Panel went on to underline the *ex ante* effect of these measures. Specifically, the Panel found that the mere existence of these measures may influence the future behaviour of taxpayers and dissuade them from resorting to fraudulent practices and money laundering operations. For this reason, too, the Panel considered that measures 1, 2, 3, 4, 7, and 8 contribute to safeguarding Argentina's tax collection system and preventing money laundering.<sup>473</sup>

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<sup>463</sup> Panel Report, para. 7.649.

<sup>464</sup> Panel Report, para. 7.650.

<sup>465</sup> Panel Report, paras. 7.651-7.654.

<sup>466</sup> Panel Report, para. 7.655.

<sup>467</sup> Panel Report, para. 7.664 (quoting Argentina's first written submission to the Panel, para. 289), and para. 7.671.

<sup>468</sup> Panel Report, para. 7.682. The Panel noted that combating money laundering is an internationally established priority shared by many countries, and has been recognized in relevant international fora, in particular, the FATF, the OECD, and the G-20. (Ibid., paras. 7.673-7.676)

<sup>469</sup> Panel Report, para. 7.688.

<sup>470</sup> Panel Report, para. 7.706. See also paras. 7.692 and 7.707 (measure 1), paras. 7.695 and 7.708 (measure 2), paras. 7.697 and 7.709 (measure 3), paras. 7.700 and 7.710 (measure 4), and paras. 7.703 and 7.711 (measure 7).

<sup>471</sup> Panel Report, para. 7.714.

<sup>472</sup> Panel Report, paras. 7.704-7.705 and 7.712.

<sup>473</sup> Panel Report, para. 7.713. The Panel reiterated, in this connection, the significance that it attached to the fact that the use of defensive measures has been recognized in relevant international fora – in particular, the OECD and the G-20 – as a legitimate tool to protect tax systems and prevent harmful tax practices. (Ibid., paras. 7.715-7.716)

6.194. For all of these reasons, the Panel concluded that "measures 1, 2, 3, 4, 7 and 8 contribute to achieving the objectives pursued".<sup>474</sup>

6.195. The Panel then turned to address the trade-restrictiveness of each of measures 1, 2, 3, 4, 7, and 8.<sup>475</sup> The Panel noted that none of these measures prevents the supply of services by service suppliers of non-cooperative countries or entails a ban on trade in services in the sectors and modes of supply concerned.<sup>476</sup> The Panel considered that these measures, except for measure 1, have relatively little restrictive impact on international trade. Even in the case of measure 1 with its irrefutable presumption of enrichment, the effect on international trade is not equivalent to a ban.<sup>477</sup> The Panel then found that all of these measures have a limited restrictive effect on international trade in services. The Panel also recalled Appellate Body jurisprudence to the effect that a measure with a relatively slight impact on imported products may more easily be considered "necessary" than a measure with intense or broader restrictive effects.<sup>478</sup>

6.196. The Panel then considered whether it could compare measures 1, 2, 3, 4, 7, and 8 with possible alternative measures identified by Panama. The Panel noted that Panama had not identified specific measures reasonably available to Argentina that would be less trade restrictive and would achieve the same level of protection as measures 1, 2, 3, 4, 7, and 8 in respect of the objectives pursued.<sup>479</sup>

6.197. As a final step in its analysis of whether measures 1, 2, 3, 4, 7, and 8 are "necessary" to secure compliance with the relevant laws or regulations, the Panel sought to weigh and balance the importance of the common interests or values protected by the laws or regulations in question, the contribution of the measures to the end pursued, and the effect of the measures on trade in services. In so doing, the Panel bore in mind that no reasonably available alternative measures had been identified by Panama. Taking account of its prior analysis of these factors, the Panel reached the conclusion that measures 1, 2, 3, 4, 7, and 8 are "necessary to secure compliance with laws or regulations which are not inconsistent" with the GATS within the meaning of Article XIV(c).<sup>480</sup>

### 6.3.3.2 Whether the Panel erred in finding that the measures are designed to secure compliance with laws or regulations

6.198. Panama contends that the Panel erred in finding that measures 1, 2, 3, 4, 7, and 8 are designed to secure compliance with laws or regulations under Article XIV(c) of the GATS, and requests us to reverse these findings.<sup>481</sup> Overall, Panama makes two main arguments. First, Panama argues that the Panel wrongly based its analysis on whether measures 1, 2, 3, and 4 secure compliance with the objectives, rather than with the specific provisions, of the relevant laws or regulations.<sup>482</sup> Second, Panama argues that the Panel failed to examine properly whether measures 1, 2, 3, 4, and 8 are designed to secure compliance with the relevant laws or regulations.<sup>483</sup>

6.199. Argentina requests us to reject Panama's claim of error on appeal.<sup>484</sup> Argentina contends that Panama selectively quotes and mischaracterizes the Panel's analysis.<sup>485</sup> In Argentina's view, after reviewing the normative content of each of the specific provisions of the relevant laws or regulations, the Panel correctly found that measures 1, 2, 3, and 4 secure compliance with the

<sup>474</sup> Panel Report, para. 7.717.

<sup>475</sup> Panel Report, paras. 7.718-7.727.

<sup>476</sup> Panel Report, paras. 7.718 and 7.725.

<sup>477</sup> Panel Report, paras. 7.719 and 7.725.

<sup>478</sup> Panel Report, para. 7.727 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 163).

<sup>479</sup> Panel Report, paras. 7.732-7.736.

<sup>480</sup> Panel Report, paras. 7.737-7.740.

<sup>481</sup> Panama's appellant's submission, paras. 5.81-5.82, 5.93, 5.153, and 5.164. See also Panel Report, paras. 7.642, 7.648, and 7.655.

<sup>482</sup> Panama's appellant's submission, paras. 5.81-5.82.

<sup>483</sup> Panama's appellant's submission, paras. 5.94-5.97, 5.104, 5.106, 5.109-5.110, 5.112, and 5.164-5.165.

<sup>484</sup> Argentina's appellee's submission, paras. 6 and 92.

<sup>485</sup> Argentina's appellee's submission, paras. 74 and 83.

obligations contained in those specific provisions.<sup>486</sup> Argentina also submits that the Panel properly examined whether measures 1, 2, 3, 4, and 8 are designed to secure compliance with the relevant laws or regulations.<sup>487</sup> Argentina contends that Panama's multiple allegations of error in connection with the Panel's assessment of the design of measures 1, 2, 3, and 4 relate to the Panel's assessment of the evidence before it and, therefore, should have been made in connection with a claim under Article 11 of the DSU. Argentina considers that Panama's failure to raise such a claim is dispositive of these allegations of error.<sup>488</sup>

6.200. We recall that the Panel's findings that measures 1, 2, 3, 4, 7, and 8 are designed to secure compliance with the relevant laws or regulations were based on the following three intermediate findings: (i) that Argentina had identified the laws or regulations with which it seeks to secure compliance for purposes of Article XIV(c) of the GATS<sup>489</sup>; (ii) that such laws or regulations are not inconsistent with the provisions of the GATS<sup>490</sup>; and (iii) that the six measures are designed to secure compliance with the relevant provisions of these laws or regulations.<sup>491</sup>

6.201. Panama's appeal is confined to the Panel's finding concerning the last of these three elements. In this dispute, Panama did not assert the GATS-inconsistency of the Gains Tax Law, the Law on Tax Procedure, or the Resolution on Companies Incorporated Abroad as a whole. Panama also has not raised on appeal the issue of whether specific provisions identified by Argentina in these legal instruments can be found to be GATS-consistent notwithstanding that such provisions are contained within the same legal instruments as the inconsistent measures themselves. We note, however, that there may be circumstances in which the GATS-inconsistency of certain provisions of a legal instrument could affect or taint the GATS-consistency of other parts of the same instrument or of the instrument as a whole.

6.202. In considering the arguments raised by Panama, we begin by recalling that, in *Korea – Various Measures on Beef*, the Appellate Body explained that, for a respondent to justify provisionally a measure under Article XX(d) of the GATT 1994, the following two elements must be shown. First, the measure must be one designed to secure compliance with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be "necessary" to secure such compliance.<sup>492</sup>

6.203. With respect to the first element, the phrase "to secure compliance" circumscribes the scope of Article XIV(c) of the GATS, as it speaks to the function of the measures that a Member can seek to justify under this provision. This phrase calls for an initial examination of the relationship between the inconsistent measure and the relevant laws or regulations<sup>493</sup> and, for this purpose, directs panels assessing whether a measure secures compliance with laws or regulations to scrutinize the design of the measures sought to be justified.<sup>494</sup> A measure can be said "to secure compliance" with laws or regulations when its design reveals that it secures compliance with specific rules, obligations, or requirements under such laws or regulations<sup>495</sup>, even if the measure cannot be guaranteed to achieve such result with absolute certainty.<sup>496</sup> The more precisely a respondent is able to identify specific rules, obligations, or requirements contained in the GATS-consistent laws or regulations, the more likely it will be able to elucidate how and why the inconsistent measure secures compliance with such laws or regulations. Yet, where the assessment of the design of the measure, including its content and expected operation, reveals that the measure is incapable of securing compliance with specific rules, obligations, or

<sup>486</sup> Argentina's appellee's submission, para. 81.

<sup>487</sup> Argentina's appellee's submission, paras. 83-89.

<sup>488</sup> Argentina's appellee's submission, para. 91.

<sup>489</sup> Panel Report, para. 7.616.

<sup>490</sup> Panel Report, para. 7.626.

<sup>491</sup> Panel Report, para. 7.655.

<sup>492</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

<sup>493</sup> We note that this relationship between the inconsistent measure and the relevant laws or regulations is further analysed under the second element of the Article XIV(c) analysis, i.e. whether the measure is "necessary" to secure compliance with the relevant laws or regulations.

<sup>494</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 72.

<sup>495</sup> In this regard, the objectives of, or the common interests or values protected by, the relevant law or regulation may assist in elucidating the content of specific rules, obligations, or requirements in such law or regulation.

<sup>496</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 74.

requirements under the relevant law or regulation, as identified by a respondent, further analysis with regard to whether this measure is "necessary" to secure such compliance may not be required. This is because there is no justification under Article XIV(c) for a measure that is not designed to "secure compliance" with a Member's laws or regulations.<sup>497</sup> A panel must not, however, structure its analysis of the first element in such a way as to lead it to truncate its analysis prematurely and thereby foreclose consideration of crucial aspects of the respondent's defence relating to the "necessity" analysis.

6.204. The second element entails a more in-depth, holistic analysis of the relationship between the inconsistent measure and the relevant laws or regulations. In particular, this element entails an assessment of whether, in the light of all relevant factors in the "necessity" analysis, this relationship is sufficiently proximate, such that the measure can be deemed to be "necessary" to secure compliance with such laws or regulations.<sup>498</sup>

6.205. We see these two elements as conceptually distinct, yet related, aspects of the overall inquiry to be undertaken into whether a respondent has established that the measure at issue is "necessary to secure compliance with laws or regulations" under Article XIV(c) of the GATS. We do not see the content of these two elements of the analysis as entirely separate. Nor do we see the structure of each analysis as one that must follow a rigid path. Rather, the analyses of these two elements may overlap in the sense that some considerations may be relevant to both elements of the Article XIV(c) defence. The way in which a panel organizes its examination of these elements in scrutinizing a defence in any given dispute will be influenced by the measures and laws or regulations at issue, as well as by the way in which the parties present their respective arguments.

#### 6.3.3.2.1 General or cross-cutting allegations by Panama

6.206. We now turn to examine Panama's arguments on appeal with respect to the first element in the Article XIV(c) analysis explained above. Panama first argues that the Panel improperly focused its analysis on whether measures 1, 2, 3, and 4 secure compliance with the *objectives* of the relevant laws or regulations, rather than on whether those measures secure compliance with *specific provisions* of such laws or regulations.<sup>499</sup> Argentina disagrees with Panama and contends that, after reviewing the normative content of each of the relevant laws or regulations, the Panel properly focused on specific obligations contained in such laws or regulations in its analysis of whether the measures are designed to secure compliance with those laws or regulations.<sup>500</sup>

6.207. In analysing whether measures 1, 2, 3, and 4 are designed to secure compliance with the relevant laws or regulations, the Panel began by examining each of the four instruments identified by Argentina, namely, the Gains Tax Law, the Law on Tax Procedure, the Criminal Tax Law, and Argentina's Constitution, including specific provisions within each of these instruments.<sup>501</sup> Having done so, the Panel opined that these instruments form the backbone of the regulatory framework for collecting taxes in Argentina.<sup>502</sup> The Panel considered the obligations imposed by these laws or regulations to be interlinked. According a particular focus to the Gains Tax Law and the Law on Tax Procedure, the Panel stated that the relevant parts of these laws develop the tax principles established in Argentina's Constitution, including the principle of tax equality in Article 16 of the Constitution.<sup>503</sup> Thus, the Panel considered that these laws oblige Argentine authorities to levy tax on the earnings of natural and legal persons residing in Argentina according to their capacity to pay, ensuring that taxpayers with equal capacity pay the same amount of tax.<sup>504</sup>

6.208. On appeal, Panama raises arguments with respect to the Panel's analysis of whether measures 1, 2, 3, and 4 are designed to secure compliance with the Gains Tax Law, the Law on Tax Procedure, the Criminal Tax Law, and Argentina's Constitution. Clearly, a respondent seeking to justify an inconsistent measure may choose, as Argentina did in this dispute, to identify several

<sup>497</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 72.

<sup>498</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

<sup>499</sup> Panama's appellant's submission, paras. 5.81-5.82.

<sup>500</sup> Argentina's appellee's submission, paras. 74-75 and 81.

<sup>501</sup> Panel Report, para. 7.632 (Gains Tax Law), para. 7.633 (Law on Tax Procedure), para. 7.634 (Criminal Tax Law), and para. 7.635 (Argentina's Constitution).

<sup>502</sup> Panel Report, para. 7.636.

<sup>503</sup> Panel Report, paras. 7.635-7.636.

<sup>504</sup> Panel Report, para. 7.636.

relevant laws or regulations for purposes of its Article XIV(c) defence.<sup>505</sup> When confronted with such defence, it may well be appropriate for a panel to rule on more than one law or regulation.

6.209. We nevertheless consider that a respondent would succeed in its Article XIV(c) defence when it is able to demonstrate that the inconsistent measure is designed and necessary to secure compliance with at least one GATS-consistent law or regulation. In our view, it follows from this that, in the circumstances of this appeal, if we sustain the Panel's findings that the measures are designed and necessary to secure compliance with Articles 1 and 5 of the Gains Tax Law, further review of the Panel's findings that the same measures are also designed and necessary to secure compliance with other laws or regulations may not be required.<sup>506</sup> Thus, we first examine Panama's arguments relating to the Gains Tax Law. To the extent that we find that Panama has not established error with respect to the Panel's findings that measures 1, 2, 3, and 4 are designed and necessary to secure compliance with the Gains Tax Law, we need not examine Panama's remaining arguments concerning the Panel's findings regarding the Law on Tax Procedure, the Criminal Tax Law, and Argentina's Constitution.

6.210. We note that, with respect to the Gains Tax Law, it is true, as Panama highlights<sup>507</sup>, that the Panel observed that measures 1, 2, 3, and 4 are designed to secure compliance with the overall objective of the Gains Tax Law. The Panel did not, however, limit its analysis to this observation. Indeed, in the very next sentence of its reasoning, the Panel explained that measures 1, 2, 3, and 4 "are also designed to secure compliance with certain key provisions of the [Gains Tax Law]".<sup>508</sup> The Panel then proceeded to examine the content of specific provisions of the Gains Tax Law that had been identified by Argentina.<sup>509</sup> In particular, the Panel observed that Article 1 of the Gains Tax Law defines who is subject to this tax.<sup>510</sup> The Panel also observed that Article 5 of the Gains Tax Law "enshrines the principle of source or territoriality as the criterion for attribution of the taxable subject matter, according to which any sums originating in activities conducted within Argentine territory, by either Argentine or foreign service suppliers, are deemed to be gains of Argentine source."<sup>511</sup> Subsequently, the Panel addressed whether measures 1, 2, 3, and 4 are designed to secure compliance with Articles 1 and 5 of the Gains Tax Law. The Panel found that measures 1, 2, 3, and 4 "discourage harmful tax practices and enable the authorities to ensure that Argentine residents are taxed '*on all their gains earned in the country or abroad, as provided in Article 1 of the [Gains Tax Law]*'".<sup>512</sup> In addition, the Panel found that these measures "are also designed to secure compliance with Article 5 of the [Gains Tax Law], which considers *earnings from activities performed in Argentine territory, by either Argentine or foreign service suppliers, to be gains of Argentine source* (and thus subject to taxation in Argentina)".<sup>513</sup> Thus, contrary to Panama's contention, the Panel did not base its analysis only on whether measures 1, 2, 3, and 4 secure compliance with the objective of the Gains Tax Law; rather, the Panel also examined whether these measures secure compliance with the specific obligation set forth in Articles 1 and 5 of the Gains Tax Law, namely, to establish properly the tax base for purposes of the gains tax.

6.211. We now turn to examine Panama's second set of arguments with respect to the first element in the Article XIV(c) analysis explained above. Panama argues that the Panel failed to examine properly whether measures 1, 2, 3, 4, and 8 are designed to secure compliance with the relevant laws or regulations. In this respect, Panama first contends that the demonstration that a

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<sup>505</sup> In doing so, a respondent may choose to justify its inconsistent measure by showing that such measure is designed and necessary to secure compliance with at least one GATS-consistent law or regulation, or it may choose to demonstrate that the measure is designed and necessary to secure compliance with an obligation or obligations arising from several laws or regulations operating together as part of a comprehensive framework.

<sup>506</sup> We highlight that Panama has not challenged on appeal the Panel's finding that the provisions of the different legal instruments identified by Argentina work together as part of a common regulatory framework for collecting taxes in Argentina. (See Panel Report, para. 7.714)

<sup>507</sup> Panama's appellant's submission, para. 5.82 (referring to Panel Report, para. 7.637).

