WORLD TRADE ORGANIZATION

WT/DS453/R/Add.1

30 September 2015

(15-5028)

Original: Spanish

ARGENTINA – MEASURES RELATING TO TRADE IN GOODS AND SERVICES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS453/R.

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

PANAMA

ARGENTINA

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

WORKING PROCEDURES OF THE PANEL

Adopted on 12 December 2013

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. Upon indication from any of the parties, at the latest during the first substantive meeting, of its intention to submit information that requires protection beyond that provided for under these Working Procedures, the Panel, after consultation with the parties, shall decide whether to adopt appropriate additional procedures.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. Should a party wish to request a preliminary ruling of the Panel, it shall do so at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Panama requests such a ruling from the Panel, Argentina shall respond to the request in its first written submission. If Argentina requests such a ruling, Panama shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in the light of the request. The Panel may grant exceptions to this rule upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals, answers to questions or comments on answers provided by the other party. The Panel may grant exceptions to this rule where good cause is shown. Where such exception has been granted,

the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits submitted to the Panel is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission to which the exhibits are annexed at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation shall be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached in annex, to the extent that it is practical to do so.

11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Panama could be numbered PAN 1, PAN 2, etc. If the last exhibit in connection with the first submission was numbered PAN 5, the first exhibit of the next submission would be numbered PAN 6.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5 p.m. on the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall first invite Panama to make an opening statement to present its case. Subsequently, the Panel shall invite Argentina to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters through the Panel secretariat. Each party shall supply the Panel and the other party with a final version of its statement, preferably at the end of the meeting, and in any event no later than 5 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask the other party questions or to make comments through the Panel. Each party shall then have an opportunity to answer those questions orally. Each party shall send in writing, within a time-frame to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the questions of the other party within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a time-frame to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Panama presenting its statement first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask Argentina if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Argentina to present its opening statement, followed by Panama. If Argentina chooses not to avail itself of that right, the Panel shall invite Panama to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters through the Panel secretariat. Each party shall supply the Panel and the other party with a final version of its statement, preferably at the end of the meeting, and in any event no later than 5 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask the other party questions or to make comments through the Panel. Each party shall then have an opportunity to answer those questions orally. Each party shall send in writing, within a time-frame to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the questions of the other party within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a time-frame to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. The third party shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5 p.m. on the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a time-frame to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have the opportunity to answer these questions orally. The Panel shall send in writing, within a time-frame to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and the third parties, which shall be attached as annexes to the report. These executive summaries shall not serve in any way as a substitute for the submissions of the parties and the third parties in the Panel's examination of the case.

20. Each party shall provide executive summaries of the facts and arguments as presented to the Panel, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of the replies to questions. These summaries shall not exceed 15 pages each. The Panel shall not summarize the parties' replies to the questions in the descriptive part, nor shall it annex them to its report.

21. Each third party shall submit an executive summary of its arguments as presented to the Panel in its written submission and its declaration of conformity with the timetable adopted by the Panel for its work. This summary may also include a summary of the replies to questions, where applicable. The executive summary to be provided by each one of the third parties shall not exceed six pages.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, like the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file four paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD ROMs/DVDs, four CD ROMs/DVDs and three paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD ROM, a DVD or as an email attachment. If the electronic copy is provided by email, it should be addressed to *****@wto.org, and cc'd to *****.*****@wto.org, *****.*****@wto.org, *****.*****@wto.org, and *****.*****@wto.org. If a CD ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5 p.m. (Geneva time) on the dates established by the Panel. A party or third party may transmit its documents to the other party or third party in electronic form only, subject to prior written consent of the notified party or third party and provided the Panel secretariat is informed.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX B

ARGUMENTS OF THE PARTIES

PANAMA

ARGENTINA

ANNEX B-1

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF PANAMA

1. INTRODUCTION

1.1. Argentina maintains a set of measures that accord to services and service suppliers (and in some cases also goods) from the excluded countries less favourable treatment than that accorded to like services and service suppliers from the beneficiary countries. Certain Argentine measures also accord products, services and service suppliers from the excluded countries treatment less favourable than that accorded to like products, services and service suppliers of Argentine origin.

1.2. The measures create discriminatory barriers that limit, or even nullify, competitive opportunities in the Argentine market for services and service suppliers from the excluded countries, while affecting the goods and services of 71 WTO Members (45% of the Membership), including 32 of the 34 least developed country Members.[1]

1.3. Argentina uses a list system to implement the measures. Initially, selection was on the basis of a positive list of "countries considered to have low or no taxes", incorporated in the Regulations implementing the Income/Profits Tax Law (*Reglamento de la Ley del Impuesto a las Ganancias* (RIG)).[2] Currently, selection is made on the basis of a negative list arising from Decree No. 589/2013, General Resolution No. 3576 of the Federal Administration of Public Revenue (AFIP) and the list published on 8 January 2014.[3]

1.4. A country is included and kept on the list subject to compliance with certain requirements imposed unilaterally by Argentina, including the signing or negotiation of an agreement on exchange of information with Argentina and the easing of certain rules concerning the disclosure of private information of individuals. Indeed, under existing Argentine legislation, "non-cooperating countries for tax transparency purposes" are (i) countries that have not signed, with Argentina, agreements on exchange of tax information or conventions to avoid international double taxation with a clause on extensive information exchange; or (ii) countries that, at AFIP's discretion, have not entered into, with Argentina, the negotiations necessary for signing the aforementioned agreements or conventions.

1.5. Although Panama is currently included on the list of beneficiary countries, it was, for many years, an excluded country, and remained so until the establishment of the Panel and timetable for this dispute. Panama's inclusion on the list does not reflect a solution agreed by both parties.

1.6. In specific terms, the claims raised by Panama in this dispute address the following issues:

- the withholding tax on the payment of interest or remuneration for certain financial services provided by suppliers from the excluded countries;
- the presumption that any entry of funds from the excluded countries constitutes an unjustified increase in wealth;
- the transfer pricing regime for the determination of profits tax, applicable to transactions with persons from the excluded countries;
- the establishment of a special rule for the allocation of expenditure for the profits tax, applicable only to service payments made to persons from the excluded countries;

[1] List of WTO Members affected by the measures in question, contained in the introduction to Panama's first written submission (p. 13).

[2] Seventh unnumbered article following Article 21 of Decree No. 1344 of 19 November 1998 establishing the Implementing Regulations for the Income/Profits Tax Law (RIG). This provision was incorporated pursuant to Decree No. 1037/2000 (Exhibit PAN-1).

[3] Pursuant to Decree No. 589 of 27 May 2013 (Decree No. 589/2013), Argentina modified the positive list system by replacing the sixth unnumbered article following Article 21 of Decree No. 1344/1998 (Exhibit PAN-3).

- the restrictions on access to the Argentine reinsurance and retrocession market;
- the restriction on access to the Argentine capital market for financial service suppliers from the excluded countries;
- the imposition of more stringent requirements for the registration of branches of companies from the excluded countries; and
- the imposition of the foreign exchange authorization requirement.

1.7. The claims concerning each measure and its inconsistency with the provisions of the GATS and the GATT are detailed below.

2. LEGAL CLAIMS

2.1. The withholding tax on payments for certain services provided by suppliers from the excluded countries is inconsistent with Article II:1 of the GATS

2.1. Argentina taxes foreign loan, credit and fund placement services for non-financial consumers, provided by foreign suppliers, differently depending on the supplier's geographical location. When suppliers of these services are based in the excluded countries, Argentina has different presumptions of net profit, which involve the imposition of a heavier tax burden.

2.2. This means that if the foreign suppliers are banks or financial entities residing in a beneficiary country[4], Argentina will presume that the payments for the services in question generate a net profit of 43% of the amount paid. On this basis, Argentina will apply the rate of 35%.[5] As a result, Argentina will effectively impose on suppliers from the beneficiary countries a withholding tax of 15.05% of the total amount of the payment for interest or remuneration (i.e. 35% on 43% of the payments). However, if the suppliers are banks or financial entities from the excluded countries, Argentina will presume, against any evidence to the contrary, that the payments generate a net profit of 100%.[6] On this basis, Argentina will apply the rate of 35%.[7] As a result, Argentina will effectively impose on suppliers from the excluded countries a withholding tax of 35% of the total amount of the payment for interest or remuneration (i.e. 35% on 100% of the payments).

2.3. Panama believes that Argentina's measure meets the criteria necessary to be deemed inconsistent with Article II:1 of the GATS.[8]

2.4. First, the measure in question is a measure covered by the GATS, as: (i) it has an impact on the cross-border supply (mode 1) of loan and credit services and services involving the placement of funds in Argentina, which are classified in sector 7.B. of the Sectoral Classification List prepared by the GATT Secretariat for the negotiation of Members' schedules of commitments[9]; and (ii) it affects trade in the above-mentioned services by having a direct impact on the "payment" (i.e. interest or remuneration as consideration) for the services provided, within the meaning of Article XXVIII(c) of the GATS.

