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1 ARTICLE XIV

1.1 Text of Article XIV

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:

- (a) necessary to protect public morals or to maintain public order;⁵

(footnote original) ⁵ The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

- (b) necessary to protect human, animal or plant life or health;

- (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;
- (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective⁶ imposition or collection of direct taxes in respect of services or service suppliers of other Members;

(footnote original) ⁶ Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:

- (i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or
- (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or
- (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or
- (iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or
- (v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or
- (vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.

Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.

- (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

1.2 General

1.2.1 Relevance of jurisprudence under Article XX of the GATT 1994

1. Elaborating on the similarities between Article XX of the GATT 1994 and Article XIV of the GATS, the Appellate Body in *US – Gambling* stated that the latter provision sets out general exceptions under the GATS (services) much in the same way as the former does under the GATT (goods). The Appellate Body also found previous decisions under Article XX of the GATT 1994 relevant for the analysis under Article XIV:¹

"Article XIV of the GATS sets out the general exceptions from obligations under that Agreement in the same manner as does Article XX of the GATT 1994. Both of these provisions affirm the right of Members to pursue 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, provided that all of the conditions set out therein are satisfied. Similar language is used in both provisions², notably the term 'necessary' and the requirements set out in their

¹ Appellate Body Report, *US – Gambling*, para. 291.

² *(footnote original)* Notwithstanding the general similarity in language between the two provisions, we note that Article XIV(a) of the GATS expressly enables Members to adopt measures "necessary to protect public morals or to maintain public order", whereas the corresponding exception in the GATT 1994, Article XX(a), speaks of measures "necessary to protect public morals". (emphasis added)

respective chapeaux. Accordingly, like the Panel, we find previous decisions under Article XX of the GATT 1994 relevant for our analysis under Article XIV of the GATS.³⁴

1.2.2 Two-tier analysis

2. The Appellate Body in *US – Gambling* stated that Article XIV, like Article XX of GATT 1994, provides for a 'two-tier analysis':⁵

Article XIV of the GATS, like Article XX of the GATT 1994, contemplates a 'two-tier analysis' of a measure that a Member seeks to justify under that provision. A panel should first determine whether the challenged measure falls within the scope of one of the paragraphs of Article XIV. This requires that the challenged measure address the particular interest specified in that paragraph and that there be a sufficient nexus between the measure and the interest protected. The required nexus—or 'degree of connection'—between the measure and the interest is specified in the language of the paragraphs themselves, through the use of terms such as 'relating to' and 'necessary to'. Where the challenged measure has been found to fall within one of the paragraphs of Article XIV, a panel should then consider whether that measure satisfies the requirements of the chapeau of Article XIV.⁶

3. Recalling the Appellate Body's findings in *US – Gambling* with respect to the analogy between Article XX of the GATT 1994 and Article XIV of the GATS, the Panel in *Argentina – Financial Services* held:

"The analogy between the two provisions led the Appellate Body in *US – Gambling* to use in its examination of Article XIV of the GATS the same 'two-tier analysis' already used in relation to Article XX of the GATT 1994. Thus, Article XIV of the GATS provides for an analysis in two stages: (i) first, the Panel must determine whether the measure falls within the scope of one of the subparagraphs of Article XIV of the GATS; and (ii) after having found that the measure at issue is justified under one of the subparagraphs of Article XIV of the GATS, the Panel must examine whether this measure satisfies the requirements laid down in the introductory clause or chapeau of Article XIV of the GATS."⁷

1.2.3 Appropriate focus in the analysis of "measures" under Article XIV of the GATS

4. In *Argentina – Financial Services*, the Appellate Body explained that, in its analysis of a general exception, a panel must address the same aspects of each measure that formed the basis of its finding of inconsistency:

"We note that the import of the statement made by the Appellate Body in *Thailand – Cigarettes (Philippines)*, 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'. 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.

³ (footnote original) In this respect, we observe that this case is not only the first where the Appellate Body is called upon to address the general exceptions provision of the GATS, but also the first under any of the covered agreements where the Appellate Body is requested to address exceptions relating to "public morals".

⁴ Appellate Body Report, *US – Gambling*, para. 291.

⁵ Appellate Body Report, *US – Gambling*, para. 292.

⁶ Appellate Body Report, *US – Gambling*, para. 292.

⁷ Panel Report, *Argentina – Financial Services*, para. 7.586.