<sup>508</sup> Panel Report, para. 7.637.

<sup>509</sup> The Panel examined Articles 1, 2, 5, 17, 80, 91, 127, 129, and 130 of the Gains Tax Law.

(See Panel Report, para. 7.632)

<sup>510</sup> Panel Report, para. 7.632 and fn 804 thereto (referring to Gains Tax Law (Panel Exhibits ARG-42 and PAN-4), Article 1).

<sup>511</sup> Panel Report, para. 7.632 and fn 806 thereto (quoting Gains Tax Law (Panel Exhibits ARG-42 and PAN-4), Article 5).

<sup>512</sup> Panel Report, para. 7.637. (emphasis added)

<sup>513</sup> Panel Report, para. 7.637. (emphasis added)



specific measure secures compliance with laws or regulations requires identification of an underlying risk of non-compliance with such laws or regulations that the measure is intended to address.<sup>514</sup> In Panama's view, the Panel found that measures 1, 2, 3, and 4 are meant to discourage simulated transactions between related parties.<sup>515</sup> Panama contends, however, that the Panel failed to assess whether these related-party transactions are inconsistent – or pose a threat of non-compliance – with the relevant provisions of the Gains Tax Law, the Law on Tax Procedure, the Criminal Tax Law, or Argentina's Constitution. Panama submits that, absent such a finding, the Panel had no legal basis to conclude that measures 1, 2, 3, and 4 are designed to secure compliance with the provisions of the identified Argentine laws or regulations.<sup>516</sup>

6.212. Argentina contends that the Panel did not assume that transactions between related parties are *per se* inconsistent with Argentina's tax laws, or otherwise raise compliance concerns. Argentina submits that, in fact, the legality of such transactions was immaterial to the Panel's finding under Article XIV(c) of the GATS.<sup>517</sup> In Argentina's view, the Panel's findings that measures 1, 2, 3, and 4 are designed to secure compliance with Argentina's tax laws were based on evidence indicating that transactions between Argentine taxpayers and service suppliers of non-cooperative countries pose a particular risk of non-compliance with Argentina's tax laws. Argentina highlights that this is because, in such circumstances, it is not possible for Argentine authorities to determine whether a transaction reflects a legitimate business purpose or is simply a means to reduce tax liabilities in Argentina.<sup>518</sup>

6.213. We understand Panama's argument to be based on the assumption that the Panel found that Argentina's concern, in connection with measures 1, 2, 3, and 4, is limited to simulated transactions between related parties. Yet, in our view, the Panel did not find that the types of practices that measures 1, 2, 3, and 4 are meant to discourage are only simulated transactions between related parties. Rather, the Panel framed the practices that are the subject of Argentina's concern more broadly as "transactions which cover up harmful tax practices".<sup>519</sup> Thus, the assumption on which Panama bases its argument is not supported by the Panel Report.

6.214. Moreover, we understand Panama's argument to refer to the fact that, in Panama's view, measures 1, 2, 3, and 4 apply both to transactions with legitimate purposes (i.e. transactions between unrelated parties or transactions between related parties at arm's length) and to transactions with fraudulent purposes (i.e. simulated transactions between related parties to evade taxes). In essence, Panama argues that measures 1, 2, 3, and 4 go beyond what is necessary to secure compliance with such laws or regulations in respect of fraudulent transactions, because the measures also capture legitimate transactions. We note that the Panel examined, and did not consider relevant, Panama's argument that measures 1, 2, 3, and 4 also cover situations other than simulated transactions between related parties<sup>520</sup> when it assessed the trade-restrictiveness of measures 1, 2, 3, and 4. There, the Panel observed that these measures must be designed to cover all transactions because they apply *ex ante*, and their purpose is to detect fraudulent transactions. In the Panel's view, "[i]f the Argentine authorities could distinguish *ex ante* between transactions with a legitimate purpose and those which involve fraudulent manoeuvres, the measures in question would not be necessary."<sup>521</sup> We agree with the Panel's reasoning. In our view, Panama's argument would hold true only with the benefit of hindsight because it cannot be known in advance, without scrutiny, which transaction has a legitimate or a fraudulent purpose.

6.215. In addition to the argument above that measures 1, 2, 3, and 4 are overly broad in addressing tax evasion, Panama also argues that the Panel did not take proper account of the broad scope of measure 2, because it failed to consider that: (i) certain transactions excluded from

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<sup>514</sup> Panama's appellant's submission, paras. 5.22-5.24 (referring to Panel Reports, *Korea – Various Measures on Beef*, para. 655; and *China – Auto Parts*, para. 7.315).

<sup>515</sup> Panama's appellant's submission, paras. 5.94-5.96 (referring to the Panel's contribution analysis set out in Panel Report, paras. 7.691, 7.693, 7.697, and 7.700).

<sup>516</sup> Panama's appellant's submission, para. 5.97.

<sup>517</sup> Argentina's appellee's submission, para. 83.

<sup>518</sup> Argentina's appellee's submission, para. 84.

<sup>519</sup> Panel Report, para. 7.732. See also paras. 7.637 and 7.715.

<sup>520</sup> We note that Panama makes the same argument on appeal. (See Panama's appellant's submission, paras. 5.100, 5.104.c, 5.109, and 5.112.c)

<sup>521</sup> Panel Report, para. 7.726.

the scope of measure 1 are covered by measure 2; and (ii) in addition to the gains tax, measure 2 also has implications for the collection of sales tax and internal taxes.<sup>522</sup>

6.216. In our view, the grounds relied upon by Panama do not establish error in respect of the Panel's assessment of the design of measure 2. Panama has not explained why the fact that measure 2 may have a broader scope than measure 1, or the fact that measure 2 may also have implications for the collection of other types of taxes, would, in itself, preclude a finding that measure 2 is designed to secure compliance with Articles 1 and 5 of the Gains Tax Law. We also do not consider that this is necessarily so.

6.217. We further observe that Panama's various arguments that the scope of certain of the measures at issue is overly broad in terms of addressing tax evasion appear to us to be more pertinent to the analysis of whether the measures concerned are "necessary" to secure compliance with the Gains Tax Law, in particular to the identification of reasonably available alternative measures, than to the question of whether they secure compliance with relevant Argentine laws or regulations.

#### **6.3.3.2 Remaining errors alleged by Panama**

6.218. Panama also alleges that the Panel made multiple discrete errors in assessing the design of each of measures 1, 2, 3, 4, and 8.<sup>523</sup> We observe that Panama offers few arguments in support of these allegations. Panama's arguments appear to have us reassess these measures, and to attach more significance to isolated elements of these measures than did the Panel. We also note that these allegations relate to findings made by the Panel, in the context of Argentina's defence under Article XIV(c) of the GATS, that have been rendered moot in the light of our reversal of the Panel's finding on "likeness". Addressing them would also not assist in clarifying the requirements imposed by Article XIV(c). For these reasons, we have decided not to rule on these allegations on appeal.

#### **6.3.3.3 Whether the Panel erred in finding that the measures are "necessary" to secure compliance with the relevant laws or regulations**

6.219. Panama claims that the Panel erred in finding that measures 1, 2, 3, 4, 7, and 8 are "necessary" to secure compliance with the relevant Argentine laws or regulations under Article XIV(c) of the GATS. Panama's appeal challenges only the following aspects of the Panel's "necessity" analysis: (i) the Panel's assessment of the contribution of these measures to the end pursued; (ii) the Panel's assessment of the trade-restrictiveness of these measures; and (iii) the Panel's weighing and balancing of the relevant factors in its "necessity" analysis.<sup>524</sup> Panama requests us to reverse the Panel's findings that measures 1, 2, 3, 4, 7, and 8 are "necessary" to secure compliance with the relevant Argentine laws or regulations.<sup>525</sup>

6.220. Argentina requests us to dismiss this ground of Panama's appeal. Argentina stresses that this claim by Panama relates to the Panel's assessment of the evidence, yet Panama has not invoked Article 11 of the DSU.<sup>526</sup> In any event, Argentina argues that Panama has failed to establish that the Panel committed legal error in finding that each of measures 1, 2, 3, 4, 7, and 8 contributes to securing compliance with the relevant laws or regulations.<sup>527</sup> Argentina further contends that Panama's challenge to the Panel's assessment of the trade-restrictiveness of these measures mischaracterizes the Panel's analysis, and that the Panel did not err in finding that these measures have a limited restrictive effect on international trade in services.<sup>528</sup> Argentina also submits that Panama's allegation concerning the Panel's weighing and balancing of the relevant

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<sup>522</sup> Panama's appellant's submission, paras. 5.106.a and 5.106.b.

<sup>523</sup> Panama's appellant's submission, paras. 5.104, 5.106, 5.109-5.110, 5.112, and 5.164-5.165.

<sup>524</sup> Panama does not challenge the Panel's finding on the importance of the objectives pursued, or the Panel's assessment of the alternative measures proposed by Panama.

<sup>525</sup> Panama's appellant's submission, paras. 5.3, 5.147.b, 5.159.b, 5.173.b, and 7.1.c. See Panel Report, para. 7.740.

<sup>526</sup> Argentina's appellee's submission, paras. 96-103.

<sup>527</sup> Argentina's appellee's submission, paras. 104-133.

<sup>528</sup> Argentina's appellee's submission, paras. 134-143.

factors is entirely dependent on the other purported errors alleged by Panama and, like them, must fail.<sup>529</sup>

6.221. Before turning to the issues raised by Panama, we note that, in analysing whether the six measures are "necessary" to secure compliance, the Panel first considered the importance of the objectives pursued.<sup>530</sup> The Panel then considered the contribution made by the six measures to the end pursued.<sup>531</sup> Next, the Panel looked at the trade-restrictiveness of the six measures.<sup>532</sup> The Panel subsequently addressed whether any reasonably available alternative measures had been identified by Panama.<sup>533</sup> Finally, the Panel conducted a single weighing and balancing exercise of these factors for all six measures, collectively.<sup>534</sup> The way in which the Panel structured its "necessity" analysis with respect to these six measures has not been appealed. While there is no single correct way to structure a multi-faceted analysis of multiple measures, we have some concerns with the approach adopted by the Panel. The initial parts of the reasoning are somewhat disaggregated and compartmentalized in that, for any given measure, the Panel's consideration of each of the relevant "necessity" factors is found in separate parts of its reasoning. The separation of the different parts of the Panel's analysis, combined with its collective weighing and balancing exercise, renders it somewhat difficult to ascertain whether, for each measure, the Panel conducted the holistic analysis of all of the relevant elements that is called for, and properly weighed and balanced the relevant elements and compared them against any proposed alternative measures.

#### 6.3.3.3.1 General or cross-cutting allegations by Panama

6.222. Panama alleges that the Panel committed multiple errors in assessing whether measures 1, 2, 3, 4, 7, and 8 are "necessary" to secure compliance with the relevant Argentine laws or regulations.<sup>535</sup> We first examine several general or cross-cutting allegations made by Panama, and then turn to an examination of Panama's remaining arguments. At the end of our analysis, we examine Panama's challenge to the Panel's weighing and balancing of the relevant "necessity" factors with respect to these measures.

6.223. A first general theme raised in many of Panama's arguments appears to us to challenge the Panel's assessment of the facts and evidence on the record. In particular, Panama submits that there is no evidentiary basis for the following: (i) that measure 1 discourages the undeclared outflow of capital and the false payment of interests that can be deducted from the gains tax by the Argentine taxpayer<sup>536</sup>; (ii) that, by making the entry of undeclared funds more burdensome, measure 2 mitigates the erosion of the tax base<sup>537</sup>; (iii) that measure 3 discourages *ex ante* harmful tax practices and protects Argentina's tax base<sup>538</sup>; and (iv) that measure 4 may serve to deter Argentine companies from contracting services with suppliers of non-cooperative countries.<sup>539</sup> Panama also contends that the Panel failed to take into account the only evidence referring to the actual trade-restrictive effect of measure 1<sup>540</sup> and, in the light of Argentina's failure to provide sufficient evidence, that the Panel failed to substantiate its findings that measures 7 and 8 have a limited trade-restrictive effect on international trade.<sup>541</sup>

6.224. The Appellate Body has held in previous disputes that, while an appellant may frame its claims of error as it sees fit, "important consequences flow from that choice, including the

<sup>529</sup> Argentina's appellee's submission, paras. 144-145.

<sup>530</sup> Panel Report, paras. 7.662-7.682.

<sup>531</sup> Panel Report, paras. 7.690-7.717.

<sup>532</sup> Panel Report, paras. 7.718-7.727.

<sup>533</sup> Panel Report, paras. 7.729-7.736.

<sup>534</sup> Panel Report, paras. 7.737-7.740.

<sup>535</sup> Panama's appellant's submission, paras. 5.75 and 5.147.b (measures 1-4), paras. 5.148 and 5.159.b (measure 7), and paras. 5.160 and 5.173.b (measure 8).

<sup>536</sup> Panama's appellant's submission, para. 5.116.e and f (referring to Panel Report, para. 7.691).

<sup>537</sup> Panama's appellant's submission, para. 5.130 (referring to Panel Report, paras. 7.694-7.695).

<sup>538</sup> Panama's appellant's submission, para. 5.137.d (quoting Panel Report, para. 7.697).

<sup>539</sup> Panama's appellant's submission, para. 5.145.a (referring to Panel Report, para. 7.318).

<sup>540</sup> Panama's appellant's submission, para. 5.124 (referring to Notarized sworn statement of 14 March 2014 prepared by a legal expert on banking matters (Panel Exhibit PAN-7)).

<sup>541</sup> Panama's appellant's submission, paras. 5.156-5.157 (referring to Panel Report, para. 7.722), and para. 5.169.

standard of review that will apply in adjudicating" those claims.<sup>542</sup> In this regard, the Appellate Body has declined to consider claims that consist solely of a challenge to the objectivity of the panel's assessment of the evidence in the absence of a claim under Article 11 of the DSU.<sup>543</sup> The Appellate Body has also held that allegations implicating a panel's assessment of the facts and evidence before it, rather than the characterization of the consistency or inconsistency of a measure with the requirements under a certain provision, should be raised under Article 11 of the DSU.<sup>544</sup>

6.225. As Argentina observes, Panama's arguments mentioned above do not fall within the scope of our review in this appeal, in particular in the absence of any claim by Panama that the Panel failed to comply with its duties under Article 11 of the DSU.<sup>545</sup> Accordingly, we do not address them further.

6.226. A second general theme in the arguments advanced by Panama concerns the Panel's assessment of the contribution made by measures 1, 2, 3, 4, and 7. In Panama's view, the Panel improperly based its assessment of the contribution of measures 1, 2, 3, 4, and 7 on whether these measures contribute to attaining the *objectives* of the relevant laws or regulations, rather than on whether they contribute to securing compliance with *specific provisions* of such laws or regulations.<sup>546</sup>

6.227. In considering Panama's argument, we are mindful that, in *Korea – Various Measures on Beef*, the Appellate Body explained that one factor to be considered in the weighing and balancing of the relevant factors when evaluating whether a measure is "necessary" under Article XX(d) of the GATT 1994 is "the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue."<sup>547</sup> As we have explained above<sup>548</sup>, the more precisely a respondent is able to identify specific rules, obligations, or requirements contained in the GATS-consistent laws or regulations, the more likely it will be able to elucidate how and why the inconsistent measure secures compliance with such laws or regulations. Similarly, a panel's assessment of the contribution of a measure to securing compliance with the law or regulation at issue should focus on specific rules, obligations, or requirements set out in such law or regulation. This is not to say that the objective of, or the common interest or value protected by, the "laws or regulations" at issue is irrelevant to the analysis of a measure's contribution. Indeed, in many instances, the specific obligations and individual provisions of a law or regulation will reflect and be closely tied to the objective(s) of the instrument within which they are contained.

6.228. In its analysis of "necessity", the Panel set out to examine each measure's contribution to the objectives pursued by the relevant Argentine laws or regulations under Article XIV(c) of the GATS.<sup>549</sup> The Panel stated that, with respect to measures 1, 2, 3, 4, and 7, the objective pursued is to protect the tax collection system against the risks posed by harmful tax practices of non-cooperative countries for tax transparency purposes. The Panel then said it would examine the

<sup>542</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 956 (referring to Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 872; *Canada – Wheat Exports and Grain Imports*, para. 177; and *Japan – Apples*, para. 136).

<sup>543</sup> Appellate Body Reports, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 956 and *Mexico – Anti-Dumping Measures on Rice*, para. 274.

<sup>544</sup> Appellate Body Reports, *China – Rare Earths*, paras. 5.173-5.175 and *EC – Seal Products*, para. 5.243.

<sup>545</sup> See Argentina's appellee's submission, paras. 101 and 135.

<sup>546</sup> Panama's appellant's submission, paras. 5.86, 5.116.a, 5.129, 5.137.a, 5.144, and 5.155.

<sup>547</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

<sup>548</sup> See paras. 6.203-6.204 above.

<sup>549</sup> Panel Report, paras. 7.661-7.662. The Panel's analysis appears at times to conflate the objective of the measures, on the one hand, with the objectives of the relevant laws or regulations, on the other hand. While the Panel stated that it would assess the objectives pursued by the relevant Argentine laws or regulations, it later seemed to refer to the objective of the inconsistent measures. We note, however, that Argentina invoked Articles 1 and 5 of the Gains Tax Law and Article 188 of the Resolution on Companies Incorporated Abroad in its Article XIV(c) defence. In addition, we note that measures 1 to 4 and 7 are specific provisions of these same legal instruments. Thus, although the Panel might have been clearer, we understand the Panel to have referred interchangeably to the objective of these measures and the objectives of the relevant laws or regulations.

design, structure, and operation of each measure, focusing in particular on whether there is an ends-and-means relationship between the objective pursued and the measure in question.<sup>550</sup>

6.229. We note that the Panel made several general statements to the effect that it would examine the contribution made by the measures to the objective of protecting Argentina's tax collection system.<sup>551</sup> We have some reservations about the Panel's identification of how it intended to assess the contribution made by each of the measures. To the extent that the Panel's statements may imply that it would not consider the contribution of these measures to the relevant end pursued – that is, the securing of compliance with specific rules, obligations, or requirements contained in the relevant laws or regulations – the Panel's analytical framework would, in our view, be flawed. With this consideration in mind, we turn to assess whether, in applying Article XIV(c) of the GATS to the measures in question, the Panel erroneously focused on whether these measures contribute to attaining the objectives of the relevant laws or regulations, at the expense of an examination of whether these measures contribute to securing compliance with specific rules, obligations, or requirements contained in the relevant laws or regulations and, if so, whether this amounted to reversible error.