[4] According to Article 92(c)(1), second paragraph, of the Income/Profits Tax Law (LIG), preferential treatment is also granted to suppliers from jurisdictions that have signed an information exchange agreement with Argentina and where banking, stock market or other forms of secrecy may not be invoked in response to a request for information from the Argentine tax authorities (Exhibit PAN-4).

[5] Articles 92 and 93 of the LIG (Exhibit PAN-4).

[6] Article 92(c)(2) of the LIG (Exhibit PAN-4).

[7] Articles 92 and 93 of the LIG (Exhibit PAN-4).

[8] In *Canada - Autos*, the Appellate Body indicated that a finding of violation of Article II:1 of the GATS must be based on the following three components: (i) the measure in question must be covered by the GATS; (ii) there must be "likeness" between the foreign services and/or service suppliers affected by the measure and other foreign services and/or service suppliers; and (iii) the measure must accord, immediately and unconditionally, treatment no less favourable to the services and/or service suppliers of a Member than that accorded to the like services and/or service suppliers of other countries.

[9] Note by the Secretariat, "Services Sectoral Classification List", of 10 July 1991, document MTN.GNS/W/120 (Document W/120) (Exhibit PAN-6).

2.5. Secondly, the foreign services and service suppliers affected by the measure are like other foreign services and/or service suppliers. In fact, through the withholding regime for payments made to suppliers from the excluded countries, Argentina affords different tax treatment depending on the location of the service supplier[10], which is less favourable for suppliers from the excluded countries. Given that the only reason for providing differential treatment is the *origin* of the service supplier, it follows that the measure affects services and service suppliers that are "like" those not covered by the measure.[11]

2.6. Lastly, the measure in question accords to services and service suppliers from the excluded countries treatment less favourable than that accorded to like services and service suppliers from other countries. Imposing a tax burden on services from suppliers in the excluded countries that is higher than that imposed on like services from suppliers in the beneficiary countries effectively reduces the profit margins of suppliers of credit and loan services from the excluded countries, in relation to the higher profit margins enjoyed by competitors from the beneficiary countries, thereby nullifying equality of competitive conditions in the Argentine market between the services and service suppliers of the excluded countries and the like services and service suppliers of the beneficiary countries. By establishing different presumptions of net profit, the measure necessarily imposes a heavier tax burden, and therefore less favourable treatment, on services and service suppliers from the excluded countries than on like services provided by suppliers from the beneficiary countries.

2.2. The presumption of unjustified increase in wealth is inconsistent with Articles II:1 and XVII of the GATS and Article I:1 of the GATT

2.7. Argentine tax legislation[12] contains the presumption that any entry of funds from the excluded countries constitutes, unless proven otherwise, an "unjustified increase in wealth" for the recipient of the funds in Argentina; such inflows are accordingly presumed to be net profits liable to the payment of profits tax and, as such, qualify as omitted sales. To rebut the presumption, taxpayers must undergo an administrative procedure in which they must certify a series of acts provided for in Argentine legislation in order to prove the legitimate origin of the funds.[13]

2.8. If the recipient is unable to prove the legitimate origin of the funds, the presumption would be confirmed, which entails consequences for the taxpayer, as it obliges him to pay profits tax, value added tax (VAT) and other internal taxes on the amount received from the excluded country, regardless of the type of operation that led to the money being sent and of whether the taxable event giving rise to the imposition of the above taxes actually occurred. The recipient of the funds is not subject to this presumption when the funds enter from a beneficiary country.

2.9. Panama believes that Argentina's measure meets the criteria necessary to be deemed inconsistent with Articles II:1 and XVII of the GATS and Article I:1 of the GATT.

Inconsistency of the measure with Article II:1 of the GATS

2.10. The legal presumption of unjustified increase in wealth accords to services and service suppliers from the beneficiary countries less favourable treatment than that accorded to like services and service suppliers from the excluded countries, in violation of Article II:1 of the GATS.[14]

2.11. First, the measure in question is a measure covered by the GATS, as (i) given that the presumption applies to any funds entering Argentina from the excluded countries "whatever their

[10] In Panama's understanding, there is no difference of treatment in the case of Argentine banks or financial entities. Article 93(c)(1), first sentence, of the LIG (Exhibit PAN-4).

[11] Panel Report, *China - Publications and Audiovisual Products*, para. 7.975. In this report, the Panel specifically noted that "[w]hen 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". Although the Panel in this dispute had to analyse the consistency of the measure in question with the national treatment obligation, Panama considers the same reasoning to be relevant to an examination of the MFN treatment obligation. This reasoning was reiterated in *China - Electronic Payment Services*.

[12] Article added to Article 18 of the Law on Tax Procedure (Exhibit PAN-9).

[13] The taxpayer must prove that the funds originate from: (i) activities actually carried out by the taxpayer in the excluded countries; (ii) activities actually carried out by third parties in those jurisdictions; or (iii) duly declared fund placements.

[14] See footnote 8.

nature or category or the type of operation involved"[15], the measure covers all trade transactions deriving from the supply of any service that requires a transfer of money from the foreign country to Argentina, in particular, loan or insurance services, *inter alia*, in cross-border mode; and (ii) the measure has an effect on the very object or "supply" of the service, within the meaning of Article XVIII(b) of the GATS, and on the "use" of the services, within the meaning of Article XVIII(c)(i) of the GATS, by having an impact on an essential part of any service the supply of which involves sending funds to Argentina.

2.12. Secondly, the foreign services and service suppliers affected by the measure are like other foreign services and/or service suppliers. In fact, if the funds come from the excluded countries, the presumption provided for in the article added to Article 18 of the Law on Tax Procedure is triggered, whereas if they enter Argentina from a beneficiary country, there is no presumption of unjustified increased wealth. The likeness requirement is therefore met, as Argentine legislation establishes differential treatment based solely on the origin of the service or service supplier.[16]

2.13. Lastly, the measure in question accords to services and service suppliers from the excluded countries less favourable treatment than that accorded to like services and service suppliers from other countries, as it creates a disincentive to contracting services that imply a transfer of funds from the listed countries (e.g. loan services, money transfers, insurance), thus distorting the conditions of competition with like services and service suppliers from other countries.

Inconsistency of the measure with Article XVII of the GATS

2.14. Under the measure, Argentina accords to services and service suppliers from the excluded countries treatment less favourable than that accorded to its own like services and service suppliers, in violation of Article XVII of the GATS, in particular as regards the following services: (i) maritime and air transport insurance, and (ii) reinsurance and retrocession.[17]

2.15. First, having included the word "None" in its schedule of specific commitments in the national treatment column in respect of mode 1 for maritime and air transport insurance, and reinsurance and retrocession, Argentina has not established any limitation on the national treatment obligation in that mode. Due to this full commitment in respect of national treatment[18], *any* limitation imposed by Argentina on mode 1 supply would be inconsistent with Article XVII of the GATS.

2.16. Secondly, the presumption of unjustified increase in wealth is a measure that affects the supply of services, as it has an impact on an essential part of the service, namely on the monetary amounts that the service supplier (i.e. the insurer or reinsurer) has undertaken to pay to the consumer of the service (i.e. the insured) in the event of the occurrence of the circumstances or contingency stipulated in the respective contract. This therefore affects the "supply" of these services, within the meaning of Article XVIII(b) of the GATS, and the "use" of the services, within the meaning of Article XVIII(c)(i) of the GATS.

2.17. Lastly, the measure in question accords to services and service suppliers from the excluded countries treatment less favourable than that accorded by Argentina to its own like services and service suppliers. Indeed, the likeness requirement is shown to have been met by the fact that the country of origin of the funds is the only element that determines the triggering of the presumption that these funds constitute an unjustified increase in wealth for the local recipient.[19] Moreover, the less favourable treatment accorded to suppliers of air and maritime transport insurance services and reinsurance and retrocession services based in excluded countries, lies in

[15] Article added to Article 18 of the Law on Tax Procedure (Exhibit PAN-9).

[16] Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

[17] As established by the Panel in *China - Electronic Payment Services*, a finding of violation of Article XVII of the GATS must be based on the following three components: (i) the Member in question has made commitments on national treatment in the relevant sector and mode of supply, regard being had to any conditions and qualifications, or limitations, set out in its Schedule; (ii) the measure in question is one affecting the supply of services in the relevant mode of supply; and (iii) the measure in question accords to services and service suppliers of any other Member treatment less favourable than that accorded to like services and service suppliers of national origin.

[18] Appellate Body Report, *US - Gambling*, para. 215; and Panel Report, *China - Electronic Payment Services*, para. 7.651.