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 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."⁸

1.3 Chapeau to Article XIV

5. The Appellate Body in *US – Gambling* stated that the focus of the chapeau is on the *application* of a measure already found by the Panel to be inconsistent with its obligations under GATS but falling within one of the paragraphs of Article XIV:⁹

"The focus of the chapeau, by its express terms, is on the *application* of a measure already found by the Panel to be inconsistent with one of the obligations under the GATS but falling within one of the paragraphs of Article XIV. By requiring that the measure be *applied* in a manner that does not constitute 'arbitrary' or 'unjustifiable' discrimination, or a 'disguised restriction on trade in services', the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised reasonably, so as not to frustrate the rights accorded other Members by the substantive rules of the GATS."¹⁰

6. The Appellate Body in *US – Gambling* stated that, since a panel is free to decide which legal issues it must address in order to resolve a dispute, it may proceed to analyse a measure under the chapeau, even if the panel has found that the measure is not provisionally justified under one of the subparagraphs of Article XIV.¹¹

7. The Appellate Body in *US – Gambling* stated that a panel, in examining a facially neutral measure for "arbitrary" or "unjustifiable" discrimination in its application, must place isolated instances of enforcement in their proper context:

"In our view, the proper significance to be attached to isolated instances of enforcement, or lack thereof, cannot be determined in the absence of evidence allowing such instances to be placed in their proper context. Such evidence might include evidence on the *overall* number of suppliers, and on *patterns* of enforcement, and on the reasons for particular instances of non-enforcement. Indeed, enforcement agencies may refrain from prosecution in many instances for reasons unrelated to discriminatory intent and without discriminatory effect."¹²

8. In *Argentina – Financial Services*, the Panel noted that the chapeau of Article XIV of the GATS is drafted in terms very similar to the chapeau of Article XX of the GATT 1994:

⁸ Appellate Body Report, *Argentina – Financial Services*, paras. 6.168-6.169.

⁹ Appellate Body Report, *US – Gambling*, para. 339.

¹⁰ Appellate Body Report, *US – Gambling*, para. 339.

¹¹ Appellate Body Report, *US – Gambling*; para. 344.

¹² Appellate Body Report, *US – Gambling*, para. 356.

"We note that the chapeau of Article XIV of the GATS describes in terms very similar to those of Article XX of the GATT 1994 the existence of three types of situation relating to the application of measures that may give rise to inconsistency with the said chapeau: (i) arbitrary discrimination between countries where like conditions prevail; (ii) unjustifiable discrimination between countries where like conditions prevail; or (iii) a disguised restriction on trade in services. In disputes under Article XX of the GATT 1994, the first two situations (i.e. arbitrary discrimination or unjustifiable discrimination) have often been addressed together. The existence of one of these situations suffices to conclude that a measure cannot be justified under Article XX of the GATT 1994.

Bearing in mind this guidance from the Appellate Body, we shall examine whether the *application* of the measures in question constitutes 'a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail'.¹³

9. The Panel also followed the Appellate Body's guidance in *EC – Seal Products* in conducting its examination of the measure's application:

"In order to conduct this examination of the measure's application, we shall be guided by the Appellate Body's statement in *EC – Seal Products*. As already indicated, in that dispute the Appellate Body determined that 'whether a measure is *applied* in a particular manner 'can most often be discerned from the design, the architecture, and the revealing structure of a measure'. Consequently, below we shall examine 'the design, the architecture, and the revealing structure' of measures 1, 2, 3, 4, 7 and 8 'in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail'.¹⁴

10. In this dispute, the Panel concluded that the measures at issue constituted arbitrary and unjustifiable discrimination within the meaning of the chapeau of Article XIV of the GATS:

"From the foregoing, we conclude that, in granting cooperative country status to countries with which it is negotiating a tax information exchange agreement, without having in force an agreement that allows effective exchange of such information, Argentina is applying measures 1, 2, 3, 4, 7 and 8 in a manner that is counterproductive with regard to the objective it has itself declared in order to justify the distinction between cooperative and non-cooperative countries. We recall that this objective is 'the ability ... to have access to the information necessary to secure compliance with Argentina's laws and regulations'. This situation leads us to the statement by the Appellate Body in *Brazil – Retreaded Tyres* in the sense that the absence of a relationship between the measures and the objectives indicates that the measures discriminate in an 'arbitrary or unjustifiable' way. For example, jurisdictions in different situations as regards Argentina's access to information are classified in the same category; and jurisdictions in a similar situation as regards Argentina's access to information are placed in different categories. We also consider that the annual updating of the list leads to discriminatory treatment between jurisdictions in the same situation. In both cases, we consider that the distortions caused by the design and application of Decree No. 589/2013 are carried over to the application of measures 1, 2, 3, 4, 7 and 8 because Decree No. 589/2013 is an inherent part of them."¹⁵