6.230. Argentina relied on Articles 1 and 5 of the Gains Tax Law in its Article XIV(c) defence. The Panel found that Article 1 of the Gains Tax Law defines the subjects of the gains tax. This provision sets forth the obligation of Argentine taxpayers to pay tax on all gains earned in Argentina or abroad. The Panel also found that Article 5 of the Gains Tax Law attributes to the taxable subject matter any sums originating from activities conducted within Argentina, by either Argentine or foreign service suppliers.<sup>552</sup>

6.231. With respect to measure 1, the Panel found that, by taxing the profits earned from certain financial services supplied by service suppliers of non-cooperative countries at a higher rate than like services from service suppliers of cooperative countries, this measure contributes to protecting the tax base because it discourages the undeclared outflow of capital and the false payment of interest.<sup>553</sup> With respect to measure 2, the Panel found that the rebuttable presumption in this measure discourages tax evasion by Argentine taxpayers, contributes to combating the erosion of Argentina's tax base, and allows Argentine authorities to adjust a taxpayer's tax base and restore tax equality among all Argentine taxpayers.<sup>554</sup> With respect to measure 3, the Panel found that this measure helps *ex ante* to discourage harmful tax practices and protect Argentina's tax base by correctly identifying the value of transactions and the expenses that are legitimately tax-deductible.<sup>555</sup> With respect to measure 4, the Panel considered that this measure enables Argentine authorities to ensure that there have actually been payments made that correspond to the expenditures deducted by Argentine taxpayers from their tax base.<sup>556</sup> We consider that, by addressing the measures' contribution to safeguarding the tax base of Argentine taxpayers, the Panel indeed conducted an examination of the contribution of these measures to securing compliance with the obligation to establish properly the tax base subject to the gains tax, as provided for in Articles 1 and 5 of the Gains Tax Law.

6.232. With respect to measure 7, Argentina relied on Article 188 of the Resolution on Companies Incorporated Abroad and Article 118.3 of the Commercial Companies Law in its Article XIV(c) defence.<sup>557</sup> These provisions specify the documents that companies incorporated abroad must submit in order to register a branch with the Public Trade Register of the City of Buenos Aires.<sup>558</sup> We note that the Panel found that, "in assessing compliance with the requirements of Article 188, the [General Justice Inspectorate] also seeks to determine whether the company is effectively engaged in economically significant business activities".<sup>559</sup> In assessing the contribution of measure 7, we understand the Panel to have focused on the requirements in Article 118.3 of the Commercial Companies Law and Article 188 of the Resolution on Companies Incorporated Abroad when referring to the need to verify that branches of foreign companies have "a legitimate

<sup>550</sup> Panel Report, paras. 7.664 and 7.688-7.689.

<sup>551</sup> See Panel Report, paras. 7.664 and 7.689. See also the heading that precedes para. 7.683.

<sup>552</sup> Panel Report, para. 7.632 (referring to Gains Tax Law (Panel Exhibits ARG-42 and PAN-4)).

<sup>553</sup> Panel Report, paras. 7.691-7.692 and 7.707.

<sup>554</sup> Panel Report, paras. 7.694-7.695 and 7.708.

<sup>555</sup> Panel Report, paras. 7.697 and 7.709.

<sup>556</sup> Panel Report, paras. 7.698, 7.700, and 7.710.

<sup>557</sup> Panel Report, paras. 7.597, 7.612, 7.614-7.615, and 7.646.

<sup>558</sup> Panel Report, para. 2.50.

<sup>559</sup> Panel Report, para. 7.347.

commercial purpose, have genuine activities, and have not been set up ... solely for the purpose of simulating transactions with Argentine taxpayers".<sup>560</sup>

6.233. Thus, despite our reservations with the Panel's analytical framework for its contribution analysis, pursuant to which it apparently set out to address each measure's contribution to attaining the general policy objectives of the relevant laws or regulations, we consider that the Panel in fact included an appropriate analysis of the contribution made by measures 1, 2, 3, 4, and 7 to securing compliance with specific rules, obligations, or requirements. For this reason, we disagree with Panama's contention that the Panel erred by basing its contribution analysis of measures 1, 2, 3, 4, and 7 merely on whether these measures contribute to attaining the objectives of the relevant laws or regulations.

6.234. In addition, we wish to sound a note of caution concerning the way in which the Panel expressed its findings with respect to each measure's contribution. Specifically, the Panel found, for each measure, that it "contributes to" the objective pursued. Yet, in an analysis of "necessity", a panel's duty is to assess, in a qualitative or quantitative manner, the extent of the measure's contribution to the end pursued, rather than merely ascertaining whether or not the measure makes any contribution. This is because "[t]he greater the contribution, the more easily a measure might be considered to be 'necessary'".<sup>561</sup> The same is true with respect to a measure's trade-restrictiveness – a panel must seek to assess the degree of a measure's trade-restrictiveness, rather than merely ascertaining whether or not the measure involves some restriction on trade. Without having undertaken such analyses, a panel would be unable to undertake a proper weighing and balancing of all of the relevant factors.

6.235. Panama raises a third cross-cutting allegation in connection with the Panel's assessment of the contribution made by measures 1 and 3<sup>562</sup>, and the Panel's assessment of the trade-restrictiveness of measures 1, 2, 3, and 4.<sup>563</sup> Panama contends that the Panel failed to consider that these measures affect not only simulated transactions between related parties, but also legitimate transactions that, according to Panama, are not at the core of Argentina's concern.<sup>564</sup> We have examined, and rejected, this argument above<sup>565</sup>, in the context of Panama's allegation concerning the Panel's assessment of the design of measures 1, 2, 3, and 4. For the same reasons, we reject it here.<sup>566</sup>

6.236. The fourth general argument raised by Panama concerns the Panel's statement that none of the measures entails a ban on trade in services.<sup>567</sup> Panama contends that the Panel failed to explain why the absence of a ban automatically implies that measures 1, 2, and 3 do not have a trade-restrictive effect. Panama argues that measures not containing a total prohibition may nonetheless have a significant trade-restrictive effect, and that any measure imposing a limiting condition on international trade should be considered as having a trade-restrictive effect.<sup>568</sup>

6.237. Argentina responds that the Panel did not find that, in the absence of a total ban on trade in services, a measure cannot be deemed to be trade restrictive.<sup>569</sup>

6.238. As the Appellate Body has explained, an import ban is, by design, the most trade-restrictive form that a measure could take.<sup>570</sup> Yet, as Panama correctly asserts, measures other than an import ban may also have restrictive effects on international trade, and such effects may be significant. We do not consider, however, that the Panel Report stands for the proposition that the absence of a ban automatically implies that a measure has no trade-restrictive effect. As summarized above, the Panel began its analysis by noting that none of the measures in question

<sup>560</sup> Panel Report, para. 7.711. See also paras. 7.702-7.703.

<sup>561</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

<sup>562</sup> Panama's appellant's submission, paras. 5.116.f and 5.137.c.

<sup>563</sup> Panama's appellant's submission, paras. 5.119, 5.123, 5.132, 5.140, and 5.145.b and c.

<sup>564</sup> Panama's appellant's submission, paras. 5.123, 5.132, 5.140, and 5.145.b and c.

<sup>565</sup> See paras. 6.213-6.214 above.

<sup>566</sup> As explained above, we understand Panama's allegation to be based on an assumption that is not supported by the Panel Report. Thus, our rejection of Panama's allegation is not on the basis of the legal standard to be applied under Article XIV(c) of the GATS.

<sup>567</sup> See Panel Report, paras. 7.718 and 7.725.

<sup>568</sup> Panama's appellant's submission, paras. 5.121-5.122, 5.134, and 5.141.

<sup>569</sup> Argentina's appellee's submission, para. 141.

<sup>570</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150.

entails a ban on trade in services in the sectors and modes of supply concerned.<sup>571</sup> The Panel then examined the structure, operation, and effect of each measure. Based on this assessment, the Panel reached separate findings on the trade-restrictiveness of each measure.<sup>572</sup> In particular, the Panel found that measure 1 could potentially deter trade with non-cooperative countries by imposing higher taxes.<sup>573</sup> For measures 2 and 3, the Panel considered that these do not have "a very high level of trade restriction".<sup>574</sup> Ultimately, the Panel concluded that measures 1, 2, and 3 have "a limited restrictive effect on international trade in services".<sup>575</sup> Thus, contrary to Panama's contention, the Panel took a more nuanced position with respect to the trade-restrictiveness of each measure, and did not consider that the absence of a ban automatically implies that the measure does not have a trade-restrictive effect.

#### **6.3.3.3.2 Remaining errors alleged by Panama**

6.239. We now turn to the multiple discrete errors that Panama alleges that the Panel made in assessing the contribution and trade-restrictiveness of measures 1, 3, 7, and 8.<sup>576</sup> As we did with respect to Panama's arguments concerning the Panel's assessment of the design of the measures, we observe that Panama offers little in the way of supporting argument for each such allegation. For the same reasons as those set out above<sup>577</sup>, we have decided not to examine further these allegations on appeal.

#### **6.3.3.3.3 The weighing and balancing of the relevant factors in the necessity analysis**

6.240. Finally, we turn to examine Panama's challenge to the Panel's weighing and balancing of the relevant factors in its "necessity" analysis.<sup>578</sup> We note that Panama makes no independent argument concerning the alleged errors in the Panel's weighing and balancing of the various elements to be considered in assessing "necessity". Instead, Panama's allegation, for each measure, is entirely dependent on Panama's arguments that the Panel erred in its assessment of the contribution and trade-restrictiveness of each measure. Thus, having rejected Panama's allegations in connection with the Panel's assessment of the contribution and trade-restrictiveness of each measure, we need not consider further Panama's assertion that the Panel also erred in weighing and balancing the relevant factors.

#### **6.3.4 Overall conclusion on Article XIV(c) of the GATS**

6.241. In the light of all of the above, we find that Panama has not demonstrated that the Panel erred in its application of Article XIV(c) of the GATS to measures 1, 2, 3, 4, 7, and 8 by failing to focus its analysis on the relevant aspects of the measures that gave rise to the findings of inconsistency with Article II:1 of the GATS. In addition, we find that Panama has not demonstrated that the Panel erred in its application of Article XIV(c) to measures 1, 2, 3, 4, 7, and 8 by finding, in paragraph 7.655 of its Report, that these measures are designed to secure compliance with the relevant Argentine laws or regulations under Article XIV(c). Finally, we find that Panama has not demonstrated that the Panel erred in its application of Article XIV(c) to measures 1, 2, 3, 4, 7, and 8 by finding, in paragraph 7.740 of its Report, that these measures are "necessary" to secure compliance with the relevant Argentine laws or regulations under Article XIV(c) of the GATS.

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<sup>571</sup> Panel Report, para. 7.718.

<sup>572</sup> Panel Report, paras. 7.719-7.725 and 7.727.

<sup>573</sup> Panel Report, paras. 7.719 and 7.724.

<sup>574</sup> Panel Report, paras. 7.720-7.721.

<sup>575</sup> Panel Report, para. 7.727.

<sup>576</sup> Panama's appellant's submission, paras. 5.116.c, 5.116.e, 5.137.b, 5.157, and 5.167.b.

<sup>577</sup> See para. 6.218 above.

<sup>578</sup> Panama's appellant's submission, paras. 5.126, 5.135, 5.142, 5.146, 5.158, and 5.172.

## 6.4 Paragraph 2(a) of the GATS Annex on Financial Services

### 6.4.1 Introduction

6.242. Panama requests us to reverse the Panel's finding that paragraph 2(a) of the GATS Annex on Financial Services "covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a)" of this Annex.<sup>579</sup>

6.243. We recall that, before the Panel, Argentina invoked paragraph 2(a) of the Annex on Financial Services with respect to two measures. Argentina argued that, in the event that the Panel were to find measure 5 (requirements relating to reinsurance services) and measure 6 (requirements for access to the Argentine capital market) to be inconsistent with Argentina's obligations under the GATS, both measures would be justified pursuant to paragraph 2(a) of the Annex on Financial Services.<sup>580</sup> Having found measures 5 and 6 to be inconsistent with Article II:1 of the GATS, the Panel proceeded to examine Argentina's defence under paragraph 2(a) of the Annex on Financial Services and, ultimately, concluded that measures 5 and 6 are not justified under paragraph 2(a).<sup>581</sup>

6.244. We briefly summarize the Panel's findings under paragraph 2(a). The Panel observed that, as a preliminary requirement, measures falling within the scope of paragraph 2(a) must be those "affecting the supply of financial services" pursuant to paragraph 1(a) of the Annex on Financial Services.<sup>582</sup> The Panel noted that Panama had proposed a further preliminary requirement, namely, "that the respondent must demonstrate that the measure [at issue] constitutes a 'domestic regulation'."<sup>583</sup> The Panel rejected Panama's argument in this respect and, in doing so, reached the interpretation with which Panama takes issue on appeal. Specifically, the Panel stated that "paragraph 2(a) of the Annex on Financial Services covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a) of [this] Annex and not only those measures that could be characterized as 'domestic regulations' within the meaning of Article VI of the GATS."<sup>584</sup>

6.245. Having found that measures 5 and 6 fall within the scope of paragraph 2(a)<sup>585</sup>, the Panel went on to examine whether these measures were taken "for prudential reasons" within the meaning of paragraph 2(a). The Panel divided its analysis into two steps. As a first step, the Panel found that the reasons identified by Argentina for adopting the measures were "prudential reasons".<sup>586</sup> As a second step, the Panel focused on the word "for" and found that a Member invoking paragraph 2(a) must demonstrate that there is "a rational relationship of cause and effect" between the measure that the Member seeks to justify under paragraph 2(a) and the prudential reason provided for taking it.<sup>587</sup> The Panel found that measures 5 and 6 do not have such a rational relationship with the prudential reasons identified by Argentina and, accordingly, that these measures were not taken "for" prudential reasons within the meaning of paragraph 2(a).<sup>588</sup> Upon making these findings, the Panel did not go on to examine, under the second sentence of paragraph 2(a), whether the measures were not being used as a means of avoiding Argentina's commitments or obligations under the GATS.<sup>589</sup> On this basis, the Panel concluded that measures 5 and 6 "are not covered by paragraph 2(a) of the Annex on Financial Services".<sup>590</sup> These findings and conclusion of the Panel are not subject to appeal.

6.246. This is the first dispute in which a WTO Member has invoked paragraph 2(a) of the Annex on Financial Services. As the Panel noted, paragraph 2(a) contains three requirements that must

<sup>579</sup> Panama's appellant's submission, para. 6.33.a (quoting Panel Report, para. 7.847).

<sup>580</sup> Panel Report, para. 7.781.

<sup>581</sup> Panel Report, para. 7.949.

<sup>582</sup> Panel Report, para. 7.825.

<sup>583</sup> Panel Report, para. 7.826 (quoting Panama's second written submission to the Panel, para. 2.651).

<sup>584</sup> Panel Report, para. 7.847.

<sup>585</sup> Panel Report, para. 7.858.

<sup>586</sup> Panel Report, paras. 7.904 and 7.937. See also para. 7.946.

<sup>587</sup> The Panel reasoned that "[a] central aspect of this rational relationship of cause and effect is the adequacy of the measure to the prudential reason, that is, whether the measure, through its design, structure and architecture, contributes to achieving the desired effect." (Panel Report, para. 7.891. See also para. 7.889)

<sup>588</sup> Panel Report, paras. 7.919-7.920 and 7.944. See also paras. 7.947-7.949.

<sup>589</sup> Panel Report, para. 7.945.

<sup>590</sup> Panel Report, para. 7.949.



be fulfilled for a measure to be justified under this provision. First, there is the threshold, or preliminary, question of what types of measures may potentially fall within the scope of paragraph 2(a). Second, a measure must have been taken "for prudential reasons". Finally, under the second sentence of paragraph 2(a), the measure "shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement". Only when a measure falls within the scope of paragraph 2(a) will there be a need to evaluate whether it was taken "for prudential reasons" and whether it fulfils the requirement in the second sentence of paragraph 2(a).<sup>591</sup> We note that Panama's appeal is limited to the threshold question identified above. In examining Panama's appeal, we begin with an overview of the participants' claims and arguments on appeal. In this context, we will refer to paragraph 2(a) of the Annex on Financial Services as either the "prudential exception" or the "prudential carve-out", depending on the terminology chosen by the participants and the Panel.<sup>592</sup> We will then set out our interpretation of the scope of paragraph 2(a), and our examination of Panama's claims and arguments on appeal.