[19] Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

that, should the agreed circumstances or risk occur, there would be a transfer of funds to Argentina that would trigger the presumption of increased wealth, with the above-mentioned procedural and tax implications. This situation has a direct impact on the service supplier's opportunities to compete, as the Argentine consumer would choose not to contract the services offered by suppliers from the excluded countries because this would imply undergoing a verification procedure and possible fiscal charges. The measure thus clearly discourages the contracting of such services by modifying the conditions of competition to the detriment of services and service suppliers from the excluded countries.

Inconsistency of the measure with Article I:1 of the GATT

2.18. The measure in question is in breach of the MFN treatment obligation for trade in goods laid down in Article I:1 of the GATT. This is because the measure does not accord to exports of like products destined for the excluded countries (giving rise to payments from the listed countries) the advantage, favour, immunity or privilege that is accorded to exports destined for the beneficiary countries.[20]

2.19. First, the presumption of unjustified increase in wealth in relation to the entry of funds as payment for exports qualifies as a "rule and formality in connection with exportation"[21] and as a "charge imposed on the international transfer of payments" for exports.

2.20. Secondly, under the measure, the Argentine exporter sending his goods to beneficiary countries receives an advantage, privilege or immunity in the form of an exemption from the procedural and fiscal charges mentioned in respect of exports destined for the excluded countries. The measure in question thus gives rise to an advantage, privilege or immunity within the meaning of Article I:1 of the GATT.

2.21. Thirdly, the measure in question affects products "like" those that receive the advantage, immunity and/or privilege, since the only indicator for the differential treatment is the country of destination of the exports. Indeed, the likeness requirement is met because Argentine legislation provides for a regulatory distinction based *only* on the destination of the exports.[22]

2.22. Lastly, Argentina does not extend the said advantage, privilege or immunity to exports destined for the excluded countries. Consequently, Argentina is clearly in breach of Article I:1 of the GATT.

2.3. Valuation based on transfer prices is inconsistent with Articles II:1 and XVII of the GATS and Articles I:1, III:4 and XI:1 of the GATT

2.23. Argentine legislation considers that transactions between an Argentine taxpayer and a person domiciled in one of the excluded countries are not consistent with normal arms-length market practices or prices, and requires the Argentine taxpayer to apply the transfer pricing regime as if the transaction were between related parties[23], even though the parties are independent.[24] Argentine legislation establishes the same presumption for importation and for exportation of goods.[25]

2.24. Hence, a taxpayer contracting from a person domiciled in any of the excluded countries is necessarily subject to the transfer pricing regime in order to establish the value of transactions that generate revenue and those that involve deductible outlays, for the purposes of determining the net profit liable to profits tax.[26]

[20] In accordance with applicable case law, a determination of inconsistency with this provision is comprised of four elements: (i) the measure in question must be covered by Article I:1; (ii) the measure in question must be related to an "advantage, favour, privilege or immunity […] to any product originating in or destined for any other country"; (iii) there is a likeness between the products in question; and (iv) the "advantage, favour, privilege or immunity" is not accorded immediately and unconditionally to like products originating in or destined for all WTO Members. Panel Report, *EU - Footwear (China)*, para. 7.99 (in reference to the Panel Report in *Indonesia - Autos*, para. 14.138).

[21] Panel Report, *US - Poultry (China)*, para. 7.410.

[22] Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

[23] Article 15, second paragraph, of the LIG (Exhibit PAN-4).

[24] Article 21 of the RIG (Exhibit PAN-1).

[25] Article 8, fifth paragraph, of the LIG (Exhibit PAN-4).

[26] Article 17 of the LIG (Exhibit PAN-4).

2.25. Under this regime, an Argentine taxpayer deciding to contract services from a service supplier based in an excluded country must follow a complex process that requires not only knowledge of the conceptual methodology framework but also the gathering of a considerable amount of information on the transaction in question and on other "comparable" transactions, or on the use of man-hours, to understand what is wanted, process the relevant information and make the appropriate calculations and comparisons. The measure also requires that an independent chartered accountant, certified by the relevant professional association, be hired to make or approve the calculations.

2.26. Panama believes that the measure in question meets the criteria necessary to be considered inconsistent with Articles II:1 and XVII of the GATS and Articles I:1, III:4 and XI:1 of the GATT.

Inconsistency of the measure with Article II:1 of the GATS

2.27. The transfer pricing regime for the valuation of services provided by suppliers from the excluded countries leads to disincentives that accord to services and service suppliers domiciled, incorporated or based in the excluded countries treatment less favourable than that accorded to like services and service suppliers from other countries, in violation of Article II:1 of the GATS.[27]

2.28. First, the measure in question is a measure covered by the GATS, as it affects transactions concluded between Argentine residents and persons domiciled in the excluded countries, under the cross-border mode and, possibly, the mode of consumption abroad.

2.29. Secondly, the foreign services and service suppliers affected by the measure are like other foreign services and/or service suppliers. The measure is premised on a regulatory distinction based only on the place where a contractual party is located. It follows that there is likeness between the services and/or service suppliers from the excluded countries and other services or service suppliers from the beneficiary countries not subject to the measure in question.[28]

2.30. Lastly, the measure in question accords to services and service suppliers from the excluded countries less favourable treatment than that accorded to like services and service suppliers from other countries. For Argentine taxpayers, purchasing services from persons in the excluded countries involves administrative requirements, financial burdens and tax contingencies, which do not apply if they choose to contract the same services from a supplier located in any of the beneficiary countries - meaning that they are discouraged from contracting under such circumstances. Consequently, by making the contracting of services from suppliers in the excluded countries more burdensome, the measure in question impairs the conditions of competition among foreign like services and service suppliers.

Inconsistency of the measure with Article XVII of the GATS

2.31. The transfer pricing regime for the valuation of services provided by suppliers from the excluded countries discourages Argentine consumers from purchasing services from suppliers domiciled, incorporated or located in the excluded countries, thereby placing such suppliers in a situation less favourable than that applicable to like domestic services and suppliers, in a manner that is inconsistent with Article XVII of the GATS.[29]

2.32. First, Argentina undertook full commitments in respect of national treatment in cross-border trade in all the sectors in its Schedule, except for certain specific services in the financial services sector.[30]

2.33. Secondly, the measure in question is a measure covered by the GATS. This is because it involves and affects services, particularly under the mode of cross-border trade in professional services, such as the legal or accounting advisory services provided by service suppliers based in the excluded countries.

[27] See footnote 8.
[28] Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.
[29] See footnote 17.
[30] Argentina's Schedule of Specific Commitments (Exhibit PAN-19).

2.34. Lastly, the measure in question accords to services and service suppliers from the excluded countries less favourable treatment than that accorded to like services and service suppliers of national origin. The likeness requirement is shown to have been met by the fact that the measure in question is premised on a regulatory distinction based only on the place of provenance or origin of the services.[31] Furthermore, the less favourable treatment is demonstrated by the fact that, for the Argentine taxpayer, the purchasing of services from persons in the excluded countries implies administrative requirements, financial burdens and significant tax contingencies, while purchasing the same services from a supplier based in Argentina would not entail the same requirements, financial burdens or tax contingencies. Consequently, the measure in question impairs the conditions of competition between like services and service suppliers from the excluded countries and those of national origin.

Inconsistency of the measure with Article I:1 of the GATT

2.35. The measure in question accords to imports from the beneficiary countries, as well as to exports of products to any beneficiary country, the possibility of being valued as transactions in line with normal market practices or prices, without making them subject to the determination of transfer prices, whereas the same advantage, immunity, favour or privilege is not extended immediately and unconditionally to imports of like products from the excluded countries. Consequently, the measure is inconsistent with Article I:1 of the GATT.[32]

2.36. First, the measure is a rule or formality linked to the importation or exportation of goods within the meaning of Article I:1 of the GATT, as all international trade transactions are subject to this mandatory requirement under Argentine legislation.

2.37. Secondly, the measure in question affects products "like" those that receive the advantage, immunity and/or privilege, since the only indicator for differential treatment is the country of destination of the exports. Indeed, the likeness requirement is met because Argentine legislation provides for a regulatory distinction based *only* on the destination of the exports.[33]

2.38. Thirdly, goods traded with persons from any of the beneficiary countries are not subject to the same type of requirements and charges. The transfer pricing regime is not usually applied to such transactions, as it is assumed that their value is that agreed between the parties. The measure thus implicitly accords to like goods imported from, or exported to, the beneficiary countries, an advantage, immunity or privilege in the Argentine market.

2.39. Lastly, Argentina does not provide the more favourable treatment that is accorded to the products imported from any of the beneficiary countries. Likewise, nor has it provided the more favourable treatment that is accorded to the export products destined for any of the beneficiary countries.