11. Similarly, the Panel in *EU – Energy Package* held that prior findings by the Appellate Body under Article XX of the GATT 1994 are relevant for the assessment of arbitrary or unjustifiable discrimination under the chapeau of Article XIV of the GATS:

¹³ Panel Report, *Argentina – Financial Services*, paras. 7.745-7.746, referring to Appellate Body Reports, *US – Gasoline*, *US – Shrimp*, para. 184, *US – Shrimp (Article 21.5 – Malaysia)*, *US – Gambling*, and *Brazil – Retreaded Tyres*; and Panel Reports, *US – Gambling*, *EC – Tariff Preferences*, *EC – Asbestos* and *Brazil – Retreaded Tyres*.

¹⁴ Panel Report, *Argentina – Financial Services*, para. 7.748, referring to Appellate Body Report, *EC – Seal Products*, para. 5.302.

¹⁵ Panel Report, *Argentina – Financial Services*, para. 7.761.

"In this regard, we recall that the Appellate Body has clarified, in the context of Article XX of the GATT 1994, that the nature and quality of the discrimination to be examined under the chapeau of this provision is different from that found to be inconsistent with the substantive obligations. More particularly, the Appellate Body has explained that '[a]nalyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination.' In our view, these findings are relevant also for the assessment of arbitrary or unjustifiable discrimination under the chapeau of Article XIV of the GATS." ¹⁶

1.4 Article XIV(a)

1.4.1 General

12. The Panel in *US – Gambling* identified two elements that a party invoking paragraph (a) of Article XIV had to demonstrate:

- "(a) the measure must be one designed to "protect public morals" or to "maintain public order"; and
- (b) the measure for which justification is claimed must be "necessary" to protect public morals or to maintain public order." ¹⁷

1.4.2 "Protect public morals" and "maintain public order"

13. The Panel in *US – Gambling*, noting that jurisprudence under Article XX of the GATT 1994 was applicable to the interpretation of this provision, stated that the meaning of 'public morals' and 'public order' varied depending on a range of factors, and that a Member had the right to determine the appropriate level of protection:

"We are well aware that there may be sensitivities associated with the interpretation of the terms 'public morals' and 'public order' in the context of Article XIV. In the Panel's view, the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values. Further, the Appellate Body has stated on several occasions that Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate. Although these Appellate Body statements were made in the context of Article XX of the GATT 1994, it is our view that such statements are also valid with respect to the protection of public morals and public order under Article XVI of the GATS. More particularly, Members should be given some scope to define and apply for themselves the concepts of "public morals" and 'public order' in their respective territories, according to their own systems and scales of values." ¹⁸

14. The Appellate Body in *US – Gambling* summarized the Panel's findings, and left them untouched, on the definition of 'public morals' and 'public order', and their application to particular measures related to gambling, in the following terms:

"In its analysis under Article XIV(a), the Panel found that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation." The Panel further found that the definition of the term 'order', read in conjunction with footnote 5 of the GATS, "suggests that 'public order' refers to the preservation of the fundamental interests of a society, as reflected in public policy and law." The Panel then referred to Congressional reports and testimony establishing that 'the government of the United States consider[s] [that the Wire Act, the Travel Act, and the IGBA] were adopted to address concerns such as those pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling.' On this basis, the Panel found that the three federal statutes are

¹⁶ Panel Report, *EU – Energy Package*, para. 7.1244.

¹⁷ Panel Report, *US – Gambling*, para. 6.455. See also Panel Report, *EU – Energy Package*, paras. 7.229–7.231.

¹⁸ Panel Report, *US – Gambling*, para. 6.461.