#### 6.4.2 Claims and arguments on appeal

6.247. Panama requests us to reverse the Panel's finding that paragraph 2(a) of the Annex on Financial Services "covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a) of the ... Annex".<sup>593</sup> Panama alleges that the Panel failed to give meaning to the term "domestic regulation" in the title of the prudential exception, and in doing so, the Panel failed to interpret the prudential exception correctly.<sup>594</sup> For Panama, the reference to "domestic regulation" in the title of the prudential exception is "key" because it delimits the scope of the provision, or, in other words, it defines the type of measures that may be covered by the provision.<sup>595</sup> Panama considers that market access restrictions are dealt with in Article XVI of the GATS, whereas domestic regulations are addressed "predominantly" in Article VI of the GATS<sup>596</sup>, and only the latter type of measures could potentially be justified under the prudential exception.<sup>597</sup>

6.248. Panama alleges that the Panel erred in the identification of the interpretive issue before it. Specifically, instead of analysing the meaning of the title of paragraph 2(a), the Panel wrongly considered that it had to decide whether the prudential exception covers only measures that constitute a "domestic regulation" within the meaning of Article VI of the GATS.<sup>598</sup> Panama further contends that, in analysing the introductory clause of paragraph 2(a) – "Notwithstanding any other provisions of the Agreement" – the Panel confused the *type of measures* covered by the prudential exception with the *provisions of the GATS* that can be violated for prudential reasons.<sup>599</sup> Panama adds that the Panel misunderstood Panama's position with respect to Article VI by stating that, under Panama's interpretation, the prudential exception would cover only violations of that provision. Panama reiterates that, under its interpretation, the prudential exception could cover inconsistencies with any provision of the GATS, as long as the prudential measure taken was a "domestic regulation".<sup>600</sup>

6.249. In response, Argentina observes that Panama does not seem to take the position that measures 5 and 6 are *not* measures of general application affecting trade in services of the kind that would qualify as a domestic regulation under Article VI of the GATS. Therefore, Argentina contends that Panama's claim of error does not appear to have any consequence for the resolution of this dispute.<sup>601</sup> Argentina further considers that Panama's proposition that the title of the prudential carve-out exhaustively defines the types of measures within its purview is untenable. In Argentina's view, the text of paragraph 2(a) indicates that the drafters of the GATS established no

<sup>591</sup> See Panel Report, paras. 7.818-7.825.

<sup>592</sup> The participants refer to paragraph 2(a) of the Annex on Financial Services as either the "prudential exception" or the "prudential carve-out". In its Report, the Panel used the term "prudential exception". When referring to the participants' submissions and the Panel's findings, we use the terminology that they employed, without adopting either of the terminologies ourselves.

<sup>593</sup> Panama's appellant's submission, para. 6.33.a (quoting Panel Report, para. 7.847).

<sup>594</sup> Panama's appellant's submission, para. 6.16.

<sup>595</sup> Panama's appellant's submission, para. 6.17.

<sup>596</sup> Panama's appellant's submission, para. 6.27.

<sup>597</sup> Panama's appellant's submission, paras. 6.27-6.28.

<sup>598</sup> Panama's appellant's submission, para. 6.21.

<sup>599</sup> Panama's appellant's submission, para. 6.22.

<sup>600</sup> Panama's appellant's submission, paras. 6.25-6.26.

<sup>601</sup> Argentina's appellee's submission, para. 152.

limitations on the types of measures covered by the exception other than the prudential rationale that leads to their adoption.<sup>602</sup>

6.250. Argentina further maintains that Panama's attempt to define "domestic regulations", as opposed to market access measures under Article XVI of the GATS, is contradicted by the text of the provision and would lead to "absurd" results.<sup>603</sup> According to Argentina, Panama's interpretation would exclude from the scope of the exception, for example, market access limitations that may clearly serve a prudential purpose, such as measures falling under Article XVI:2(e) of the GATS.<sup>604</sup> Argentina considers that Panama's interpretation would improperly upset the carefully negotiated balance of rights and obligations by narrowing the scope of application of the prudential carve-out.<sup>605</sup>

#### 6.4.3 The scope of paragraph 2(a) of the Annex on Financial Services

6.251. As noted above, Panama's appeal is limited to the threshold question of what types of measures may potentially fall within the scope of paragraph 2(a) of the Annex on Financial Services. Panama's appeal does not concern the interpretation of the other requirements of paragraph 2(a) and, therefore, we do not address them in our analysis.

6.252. Paragraph 2(a) of the Annex on Financial Services provides:

##### 2. *Domestic Regulation*

- (a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

6.253. We note that the word "measures" appears in both sentences of this provision. On its face, neither sentence identifies a particular type of measure that may fall within the scope of paragraph 2(a). Furthermore, we note that paragraph 1(a) of the Annex on Financial Services establishes the scope of all provisions in this Annex, and, as a result, it assists in establishing the scope of the measures that are covered under paragraph 2(a). Paragraph 1(a) stipulates that the Annex "applies to measures affecting the supply of financial services". The use of the phrase "measures affecting the supply of financial services" in paragraph 1(a) supports the view that paragraph 2(a) does not impose specific restrictions on the types of measures falling within its scope.

6.254. The introductory clause "[n]otwithstanding any other provisions of the Agreement" in the first sentence of paragraph 2(a) is also relevant to our understanding of the scope of measures covered by this provision. The ordinary meaning of the term "notwithstanding", on the basis of its relevant dictionary definition, is "in spite of, without regard to or prevention by".<sup>606</sup> This means that, under paragraph 2(a), a Member shall not be prevented from taking measures for prudential reasons despite its obligations under "any other provisions of the Agreement", provided that such measures fulfil all of the requirements of paragraph 2(a).<sup>607</sup> This understanding of the meaning of

<sup>602</sup> Argentina's appellee's submission, para. 153.

<sup>603</sup> Argentina's appellee's submission, paras. 154-155.

<sup>604</sup> Argentina's appellee's submission, para. 155. Article XVI:2(e) applies to "measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service".

<sup>605</sup> Argentina's appellee's submission, para. 155.

<sup>606</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1952.

<sup>607</sup> We note that the Appellate Body interpreted a similar phrase in the same way in *EC – Tariff Preferences*, finding that the phrase "[n]otwithstanding the provisions of Article I of the General Agreement" "permits Members to provide 'differential and more favourable treatment' to developing countries in spite of the [most-favoured-nation obligation] of Article I:1" of the GATT 1994. (Appellate Body Report, *EC – Tariff Preferences*, para. 90) The Appellate Body also noted that paragraph 1 of the Enabling Clause "thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause". (Ibid.)

the introductory clause of paragraph 2(a) is confirmed by the second sentence of paragraph 2(a). Specifically, the second sentence states that "[w]here such measures do not conform with *the provisions of the Agreement*, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement."<sup>608</sup> The reference to "the provisions of the Agreement" suggests that this sentence also relates to inconsistencies with *any other provision* of the GATS.

6.255. The fact that paragraph 2(a) covers violations of obligations under "*any other provisions* of the Agreement" means that it could be invoked to justify inconsistencies with all of a Member's obligations under the GATS.<sup>609</sup> These include, for example, a Member's most-favoured-nation treatment obligation under Article II, market access commitments under Article XVI, or national treatment obligation under Article XVII. This indicates that, for example, measures which are of the types listed in Article XVI:2, and which impose market access restrictions for prudential reasons, could potentially fall within the scope of paragraph 2(a). The type of measure taken by a Member (such as market access restrictions) and the provision of the GATS contravened by such measure (such as Article XVI) are distinct, but related, concepts. For this reason, we do not agree with Panama that the permission granted by the introductory clause of paragraph 2(a) to depart from the obligations set out in "any provisions of" the GATS "has no implication on the *type of measures* that may be inconsistent with any provision of the GATS and also covered by the prudential exception".<sup>610</sup>

6.256. In this respect, we also note Panama's argument that "[m]arket access restrictions are dealt with in Article XVI of the GATS, whereas domestic regulations are addressed *predominantly* in Article VI of the GATS", and that "measures will either fall within the category of 'market access' limitation or 'domestic regulation'".<sup>611</sup> According to Panama, "measures justifiable for prudential reasons must take the form of 'domestic regulations' ... as opposed, for example, to 'market access' barriers".<sup>612</sup> In our view, however, by excluding market access restrictions from the scope of paragraph 2(a), Panama's interpretation effectively means that paragraph 2(a) *cannot* be invoked to justify inconsistencies with Article XVI. Such exclusion is contrary to the introductory clause of paragraph 2(a), which states "[n]otwithstanding *any other provisions*" of the GATS.<sup>613</sup>

6.257. With respect to the title of paragraph 2(a) of the Annex on Financial Services, "Domestic Regulation", we note that the title forms part of the text of paragraph 2. In our view, the meaning and function to be attributed to the title should be consistent with a proper interpretation of paragraph 2(a) itself. In this respect, we note that the Appellate Body has, in prior cases, referred to the title of a provision to reinforce its interpretation of the text of that provision.<sup>614</sup> Neither the Annex on Financial Services nor the GATS itself contains a definition of the term "domestic regulation".

6.258. Nonetheless, the context provided by Article VI of the GATS, which is also entitled "Domestic Regulation", may shed some light on the meaning and function of the title of paragraph 2(a). The provisions of Article VI refer to a variety of measures, ranging from "measures of general application affecting trade in services" in Article VI:1, "administrative decisions affecting trade in services" in Article VI:2, and "authorization ... for the supply of a service" in Article VI:3, to licensing requirements, qualification requirements and procedures, and technical standards in Articles VI:4 and VI:5(a), and "adequate procedures to verify the

<sup>608</sup> Emphasis added.

<sup>609</sup> In interpreting the phrase "[n]othing in this Agreement" in Article XX of the GATT 1994, the Appellate Body in *US – Gasoline* considered that the exceptions listed in Article XX "thus relate to *all of the obligations* under the *General Agreement*: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well." (Appellate Body Report, *US – Gasoline*, p. 24, DSR 1996:1, p. 22 (emphasis added))

<sup>610</sup> Panama's appellant's submission, para. 6.23. (italics original; underlining added)

<sup>611</sup> Panama's appellant's submission, para. 6.27. (emphasis added)

<sup>612</sup> Panama's appellant's submission, para. 6.26.

<sup>613</sup> Emphasis added.

<sup>614</sup> E.g. in *US – Carbon Steel*, after reviewing the text of Articles 11.9 and 21.3 of the Agreement on Subsidies and Countervailing Measures and the context contained in the eleven paragraphs of Article 11 of that Agreement, the Appellate Body noted that the various paragraphs of Article 11 "set forth rules of a mainly procedural and evidentiary nature" and that "[a]ll of them relate to the authorities' initiation and conduct of a countervailing duty *investigation*." The Appellate Body noted that this understanding is consistent with "the overall title of Article 11 – '*Initiation and Subsequent Investigation*'." (Appellate Body Report, *US – Carbon Steel*, para. 67 (emphasis original))

competence of professionals of any other Member" in Article VI:6. In our view, the broad scope of measures potentially covered by Article VI indicates that its title, "Domestic Regulation", should also be construed in a broad sense and should not serve the function of restricting the types of measures falling under that provision. Similarly, the title of paragraph 2(a), like that of Article VI, in our view, does not serve such a function.

6.259. Additionally, as an annex to the GATS, the Annex on Financial Services forms "an integral part of [the GATS]" pursuant to Article XXIX thereof, and, as a result, the definitions provided in Article XXVIII of the GATS also provide useful context for interpreting the Annex. In particular, according to Article XXVIII(a), for the purpose of the GATS, the word "measure" means "*any* measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or *any other form*".<sup>615</sup> The use of the word "any" in the terms "*any* measure" and "*any other form*" suggests that Article XXVIII(a) contains no *a priori* exclusion of the type or form that a measure may take under the GATS, including under the Annex on Financial Services. Thus, the text of paragraph 2(a) of the Annex on Financial Services, read in the light of the scope and definition of the term "measure" in both paragraph 1(a) of the Annex and Article XXVIII(a) of the GATS, indicates no restrictions on the type or form of a "measure" falling under paragraph 2(a) of the Annex.

6.260. Turning to the object and purpose of the GATS, we note that both the third and fourth recitals of the preamble of the GATS refer to Members' "national policy objectives". The third recital refers to the desire "for the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at ... securing an overall balance of rights and obligations, while giving due respect to national policy objectives". The fourth recital recognizes "the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives". The "national policy objectives" referred to in the preamble could be pursued through various means, including through measures taken pursuant to paragraph 2(a) of the Annex on Financial Services, provided that the measures "affect[] the supply of financial services", are taken "for prudential reasons", and are not "used as a means of avoiding" the Member's GATS commitments or obligations. An interpretation limiting the types of measures that could potentially fall under paragraph 2(a) would not be in consonance with the balance of rights and obligations that is expressly recognized in the preamble of the GATS.

6.261. As our analysis above indicates<sup>616</sup>, the meaning and function to be attributed to the title should be consistent with a proper interpretation of paragraph 2(a) itself. An interpretation of paragraph 2(a) on the basis of its text, read in the light of its context and the object and purpose of the GATS, indicates that paragraph 2(a) does not impose specific restrictions on the types of "measures affecting the supply of financial services" falling within its scope, provided that they also fulfil the other requirements of paragraph 2(a). We therefore disagree with Panama's argument that the title of paragraph 2(a) "delimits the scope of this provision" or "defines the type of measures that may be covered by the prudential exception".<sup>617</sup>

6.262. On this basis, we consider that the Panel's interpretation, that paragraph 2(a) of the Annex on Financial Services "covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a)" of the Annex<sup>618</sup>, comports with our interpretation of paragraph 2(a). We note, however, that Panama alleges certain errors regarding discrete aspects of the Panel's analysis in reaching this interpretation. We turn to address these alleged errors in the next section.

#### **6.4.4 Specific errors alleged by Panama in the Panel's interpretation of paragraph 2(a) of the Annex on Financial Services**

6.263. Panama claims on appeal that the Panel failed to identify correctly the interpretive issue before it.<sup>619</sup> Specifically, Panama contends that the Panel appears to have erroneously believed that it had to decide whether paragraph 2(a) of the Annex on Financial Services covers only

<sup>615</sup> Emphasis added.

<sup>616</sup> See *supra*, para. 6.257.

<sup>617</sup> Panama's appellant's submission, para. 6.17.

<sup>618</sup> Panama's appellant's submission, para. 6.33.a (quoting Panel Report, para. 7.847).

<sup>619</sup> Panama's appellant's submission, para. 6.21. See also paras. 6.16. and 6.31.

measures that constitute a "domestic regulation" within the meaning of Article VI of the GATS.<sup>620</sup> In order to determine whether the Panel erred in identifying the interpretive issue before it in this dispute, we consider it useful to begin by recalling the arguments that Panama submitted before the Panel.

6.264. Panama argued before the Panel that, in order to invoke paragraph 2(a), "a responding Member must prove that the measure in question qualifies as a 'domestic regulation'."<sup>621</sup> To this end, Panama considered that it must be proved that the measure is "a supplier's technical standard, qualification or licence, such as those 'relating to, for instance, the quality of the service supplied or the ability of the supplier to supply the service'".<sup>622</sup> In support of this contention, Panama referred to the title of paragraph 2 of the Annex on Financial Services, "Domestic Regulation", and submitted that this title informs the interpretation of paragraph 2(a) "by confining it to the type of measures envisaged in Article VI of the GATS, also entitled 'Domestic Regulation'".<sup>623</sup> On the basis of these arguments, the Panel considered that Panama's arguments confronted it with two separate issues:

[O]n the one hand, whether the reference to "domestic regulation" in the heading of paragraph 2 of the Annex on Financial Services has the same significance as the similar reference in the title of Article VI of the GATS; and, on the other, whether the concept of "domestic regulation", referred to in Article VI of the GATS and also – according to Panama – in paragraph 2 of the Annex on Financial Services, covers only measures relating to qualifications, technical standards and licensing.<sup>624</sup>

6.265. The Panel began with the second issue identified above. The Panel found that "[a] careful reading of Article VI of the GATS reveals that measures relating to qualifications, technical standards and licensing are mentioned only in paragraphs 4 and 5 of Article VI"<sup>625</sup>, and that Article VI refers to other "domestic regulations" in the other paragraphs of that Article. The Panel therefore considered that "the *universe* of 'domestic regulation' is, for Article VI of the GATS itself, broader than that relating to technical standards, licensing and qualifications."<sup>626</sup> The Panel's view comports with our analysis above that Article VI of the GATS refers to a broad scope of measures, which includes "measures of general application affecting trade in services" in Article VI:1, as well as a variety of measures described in the other paragraphs of Article VI.<sup>627</sup> Indeed, despite what it argued before the Panel<sup>628</sup>, Panama states on appeal that it does not take issue with the Panel's finding that the universe of domestic regulations is broader than the qualification procedures, technical standards, and licensing requirements listed in Articles VI:4 and VI:5 of the GATS.<sup>629</sup>

6.266. The Panel proceeded to analyse the first issue identified in paragraph 6.264 above, namely, "whether the reference to 'domestic regulation' in the heading of paragraph 2 of the Annex on Financial Services has the same significance as the similar reference in the title of Article VI of the GATS".<sup>630</sup> The Panel rephrased this issue as "whether paragraph 2(a) of the Annex on Financial Services covers only measures that should be regarded as 'domestic regulation' within the meaning of Article VI of the GATS".<sup>631</sup> Referring to this statement of the Panel, Panama contends that the Panel "appears to have erroneously believed that it had to decide whether the prudential exception covers only 'domestic regulations' *within the meaning of Article VI of the GATS*".<sup>632</sup>

6.267. As indicated by our review of the arguments that Panama submitted before the Panel, the Panel identified the issue above in response to Panama's contention that the title of

<sup>620</sup> Panama's appellant's submission, para. 6.21.

<sup>621</sup> Panel Report, para. 7.828 (quoting Panama's second written submission to the Panel, para. 2.651).

<sup>622</sup> Panel Report, para. 7.828 (quoting Panama's second written submission to the Panel, para. 2.651).

<sup>623</sup> Panel Report, para. 7.828 (referring to Panama's second written submission to the Panel, paras. 2.640 and 2.642-2.643).

<sup>624</sup> Panel Report, para. 7.836.

<sup>625</sup> Panel Report, para. 7.837.

<sup>626</sup> Panel Report, para. 7.838. (emphasis original)

<sup>627</sup> See *supra*, para. 6.258.

<sup>628</sup> See *supra*, para. 6.264.

<sup>629</sup> Panama's appellant's submission, para. 6.19 (referring to Panel Report, para. 7.838).

<sup>630</sup> Panel Report, para. 7.836.

<sup>631</sup> Panel Report, para. 7.839.