Inconsistency of the measure with Article III:4 of the GATT

2.40. Subjecting Argentine taxpayers to the transfer pricing regime for the valuation of imported goods when they are sold by persons from the excluded countries accords to these goods less favourable treatment than that accorded to domestic goods sold by persons based in Argentina, in violation of Article III:4 of the GATT.[34]

2.41. First, the measure in question is contained in laws, regulations and requirements established by Argentina, since it derives from Articles 8, 14 and 15 of the LIG, in conjunction with Article 21 of the RIG, and the subsequent articles following Article 21 of the RIG, and AFIP General Resolution No. 1122.[35]

---

[31] Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

[32] See footnote 20.

[33] See Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

[34] In *Korea - Various Measures on Beef (*para. 133), the Appellate Body found that an assessment of conformity with Article III:4 of the GATT requires the determination of whether: (i) the measure in question is a law, regulation or requirement affecting the sale, offering for sale, purchase, transportation, distribution or use of these products in a Member's internal market; (ii) the imported products affected by the measure at issue are "like" the domestic products; and (iii) the treatment accorded to the imported products is less favourable than that accorded to like domestic products.

[35] AFIP General Resolution No. 1122 (Exhibit PAN-26).

2.42. Secondly, the measure affects products from the excluded countries that are like those traded by other persons, including domestic products traded by persons based in Argentina, as the regulatory distinction for applying the measure is based on the location of the traders of the goods (whether they are in the excluded countries or not).[36]

2.43. Thirdly, the measure accords to products originating in or coming from the excluded countries less favourable treatment than that granted to like products of national origin. Indeed, subjecting imports from persons from the excluded countries to the transfer pricing regime imposes on Argentine taxpayers additional administrative requirements, financial burdens and tax contingencies that are not imposed on transactions concluded for goods of Argentine origin. These additional requirements and charges constitute regulatory conditions that influence the taxpayer's decision to contract with persons from the excluded countries. They therefore affect the sale, offering for sale, and purchase or use of products from the excluded countries by actual or potential importers in Argentina. Since they are onerous for a buyer in Argentina, these requirements and charges deny imported products effective opportunities to compete in the Argentine market. Conversely, domestic products sold by persons based in Argentina are not subject to the transfer pricing regime.

Inconsistency of the measure with Article XI of the GATT

2.44. The measure alternatively qualifies as a restriction on the importation and exportation of goods within the meaning of Article XI:1 of the GATT, as it establishes restrictive conditions consisting of certain requirements and charges that condition and discourage the importation of goods from the excluded countries, and the exportation of goods to these countries.[37]

2.45. Importing products from the excluded countries entails automatic consequences: for determination of the profits tax, Argentine taxpayers are subject to the transfer pricing regime, which generates extra costs and significant risks. There is no legally valid way to avoid these consequences, and failure to comply with the information obligations and related requirements gives rise to penalties of various kinds. These conditions end up discouraging the importation of goods from the excluded countries.

2.46. The exportation of goods to the excluded countries is also affected by the transfer pricing regime. The application of these rules and procedures discourages the exportation of goods to certain destinations. This is due to the administrative and financial charges and tax contingencies imposed through application of the transfer pricing regime. The measure in question thus limits the ability of buyers from the excluded countries to effectively procure goods produced in Argentina.

2.4. The rule on allocation of expenditure for transactions with persons from the excluded countries is inconsistent with Articles II:1 and XVII of the GATS

2.47. Under Argentine legislation, the allocation of expenditure in relation to transactions with any person from abroad for the purposes of determining the tax base is governed in general terms by the "accrual" rule[38], according to which profits and expenditure shall be allocated to the period in which they originated, regardless of the time when the expenses become due or payment was actually made. However, under Argentine legislation, the deduction may not be made under the accrual rule if the allocation of expenditure stems from a transaction with a person from an excluded country.[39] In these circumstances, Argentine legislation provides that the allocation shall be made at the time of verification that payment of the obligation has actually been made.[40]

[36] See Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

[37] Panel Report, *India - Autos,* paras. 266-268; Panel Report, *Colombia - Ports of Entry,* para. 7.252; Panel Report, *China - Raw Materials,* paras. 7.914-7.915.

[38] Article 18, paragraph 6, of the LIG, and Article 18, paragraph 11, of the LIG (Exhibit PAN-4).

[39] Article 18, final paragraph, of the LIG.

[40] Alternatively, Article 18, final paragraph, of the LIG, provides that this allocation shall be made in the event of any of the cases set forth in paragraph 6 of Article 18 or, failing this, if any of the circumstances mentioned in that paragraph occur within the period provided for submission of the sworn declaration in which the respective expense was accrued (Exhibit PAN-4).

2.48. Because of the way in which the measure is configured, the rule on allocation of expenditure at the time of payment applies to any transactions with service suppliers in the excluded countries that generate profits considered to be of Argentine origin, including credit, loan and fund placement services.[41]

2.49. In Panama's opinion, the measure in question meets the criteria necessary to be considered inconsistent with Articles II:1 and XVII of the GATS.

Inconsistency of the measure with Article II:1 of the GATS

2.50. The rule on allocation of expenditure for service transactions with persons from the excluded countries limits the possibility of being able to deduct payment for services provided by these suppliers, and accords them less favourable treatment than that accorded to like services and service suppliers from the beneficiary countries, in violation of Article II:1 of the GATS.[42]

2.51. First, the measure in question is a measure covered by the GATS. This is because it involves and affects services, such as the credit, financial loan or fund placement services from the excluded countries that are referred to in Title V of the Income/Profits Tax Law (LIG).[43] The measure affects these services under the cross-border mode.

2.52. Secondly, the foreign services and service suppliers affected by the measure are like other foreign services and/or service suppliers. Given its configuration, the measure is premised on a distinction based on the place of provenance or origin of the services generating the expenses in question. There is therefore a presumption of likeness in this case, as it is not necessary to demonstrate the concurrence of additional similar factors.[44]

2.53. Lastly, the measure in question accords to services and service suppliers from the excluded countries less favourable treatment than that accorded to like services and service suppliers from other countries. The less favourable treatment stems from the fact that the measure in question increases the tax liability of the service consumer, i.e. the Argentine taxpayer, which places the services provided by persons from the excluded countries under tax and accounting conditions that make them less attractive in the Argentine market and, as a result, reduce their opportunities to compete on an equal footing with like services and service suppliers from other countries.

Inconsistency of the measure with Article XVII of the GATS

2.54. The rule on allocation of expenditure for service transactions with persons from the excluded countries accords to suppliers from the excluded countries and to their services less favourable treatment than that accorded to domestic like services and service suppliers, in violation of Article XVII of the GATS.[45]

2.55. First, the measure in question affects specific services in respect of which Argentina undertook full commitments on national treatment in cross-border trade.[46]

2.56. Secondly, the foreign services and service suppliers affected by the measure are like other foreign services and/or service suppliers. Indeed, the measure establishes a regulatory distinction based only on the location and place of domicile and/or incorporation of the service supplier, which is why there should be a presumption of likeness in this case.[47]

2.57. Lastly, the measure accords less favourable treatment to excluded services and service suppliers than to like services and service suppliers of national origin, because applying the criterion of payments received (*criterio de lo percibido*) in order to be allowed to deduct expenses means that purchasing foreign services is less attractive for Argentine taxpayers. The measure

[41] According to Article 1, third paragraph, of the LIG, "[n]on-residents shall pay tax only on their earnings of Argentine origin, in accordance with the provisions of Title V." (Exhibit PAN-4). The services referred to in Title V of the LIG, particularly in Articles 91 and 93, are credit, loan and fund placement services.

[42] See footnote 8.

[43] Article 93(c) of the LIG (Exhibit PAN-4).

[44] Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

[45] See footnote 17.

[46] Argentina's Schedule of Specific Commitments (Exhibit PAN-19).

[47] Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

thus denies foreign services and service suppliers opportunities to compete under equal conditions with domestic services and service suppliers, for which payments may continue to be allocated on an accrual basis.

2.5. The restrictions on access to the Argentine reinsurance and retrocession market are inconsistent with Articles II:1, XVI:1 and XVI:2(a) of the GATS[48]

2.58. Argentine legislation contains various provisions that prohibit, in absolute terms, the provision of reinsurance services[49] in Argentine territory when provided by suppliers from the excluded countries in the modes of cross-border trade (mode 1) and commercial presence (mode 3).

2.59. In normal circumstances, reinsurance services may be provided in Argentina by suppliers from the beneficiary countries that have branches, i.e. a commercial presence, in Argentina.[50] However, this possibility is expressly denied to suppliers of the same service when they are incorporated in the excluded countries.[51] Furthermore, in exceptional circumstances, reinsurance service suppliers from the beneficiary countries may be authorized to provide reinsurance services in Argentina in cross-border mode.[52] However, this possibility is also expressly denied to suppliers of the same services when they are incorporated in the excluded countries.[53]

2.60. Panama believes that the measure in question meets the criteria necessary to be considered inconsistent with Articles II:1, XVI:1 and XVI:2(a) of the GATS.