"measures that are designed to 'protect public morals' and/or 'to maintain public order' within the meaning of Article XIV(a)."¹⁹

15. The Appellate Body in *US – Gambling* stated that the Panel had properly applied footnote 5 to Article XIV(a), which states "that [t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society", since:

"Having defined 'public order' to include the standard in footnote 5, and then applied that definition to the facts before it to conclude that the measures "are designed to 'protect public morals' and/or 'to maintain public order'", the Panel was not required, in addition, to make a separate, explicit determination that the standard of footnote 5 had been met."²⁰

16. The Panel in *EU – Energy Package* noted the Appellate Body's finding that panels are not required to make a separate explicit determination on whether the standard in footnote 5 has been met. However, given that the parties had structured their arguments based on footnote 5, the Panel considered it appropriate to base its finding on the standard set out in that footnote:

"The Appellate Body has found that the definition of public order 'include[s] the standard in footnote 5' and has clarified that panels are not required 'to make a separate, explicit determination that the standard of footnote 5 ha[s] been met'. In the dispute before us, both parties have structured their arguments based on the standard in footnote 5. Therefore, while we agree that an explicit examination under this standard may not be necessary in all circumstances, we find it appropriate to follow this structure in our assessment below. Hence, we begin by considering whether the European Union has demonstrated that security of energy supply is a fundamental interest of society and turn, as appropriate, to consider whether it has demonstrated that foreign control of TSOs poses a genuine and sufficiently serious threat to this interest."²¹

1.4.3 "Necessary"

17. The Appellate Body in *US – Gambling* observed that the standard of 'necessity' is an objective standard:

"We note, at the outset, that the standard of 'necessity' provided for in the general exceptions provision is an *objective* standard. To be sure, a Member's characterization of a measure's objectives and of the effectiveness of its regulatory approach—as evidenced, for example, by texts of statutes, legislative history, and pronouncements of government agencies or officials—will be relevant in determining whether the measure is, objectively, 'necessary'. A panel is not bound by these characterizations, however, and may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. In any event, a panel must, on the basis of the evidence in the record, independently and objectively assess the 'necessity' of the measure before it."²²

18. The Appellate Body in *US – Gambling* observed that the assessment of the standard of 'necessity' was carried out through a process of 'weighing and balancing a series of factors':

"In *Korea – Various Measures on Beef*, the Appellate Body stated, in the context of Article XX(d) of the GATT 1994, that whether a measure is 'necessary' should be determined through 'a process of weighing and balancing a series of factors'. The Appellate Body characterized this process as one:

... comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could "reasonably be

¹⁹ Appellate Body Report, *US – Gambling*, para. 296.

²⁰ Appellate Body Report, *US – Gambling*, para. 298.

²¹ Panel Report, *EU – Energy Package*, para. 7.1144.

²² Appellate Body Report, *US – Gambling*, para. 304.

expected to employ" is available, or whether a less WTO inconsistent measure is "reasonably available".²³

19. The Appellate Body in *US – Gambling* described the specific steps in the process of weighing and balancing:

"The process begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure. Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be 'weighed and balanced'. The Appellate Body has pointed to two factors that, in most cases, will be relevant to a panel's determination of the 'necessity' of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.

A comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It 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'.²⁴

20. In determining what constitutes a 'reasonably available' alternative measure the Appellate Body in *US – Gambling* observed:

"The requirement, under Article XIV(a), that a measure be 'necessary'—that is, that there be no 'reasonably available', WTO-consistent alternative—reflects the shared understanding of Members that substantive GATS obligations should not be deviated from lightly. An alternative measure may be found not to be 'reasonably available', however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a 'reasonably available' alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.²⁵

21. The Appellate Body in *US – Gambling* reversed the Panel's finding that the responding Member must have first "explored and exhausted" all reasonably available WTO-compatible alternatives before adopting its WTO-inconsistent measure, and the Panel's further finding that the United States therefore had "an obligation to consult with Antigua before and while imposing its prohibition on the cross-border supply of gambling and betting services", especially in light of its existing specific commitments with respect to these services.²⁶ The Appellate Body stated:

"In our view, the Panel's 'necessity' analysis was flawed because it did not focus on an alternative measure that was reasonably available to the United States to achieve the stated objectives regarding the protection of public morals or the maintenance of public order. Engaging in consultations with Antigua, with a view to arriving at a negotiated settlement that achieves the same objectives as the challenged United States' measures, was not an appropriate alternative for the Panel to consider because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case."²⁷

We note, in addition, that the Panel based its requirement of consultations, in part, on 'the existence of [a] specific market access commitment [in the United States' GATS Schedule] with respect to cross-border trade of gambling and betting services'. We do not see how the existence of a specific commitment in a Member's Schedule affects

²³ Appellate Body Report, *US – Gambling*, paras. 304–305.