<sup>632</sup> Panama's appellant's submission, para. 6.21. (emphasis original)

paragraph 2(a) of the Annex on Financial Services, "Domestic Regulation", informs the scope of paragraph 2(a) "*by confining it to the type of measures envisaged in Article VI of the GATS*, also entitled 'Domestic Regulation'".<sup>633</sup> While the Panel rephrased the issue before it, its two formulations of the issue, as quoted in paragraph 6.266 above, concern the same substantive point raised by Panama, that is, whether the scope of paragraph 2(a) of the Annex on Financial Services is limited to the types of measures envisaged in Article VI of the GATS, given that both provisions are entitled "Domestic Regulation". Thus, contrary to Panama's argument, the Panel did not erroneously identify the issue before it; rather, the Panel tailored its analysis to the arguments that Panama had raised concerning the scope of paragraph 2(a) of the Annex on Financial Services.

6.268. Having identified the issue in the light of the arguments before it, the Panel went on to analyse the text of paragraph 2(a). The Panel considered that, if it were to interpret paragraph 2(a) as referring solely to measures that constitute a domestic regulation under Article VI of the GATS, as Panama had argued, it could render certain parts of paragraph 2(a) inutile. Specifically, the explicit reference to "[n]otwithstanding any other provisions of the Agreement" in the introductory clause of paragraph 2(a) would be reduced merely to "[n]otwithstanding Article VI of the Agreement".<sup>634</sup> In the same vein, the Panel expressed the concern that Panama's interpretation "would drastically reduce the scope of the prudential exception, since it would provide an escape valve only for those 'domestic regulations' which do not conform with Article VI of the GATS and not for those measures which may be covered by other provisions of the GATS (such as those relating to market access, national treatment or MFN treatment)".<sup>635</sup>

6.269. Panama contends that the Panel confused the *scope of violations* that paragraph 2(a) could potentially justify, which is the subject of the introductory clause of paragraph 2(a), with the *types of measures* that could fall under paragraph 2(a).<sup>636</sup> Further, noting the concern expressed by the Panel that Panama's interpretation would "drastically reduce" the scope of paragraph 2(a)<sup>637</sup>, Panama submits that the Panel misunderstood its position with regard to Article VI of the GATS. According to Panama, it did not argue that paragraph 2(a) covers only *violations of Article VI*; rather, its argument "was always that the prudential exception could cover inconsistencies with any provision of the GATS, as long as the prudential measure taken was a 'domestic regulation'", as opposed to, for example, a market access restriction.<sup>638</sup>

6.270. We recall Panama's argument before the Panel that the title of paragraph 2(a) informs the interpretation of this provision by confining it to the type of measures envisaged in Article VI of the GATS, which is also entitled "Domestic Regulation".<sup>639</sup> Thus, it appears that Panama did not maintain before the Panel that the measures falling within the scope of paragraph 2(a) must be *in violation of Article VI of the GATS*. Rather, its position before the Panel was that such measures must be measures of the type constituting "domestic regulation" within the meaning of Article VI, irrespective of which provision of the GATS it violates.

6.271. Nonetheless, we recall our analysis above that the type of measure taken by a Member (such as market access restrictions) and the provision violated by such measure (such as Article XVI) are distinct, but *related*, concepts.<sup>640</sup> We further recall Panama's argument that paragraph 2(a) covers only measures that qualify as a "domestic regulation", as opposed to, for example, a market access restriction.<sup>641</sup> As noted above<sup>642</sup>, however, by excluding market access restrictions from the scope of paragraph 2(a), Panama's interpretation effectively means that paragraph 2(a) cannot be invoked to justify inconsistencies with Article XVI, contrary to the

<sup>633</sup> Panel Report, para. 7.828 (referring to Panama's second written submission to the Panel, paras. 2.640 and 2.642-2.643). (emphasis added)

<sup>634</sup> Panel Report, para. 7.841.

<sup>635</sup> Panel Report, para. 7.848.

<sup>636</sup> Panama's appellant's submission, para. 6.22.

<sup>637</sup> Panel Report, para. 7.848.

<sup>638</sup> Panama's appellant's submission, para. 6.26 (referring to Panama's second written submission to the Panel, para. 2.649).

<sup>639</sup> Panel Report, para. 7.828 (referring to Panama's second written submission to the Panel, paras. 2.640 and 2.642-2.643).

<sup>640</sup> See *supra*, para. 6.255.

<sup>641</sup> Panama's appellant's submission, para. 6.26. See also *supra*, paras. 6.256 and 6.269.

<sup>642</sup> See *supra*, para. 6.256.

introductory clause of paragraph 2(a). Therefore, even if, as Panama alleges, the Panel may have failed to appreciate Panama's position regarding Article VI, the Panel did not err in ultimately rejecting Panama's interpretation of paragraph 2(a) of the Annex on Financial Services.

#### 6.4.5 Conclusion

6.272. We have found that an interpretation of paragraph 2(a) of the Annex on Financial Services on the basis of its text, read in the light of its context and the object and purpose of the GATS, supports the view that paragraph 2(a) does not impose specific restrictions on the types of "measures affecting the supply of financial services" that fall within its scope, provided that such measures fulfil all of the requirements of paragraph 2(a). We have also reviewed, and disagreed with, Panama's arguments concerning the alleged errors in the Panel's interpretation of paragraph 2(a). In the light of the above, we find that the Panel did not err in finding, in paragraph 7.847 of its Report, that "paragraph 2(a) of the Annex on Financial Services covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a)" of the Annex.

### 7 FINDINGS AND CONCLUSIONS

7.1. For the reasons set out in this Report, the Appellate Body:

- a. with respect to Article II:1 of the GATS:
  - i. finds that the Panel erred in its analysis of the term "like services and service suppliers", and therefore reverses the Panel's finding, in paragraph 7.186 of the Panel Report, that services and service suppliers of cooperative countries are like services and service suppliers of non-cooperative countries;
  - ii. finds that the Panel erred in finding, in paragraph 7.235 of the Panel Report, that an assessment of "treatment no less favourable" in this dispute "has to take into account regulatory aspects relating to services and service suppliers that may affect the conditions of competition; in particular, whether Argentina is able to have access to tax information on foreign suppliers"; and
  - iii. reverses the Panel's conclusion, in paragraphs 7.367 and 8.2.b of the Panel Report, that measures 1 to 8 are inconsistent with Article II:1 of the GATS;
- b. with respect to Article XVII of the GATS:
  - i. finds that the Panel erred in its analysis of the term "like services and service suppliers", and therefore reverses the Panel's finding, in paragraph 7.489 of the Panel Report, that Argentine services and service suppliers are like services and service suppliers of non-cooperative countries;
  - ii. finds that the Panel erred in finding, in paragraph 7.494 of the Panel Report, that an assessment of "treatment no less favourable" under Article XVII of the GATS in this dispute "has to take into account regulatory aspects concerning the services and service suppliers that might affect the conditions of competition ... in particular ... the possibility for Argentina to access tax information on the relevant service suppliers"; and
  - iii. reverses the Panel's conclusion, in paragraphs 7.525 and 8.2.c of the Panel Report, that measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS;
- c. with respect to the Panel's application of Article XIV(c) of the GATS to measures 1, 2, 3, 4, 7, and 8:
  - i. finds that Panama has not demonstrated that the Panel failed to focus its analysis on the relevant aspects of the measures that gave rise to the findings of inconsistency with Article II:1 of the GATS;

- ii. finds that Panama has not demonstrated that the Panel erred in finding, in paragraph 7.655 of the Panel Report, that these measures are designed to secure compliance with the relevant Argentine laws or regulations; and
- iii. finds that Panama has not demonstrated that the Panel erred in finding, in paragraph 7.740 of the Panel Report, that these measures are "necessary" to secure compliance with the relevant Argentine laws or regulations; and
- d. with respect to paragraph 2(a) of the Annex on Financial Services, finds that the Panel did not err in finding, in paragraph 7.847 of the Panel Report, that paragraph 2(a) of the Annex on Financial Services "covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a)" of the Annex.

7.2. Given that we have reversed the Panel's conclusion that measures 1 to 8 are inconsistent with the GATS and have not ruled in this Report on the consistency of these measures with Argentina's obligations under the covered agreements, we make no recommendation pursuant to Article 19.1 of the DSU.

Signed in the original in Geneva this 16th day of March 2016 by:



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Seung Wha Chang  
Presiding Member



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Ujal Singh Bhatia  
Member



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Yuejiao Zhang  
Member

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## APPENDIX

The distinction between cooperative and non-cooperative countries is established in Decree No. 589/2013. Article 1 of Decree No. 589/2013 is set out below in relevant part<sup>1</sup>:

**Article 1 – ...**

Countries, dominions, jurisdictions, territories, associate States or special tax regimes which have signed with the Government of the ARGENTINE REPUBLIC an agreement on exchange of tax information or a convention for the avoidance of international double taxation with a broad information exchange clause shall be considered cooperative for tax transparency purposes, provided that there is an effective exchange of information.

This status shall lapse in cases where the signed agreement or convention is denounced or becomes inoperative for any reason of nullity or termination governing international agreements or if it is found that there is a lack of effective exchange of information.

A country may also be recognized as cooperative for tax transparency purposes if the government concerned has initiated the required negotiations with the Government of the ARGENTINE REPUBLIC with a view to signing an agreement on exchange of tax information or a convention for the avoidance of international double taxation with a broad information exchange clause.

The agreements and conventions referred to in this Article shall as far as possible comply with the international standards on transparency adopted by the Global Forum on Transparency and Exchange of Information for Tax Purposes so that by virtue of the application of their domestic rules, the respective countries, dominions, jurisdictions, territories, associate States or special tax regimes with which such agreements or conventions have been signed may not invoke banking, stock market or any other form of secrecy in response to specific requests for information from the ARGENTINE REPUBLIC.

The FEDERAL PUBLIC REVENUE ADMINISTRATION, an autonomous body within the MINISTRY OF THE ECONOMY AND PUBLIC FINANCE, shall establish the criteria for determining whether or not there is effective exchange of information and the necessary requirements for initiating negotiations on the signing of the aforementioned agreements and conventions.

**Measure 1** is applied pursuant to Article 93(c) of the Gains Tax Law, which is set out below in relevant part<sup>2</sup>:

When beneficiaries abroad are paid amounts under the headings indicated below, a net gain shall be presumed against any evidence to the contrary:

...

(c) Interest or remuneration paid on credits, loans or placements of funds of any origin or type obtained abroad:

1. Forty-three per cent (43%) when the borrower or loan or fund recipient is an entity governed by Law No. 21.526 or if the transactions involve the financing of imports of depreciable movables – except automobiles – provided by the suppliers.

The presumption established in this section shall also apply if the borrower is one of the other persons covered by Article 49 of this Law, a natural person or undivided estate, provided that the creditor is a banking or financial entity based in a jurisdiction not considered to have no or low taxes<sup>3</sup> in accordance with the rules in this Law and its implementing regulations or in a jurisdiction that has signed an information exchange agreement with the Argentine Republic and also, by application of its domestic rules, may not involve banking, stock market or any other form of secrecy in response to request for information from the competent tax authority. The financial entities covered by this paragraph are those subject to supervision by the respective central bank or equivalent institution.

<sup>1</sup> Panel Report, para. 2.5 (quoting Decree No. 589/2013 (Panel Exhibits ARG-35 and PAN-3)).

<sup>2</sup> Panel Report, para. 2.13 (quoting Gains Tax Law (Panel Exhibits ARG-42 and PAN-4)). (fn omitted)

<sup>3</sup> "Countries with low or no taxes" should be understood to mean non-cooperative countries. (See fn 57 on p. 16 of this Report)

The same treatment shall apply if the interest or remuneration consists of debt bonds presented in countries with which there is a reciprocal agreement on protecting investment, provided that their registration in the Argentine Republic, in accordance with the provisions of Law No. 23.576 and the amendments thereto, takes place within two (2) years following their issuance.

2. One hundred per cent (100%) when the borrower or loan or fund recipient is a person covered by Article 49 of this Law, excluding the entities governed by Law No. 21.526 and amendments thereto, a natural person or undivided estate, and the creditor does not meet the condition and requirement specified in the second paragraph of the preceding section.

**Measure 2** is applied pursuant to the unnumbered provision added after Article 18 of the Law on Tax Procedure, which is set out below<sup>4</sup>:

In the case of funds from countries with low or no taxes – as indicated in Article 15 of the Gains Tax Law (consolidated text of 1997 and amendments thereto) – irrespective of their nature or purpose or the type of transaction involved, it shall be considered that such funds constitute unjustified increases in wealth for the local borrower or recipient.

Unjustified increases in wealth referred to in the preceding paragraph amounting to over TEN PER CENT (10%) in the form of income disposed of or consumed as non-deductible expenditure, represent net gains during the financial year in which they occur, for the purposes of determining the gains tax and, where applicable, the basis for estimating the taxable transactions omitted from the respective marketing year in terms of value added and internal taxes.

Notwithstanding the provisions in the preceding paragraphs, the Federal Public Revenue Administration shall consider as justified such entries of funds as are conclusively proven by the interested party to have originated from activities actually carried out by the taxpayer or by a third party in those countries or from placements of duly declared funds.

**Measure 3** is applied pursuant to Article 8, fifth paragraph, and Article 15, second paragraph, of the Gains Tax Law, which are set out below<sup>5</sup>:

#### Article 8

Operations covered by this article that are conducted with natural or legal persons domiciled, incorporated or located in [non-cooperative countries] shall not be considered as consistent with normal arm's-length market practices or prices, in which case the rules of the aforementioned Article 15 shall apply.

#### Article 15

Where stable institutions domiciled or located in the country or companies covered by subparagraphs (a) and (b) and trust funds referred to in the subparagraph added after subparagraph (d) of the first paragraph of Article 49, respectively, conduct transactions with natural or legal persons domiciled, incorporated or located in [non-cooperative countries], as referred to exhaustively in the regulations, such transactions shall not be considered to be in line with normal arm's-length market practices or prices.

**Measure 4** is applied pursuant to the last paragraph of Article 18 of the Gains Tax Law, which is set out below<sup>6</sup>:

In the case of outlays by local companies which result in profits of Argentine source for foreign persons or entities with which these companies are related or for persons or entities located, incorporated, based or domiciled in jurisdictions with low or no taxes, the allocation to the tax balance may only be made at the time of payment or in any of the cases covered by the sixth paragraph of this Article or, in their absence, if one of the situations indicated arises within the period allowed for submission of the sworn declaration that the respective outlay has been accrued.

<sup>4</sup> Panel Report, para. 2.17 (quoting Law on Tax Procedure (Panel Exhibits ARG-45 and PAN-9)). (fn omitted)

<sup>5</sup> Panel Report, para. 2.19 (quoting Gains Tax Law (Panel Exhibits ARG-42 and PAN-4)). (fn omitted)

<sup>6</sup> Panel Report, para. 2.21 (quoting Gains Tax Law (Panel Exhibits ARG-42 and PAN-4)). (fn omitted)

**Measure 5** is applied pursuant to points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011, as amended by Articles 1 and 2 of SSN Resolution No. 38.284/2014, which are set out below<sup>7</sup>:

ARTICLE 1: Replace point 18 of ANNEX I to SSN Resolution No. 35.615/2011 by the following:

"Branches of foreign companies must prove that the parent company:

(a) Has been incorporated and registered in countries, dominions, jurisdictions, territories or associate States considered 'cooperative for tax transparency purposes', in accordance with the provisions of Decree No. 589/2013 and supplementary regulations.

If the parent company of the branch of the foreign company has not been incorporated and registered in accordance with the terms of the preceding paragraph, it must prove that it is subject to the control and supervision of a body which fulfils functions similar to those of the NATIONAL INSURANCE SUPERVISORY AUTHORITY, and with which a memorandum of understanding on cooperation and exchange of information has been signed.

(b) Has been incorporated and registered in countries, dominions, jurisdictions, territories or associate States that cooperate in the global fight against money laundering and terrorist financing offences in accordance with the criteria defined in the public documents issued by the FINANCIAL ACTION TASK FORCE (FATF).

If the parent company of the branch of the foreign company has not been incorporated and registered in accordance with the terms of the preceding paragraph, the assessment of the request for authorization shall be subject to enhanced due diligence, proportionate to the risks, and the counter-measures indicated in Recommendation 19 of the FINANCIAL ACTION TASK FORCE (FATF) and the Interpretive Note thereto may be applied."

ARTICLE 2 - Replace subparagraph (f) of point 20 of ANNEX I to SSN Resolution No. 35.615 by the following:

"(f) Prove that they have been incorporated and registered in:

I. Countries, dominions, jurisdictions, territories or associate States considered 'cooperative for tax transparency purposes', in accordance with the provisions of Decree No. 589/2013 and supplementary regulations.

If they have not been incorporated and registered in accordance with the terms of the preceding paragraph, they must prove that they are subject to the control and supervision of a body which fulfils functions similar to those of the NATIONAL INSURANCE SUPERVISORY AUTHORITY, and with which a memorandum of understanding on cooperation and exchange of information has been signed.

II. They have been incorporated and registered in countries, dominions, jurisdictions, territories or associate States that cooperate in the global fight against money laundering and terrorist financing offences in accordance with the criteria defined in the public documents issued by the FINANCIAL ACTION TASK FORCE (FATF).

If they have not been incorporated and registered in accordance with the terms of the preceding paragraph, the assessment of the request for authorization shall be subject to enhanced due diligence, proportionate to the risks, and the counter-measures indicated in Recommendation 19 of the FINANCIAL ACTION TASK FORCE (FATF) and the Interpretive Note thereto may be applied."

<sup>7</sup> Panel Report, para. 2.30 (quoting Articles 1 and 2 of SSN Resolution No. 38.284/2014 (Panel Exhibit ARG-47), which, respectively, replace the text of points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011). See also SSN Resolution No. 35.615/2011 (Panel Exhibit ARG-27).

**Measure 6** is applied pursuant to Title XI, Section III, Article 5 of the Rules of the National Securities Commission, which is set out below<sup>8</sup>:

All the persons indicated in Article 1 above may only engage in transactions involving the public offering of negotiable securities, forward contracts, futures or options of any nature or other financial instruments or products, when they are conducted or ordered by persons incorporated, domiciled or residing in dominions, jurisdictions, territories or associate States included in the list of cooperative countries set forth in Article 2, subparagraph (b), of Decree No. 589/2013.