Inconsistency of the measure with Article II:1 of the GATS

2.61. Argentina accords to reinsurance services and service suppliers from the excluded countries less favourable treatment than that accorded to like reinsurance services and service suppliers from other countries, in violation of Article II:1 of the GATS.[54]

2.62. First, the measure in question is covered by the GATS. This is because the prohibition on suppliers from the excluded countries providing reinsurance services in cross-border mode and through commercial presence is a measure that affects trade in reinsurance services conducted through two of the four modes of supply provided for in Article I:1 of the GATS, since it regulates the manner and cases in which reinsurance services may be provided in Argentina by foreign suppliers.

2.63. Secondly, the foreign services and service suppliers affected by the measure are like other foreign services and/or service suppliers. In effect, the prohibition is imposed *only* on reinsurance service suppliers from the excluded countries. Given that the only reason for providing differential treatment in respect of the provision of reinsurance services is the *origin* of the service supplier, it follows that the measure affects services and service suppliers "like" those not covered by the measure.[55]

2.64. Lastly, the measure in question accords to services and service suppliers from the excluded countries less favourable treatment than that accorded to like services and service suppliers from other countries. Indeed, by directly denying suppliers from the excluded countries the opportunity to access the Argentine reinsurance market, the measure places them at a "serious competitive disadvantage"[56] in relation to like suppliers from other countries, which can always supply their services through commercial presence and, in exceptional circumstances, in cross-border mode.

---

[48] It should be noted that Argentina modified its reinsurance-related measures on the same day that Panama presented its first written submission to the Panel, i.e. 25 March 2014.

[49] Any reference made solely to the term "reinsurance" also includes retrocession services, in accordance with the Note in Chapter III of National Insurance Supervisory Authority Resolution No. 35.615 of 11 February 2011 (Exhibit PAN-36).

[50] Point 1 of Annex I to Resolution No. 35.615 (Exhibit PAN-36).

[51] Point 18 of Annex I to Resolution No. 35.615 (Exhibit PAN-36).

[52] Point 19 of Annex I to Resolution No. 35.615 and Article 4 of Resolution No. 35.794.

[53] Point 20(f) of Annex I to Resolution No. 35.615 (Exhibit PAN-36).

[54] See footnote 8.

[55] Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

[56] Panel Report, *US - Poultry (China)*, para. 7.416.

Inconsistency of the measure with Articles XVI:1 and XVI:2(a) of the GATS

2.65. Through the measure in question, Argentina establishes restrictions that accord less favourable treatment than that provided for in Argentina's Schedule of Specific Commitments, in a manner that is inconsistent with Article XVI:1 of the GATS; in particular, these restrictions constitute limitations on access to the Argentine market that are impermissible under Article XVI:2(a) of the GATS.[57]

2.66. In mode 1, Argentina has undertaken a full market access commitment in respect of the reinsurance services sector and yet completely prohibits the provision of these services by suppliers from the excluded countries. This prohibition accords to suppliers from the excluded countries less favourable treatment than that provided for in Argentina's Schedule of Commitments, in a manner that is inconsistent with Article XVI:1 of the GATS, since it constitutes a limitation inconsistent with Article XVI:2(a) of the Agreement. Furthermore, even if Argentina were to allow suppliers from the excluded countries to access its reinsurance market in cross-border mode, such access would be limited and subject to economic needs tests, which are not inscribed in Argentina's Schedule of Commitments.

2.67. Hence, Argentina also accords to foreign service suppliers less favourable treatment than that provided for in its Schedule, in a manner that is inconsistent with Article XVI:1 of the GATS, as the limitation arising from the requirement for an economic needs test is inconsistent with Article XVI:2(a) of the Agreement.

2.68. Consequently, by not allowing foreign suppliers to provide reinsurance services through cross-border trade, Argentina accords to these suppliers treatment less favourable than that established in its Schedule of Commitments, in a manner that is inconsistent with Articles XVI:1 and XVI:2(a) of the GATS.

2.69. In mode 3, Argentina has undertaken a market access commitment in respect of the reinsurance services sector. This commitment is not, at present, subject to any limitation. However, Argentina prohibits suppliers from the excluded countries from providing reinsurance services under mode 3. This prohibition accords to these suppliers less favourable treatment than that accorded by Argentina in its Schedule of Commitments in respect of market access under mode 3, in a manner that is inconsistent with Article XVI:1 of the GATS, and constitutes a limitation inconsistent with Article XVI:2(a) of the Agreement.

2.6. The restriction on access to the Argentine capital market for service suppliers from the excluded countries is inconsistent with Article II:1 of the GATS

2.70. Under Argentine legislation[58], agents registered to operate in the Argentine capital market are, as a general rule, prohibited from carrying out transactions involving the public offering of negotiable securities when such transactions are conducted or ordered by persons incorporated, domiciled or residing in the excluded countries. Service suppliers from the excluded countries that require access to the capital market to effectively provide their services, such as portfolio managers, cannot directly obtain such access because of the prohibition imposed by the regulatory provisions of the National Securities Commission (CNV). Transactions in the Argentine capital market ordered by persons from the excluded countries are allowed only if the foreign manager is registered with a body equivalent to the CNV and if there is a memorandum of understanding between that body and the CNV.

2.71. Panama believes that the measure in question meets the criteria necessary to be considered inconsistent with Article II:1 of the GATS.[59]

2.72. First, the measure in question is a measure covered by the GATS. The prohibition on access to the Argentine capital market for persons from the excluded countries is a measure that affects

[57] Panel Report, *China - Electronic Payment Services*, para. 7.629 (citing the Panel Report in *China - Publications and Audiovisual Products*, para. 7.1353). Appellate Body Report, *US - Gambling*, para. 143; Panel Reports, *China - Publications and Audiovisual Products*, para. 7.1354, and *China - Electronic Payment Services*, para. 7.511.

[58] Article 5 in Section III of Title XI of the regulatory provisions of the National Securities Commission (CNV) (Exhibit PAN-58).

[59] See footnote 8.

trade in services within the meaning of Article I:1 of the GATS, as: (i) the measure has an impact on the supply of portfolio management services under one of the modes provided for in Article I:2 of the GATS: the cross-border mode (mode 1); and (ii) the measure "affects" the cross-border supply in Argentina of portfolio management services from foreign suppliers, since it has a direct impact on the effective supply of these services.[60] For the managers concerned, the prohibition established by Argentina amounts to a restriction on access to the Argentine capital market, thereby affecting the supply of portfolio management services.

2.73. Secondly, the foreign services and service suppliers affected by the measure are like other foreign services and/or service suppliers. The measure addressed in this claim is the restriction on Argentine registered agents carrying out transactions in the capital market "when they are conducted or ordered by persons incorporated, domiciled or residing in [excluded countries]".[61] Therefore, the regulations themselves expressly stipulate that the difference in treatment shall be determined by the origin of the service supplier. Given that the only reason for providing differential treatment is the *origin* of the supplier of the portfolio management service, it follows that the requirement that the measure apply to "like" service suppliers has been met.[62]

2.74. Lastly, the measure in question accords to services and service suppliers from the excluded countries less favourable treatment than that accorded to like services and service suppliers from other countries. Indeed, the Argentine measure limits the investment options of portfolio managers from the excluded countries by restricting their access to the essential auxiliary service of stock brokerage and, consequently, to the Argentine capital market. The practical impossibility of directly and freely accessing the Argentine capital market thus puts portfolio managers from the excluded countries at a clear competitive disadvantage *vis-à-vis* managers from other countries. The measure also discourages Argentine consumers from seeking the services of suppliers from the excluded countries, in favour of suppliers from other countries that can ensure access to a greater number of markets, develop broader and more diverse investment strategies and offer more competitive prices. This, by definition, accords portfolio management service suppliers from the beneficiary countries a competitive advantage[63], which is not extended immediately and *unconditionally* to like suppliers from the excluded countries.

2.7. The imposition of more stringent requirements governing the registration of branches of companies from the excluded countries is inconsistent with Article II:1 of the GATS

2.75. Under Argentine legislation, when a foreign company from a beneficiary country wishes to enter its branch in the Public Trade Register of Buenos Aires, the Argentine Office of Corporations (IGJ) will only seek compliance with the requirements listed in Article 188 of Resolution No. 7/2005.[64] If a foreign company from an excluded country wishes to do the same, the IGJ will request not only compliance with those requirements but also certification that the company is effectively engaged in economically significant business activity in the place where it was set up, registered or incorporated. In other words, it must be demonstrated that the foreign company is engaged in business activity in its place of origin, that it engages in this activity in an effective manner, and that the activity is economically significant. To this end, the IGJ may require that the company also provide the documentation listed in Article 192.1(a), (b), (c) and (d).[65]

2.76. If the requirements provided for in Resolution No. 7/2005 are not met, the IGJ may, in the exercise of its supervisory functions, request any information and document that it considers

[60] Although Article 5 in Section III of Title XI of the regulatory provisions of the CNV does not refer explicitly to portfolio management services, this provision imposes certain obligations on authorized intermediaries (whose services are essential for portfolio managers).