²⁴ Appellate Body Report, *US – Gambling*, paras. 306–307.

²⁵ Appellate Body Report, *US – Gambling*, para. 308.

²⁶ Appellate Body Report, *US – Gambling*, para. 315.

²⁷ Appellate Body Report, *US – Gambling*, para. 317.

the 'necessity' of a measure in terms of the protection of public morals or the maintenance of public order. For this reason as well, the Panel erred in relying on consultations as an alternative measure reasonably available to the United States."²⁸

1.4.4 Burden of proof

22. The Appellate Body in *US – Gambling* clarified that the burden of proof on the party invoking Article XIV(a) is to establish a *prima facie* case that the measure at issue is "necessary":

"It is well-established that a responding party invoking an affirmative defence bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked defence. In the context of Article XIV(a), this means that the responding party must show that its measure is 'necessary' to achieve objectives relating to public morals or public order. In our view, however, it is not the responding party's burden to show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden.

Rather, it is for a responding party to make a *prima facie* case that its measure is 'necessary' by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be 'weighed and balanced' in a given case. The responding party may, in so doing, point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is 'necessary'. If the panel concludes that the respondent has made a *prima facie* case that the challenged measure is 'necessary'—that is, 'significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'—then a panel should find that challenged measure 'necessary' within the terms of Article XIV(a) of the GATS."²⁹

23. The Appellate Body in *US – Gambling* specified that a respondent invoking Article XIV(a) must nonetheless demonstrate why a WTO-consistent measure raised by the claimant is not "reasonably available":

"If, however, the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains 'necessary' in the light of that alternative or, in other words, why the proposed alternative is not, in fact, 'reasonably available'. If a responding party demonstrates that the alternative is not 'reasonably available', in the light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be 'necessary' within the terms of Article XIV(a) of the GATS."³⁰

1.5 Article XIV(c)

1.5.1 General

24. In *US – Gambling*, the Panel, noting the textual similarity between Article XX(d) of the GATT 1994 and Article XIV of the GATS, stated:

"We note that, textually, Article XIV(c) is very similar to Article XX(d) of the GATT 1994. Accordingly, on the basis of the comments made by the Appellate Body to which we have referred above regarding the applicability of jurisprudence under the

²⁸ Appellate Body Report, *US – Gambling*, para. 318.

²⁹ Appellate Body Report, *US – Gambling*, paras. 309–310.

³⁰ Appellate Body Report, *US – Gambling*, para. 311.

GATT 1994 to the GATS, we will refer to and rely upon such jurisprudence to the extent to which it is applicable and relevant in our interpretation of Article XIV(c)."³¹

25. Noting that one part of the wording of Article XIV(c) of the GATS ("necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement") is very similar to that of Article XX(d) of the GATT 1994, and recalling the conclusions of the Appellate Body in *US – Gambling* to the effect that previous decisions under Article XX of the GATT 1994 are relevant to the analysis under Article XIV of the GATS (see paragraph 1 above), the Panel in *Argentina – Financial Services* stated:

"We agree with the panel in *US - Gambling* that the legal standard set forth by the Appellate Body in *Korea – Various Measures on Beef* is relevant to our analysis of Argentina's defence under Article XIV(c) of the GATS.

In order to justify its measures successfully under subparagraph (c) of Article XIV, therefore, 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."³²

26. Furthermore, when examining whether a measure is designed to secure compliance with laws and regulations that are not themselves inconsistent with the GATS, the Panel in *Argentina – Financial Services* also decided to follow the three-step approach adopted by previous panels under the GATT, whereby the Member invoking such a defence must (i) identify the laws and regulations with which the challenged measure is intended to secure compliance, and prove that (ii) those laws and regulations are not in themselves inconsistent with WTO law; and (iii) that the measure challenged is designed to secure compliance with those laws or regulations.³³

27. Noting that previous panels had taken into account the prevailing circumstances at the time of implementing measures when assessing whether these were designed to secure compliance with laws and regulations under Article XX(d) of the GATT 1994, the Panel in *Argentina – Financial Services* considered that such circumstances were also relevant under Article XIV(c) of the GATS.³⁴

1.5.2 "laws or regulations which are not inconsistent with the provisions of this Agreement"

28. In *US – Gambling*, the Panel found that Article XIV(c) provides a non-exhaustive list of laws or regulations "which are not inconsistent with the provisions" of the GATS:

"As for the second element, we note that Article XIV(c) provides a non-exhaustive list of laws or regulations 'which are not inconsistent with the provisions of this Agreement'. The list refers to laws and regulations for the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts; 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; and safety. Accordingly, laws and regulations other than those that fall within the list may be relied upon in justifying a GATS-inconsistent measure under Article XIV(c) provided that those other laws and regulations are WTO-consistent."³⁵

³¹ Panel Report, *US – Gambling*, para. 6.537.