If such persons are not included in the above-mentioned list and in their home jurisdiction have the status of intermediaries registered with an entity under the control and supervision of a body fulfilling functions similar to those of the Commission, such transactions shall go forward only if it is certified that the aforementioned body in their home jurisdiction has signed a memorandum of understanding on cooperation and exchange of information with the NATIONAL SECURITIES COMMISSION.

**Measure 7** is applied pursuant to Article 192 of the Resolution on Companies Incorporated Abroad, which is set out below<sup>9</sup>:

The General Justice Inspectorate shall closely review compliance with the requirements of Article 188, paragraph 3, subparagraphs (b) and (c) by companies which, without being offshore or from offshore jurisdictions, have been set up, registered or incorporated in jurisdictions considered as having low or no taxes and/or classified as not collaborating in the fight against "money laundering" and transnational crime.

Accordingly:

1. 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 shall be required, for which the company may have to provide:

(a) The relevant documents showing its latest approved accounting statements;

(b) A deed describing the main operations conducted during the financial year to which the accounting statements correspond or during the immediately preceding year if the accounting frequency is less, indicating the dates, parties, purpose and economic volume concerned, to be signed by the competent authority in the country of origin or by an officer of the company possessing duly accredited status and authority;

(c) The deeds of ownership of the non-current (fixed) assets or the contracts conferring operating rights in such assets, if the document referred to in subparagraph (b) is considered insufficient;

(d) Any other document deemed necessary for the purposes indicated.

2. Information in addition to that indicated in subparagraph 3 of 188 may be required for the purpose of obtaining personal particulars of the partners with a view to verifying their background, including information on their economic and tax status.

If the jurisdictions referred to in this Article are "offshore" jurisdictions, Article 193 shall apply.

**Measure 8** is applied pursuant to Section I of Communication "A" No. 4940 of the Argentine Central Bank, which is set out below<sup>10</sup>:

Prior authorization from the Central Bank shall be required for access to the foreign exchange market in order to purchase foreign currency for the repatriation of direct and portfolio investments by non-residents covered by points 1.13 and 1.14 of Communication "A" 4662, amended by Communication "A" 4692, respectively, if the beneficiary abroad is a natural or legal person residing or incorporated or domiciled in dominions, jurisdictions, territories or associate States included in the list in Decree No. 1.344/98 regulating the Gains Tax Law No. 20.628 and amendments thereto.

<sup>8</sup> Panel Report, para. 2.35 (quoting Rules of the National Securities Commission (Panel Exhibits ARG-50 and PAN-58)). (fn omitted)

<sup>9</sup> Panel Report, para. 2.37 (quoting Resolution on Companies Incorporated Abroad (Panel Exhibits ARG-33 and PAN-62)). (fn omitted)

<sup>10</sup> Panel Report, para. 2.39 (quoting Communication "A" No. 4940 (Panel Exhibits ARG-31 and PAN-71)).



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

AB-2015-8

*Report of the Appellate Body*

*Addendum*

This Addendum contains Annexes A to C to the Report of the Appellate Body circulated as document WT/DS453/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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**LIST OF ANNEXES****ANNEX A**

## NOTICES OF APPEAL AND OTHER APPEAL

<b>Contents</b>		<b>Page</b>
Annex A-1	Panama's Notice of Appeal	A-2
Annex A-2	Argentina's Notice of Other Appeal	A-4

**ANNEX B**

## ARGUMENTS OF THE PARTIES

<b>Contents</b>		<b>Page</b>
Annex B-1	Executive summary of Panama's appellant's submission	B-2
Annex B-2	Executive summary of Argentina's other appellant's submission	B-4
Annex B-3	Executive summary of Argentina's appellee's submission	B-7
Annex B-4	Executive summary of Panama's appellee's submission	B-10

**ANNEX C**

## ARGUMENTS OF THE THIRD PARTICIPANTS

<b>Contents</b>		<b>Page</b>
Annex C-1	Executive summary of Australia's third participant's submission	C-2
Annex C-2	Executive summary of Brazil's third participant's submission	C-3
Annex C-3	Executive summary of the European Union's third participant's submission	C-4
Annex C-4	Executive summary of Guatemala's third participant's submission	C-6
Annex C-5	Executive summary of the United States' third participant's submission	C-7

**ANNEX A**

NOTICES OF APPEAL AND OTHER APPEAL

<b>Contents</b>		<b>Page</b>
Annex A-1	Panama's Notice of Appeal	A-2
Annex A-2	Argentina's Notice of Other Appeal	A-4

**ANNEX A-1****PANAMA'S NOTICE OF APPEAL\***

Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 20(1) of the Working Procedures for Appellate Review, Panama hereby notifies its decision to appeal certain issues of law covered in the Panel Report in *Argentina – Measures relating to Trade in Goods and Services* (WT/DS453/R), which was circulated on 30 September 2015 (Panel Report). Pursuant to Rule 21(1) of the Working Procedures for Appellate Review, Panama is simultaneously filing this Notice of Appeal and its Appellant's Submission with the Appellate Body Secretariat.

Panama seeks review by the Appellate Body of the following errors of law contained in the Panel Report:

**i. The Panel erred in interpreting and applying the term "treatment no less favourable" in the context of Articles II:1 and XVII of the General Agreement on Trade in Services (GATS)**

The Panel interpreted the term "treatment no less favourable" in Articles II:1 and XVII of the GATS as permitting the consideration of "regulatory aspects" in the assessment of whether a measure modifies the conditions of competition in the relevant marketplace. The Panel considered that the relevant "regulatory aspect" in this dispute was whether Argentina has access to tax information on foreign suppliers. The Panel also considered that this regulatory aspect provides a competitive advantage to services and service suppliers of countries that do not exchange tax information with Argentina.

In essence, the Panel considered that when a Member imposes higher tax burdens or additional administrative requirements only on services or service suppliers of certain origin in order to neutralize a competitive advantage, that Member is not modifying the conditions of competition in the marketplace and, therefore, is not acting in a manner inconsistent with its obligations under Articles II:1 and XVII of the GATS to provide "treatment no less favourable".

The Panel's interpretation is inconsistent with established jurisprudence regarding the meaning of "treatment no less favourable" in these provisions and establishes a new legal standard that has no proper basis in either the text or context of Articles II:1 or XVII of the GATS, or in the object and purpose of these provisions or of the GATS itself.

Without prejudice to Panama's ability to refer to other paragraphs in the Panel Report, the Panel's incorrect interpretation is contained in paragraphs 7.212, 7.232, and 7.215 (for Article II:1 of the GATS<sup>1</sup>), as well as in paragraphs 7.490-7.494, 7.514-7.516, and 7.520-7.521 (for Article XVII of the GATS<sup>2</sup>) of the Report.

**ii. The Panel erred in applying the terms "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement" within the meaning of Article XIV(c) of the GATS to the facts of the case**

Having found that measures 1, 2, 3, 4, 7, and 8 (as defined in paragraphs 2.13-2.22 and 2.37-2.40 of the Panel Report) were inconsistent with Article II:1 of the GATS, the Panel had to address Argentina's defences under Article XIV(c) of the GATS in the light of the well-developed legal standards for panels addressing defences raised under the exceptions contained in Article XX of the GATT 1994 and Article XIV of the GATS.

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\* This Notice, dated 27 October 2015, was circulated to Members as document WT/DS453/7.

<sup>1</sup> The Panel applied its incorrect interpretation in paragraphs 7.283-7.293, 7.300-7.302, 7.309-7.310, 7.319-7.320, 7.329-7.330, 7.339-7.340, 7.351-7.352, and 7.360-7.361 of the Report.

<sup>2</sup> The Panel applied its incorrect interpretation in paragraphs 7.500-7.525 of the Report.



In this case, Panama considers that the Panel failed to apply properly the relevant legal standard for an Article XIV(c) defence to the measures before it. In particular, the Panel failed to focus its analysis on the aspects of measures 1, 2, 3, 4, 7, and 8 that were found to accord less favourable treatment within the meaning of Article II:1 of the GATS to like services and service suppliers of non-cooperative countries.

Furthermore, the Panel focused its analysis on the question of whether the measures at issue secure compliance with the objectives of the relevant laws and regulations, and not on whether they secure compliance with the specific provisions of those laws and regulations referred to by Argentina.

In addition, the Panel erred in finding that Argentina had demonstrated that measures 1, 2, 3, 4, 7, and 8 were "designed" and are "necessary" to secure compliance with the relevant laws and regulations within the meaning of Article XIV(c) of the GATS. In particular:

- a. the Panel failed to conduct a proper analysis of the contribution of measures 1, 2, 3, 4, 7, and 8 to the objective of securing compliance with the relevant laws and regulations; and
- b. the Panel erred in finding that measures 1, 2, 3, 4, 7, and 8 have a limited trade-restrictive effect on international trade in services.

For these reasons, the Panel erred in finding that measures 1, 2, 3, 4, 7, and 8 were provisionally justified under Article XIV(c) of the GATS.

Without prejudice to Panama's ability to refer to other paragraphs in the Panel Report, the Panel's incorrect application of the relevant legal standard is contained in section 7.3.5.2 of the Panel Report, in particular, in paragraphs 7.637-7.642, 7.646-7.648, 7.692, 7.695, 7.700, 7.703, 7.705, 7.706-7.717, 7.720-7.728, and 7.737-7.740.

**iii. The Panel erred in interpreting the scope of paragraph 2(a) of the GATS Annex on Financial Services, which is entitled "Domestic Regulation"**

Having found measures 5 and 6 (as defined in paragraphs 2.23-2.36 of the Panel Report) to be GATS-inconsistent, the Panel was called upon to interpret paragraph 2(a) of the GATS Annex on Financial Services (prudential exception) and to determine whether Argentina had met its burden of establishing that measures 5 and 6 were justified under that provision.

In doing so, the Panel failed to interpret the scope of the prudential exception correctly. In particular, the Panel failed to give effect to the term "domestic regulation" in the title of the prudential exception, which determines the scope of this exception. The Panel incorrectly concluded that the prudential exception covers all types of measures affecting the supply of financial services and not only those measures that can be characterized as "domestic regulations".

Without prejudice to Panama's ability to refer to other paragraphs in the Panel Report, the Panel's finding reflecting its incorrect interpretation is contained in paragraph 7.847 of the Report.

**ANNEX A-2****ARGENTINA'S NOTICE OF OTHER APPEAL\***

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23 of the *Working Procedures for Appellate Review* (WT/AB/WP/6) ("Working Procedures"), Argentina hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law and legal interpretation contained in the report of the Panel in *Argentina – Measures Relating to Trade in Goods and Services* (WT/DS453) ("Panel Report").

2. The issues that Argentina raises in this other appeal relate to the Panel's findings that services and service suppliers located in jurisdictions that Argentina designates as "cooperative" and "non-cooperative" under Decree No. 589/2013 and the defensive tax measures at issue in this dispute are "like" within the meaning of Articles II:1 and XVII of the General Agreement on Trade in Services ("GATS").

3. In particular, Argentina seeks review of the Panel's finding that services and service suppliers located in "cooperative" and "non-cooperative" jurisdictions are "like" under Article II:1 of the GATS.<sup>1</sup> The Panel erred in its interpretation and application of Article II:1 in concluding that the services and service suppliers at issue are "like" on the grounds that the measures at issue provide differential treatment "by reason of origin".<sup>2</sup> If the Appellate Body were to conclude that services and service suppliers may be considered "like" when a measure provides differential treatment "*exclusively* on the basis of origin", Argentina respectfully request that the Appellate Body find that the Panel erred in concluding that the services and services suppliers are "like" in the absence of a finding that the measures at issue provide differential treatment "exclusively" on the basis of origin.<sup>3</sup>

4. Argentina further considers that the Panel committed legal error under Article II:1 of the GATS by reversing the burden of proof and finding that it was incumbent upon Argentina to demonstrate that the services and service suppliers located in "cooperative" and "non-cooperative" jurisdictions are *not* like under that provision.<sup>4</sup>

5. The Panel also erred in its interpretation and application of Article XVII of the GATS when it relied on its erroneous likeness finding under Article II:1 to conclude that services and service suppliers located in Argentina are "like" those located in "non-cooperative" jurisdictions.<sup>5</sup> In addition to the fact that the Panel's findings under Article II:1 were themselves in error, the Panel's findings under Article II:1 were not sufficient to establish likeness under Article XVII of the GATS. Argentina therefore requests that the Appellate Body modify the Panel's reasoning while upholding its ultimate conclusion that measures 2, 3 and 4 are not inconsistent with Article XVII of the GATS.<sup>6</sup>

6. With respect to Panama's claims under both Article II:1 and Article XVII of the GATS, Argentina further considers that the Panel committed legal error by making a *prima facie* case of likeness for Panama in the absence of evidence and legal argument.

7. Alternatively, in the event that the Appellate Body were to find that Argentina bore the burden of proving likeness under Articles II:1 and XVII of the GATS, or that Panama had otherwise established a *prima facie* case of likeness, Argentina claims on appeal that the Panel failed to act consistently with its duties to conduct an objective assessment of the matter under Article 11 of

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\* This Notice, dated 2 November 2015, was circulated to Members as document WT/DS453/8.

<sup>1</sup> Panel Report, para. 7.186.

<sup>2</sup> Panel Report, paras. 7.153-7.185 and 7.365.

<sup>3</sup> Panel Report, paras. 7.185, 7.186, 7.365.

<sup>4</sup> Panel Report, paras. 7.171-7.185, but in particular para. 7.179.

<sup>5</sup> Panel Report, paras. 7.481-7.489.

<sup>6</sup> Panel Report, para. 7.525.

the DSU in reaching its findings under those provisions. The Panel ignored uncontested evidence on the panel record which demonstrated that the differences in regulatory frameworks between cooperative and non-cooperative jurisdictions affect the nature and extent of the competitive relationship among services and service suppliers located in these different types of jurisdictions, to the extent that they cannot be considered "like" under Articles II:1 and XVII of the GATS.<sup>7</sup> Should the Appellate Body sustain this alternative claim of error, Argentina requests that the Appellate Body complete the legal analysis and find, on the basis of the Panel's factual findings and uncontested evidence on the panel record, that these categories of services and service suppliers are not like under Articles II:1 and XVII of the GATS.

8. For these reasons, Argentina respectfully requests that the Appellate Body reverse the Panel's finding that services and service suppliers located in "non-cooperative" jurisdictions are "like" services and service suppliers located in "cooperative" jurisdictions and in Argentina under Articles II:1 and XVII of the GATS, respectively.<sup>8</sup> Consequently, Argentina respectfully requests that the Appellate Body (1) reverse the Panel's ultimate finding that the measures at issue in this dispute are inconsistent with Article II:1 of the GATS<sup>9</sup>; and (2) modify the basis for the Panel's ultimate finding that measures 2, 3, and 4 are not inconsistent with Article XVII.<sup>10</sup>

9. Pursuant to Rule 23(3) of the Working Procedures, Argentina files this Notice of Other Appeal together with its Other Appellant's Submission with the Appellate Body Secretariat.

10. Pursuant to Rule 23(2)(c)(ii)(C) of the Working Procedures, this Notice of Other Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel, without prejudice to Argentina's ability to rely on other paragraphs of the Panel Report in its other appeal.

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<sup>7</sup> See e.g., Panel Report, paras. 7.509-7.521.

<sup>8</sup> Panel Report, paras. 7.185, 7.186, 7.365, 7.488 and 7.489.

<sup>9</sup> Panel Report, paras. 7.367 and 8.2.b.

<sup>10</sup> Panel Report, paras 7.523-7.525 and 8.2.c.



**ANNEX B**

ARGUMENTS OF THE PARTICIPANTS

<b>Contents</b>		<b>Page</b>
Annex B-1	Executive summary of Panama's appellant's submission	B-2
Annex B-2	Executive summary of Argentina's other appellant's submission	B-4
Annex B-3	Executive summary of Argentina's appellee's submission	B-7
Annex B-4	Executive summary of Panama's appellee's submission	B-10

**ANNEX B-1****EXECUTIVE SUMMARY OF PANAMA'S APPELLANT'S SUBMISSION<sup>1</sup>****1.1 The Panel erred in the interpretation and application of the term "treatment no less favourable" in Articles II:1 and XVII of the GATS**

1.1. In resolving Panama's claims under Article II:1 of the GATS, the Panel reached the "preliminary conclusion" that all of the measures at issue accord less favourable treatment to services and service suppliers of non-cooperative countries in comparison with that accorded to like services and service suppliers of cooperative countries.<sup>2</sup> Similarly, in resolving Panama's claims under Article XVII of the GATS, the Panel decided "on a preliminary basis" that measures 2, 3 and, 4 accord less favourable treatment to services and service suppliers of non-cooperative countries in comparison with that accorded to like Argentine services and service suppliers.<sup>3</sup>

1.2. Based on previous Appellate Body jurisprudence, these findings should have sufficed to establish that: (i) measures 1, 2, 3, 4, 5, 6, 7, and 8 are inconsistent with Article II:1 of the GATS; and (ii) measures 2, 3, and 4 are inconsistent with Article XVII of the GATS, as claimed by Panama in its panel request.

1.3. However, the Panel went further and asserted that in analyzing "no less favourable treatment" under Articles II:1 and XVII of the GATS respectively, the regulatory framework in which service suppliers operate is a relevant factor that may be taken into account.<sup>4</sup>

1.4. Under the Panel's interpretation, the regulatory framework – in this case, access (or lack thereof) to information by Argentine authorities – gives services and service suppliers of non-cooperative countries a competitive advantage over like Argentine services and service suppliers (and over like services and service suppliers of cooperative countries). In the Panel's view, this advantage modifies the conditions of competition. Thus, according to the Panel, a Member that imposes discriminatory measures to neutralize this perceived advantage is not acting in a manner inconsistent with the obligation to provide "treatment no less favourable". Instead, that Member does not modify the conditions of competition *in favour of* Argentine like services and service suppliers (and by extension, like services and service suppliers of cooperative countries.)