[61] Article 5 in Section III of Title XI of the regulatory provisions of the CNV (Exhibit PAN-58).

[62] Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

[63] Panel Report, *EC - Bananas III (Ecuador)*, para. 7.239.

[64] Article 188 of Resolution No. 7/2005 (Exhibit PAN-62).

[65] In addition, Article 192.2 of Resolution No. 7/2005 establishes that, with regard to companies from the excluded countries, the Argentine Office of Corporations (IGJ) may request, for the purposes of identifying partners and certifying their credentials, the presentation of elements other than those provided for in paragraph 3 of Article 188, including those relating to the assets and tax status of partners.

It should be noted that while the companies of beneficiary countries have only to identify their partners and their respective shares in the company, companies from the excluded countries may be obliged to provide information relating to the personal assets and tax status of their partners (Exhibit PAN-62).

necessary.[66] In the event of failure to comply, the IGJ will refuse to register the branch of the foreign company.[67]

2.77. Panama believes that the measure in question meets the criteria necessary to be considered inconsistent with Article II:1 of the GATS.[68]

2.78. First, the measure in question is a measure covered by the GATS. It affects trade in services within the meaning of Article I:1 of the GATS[69], as: (i) it has an impact on all the services likely to be provided in Argentine territory through commercial presence (mode 3); and (ii) it "affects" trade in services supplied through commercial presence, since it regulates the requirements to be met for establishing branches in Argentine territory, and specifies the consequences of non-compliance with those requirements. The measure therefore has "an effect on" such services.

2.79. Secondly, the foreign services and service providers affected by the measure are like other foreign services and/or service providers. In effect, the determining factor for applying the additional requirement provided for in Article 192.1 is the origin of the foreign company. Foreign companies, in general, must thus comply with the requirements listed in Article 188 of Resolution No. 7/2005. Companies from the excluded countries must, however, also comply with the additional effective business activity requirement provided for in Article 192.1 of that same Resolution. Given that the only reason for providing differential treatment in respect of the supply of reinsurance services is the *origin* of the service supplier, it follows that the measure affects services and service suppliers "like" those not covered by the measure.[70]

2.80. Lastly, the measure in question accords to services and service suppliers from the excluded countries less favourable treatment than that accorded to like services and service suppliers from other countries. The measure thus undermines equal opportunities for competition between foreign suppliers of different origins and, in particular, hinders opportunities for the development and achievement of certain business models that involve the parallel presence of a central office in a listed country and a branch in Argentina, without there having been any economically significant business activity prior to the moment of requesting branch registration. Furthermore, the very structure and design of the measure discourages companies from the excluded countries from establishing a commercial presence in Argentina. Imposition of the registration requirement in question also constitutes an additional administrative burden that, in itself, has a negative impact on the competitive position of companies from the excluded countries in Argentina.

2.8. The imposition of the foreign exchange authorization requirement is inconsistent with Article II:1 of the GATS

2.81. A foreign resident supplying services (of any sort other than financial) through commercial presence in Argentina, for a period of 365 days or more, may repatriate investments made without prior authorization to access the foreign exchange market from the Central Bank of the Argentine Republic (BCRA). This exception to the BCRA general prior authorization requirement does not, however, apply when the investor is from an excluded country.[71] In this case, the repatriation of direct investments by natural or legal persons residing, incorporated or domiciled in the excluded countries remains subject to prior authorization from the BCRA. This authorization is needed in order to be able to gain access to the Unified Free Foreign Exchange Market (MULC) and buy the foreign currency, which must be remitted, for such repatriation. Given that there is no specific regulatory procedure for obtaining this authorization, the process is governed by the general rules of Argentine administrative law, which means that the administration has an ample amount of time (90 administrative working days, i.e. around four months) to issue a response. Failure to comply with the foreign exchange regulations gives rise to criminal penalties.[72]

[66] Article 6(a) of the Basic Law (LO) of the IGJ (Exhibit PAN-63).
[67] Article 6(f) of the Basic Law (LO) of the IGJ (Exhibit PAN-63).
[68] See footnote 8.
[69] Appellate Body Report, *EC - Bananas III*, para. 220.
[70] Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.
[71] Point I of Communication "A" 4940 of the BCRA of 12 May 2009, which refers to the "list of Decree No. 1344/1998", which was incorporated in the RIG by Decree No. 1037/2000 and contains the names of "countries with low or no taxes" (Exhibit PAN-71).
[72] Communication "A" 3471 of the BCRA of 8 February 2002 (Exhibit PAN-66).

2.82. Panama believes that the measure in question meets the criteria necessary to be considered inconsistent with Article II:1 of the GATS.[73]

2.83. First, the measure in question is a measure covered by the GATS, as it affects trade in services within the meaning of Article I:1 of the GATS, i.e.: (i) it has an impact on all the services likely to be supplied in Argentine territory through commercial presence (mode 3); (ii) the measure "affects" trade in services supplied through commercial presence, since it regulates a key aspect of the development of any business model that involves commercial presence in Argentine territory, namely, the repatriation of investment in the event of sale, liquidation, reduction of capital or return of irrevocable capital contributions by the company. The measure thus has "an effect on" such services.

2.84. Secondly, the foreign services and service suppliers affected by the measure are like other foreign services and/or service suppliers. The foreign exchange authorization requirement for the repatriation of direct investments by persons from the excluded countries, in accordance with point I of Communication "A" 4940, is imposed *only* when the foreign beneficiary is a natural or legal person residing, incorporated or domiciled in one of the excluded countries. Given that the only reason for providing differential treatment in respect of the repatriation of direct investments is the *origin* of the service supplier, under case law the requirement that the measure apply to "like" service suppliers is met.[74]

2.85. Lastly, the measure in question accords to services and service suppliers from the excluded countries treatment less favourable than that accorded to like services and service suppliers from other countries. By limiting the outflow of capital once the investment has been made, the measure has the effect of discouraging *ab initio* the establishment of commercial presence in Argentina by the listed service suppliers. These suppliers bear not only an additional administrative burden (i.e. having to request the consent of the BCRA), but also the risk of seeing their request denied or granted too late. Consequently, the measure puts suppliers from the excluded countries at a clear competitive disadvantage in relation to suppliers from beneficiary countries, when accessing and setting up in the Argentine market.

[73] See footnote 8.
[74] Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

ANNEX B-2

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF PANAMA

1 INTRODUCTION

1.1. Panama has presented a solid case of violation of the MFN principle in relation to services and, in some regards, to goods, as well as of the national treatment and market access obligations. In its attempts at rebuttal, Argentina resorts to laboured and clearly untenable arguments that entail absurd consequences.

1.2. Argentina also attempts to justify the violations by invoking Articles XIV(c)(i) and XIV(d) of the GATS, as well as Article XX(d) of the GATT, and in regard to two of the challenged measures, the prudential exception under paragraph 2(a) of the GATS Annex on Financial Services. However, the defence raised by Argentina is in all respects inadequate. Consequently, Panama considers that the Panel should find that the Argentine measures are inconsistent with the GATS and GATT obligations identified by Panama.

2 LEGAL ARGUMENT

2.1 Discrimination in regard to the withholding tax on payment for certain services

2.1. The withholding tax on payments made by Argentine residents to persons in excluded countries in return for loan, credit and other services entailing the placement of funds in Argentina is a compulsory tax and is imposed by virtue of Article 93(c) of the Income/Profits Tax Law (LIG). Argentina taxes certain transactions between Argentine residents and persons in other countries by means of a withholding tax on net profits from such transactions. Loan, credit and other services that entail the placement of funds in Argentina are subject to this withholding tax on profits. When Argentine consumers – that are not banks or financial entities – obtain loans, credits or funds in general from abroad, Argentina imposes different tax burdens on payments of interest or remuneration, depending on the location of the supplier. If the payments are intended for suppliers in beneficiary countries, Argentina imposes an effective withholding tax of 15.05% of the amount of the payments. However, if they are intended for excluded countries, Argentina imposes an effective withholding tax of 35% on the amount of such payments.