³² Panel Report, *Argentina – Financial Services*, paras. 7.592-7.593. See also Appellate Body Report, *Argentina – Financial Services*, para. 6.202.

³³ Panel Report, *Argentina – Financial Services*, paras. 7.595-7.596, referring to Panel Reports, *Colombia – Ports of Entry*, para. 7.514; and *US – Shrimp (Thailand)*, para. 7.174. The Panel also refers to the Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

³⁴ Panel Report, *Argentina – Financial Services*, para. 7.649, referring to Panel Reports, *Korea – Various Measures on Beef*, paras. 655-658; *China – Auto Parts*, paras. 7.309-7.312; and *Colombia – Ports of Entry*, paras. 7.542 and 7.543.

³⁵ Panel Report, *US – Gambling*, para. 6.540.

29. In *Argentina – Financial Services*, the Panel recalled that Article XIV(c) contains an illustrative list of laws or regulations "which are not inconsistent with the provisions" of the GATS. The Panel stated:

"[W]e agree with the panel in *US – Gambling* that Article XIV(c) contains an illustrative list of laws or regulations 'which are not inconsistent with the provisions' of the GATS. On this premise, the panel considered that laws and regulations other than those in subparagraphs (i) to (iii) may be relied upon in justifying a GATS-inconsistent measure under subparagraph (c) provided that those other laws and regulations are consistent with the provisions of the GATS. It should be noted that the Appellate Body reached a similar conclusion regarding the list in Article XX(d) of the GATT 1994.

The Panel therefore agrees with Argentina that Article XIV(c) 'does not contain any limitation *a priori* with regard to the types of 'laws and regulations' consistent with the GATS with which a Member may seek to secure compliance'. Accordingly, the Panel will not assess whether Argentina has proved that the relevant 'laws or regulations' are related to 'the prevention of deceptive and fraudulent practices', provided that it considers that Argentina has proved that the relevant measures secure compliance with laws and regulations that are not inconsistent with the provisions of the GATS."³⁶

30. In *Argentina – Financial Services*, the Appellate Body addressed the situation where a respondent identifies several laws or regulations for the purpose of a defence under Article XIV(c):

"Clearly, a respondent seeking to justify an inconsistent measure may choose, as Argentina did in this dispute, to identify several relevant laws or regulations for purposes of its Article XIV(c) defence.³⁷ When confronted with such defence, it may well be appropriate for a panel to rule on more than one law or regulation.

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."³⁸

1.5.3 Identifying the laws and regulations with which the challenged measure is intended to secure compliance

31. Referring to the Appellate Body's conclusion that the terms "laws and regulations" in Article XX of the GATT 1994 "cover rules that form part of the domestic system of a WTO Member", the Panel in *Argentina – Financial Services* found that "[a]ll the instruments mentioned by Argentina form part of Argentina's domestic legal system".³⁹

1.5.4 "not inconsistent with the provisions" of the GATS

32. In *Argentina – Financial Services*, the Panel recalled that "a Member's legislation shall be presumed WTO-consistent until proven otherwise". The Panel further observed:

"In our view, the findings of inconsistency of certain provisions of the LIG, the LPT and IGJ Resolution No. 7/2005 do not mean that the other provisions of these instruments are also inconsistent with the GATS. The Panel therefore considers that it is not necessary to undertake a detailed examination of the instruments and/or provisions

³⁶ Panel Report, *Argentina – Financial Services*, paras. 7.582-7.583.

³⁷ (footnote original) 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.

³⁸ Appellate Body Report, *Argentina – Financial Services*, paras. 6.208-6.209.