1.5. The Panel's interpretation is legally incorrect.

1.6. Consistently with previous jurisprudence, Panama starts with the premise that the "treatment no less favourable" obligations in Articles II:1 and XVII of the GATS are meant to "ensure equality of conditions of competition": (i) between services and service suppliers of a Member and the like services and service suppliers of other Members; and (ii) between domestic services and service suppliers and like services and service suppliers of all other Members, respectively.

1.7. In Panama's view, "ensuring equality of conditions of competition" means that measures that are regulated under Articles II:1 and Article XVII of the GATS must not alter the opportunities of like services and service suppliers of different origins to compete in a given market. In this context, the measures must be neutral in their application with respect to the pre-existing relative competitiveness between like services and service suppliers of different origins.

1.8. The Panel appears to interpret "ensuring equality of conditions of competition" in a different manner. Panama's understanding of the Panel's interpretation is that Argentina's rights and obligations under Articles II:1 and XVII of the GATS are to: (i) assess the relative competitiveness of like services and service suppliers; (ii) identify any disadvantages of services and service

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<sup>1</sup> This executive summary contains a total of 1,169 words. The remainder of this submission (excluding the executive summary) contains a total of 38,999 words.

<sup>2</sup> Panel Report, paras. 7.282, 7.300, 7.308, 7.318, 7.328, 7.338, 7.350 and 7.359.

<sup>3</sup> Panel Report, paras. 7.501, 7.502 and 7.503.

<sup>4</sup> Panel Report, paras. 7.212, 7.235, 7.493, and 7.494.

suppliers of cooperative countries and of Argentine origin based on whether Argentine authorities have access to information; and (iii) impose a discriminatory measure that compensates for the perceived disadvantages and, in so doing, "equalizes" the conditions of competition.

1.9. Under the Panel's interpretation, therefore, Articles II:1 and XVII of the GATS do not limit Members to apply measures with a neutral impact on all like services and service suppliers. In addition, a Member may assess the respective regulatory framework applicable to like services and service suppliers, identify the relative disadvantages arising from differences in the regulatory framework, and impose a measure that compensates for those disadvantages.

1.10. The Panel's interpretation deviated from established jurisprudence and set a new legal standard that has no basis in the text or context of Articles II:1 and XVII of the GATS, or in the object and purpose of the GATS.

### **1.2 The Panel erred in finding that measures 1, 2, 3, 4, 7, and 8 are provisionally justified under Article XIV(c) of the GATS**

1.11. The Panel erred in its interpretation and application of Article XIV(c) of the GATS to the assessment of measures 1, 2, 3, 4, 7, and 8. The Panel conducted its analysis on the basis of criteria that have been previously rejected by the Appellate Body and panels. The Panel did not focus on the differences in treatment between services and service suppliers of cooperative and non-cooperative jurisdictions, i.e. the aspects of the measures that gave rise to the inconsistencies with Article II:1 of the GATS.

1.12. Furthermore, the Panel did not carry out its assessment under Article XIV(c) of the GATS on the basis of the contribution of the measures to the objective of securing compliance with specific Argentine laws and regulations. The Panel relied on unsubstantiated assumptions and incomplete reasoning not supported by the evidence with respect to the contribution of the measures to the ends pursued and the assessment of their restrictiveness in international trade in services.

1.13. Thus, Panama considers that the Panel improperly found that measures 1, 2, 3, 4, 7, and 8 are provisionally justified under Article XIV(c) of the GATS.

### **1.3 The Panel erred in rendering meaningless the term "domestic regulation" in paragraph 2(a) of the GATS Annex on Financial Services**

1.14. Argentina claimed that measures 5 and 6 were justified by paragraph 2(a) of the GATS Annex on Financial Services (the prudential exception<sup>5</sup>). The Panel was called upon to interpret the prudential exception and to determine whether Argentina had met its burden of establishing that the challenged measures were justified under that provision.

1.15. In Panama's view, the Panel failed, as treaty interpreter, to give meaning and effect to all the terms of the provision under examination. In particular, the Panel rendered the reference to "domestic regulation" in the heading of the prudential exception meaningless. Panama suggested ways to interpret this term. However, the Panel rejected Panama's suggestions and ultimately concluded that the prudential exception covers *all* types of measures affecting the supply of financial services, not merely "domestic regulations". Panama appeals this interpretation and requests the Appellate Body to reverse the Panel's findings with respect to the prudential exception.

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<sup>5</sup> Panama notes that the literature normally uses the terms "financial carve-out" or "prudential carve-out" to refer to the exception in paragraph 2(a) of the Annex on Financial Services. For ease of reference, Panama uses the term employed by the Panel and refers to the "prudential exception" in this submission. However, the Appellate Body may wish to use one of the more commonly-used terms.

**ANNEX B-2****EXECUTIVE SUMMARY OF ARGENTINA'S OTHER APPELLANT'S SUBMISSION****I. INTRODUCTION**

1. This dispute concerns measures that Argentina has adopted to preserve the integrity of its national tax system and to combat financial crimes such as money laundering and tax evasion. The types of measures at issue in this dispute have been recognized by the Organization for Economic Cooperation and Development (OECD), the G-20, and other multilateral organizations as essential tools for enforcing domestic tax laws, preventing the erosion of domestic tax bases, ensuring the integrity and stability of the global financial system, and achieving a level competitive playing field in the international market for financial and other related services.

2. The measures at issue in this dispute are concerned with Argentina's inability to obtain tax-related information from service suppliers located in jurisdictions that do not adhere to international standards of transparency and effective information exchange in tax-related matters. These types of measures are commonly referred to as "defensive tax measures". The eight specific measures challenged by Panama establish various presumptions, tax determination methodologies, registration requirements, and other provisions of law designed to address the risks associated with transactions that involve service suppliers located in jurisdictions that do not engage in effective information exchange with Argentina.<sup>1</sup>

3. The eight defensive tax measures at issue in this dispute all refer to Decree No. 589/2013. Decree No. 589/2013 establishes two distinct bases upon which Argentina will designate a jurisdiction as cooperative. The first basis upon which Argentina will designate a jurisdiction as cooperative is if that jurisdiction has entered into a tax information exchange agreement with Argentina, or a convention on the avoidance of double taxation that includes a broad information exchange clause, provided in either case that the agreement results in effective information exchange. The second basis upon which Argentina will designate a jurisdiction as cooperative is if that jurisdiction has entered into negotiations with Argentina toward the conclusion of either type of agreement. A non-cooperative jurisdiction is a jurisdiction that does not satisfy either of the two bases for designation as cooperative.

4. Panama's core allegation in this dispute is that the differential treatment accorded under the measures at issue to services and service suppliers located in non-cooperative jurisdictions violates the obligations of most-favoured nation and national treatment under Articles II:1 and XVII of the General Agreement on Trade in Services (GATS), respectively. In its other appeal, Argentina seeks review of the Panel's finding that services and service suppliers located in Argentina and in jurisdictions that Argentina designates as cooperative are "like" those located in jurisdictions designated as non-cooperative.

**II. THE PANEL ERRED IN FINDING THAT SERVICES AND SERVICE SUPPLIERS LOCATED IN "COOPERATIVE" AND "NON-COOPERATIVE" JURISDICTIONS ARE "LIKE" UNDER ARTICLE II:1 OF THE GATS**

5. The Panel erred in finding that the services and service suppliers at issue in this dispute are "like" under Article II:1 of the GATS because Panama demonstrated that the measures at issue provide differential treatment "by reason of origin".<sup>2</sup> This finding is in error for the following two reasons.

6. First, as a matter of law, the fact that a measure provides differential treatment on the basis of the origin of a service or service supplier is not a basis for presuming "likeness". The "origin-based" presumption that arose under the multilateral agreements on trade in goods reflects the fact that these agreements refer only to "like products" (and not like *producers*), combined with the fact that the origin of a product does not ordinarily affect its characteristics as a product.

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<sup>1</sup> Panel Report, Section 2.3.

<sup>2</sup> Panel Report, para. 7.365.



7. Whereas the characteristics of goods are usually intrinsic to the good itself, the characteristics of services are frequently inseparable from a characteristic of the service supplier. For this reason, Article II:1 uses the conjunctive "and" to refer to "like services *and* service suppliers". Any inquiry into "likeness" under Article II:1 must therefore proceed on a cumulative basis, taking into account, as appropriate, the relevant characteristics of the service as well as the relevant characteristics of the service supplier.

8. Within this framework, and unlike the case of trade in goods, the origin of a service or service supplier may be highly relevant to its characteristics. A service or service supplier from a particular jurisdiction may have certain characteristics as a service or service supplier *precisely because* of its origin, as a result of the regulatory framework within which the service supplier operates. Differences in the regulatory framework prevailing within a service supplier's country of origin may affect the nature of the service that it provides and the manner in which it supplies that service. These considerations, in turn, may affect the competitive relationships among services and service suppliers in the marketplace.

9. For these reasons, the fact that a measure provides differential treatment "on the basis of origin" does not provide a basis for presuming the likeness of the services and service suppliers at issue. Even if the "origin-based" presumption developed in the context of trade in goods were applicable in a GATS context, the Panel erred in finding "likeness" in the absence of a finding that the measures provided differential treatment *exclusively* on the basis of origin, as argued by Panama. On the contrary, the Panel found that the measures at issue provide differential treatment based on differences in regulatory frameworks in cooperative and non-cooperative jurisdictions.

10. Second, the Panel erred in reversing the burden of proof under Article II:1 of the GATS. Despite Panama's failure to establish a *prima facie* case that Argentina's measures provided differential treatment "exclusively" on the basis of origin, and the Panel's recognition that Argentina's ability to access tax information from service suppliers is relevant to an evaluation of likeness in this case, the Panel erroneously concluded that it was incumbent upon *Argentina* to prove that this "other factor" affects the competitive relationship between services and service suppliers. This constitutes a separate and independent reason why the Appellate Body must reverse the Panel's conclusion that the measures at issue are inconsistent with Article II:1 of the GATS.

### **III. THE PANEL ERRED IN FINDING THAT SERVICES AND SERVICE SUPPLIERS IN ARGENTINA ARE "LIKE" SERVICES AND SERVICE SUPPLIERS LOCATED IN "NON-COOPERATIVE" JURISDICTIONS UNDER ARTICLE XVII OF THE GATS**

11. The Panel also committed legal error when it relied on its erroneous likeness finding under Article II:1 to conclude that services and service suppliers *in Argentina* were "like" services and service suppliers located in jurisdictions designated as "non-cooperative". The Panel's likeness finding under Article II:1 was entirely inapposite to the analysis that it was required to undertake in the context of Article XVII. Consistent with the burden of proof, Panama was required to establish a *prima facie* case that services and service suppliers of Argentine origin are "like" services and service suppliers located in jurisdictions that Argentina designates as non-cooperative. The Panel's prior findings under Article II:1, whatever their other shortcomings, simply were not relevant to its analysis of whether Panama had discharged this burden.

### **IV. ALTERNATIVELY, THE PANEL ACTED INCONSISTENTLY WITH ARTICLE 11 OF THE DSU IN FINDING THAT THE SERVICES AND SERVICE SUPPLIERS AT ISSUE ARE "LIKE" UNDER ARTICLES II AND XVII OF THE GATS**

12. Alternatively, in the event that the Appellate Body were to find that Argentina bore the burden of proving likeness under Articles II:1 and XVII of the GATS, or that Panama had otherwise established a *prima facie* case of likeness, Argentina claims on appeal that the Panel failed to act consistently with its duties to conduct an objective assessment of the matter under Article 11 of the DSU in reaching its findings under those provisions. The Panel ignored uncontested evidence on the panel record which demonstrated that the differences in regulatory frameworks between cooperative and non-cooperative jurisdictions affect the nature and extent of the competitive

relationship among services and service suppliers located in these different types of jurisdictions, to the extent that they cannot be considered "like" under Articles II:1 and XVII of the GATS.

13. Should the Appellate Body sustain this alternative claim of error, Argentina requests that the Appellate Body complete the legal analysis and find, on the basis of the Panel's factual findings and uncontested evidence on the panel record, that these categories of services and service suppliers are not like under Articles II:1 and XVII of the GATS.

#### **V. REQUEST FOR FINDINGS**

14. For these reasons, Argentina respectfully requests that the Appellate Body reverse the Panel's finding that services and service suppliers located in "non-cooperative" jurisdictions are "like" services and service suppliers located in "cooperative" jurisdictions and in Argentina under Articles II:1 and XVII of the GATS, respectively.<sup>3</sup> Consequently, Argentina respectfully requests that the Appellate Body (1) reverse the Panel's ultimate finding that the measures at issue in this dispute are inconsistent with Article II:1 of the GATS<sup>4</sup>; and (2) modify the basis for the Panel's ultimate finding that measures 2, 3, and 4 are not inconsistent with Article XVII.<sup>5</sup>

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<sup>3</sup> Panel Report, paras. 7.185-7.186, 7.365, 7.488 and 7.489.

<sup>4</sup> Panel Report, paras. 7.367 and 8.2.b.

<sup>5</sup> Panel Report, paras. 7.523-7.525 and 8.2.c.

## ANNEX B-3

### EXECUTIVE SUMMARY OF ARGENTINA'S APPELLEE'S SUBMISSION

#### 1 INTRODUCTION

1.1. On 27 October 2015, Panama appealed certain issues of law and legal interpretation contained in the report of the Panel in *Argentina – Measures Relating to Trade in Goods and Services*. In this submission, Argentina responds to the arguments raised by Panama on appeal on an *arguendo* basis. This is because, as explained in Argentina's other appellant's submission, Argentina believes that the Panel erred in finding that the services and service suppliers at issue in this dispute are "like" within the meaning of Articles II:1 and XVII of the GATS. Should the Appellate Body reverse the Panel's likeness finding, it will not be necessary for it to address any of the claims raised by Panama on appeal. However, in the event that the Appellate Body upholds the Panel's finding that the services and service suppliers at issue are "like", Argentina respectfully requests that the Appellate Body reject Panama's claims of error in relation to the Panel's analysis of Article XIV(c) of the GATS and the prudential carve-out.

#### 2 PANAMA'S CLAIMS OF ERROR CONCERNING THE PANEL'S INTERPRETATION OF THE PHRASE "TREATMENT NO LESS FAVOURABLE" IN ARTICLES II AND XVII SHOULD BE RESOLVED ON THE GROUNDS OF LIKENESS

2.1. Panama appeals the Panel's interpretation of the phrase "treatment no less favourable" in Articles II and XVII of the GATS and, in particular, the Panel's conclusion that the concept of "less favourable treatment" permits a panel to take into account "regulatory aspects relating to services and service suppliers that may affect the conditions of competition".

2.2. Argentina believes that the Panel did not err in its conclusions concerning the importance of regulatory distinctions to a proper interpretation of Articles II and XVII of the GATS. However, for the reasons that Argentina set forth in its other appeal, Argentina considers that regulatory differences that affect competitive relationships among services and service suppliers are properly examined, in the first instance, as part of the evaluation of whether the services and service suppliers at issue may be considered "like". Notably, in its appellant submission, Panama *agrees* with Argentina that the ability or inability of a Member to obtain tax-related information from foreign service suppliers is a "likeness-related consideration"<sup>1</sup> that the Panel should have examined under the heading of likeness. Had the Panel held Panama to its burden of proof in this respect, the Panel would properly have concluded that Panama had failed to establish a *prima facie* case of likeness.

2.3. Panama's failure to establish a *prima facie* case of likeness should have led the Panel to reject Panama's claims under Articles II and XVII without proceeding to an examination of whether the measures at issue provide "less favourable treatment". Argentina respectfully submits that the Appellate Body should resolve the present appeals on that basis.

#### 3 THE PANEL DID NOT ERR IN FINDING THAT THE MEASURES AT ISSUE ARE PROVISIONALLY JUSTIFIED UNDER ARTICLE XIV(C) OF THE GATS

3.1. Panama appeals the Panel's finding that measures 1, 2, 3, 4, 7 and 8 are provisionally justified under Article XIV(c) of the GATS. Panama contends that the Panel erred in concluding that the measures are "designed" to secure compliance with Argentina's tax and anti-money laundering laws and regulations, and that they are "necessary" to secure such compliance.

3.2. In relation to whether the measures are "designed" to secure compliance with Argentina's tax and anti-money laundering laws and regulations, Panama argues that the Panel erred for three reasons.

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<sup>1</sup> Panama's appellant's submission, para. 3.44.

3.3. First, Panama maintains that the Panel failed to examine the aspects of the measures that gave rise to a finding of inconsistency under Article II:1 of the GATS. Contrary to what Panama suggests, it is patently evident from the Panel's analysis that it focused on the additional information requirements and more onerous tax and inspection burdens that apply exclusively to transactions with service suppliers of non-cooperative jurisdictions under the measures in determining whether these measures are designed to secure compliance with Argentina's laws and regulations. Accordingly, the Panel correctly focused on the aspects of the measures that gave rise to a finding of inconsistency under Article II:1 of the GATS.

3.4. Second, Panama argues that the Panel incorrectly evaluated whether measures 1, 2, 3, 4, and 7 are designed to attain the objectives of Argentina's laws and regulations, rather than securing compliance with specific provisions of such laws and regulations. Contrary to Panama's argument, the Panel did not find that measures 1 to 4 and 7 attain the "general" tax collection objectives of Argentina's measures. Rather, after carefully examining the normative content of each of the measures with which those measures secure compliance, the Panel found that measures 1 to 4 and 7 secure compliance with the specific obligations contained in Articles 1 and 5 of the Income Tax Law, Article 46 of the LPT, Article 1 of the CTL, Article 16 of the National Constitution, Article 118.3 of the LSC and Article 188 of IGJ Resolution No. 7/2005.

3.5. Third, and finally, Panama argues that the Panel lacked legal basis or evidentiary support for its conclusion that transactions with non-cooperative jurisdictions raise compliance concerns. Contrary to Panama's argument, however, the Panel did not assume that transactions between related parties *per se* violate Argentina's tax laws or otherwise raise compliance concerns. Instead, the Panel's finding that measures 1 to 4 are designed to secure compliance with Argentina's tax laws is based on extensive evidence on the panel record indicating that transactions between Argentine taxpayers and service suppliers located in *non-cooperative jurisdictions* pose a particular risk to the enforcement of Argentina's tax laws.