2.1.1 Argentina has not succeeded in rebutting the *prima facie* inconsistency of the withholding tax on payments for certain services with the MFN treatment obligation under Article II:1 of the GATS

2.2 Panama has established in this proceeding that: (i) the discriminatory withholding tax is a measure affecting trade in services and is therefore covered by the GATS; (ii) the measure affects like services and service suppliers from excluded and beneficiary countries; and (iii) the treatment accorded to the said services and service suppliers from excluded countries is less favourable than that applicable to like services and service suppliers from the beneficiary countries. Thus, Panama has demonstrated that the measure is inconsistent with Article II:1 of the GATS.

2.3. Applying the correct legal standard, in the order established by the case law[1], Panama notes that, with regard to the coverage of the measure by the GATS, the withholding tax is a measure "in respect of" the payment of a service within the meaning of Article XXVIII(c)(i), and as such is a measure "affecting trade in services" within the meaning of that Article and Article I:1 of the GATS. Argentina maintains that there is no trade in services because Panama has failed to identify clearly and concretely the relevant services and modes of supply[2] and because Panama has not

[1] Argentina has put forward a legal standard inconsistent with that established by the case law for the assessment of claims under GATS Article II:1. Panama considers that the Panel should reject that legal standard and apply the correct standard, which has three elements and a specific order, namely: (i) the coverage and applicability of the GATS; (ii) the likeness of services and service suppliers; and (iii) less favourable treatment.

[2] Argentina's first written submission, para. 142.

demonstrated the existence of a genuine supply to consumers in Argentina.[3] In Panama's opinion, Argentina's arguments are out of place and, in any case, have no basis either in the text of Articles I and XXVIII of the GATS or in the case law. To make application of the GATS subject to the existence of actual trade would run counter to the object and purpose of the GATS and would, if anything, limit its scope. Nevertheless, Panama places on record that it has duly identified the services affected[4] and has demonstrated the existence of trade in services.[5] Argentina also appears to insinuate that trade in services is not affected because Panama posits a "theoretical effect" on potential service suppliers.[6] However, the effect is clear from the very wording of Article 93(c) of the Income/Profits Tax Law (LIG) and this has been recognized by Argentina.[7]

2.4. Regarding likeness, the distinction made by the measure centres not on the supplier or the service as such, but simply on "the place where the supplier is located". The case law (*China - Publications and Audiovisual Products* and *China - Electronic Payment Services*) has established that, when the only distinction between service suppliers is based on origin, the requirement of likeness between the suppliers in question is met. Argentina's arguments do not detract from the legal validity of that approach. However, even if it were relevant to resort to other criteria in order to verify that the measure affects like services and service suppliers, Panama considers that, applying *mutatis mutandis* the criteria used for those purposes in goods trade (namely the nature of the service, its purpose, consumer preferences and classification), an assessment of the facts would continue to show the existence of likeness in the services and suppliers affected by the withholding tax.[8] Lastly, in pointing out that origin and regulatory environment (understood in this dispute as the existence or non-existence of an agreement on exchange of tax information between governments) is a relevant criterion for distinguishing service suppliers, Argentina suggests that an analysis of aims and effects should be introduced for the determination of likeness. However, this criterion has been rejected by the Appellate Body, with respect to both trade in goods and trade in services.

2.5. Finally, contrary to what it is stated by Argentina, the demonstration of less favourable treatment does not require the demonstration of actual effects. When the claim is based on legislation, what has to be examined is the existence of less favourable treatment in Argentina's regulatory framework, such as to alter equality of competitive opportunities in the relevant market.[9] This clearly occurs in the case of the withholding tax, since a much higher tax burden is imposed on the services of suppliers from excluded countries than that which is imposed on the like services of the suppliers from beneficiary countries.

2.1.2 Argentina has failed to demonstrate that the withholding tax on payments for certain services is justified by Article XIV(c)(i) of the GATS

2.6. Argentina has failed to demonstrate that the measure in question is designed to secure compliance with laws and regulations which in themselves are not inconsistent with the GATS. Argentina maintains that the discriminatory withholding tax seeks to enforce the LIG but does not show how it is that a law establishing a tax on profits is a law relating to the prevention of deceptive and fraudulent practices within the meaning of Article XIV(c)(i) of the GATS. The reference to the LIG in general - with its 182 articles - is insufficient to meet the standard of Article XIV(c)(i) of the GATS, and Argentina has also failed to make any attempt to demonstrate that the LIG is consistent with the GATS. At the same time, Argentina fails to explain how it is that its measures, and the discriminatory withholding tax in particular, secure compliance with the LIG. On the contrary, the analysis of the design, structure and architecture of the discriminatory withholding tax shows that it is not a compliance measure.[10]

2.7. In any event, Argentina has not succeeded in demonstrating that the measure is "necessary" to secure compliance with the LIG. Argentina has failed to demonstrate that the discriminatory withholding tax contributes to the purpose intended by Argentina, and that the measure has no

[3] Argentina's first written submission, paras. 143-144.
[4] Panama's first written submission, paras. 4.3, 4.4, 4.30 and 4.31.
[5] Panama's second written submission, para. 2.99.
[6] Argentina's first written submission, para. 145.
[7] Ibid., para. 109.
[8] Panama's second written submission, para. 2.132.
[9] Panama's first written submission, paras. 4.22-4.24.
[10] The fact that the tax is withheld at the time of remittance of the payment ensures payment of the tax charged to the person responsible, that is, the supplier from abroad.

adverse impact on international trade in the services in question. Although the interest in collecting taxes may be important in the highest degree to Argentina, that interest must be interpreted in conjunction with the interests of the Argentine citizen, resident or economic operator who trusts that tax authority measures are in keeping with the parameters of the principles of legality and tax equality. Finally, with the regard to the *chapeau* of GATS Article XIV(c)(i), the measure in question constitutes a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, and a disguised restriction on trade in services. The measure is applied arbitrarily, distinguishing between countries on the basis of cooperation with Argentina, although the initiation of negotiations is subject to the discretion of Argentina (the example of Bahrain may be recalled). In addition, there is no reason for the discriminatory withholding tax to have a broader scope than that relating to the concern that allegedly gave rise to the measure: the situation of insider loans.

2.2 Presumption of unjustified increase in wealth

2.8. Argentine tax legislation contains the legal presumption that any entry of funds from the excluded countries constitutes, unless proven otherwise, an "unjustified increase in wealth" for the recipient of the funds in Argentina. This has consequences for the taxpayer as it obliges him to pay profits tax, value added tax (VAT) and other internal taxes on the amount received from the excluded country, regardless of the type of operation that led to the money being sent and of whether the taxable event giving rise to the imposition of the above taxes actually occurred. When the funds enter Argentina from beneficiary countries, the presumption of unjustified increase in wealth does not arise and, therefore, the local recipient of those funds incurs no risk of fiscal consequences.

2.2.1 Argentina has failed to rebut the *prima facie* inconsistency of the presumption of unjustified increase in wealth with the MFN treatment obligation under Article II:1 of the GATS

2.9. Panama has established in this proceeding: (i) that the presumption of unjustified increase in wealth, as provided for in the article added to Article 18 of the Law on Tax Procedure (LPT), is a measure affecting trade in services, the delivery of which implies the entry of funds from abroad and is covered by the GATS; (ii) that the services and service suppliers in question are like; and (iii) that the treatment accorded to the services and service suppliers in question from the excluded countries is less favourable than that applicable to like services and service suppliers from the beneficiary countries. Consequently, the measure is inconsistent with Article II:1 of the GATS.[11]

2.10. Argentina has not succeeded in disproving that its measure is in breach of the MFN treatment obligation provided for in the GATS. With regard to coverage, Argentina has not succeeded in disproving that the presumption of unjustified increase in wealth qualifies as a measure affecting trade in services within the meaning of Article I:1 of the GATS, and therefore as a measure covered by the GATS. The measure affects all those services the delivery or supply of which requires the entry of funds into Argentina, as has been indicated by Panama.[12] Argentina's argument that it is necessary to show that trade actually exists between the complainant and the respondent in order for the GATS to be applicable, lacks any foundation in the GATS and in the case law and would render the purpose of the GATS meaningless.

2.11. Regarding likeness, Argentina asserts that the services and service suppliers of the excluded countries are not like those of the beneficiary countries because of the different regulatory environment of each, particularly as regards the regulations on exchange of tax information with the Argentine Government.[13] As was mentioned earlier, a distinction between service suppliers on the basis of this "regulatory environment" is unfounded. The regulatory environment is a factor external to the service supplier and could only be relevant in a de facto case insofar as it is perceived by the market - and not by the regulator - as a key factor affecting competition. The only distinction established by the measure is on account of the location of the supplier, but not the nature of the services or the supplier of the services. Therefore, it is clear that it flows from

[11] As in the case of the first measure, Argentina posits a legal standard inconsistent with that established by the case law for the assessment of claims regarding less favourable treatment in trade in services, which should be rejected by this Panel.