³⁹ Panel Report, *Argentina – Financial Services*, para. 7.607, referring to Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79.

invoked by Argentina in order to establish whether they are consistent with the GATS."⁴⁰

33. In *Argentina – Financial Services*, the Appellate Body noted that Panama had not raised on appeal the issue of whether specific provisions identified by Argentina in the legal instruments at issue could be found to be GATS-consistent even though these provisions were contained in the same legal instruments as the inconsistent measures themselves. The Appellate Body, however, noted:

"[T]here 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."⁴¹

1.5.5 "to secure compliance"

34. In *Argentina – Financial Services*, the Appellate Body explained its understanding of the phrase "to secure compliance" in Article XIV(c) as follows:

"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 regulations⁴² 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. 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 regulations⁴³, even if the measure cannot be guaranteed to achieve such result with absolute certainty. 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 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. 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."⁴⁴

35. In the same dispute, the Appellate Body also compared the analysis to be undertaken under, respectively, each of the two elements required to justify a measure under Article XIV(c) (see paragraph 25 above). After setting out its understanding of the phrase "to secure compliance" (see paragraph 34 above), the Appellate Body turned to the second element, namely the requirement to demonstrate "necessity" and explained:

"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

⁴⁰ Panel Report, *Argentina – Financial Services*, para. 7.625.

⁴¹ Appellate Body Report, *Argentina – Financial Services*, para. 6.201.

⁴² (*footnote original*) 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.

⁴³ (*footnote original*) 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.

⁴⁴ Appellate Body Report, *Argentina – Financial Services*, para. 6.203.

measure can be deemed to be 'necessary' to secure compliance with such laws or regulations."⁴⁵

36. Finally, the Appellate Body explained the relationship between those two elements for purposes of a panel's analysis:

"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."⁴⁶

1.5.6 "necessary"

1.5.6.1 General

37. In *Argentina – Financial Services*, the Panel referred to previous Appellate Body reports which defined the standard of "necessity" under Article XIV of the GATS and Article XX of the GATT 1994, and stated:

"The Panel will therefore assess whether measures 1, 2, 3, 4, 7 and 8 are 'necessary' within the meaning of Article XIV(c) of the GATS, being guided by these comments of the Appellate Body. The Panel will take into account (a) the importance of the objective pursued; (b) the measure's contribution to that objective; and (c) the trade-restrictiveness of measures 1, 2, 3, 4, 7 and 8. We shall then turn to examine whether it is feasible to make a comparison between measures 1, 2, 3, 4, 7 and 8 and possible alternatives."⁴⁷

1.5.6.2 Importance of the objective pursued

38. In *Argentina – Financial Services*, the Panel concluded that "the protection of its tax system and the fight against harmful tax practices and money laundering are objectives, interests or value of utmost importance for Argentina."⁴⁸ The Panel observed:

"In any country, tax collection is an indispensable source of revenue to ensure the functioning of the State and the various government services to citizens. Protection of the national tax base guarantees the viability of a country's public finances and, by extension, its economy and financial system. The risks posed by harmful tax practices⁴⁹ are even more important for developing countries because they deprive their public finances of financial resources vital to promoting their economic development and implementing their domestic policies. Lastly, there can be no doubt that combating money laundering, which fits in with the fight against drug trafficking and terrorism, is a priority for the international community and thus also for Argentina."⁵⁰

⁴⁵ Appellate Body Report, *Argentina – Financial Services*, para. 6.204.

⁴⁶ Appellate Body Report, *Argentina – Financial Services*, para. 6.205.

⁴⁷ Panel Report, *Argentina – Financial Services*, para. 661. The Panel referred to Appellate Body Reports, *US – Gambling*, para. 304 and *EC – Seal Products*, paras. 5.169 and 5.214. See Panel Report, *Argentina – Financial Services*, paras. 7.558 to 7.660.

⁴⁸ Panel Report, *Argentina – Financial Services*, para. 7.682.

⁴⁹ (footnote original) The expression "harmful tax practices" covers tax evasion, avoidance and fraud.

⁵⁰ Panel Report, *Argentina – Financial Services*, para. 7.681.

1.5.6.3 Contribution to achieving the objectives pursued

39. In *Argentina – Financial Services*, the Appellate Body addressed the distinction between assessing whether a measure contributes to attaining the *objectives* of the relevant laws or regulations, and whether that measure contributes to securing compliance with *specific provisions* of such laws or regulations. The Appellate Body stated:

"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.' As we have explained above, 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."⁵¹

40. In the same dispute, the Appellate Body also stressed that, 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:

"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'.' 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."⁵²

Current as of: June 2019

⁵¹ Appellate Body Report, *Argentina – Financial Services*, para. 6.227.

⁵² Appellate Body Report, *Argentina – Financial Services*, para. 6.234.