3.6. Panama further argues that the Panel erred in finding that measure 8 is designed to secure compliance with Law 25,246 because the Panel focused on information and reporting requirements that do not form part of measure 8. Instead, the Panel expressly relied on the due diligence powers of the Central Bank under measure 8 in concluding that the "closer scrutiny" of transfers to non-cooperative jurisdictions to ensure that the operations concerned are of genuine origin secures compliance with Law 25,246.

3.7. For the foregoing reasons, the Panel did not err in finding that measures 1, 2, 3, 4, 7 and 8 are designed to secure compliance with Argentina's laws and regulations within the meaning of Article XIV(c) of the GATS.

3.8. Panama's appeal of the Panel's "necessity" analysis relates exclusively to the "contribution" and "trade-restrictiveness" factors. In Argentina's view, Panama's appeal relates to the Panel's assessment of the evidence and arguments before it, and not to the Panel's application of Article XIV(c) to the facts before it. As such, Panama should have brought its claims under Article 11 of the DSU, and its failure to do so provides a separate and independent basis for the Appellate Body to dismiss the entirety of Panama's claims at the threshold.

3.9. In the unlikely event that the Appellate Body were to consider that Panama's claims of error constitute legal characterization claims, Argentina considers that Panama has failed to establish that the Panel committed legal error in concluding that the measures contribute to securing compliance with Argentina's laws and regulations and have only "limited restrictive effect on international trade in services".

3.10. Consistent with the Appellate Body's guidance in *Brazil – Retreaded Tyres*, the Panel found that each of the measures contributed, *individually*, to secure compliance with Argentina's laws and regulations. The Panel then found that these measures, operating *collectively* in the context of a comprehensive policy to combat harmful tax practices, have a combined effect that is greater than the sum of each measure taken individually. As such, these measures operate synergistically

so that their collective effect, as the Panel found, is greater than the sum of the individual components.<sup>2</sup>

3.11. In relation to trade restrictiveness, the Panel did not fail to take into account that the measures at issue may apply to transactions that serve a legitimate business purpose. The Panel took this argument of Panama into account, but was ultimately not persuaded by it. Moreover, Panama is incorrect that the Panel did not have a sufficient evidentiary basis or did not properly explain its finding that the measures at issue had only a "limited" restrictive effect on international trade in services. To the contrary, the Panel provides a reasoned and adequate explanation for those findings, in relation to each of the measures at issue.

3.12. For the reasons outlined above, the Panel did not err in finding that measures 1, 2, 3, 4, 7 and 8 are provisionally justified under Article XIV(c) of the GATS because they are necessary to secure compliance with Argentina's laws and regulations. Accordingly, Argentina respectfully requests that the Appellate Body uphold the Panel's findings in paragraph 7.740 of the Panel Report.

#### **4 THE PANEL DID NOT ERR IN ITS INTERPRETATION OF THE PRUDENTIAL CARVE-OUT**

4.1. On appeal, Panama claims that the Panel erred in its interpretation of the prudential carve-out by finding that the prudential carve-out applies to all measures affecting the supply of financial services. Panama argues that the Panel failed to give meaning to the reference to "domestic regulations" in the title of the prudential carve-out, which in Panama's view exhaustively defines the types of measures that are subject to justification under that provision.

4.2. At the same time, Panama now seems prepared to accept that "all measures of general application affecting trade in services" are covered by the prudential carve-out.<sup>3</sup> In light of Panama's concession, one has to wonder about the practical effect of its appeal, because Panama does not seem to take the position that measures 5 and 6 are *not* measures of the kind that the Panama now admits would qualify as domestic regulations under Article VI.

4.3. In any event, Panama's claim of error hinges on the proposition that the title of the prudential carve-out exhaustively defines the types of measures that fall within its purview, while the actual text of the provision defines only the types of violations that may be subject to justification. This proposition, of course, is untenable. In establishing that a Member "shall not be prevented from taking measures for prudential reasons", the drafters of the GATS established no limitation on the types of measures covered by the exception other than the prudential rationale that leads to their adoption. As the Panel correctly noted, Panama's interpretation would read the terms "notwithstanding any other provisions of the Agreement", and "where such measures do not conform with the provisions of the Agreement" out of the text of the prudential carve-out.

4.4. Accordingly, Argentina respectfully requests that the Appellate Body uphold the Panel's finding in paragraph 7.847 of the Panel Report that the prudential carve-out covers all types of measures affecting the supply of financial services under paragraph 1(a) of the Annex on Financial Services of the GATS.

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<sup>2</sup> Panel Report, para. 7.706-7.712; 7.714-7.717.

<sup>3</sup> Panama's appellant's submission, para. 6.19.

## ANNEX B-4

### EXECUTIVE SUMMARY OF PANAMA'S APPELLEE'S SUBMISSION

1.1. Panama considers that the Panel correctly concluded that the services and service suppliers at issue are "like" within the meaning of Articles II:1 and XVII of the GATS. In particular, Panama is of the view that, where measures distinguish on their face on the basis of the origin of goods, services, or service suppliers, "likeness" shall be established. In this dispute, the Panel should have ended its determination once it found that the measures accord different treatment "by reason of origin".

1.2. In any event, the regulatory framework in which services and service suppliers operate is not relevant to determine the competitive relationship between services and service suppliers and their "likeness" *inter se*. Even assuming *arguendo* that the regulatory framework may be relevant, the Panel correctly found that Argentina had to prove that such regulatory framework affects "likeness". It is a general principle of evidence that the party that alleges a fact bears the burden of proving it. In this case, as Argentina argued that the regulatory framework plays a role in the determination of "likeness", it bore the burden of proving that fact. A complainant in a WTO dispute cannot bear the burden of identifying the regulatory concerns of the respondent.

1.3. Furthermore, Argentina has not demonstrated that the Panel acted inconsistently with Article 11 of the DSU. There are no reasons to submit that the Panel did not take into account the evidence adduced by Argentina. The Panel exercised its discretion as the trier of facts and determined, based on what it considered as the relevant facts, that Argentina had not demonstrated the existence of "likeness". Indeed, the evidence presented by Argentina shows that the services and service suppliers at issue are "like".

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**ANNEX C**

## ARGUMENTS OF THE THIRD PARTICIPANTS

<b>Contents</b>		<b>Page</b>
Annex C-1	Executive summary of Australia's third participant's submission	C-2
Annex C-2	Executive summary of Brazil's third participant's submission	C-3
Annex C-3	Executive summary of the European Union's third participant's submission	C-4
Annex C-4	Executive summary of Guatemala's third participant's submission	C-6
Annex C-5	Executive summary of the United States' third participant's submission	C-7

## **ANNEX C-1**

### **EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTICIPANT'S SUBMISSION**

#### **Paragraph 2 of the Annex on Financial Services**

1. Australia's view is that the scope of the prudential exception in paragraph 2(a) of the Annex on Financial Services should be interpreted broadly. The text of paragraph 2(a) is silent on any limitation, which leads to the presumption that no limitation exists.
2. Australia agrees with the Panel's analysis that the words of the text indicate that the scope of application is the entirety of the GATS, subject to falling within the meaning of financial services in paragraph 1(a) of the Annex on Financial Services.
3. In addition, Australia argues that the heading 'domestic regulation' provides context, but can be given meaning without limiting the scope of the prudential exception.
4. Furthermore, the technique of cross-referencing in other parts of the GATS suggests that the drafters did not wish to limit the scope of the prudential exception.
5. The objects and purposes of the GATS, in emphasising economic growth as the purpose of the liberalisation of trade in services and recognising the right of members to make regulations, also support a broad interpretation.
6. This interpretation is also supported by subsequent practice.



## **ANNEX C-2**

### **EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION**

1. In its Third Party Submission, Brazil raises four main points regarding the present dispute. First, Brazil reaffirms the importance of international financial regulation for the stability of the financial system and the security of economies worldwide. The prevention of deceptive practices, therefore, remains crucial in the global efforts towards promoting stability of the international financial system.
2. Second, Brazil emphasizes that the guiding principle of the "likeness" analysis in the GATS is the protection of competitive relationships between domestic and foreign services and service providers, which is to be assessed on a case-by-case basis. For that, in the consideration of "likeness" of services and service providers, the assessment must take into account the particularities of this sector, as well as the regulatory framework and international commitments of the country where the service provider is located.
3. Third, Brazil understands that in GATS the regulatory aspects pertain to the likeness, but not to the "treatment less favourable" analysis. Contrary to the "likeness" criterion, the consideration of regulatory aspects in the "treatment less favourable" could potentially undermine the exceptions laid out in Article XIV of the GATS.
4. Finally, paragraph 2(a) of the Annex of Financial Services gives Members significant leeway for the adoption of measures for prudential reasons to maintain the stability of that Member's financial market. Accordingly, Brazil understands that domestic regulations may affect either foreign or domestic services or both, as long as they are adopted with a view to organizing and regulating the domestic market of services.

**ANNEX C-3****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION****A. Like services and service suppliers**

1. The first of four issues in this appeal concerns the interpretation of the concept of "likeness" in Articles II and XVII of the GATS. The European Union considers that it is appropriate to conclude that, if the distinction in a measure is exclusively based on origin, "likeness" can automatically be established and there is no need to further assess likeness criteria. Indeed, when a measure provides explicitly, or by necessary implication, for different regulatory treatment based on origin, there is a *de jure* distinction which is based on origin.

2. In case the measure itself draws up a list of countries that benefit from a certain "more favourable treatment", it cannot be disputed that the measure is based on origin explicitly. The European Union considers that the Panel did examine whether the regulatory distinction was exclusively based on origin and made a finding. Had the Panel found that the distinction in Decree No. 589/2013 was *not* exclusively based on origin, it would have had to assess whether the fact that a service was provided by a supplier from a country that is labelled as "non-cooperative" (which depends on the regulatory framework applicable in the home country) was reflected in the competitive relationship in the marketplace between the allegedly like services and suppliers. In particular, if consumers considered that this fact meant that they are not in a competitive relationship, the services and suppliers would not be "like".

3. In respect of the distribution of the burden of proof to show "likeness", the European Union considers that Panama was obliged to establish a *prima facie* case of "likeness". Once this proof is made, it is for the responding party to rebut these showings as it is more familiar with its own regulatory framework.

**B. Treatment no less favourable**

4. The second issue concerns the interpretation of the term "less favourable treatment" in Articles II and XVII of the GATS. With respect to the context of the term "treatment no less favourable" the European Union considers that the Panel's heavy reliance on the reference to "service suppliers" in the GATS and the distinction the Panel drew with Articles I and III:4 of the GATT 1994 would seem to be exaggerated. A close connection also exists between products and producers. However, the consideration of the connection between services and suppliers is most appropriately done in case of the determination of "likeness".

5. The European Union objects to the test that the regulatory framework in which suppliers operate may be taken into account when determining whether a measure provides "less favourable treatment" provided that these aspects affect the conditions of competition. Such a test is too short and pays insufficient attention to the reasons for neutralising a competitive advantage and thus to the objectives of the regulatory distinction. The European Union considers it inappropriate to develop a test under Articles II:1 and XVII of the GATS that would accept the neutralisation of a competitive advantage without even looking at the objectives of such neutralisation. In any event, a panel should do more than merely establish that the conditions of competition are modified. It must establish a genuine relationship between the measure and the detrimental impact on services or suppliers of a certain origin.

**C. The exception in Article XIV(c) of the GATS**

6. With respect to the interpretation of Article XIV(c) of the GATS, the European Union notes that what should be analysed under sub-paragraph (c) is whether the aspects of the measures that have given rise to the findings of inconsistency with an obligation in the GATS meet the requirements of that sub-paragraph.

7. The European Union considers that the existing exceptions in Article XIV of the GATS should be read in an evolutionary and non-restrictive manner, on the basis of customary rules for interpretation of international agreements, while accommodating for developments in societal concerns and for policy objectives that the negotiating parties of the GATT 1994 or the GATS may not have been aware of at the time. Such an approach was confirmed already by the Appellate Body in *US – Shrimp*.

8. At the same time, the European Union notes that sub-paragraph (c) should not be interpreted such as to enable circumvention of conditions attached to the exceptions in the GATS. When relying on Article XIV(c), the responding Member needs to (i) identify the laws and regulations with which the challenged measure is intended to secure compliance; (ii) prove that those laws and regulations are not in themselves inconsistent with WTO law; and (iii) provide that the measure challenged is designed to secure compliance with those laws or regulations. Furthermore, the responding Member must also show that the measure is "necessary" under Article XIV(c), demonstrating that there are no less trade restrictive alternative measures reasonably available, which make an equivalent contribution to the objective pursued. Finally, the responding Member must demonstrate that the measure meets the conditions of the chapeau of Article XIV(c) of the GATS.

9. The European Union agrees that a "coincidence between the objectives of the relevant measures and its enforcement mechanisms" is not "dispositive" for finding that the conditions of Article XIV(c) are met. What a responding Member must identify under Article XIV(c) of the GATS are the specific obligations with which the enforcement measures secure compliance.

#### **D. Scope of the "prudential exception"**

10. With respect to the scope of the prudential exception in Paragraph 2(a) of the GATS Annex on financial Services, the European Union disagrees with Panama's argument that measures that would fall within the scope of one of the six types of prohibited market access limitations, listed in Article XVI:2 of the GATS, could not be justified under the prudential exception because they would not be "domestic regulations". The European Union does not consider that there are certain violations of obligations in the GATS, particularly Article XVI, that could not be justified under the prudential exception. The prudential exception provides no limitation on the types of measures covered by its scope other than the prudential rationale that leads to their adoption.

#### ANNEX C-4

##### EXECUTIVE SUMMARY OF GUATEMALA'S THIRD PARTICIPANT'S SUBMISSION

1. Guatemala provides its views on certain legal arguments advanced by the Parties with respect to the concept of "likeness" of services and service suppliers and "treatment no less favourable" under Articles II:1 and XVII of the GATS.
2. Guatemala considers that any panel should conclude on the existence of likeness once it finds that a measure accords different treatment *exclusively by reason of origin*. In this case, there should be always a presumption of likeness unless proven otherwise.
3. In the view of Guatemala, a presumption of likeness can be rebutted only by taking into consideration *intrinsic characteristics* of the services or service suppliers.
4. In the context of "treatment no less favourable", regardless of whether having access to tax information on foreign suppliers as a matter of fact or a matter of law modifies the conditions of competition, the Panel's interpretation *expands* the limits of Articles XIV and XIV *bis* and introduces them in the context of "no less favourable treatment" analysis. This interpretation is unwarranted and highly problematic.
5. Guatemala is of the view that, as long as Members comply with their GATS obligations and commitments, they are free to pursue any objective they consider appropriate. However, only the objectives expressly envisaged by the exceptions of the GATS may justify violations of GATS obligations.

**ANNEX C-5****EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION**

1. The United States welcomes the opportunity to provide its views on certain issues raised in this dispute, in which Panama and Argentina each appeal certain findings by the Panel. The United States has a strong interest in the proper interpretation of the *General Agreement on Trade in Services* ("GATS") and, in particular, in the development of an effective and coherent approach to interpreting Article II and Article XVII, and to interpreting Paragraph 2(a) of the *Annex on Financial Services* to the GATS. The issues presented in these appeals are issues with systemic importance to Members, including issues that touch on Members' ability to regulate services to fulfill public policy objectives.

2. Articles II and XVII both discipline a Member's treatment of the services and service suppliers of other Members, requiring that it be no less favorable than the treatment accorded to like services and service suppliers of any other Member (in the case of Article II) or to the like services and service suppliers of the Member itself (in the case of Article XVII). Application of these disciplines accordingly requires a comparison, with the treatment of one Member's services and service suppliers serving as the benchmark for treatment of another's like services and services. Likeness is obviously critical to the validity – if two things subject to comparison are dissimilar, then differences in their treatment may arise from the dissimilarities, rather than some sort of discrimination between them based on origin. Under the comparable most favored nation and national treatment disciplines in Articles I and III, respectively, of GATT 1947 and GATT 1994, panels developed a number of factors to determine whether products were sufficiently like for this comparison – physical characteristics, end uses, customer perceptions, as well as any additional relevant factors. In the services context, this inquiry would involve consideration of the nature of the services and the types of services suppliers.

3. The findings of the Panel and the arguments of the participants in this appeal present several concerns with regard to the conduct of these comparisons under the GATS, involving the identification of like services and service suppliers, as well as the comparison of the treatment accorded to services and service suppliers of another Member.

4. Under GATT 1947 and GATT 1994, Panels developed a principle that in limited circumstances, when national origin was the sole basis for treatment of imported products, a panel may assume that they were like domestic products without conducting a more detailed analysis. The Panel in this proceeding correctly rejected Panama's argument that this principle meant that treatment triggered by the nationality of the supplier (in some modes of supply) allowed an assumption that services and service suppliers were like. However, the Panel erred in then basing its likeness analysis entirely on an inquiry into whether there were factors other than nationality that determined Argentina's treatment of services and services suppliers. A proper analysis would have addressed the nature and characteristics of the services and service suppliers at issue, including any relevant regulatory characteristics, rather than the treatment of services and services not yet determined to be like.

5. In the comparison of the treatment of the services and service suppliers in question, the Panel correctly recognized that it needed to take account of the regulatory context of the measures, but did so incorrectly. The Panel incorrectly viewed Panama's regulatory framework as a competitive advantage, and found that Argentina was entitled to apply tax measures to offset that advantage. However, the key finding was that Argentina's measures were aimed at protecting its ability to assess taxes based on accurate information. In this context, Panama's refusal to share tax information was a competitive disadvantage in its service suppliers' efforts to sell to Argentine customers who sought to obey the law. Footnote 10 to Article XVII specifies that Argentina bears no obligation to compensate for this disadvantage by allowing the use of unverifiable information provided by Panamanian suppliers.