[12] Panama's first written submission, paras. 4.3, 4.4, 4.30 and 4.31.

[13] See, for example, Argentina's first written submission, paras. 193 and 220.

the same Argentine legislation, and that objectively it does not allow for the assumption of a difference in the character of the suppliers from excluded countries and those from beneficiary countries in the context of services the delivery of which implies entry of funds from abroad (such as insurance, reinsurance, retrocession and loans), as Argentina seeks to have us believe on the basis of mere argument. Even if it were relevant to have recourse to other criteria in order to verify that the measure affects services and service suppliers from excluded countries *like* those from beneficiary countries, Panama considers that, taking into account the criteria used in goods trade to determine likeness between products, there would also be no reason to maintain that the services and service suppliers of excluded countries and beneficiary countries are not like.[14]

2.12. With regard to less favourable treatment, the measure constitutes an "additional requirement" which in the circumstances of this case - lack of a similar requirement for the entry of funds from beneficiary countries – proves a change in the conditions of competition and, therefore, the existence of less favourable treatment.[15] The mere existence of a presumption of unjustified increase in wealth which applies solely to suppliers from excluded countries is sufficient to impair equality in the conditions of competition between suppliers from excluded countries and from beneficiary countries, and therefore gives rise to less favourable treatment for the former. The statistics submitted by Argentina to refute the existence of less favourable treatment are not relevant and, in any case, confirm that, due to the difficulty of rebutting the presumption, in most cases the taxpayer will fail in his attempt to demonstrate the legitimacy of the funds and therefore will remain subject to the tax consequences entailed by the confirmation of an unjustified increase in wealth.[16]

2.2.2 Nor has Argentina succeeded in rebutting Panama's *prima facie* case that the measure in question is inconsistent with Article XVII of the GATS

2.13. Argentina does not deny having made full commitments in respect of national treatment under mode 1 for maritime transport and air transport insurance services, as well as reinsurance and retrocession services. Nevertheless, despite having assumed that commitment, Argentina applies the presumption of unjustified increase in wealth solely to funds originating from companies located in excluded countries. Consequently, Argentina accords to maritime and air transport insurers and suppliers of reinsurance and retrocession services from excluded countries treatment less favourable than that accorded to like domestic insurers and reinsurers, in a manner clearly inconsistent with Article XVII of the GATS.

2.14. Panama has shown that the presumption of unjustified increase in wealth is a measure affecting the supply of maritime and air transport insurance services, as well as the supply of reinsurance and retrocession services (delivery of which implies the entry of funds from abroad). In the context of this measure, origin is the only criterion for differentiating between the services and service suppliers in question. Consequently, and in accordance with the case law, likeness is verified between suppliers of excluded countries and national suppliers. Finally, Argentina has not disproved that the treatment accorded to services and service suppliers from excluded countries is not only different, but is also less favourable treatment than that accorded to like services and service suppliers of Argentine origin.

2.2.3 Argentina has not demonstrated that the presumption of unjustified increase in wealth is justified under Article XIV(c)(i) of the GATS

2.15. Argentina has not demonstrated that the presumption of unjustified increase in wealth is aimed at securing compliance with laws and regulations which in themselves are not inconsistent with the GATS. The objective proposed by Argentina of "preventing undeclared funds or income which should have been subject to taxation in Argentina, but which was diverted to non-cooperative tax jurisdictions, from being repatriated to Argentina by means of simulated transactions between the same beneficiary owners or related parties"[17], would not qualify as an objective of "compliance" with the LIG.

2.16. Argentina has failed to show how it is that the practices mentioned allegedly prevent the achievement of compliance with the LIG, or how it is that the presumption of unjustified increase

[14] Panama's second written submission, para. 2.278.
[15] Appellate Body Report, *Thailand - Cigarettes*, para. 130.
[16] Panama's second written submission, para. 2.285.
[17] Argentina's first written submission, paras. 280–281.

in wealth serves to require its enforcement. Nor has it demonstrated that the presumption of unjustified increase in wealth is "necessary" to secure compliance with the LIG. However, even if the presumption of unjustified increase in wealth were to constitute a means of compliance provisionally justified under subparagraph (c)(i) of Article XIV of the GATS, the measure would nevertheless be a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail for the purposes of tax transparency and exchange of information, since Argentina's distinctions based on the list of beneficiary or "cooperative" countries for purposes of tax transparency and exchange of information do not reflect impartial and neutral treatment with regard to countries that face similar situations in this context.

2.2.4 Argentina has not demonstrated that the measure in question is justified under Article XIV(d) of the GATS.

2.17. Argentina has failed to meet the standard for demonstrating justification of a measure under Article XIV(d) of the GATS.[18] In the first place, the presumption of unjustified increase in wealth refers to certain taxes that are not direct taxes of (VAT and internal taxes). Secondly, the presumption of unjustified increase in wealth is not aimed at ensuring collection of the profits tax on parties abroad, but gives rise to tax effects on the recipient of the funds.[19] Nor is it a measure on the imposition or collection of the profits tax on the services in question. Finally, the presumption of increased wealth constitutes a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail for purposes of tax transparency and exchange of information, since Argentina's distinctions based on the list of beneficiary or "cooperative" countries for purposes of tax transparency and exchange of information do not reflect impartial treatment between countries in a similar situation.

2.2.5 Argentina has failed to rebut the *prima facie* inconsistency of the presumption of unjustified increase in wealth with Article I:1 of the GATT, nor has it demonstrated that the measure is justified under Article XX(d) of the GATT

2.18. Panama has demonstrated that the presumption of unjustified increase in wealth is a measure affecting payments for exports and falls within the scope of Article I:1 of the GATT. Regarding coverage, although it is a rule in the sphere of taxation, through its legal effects it governs payments for exports (which are considered unjustified increases in wealth, depending on their origin). For this reason, from the standpoint of Article I:1 of the GATT, the measure in question constitutes a "rule in connection with exportation" carried out by Argentine persons. With regard to likeness, Argentina does not deny that exports destined for beneficiary countries are like those destined for excluded countries. Nor would there be any scope for such an argument, since in the case of discrimination regarding exports, the same products, exported by the same parties in Argentina, are involved. With regard to less favourable treatment, the measure in question grants an advantage, favour, privilege or immunity to products destined for beneficiary countries, since, despite emphasizing that the presumption is rebuttable, Argentina recognizes that the presumption is automatic. As was pointed out by Panama, a Member's compliance with its obligations cannot be made conditional on the act of a private individual.

2.19. Furthermore, Argentina has failed to demonstrate that the measure addressed in this claim is justified. Although Argentina invoked Article XX(d) of the GATT, it failed to identify specific laws or regulations with which it is sought to secure compliance through presumption of unjustified increase in wealth. Without this basis, it is impossible to determine whether the measure is intended, and whether it is "necessary", to achieve the purpose of compliance which is the subject of protection under Article XX(d) of the GATT. In any event, the application of the presumption of unjustified increase in wealth on the basis of a list of beneficiary countries which does not meet objective criteria constitutes a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail, in a manner inconsistent with the *chapeau* of Article XX(d).

[18] In order to justify a measure under the above-mentioned article, the respondent must: (i)identify the direct taxes; (ii) establish what it considers to be fair or effective imposition or collection [of these taxes] with respect to services and service suppliers of other Members; and (iii) demonstrate that the measure has the purpose of guaranteeing such imposition or collection. In addition, the measure must be applied in accordance with the *chapeau* of Article XIV of the GATS.

[19] Article added to Article 18 of the LPT.

2.3 Requirement of valuation based on transfer prices for transactions with excluded countries

2.20. In the case of arm's-length transactions where there is no link between the Argentine taxpayer and his counterpart, the value of a transaction may be considered as a market value and will be determined in accordance with the agreement reached between the parties. This general rule applies to transactions with persons from beneficiary countries and transactions with Argentine persons. On the other hand, in accordance with Articles 8 and 15 of the LIG, if the transaction takes place between an Argentine taxpayer and a person domiciled in any of the excluded countries, that transaction is not considered to be consistent with normal arm's-length market practices or prices, and the Argentine taxpayer is required to apply the transfer pricing regime as if the transaction were between related parties.

2.3.1 Argentina has failed to rebut the *prima facie* inconsistency of valuation based on transfer prices with the MFN treatment obligation under Article II:1 of the GATS

2.21. Panama has established in this proceeding that: (i) the requirement of valuing services from excluded countries on the basis of transfer prices is a measure affecting trade in services and is covered by the GATS; (ii) the measure affects like services and service suppliers from excluded countries and beneficiary countries; and (iii) the treatment accorded to services and service suppliers from the excluded countries is less favourable than that applied to like services and service suppliers from the beneficiary countries. Therefore, the measure is inconsistent with Article II:1 of the GATS.[20]

2.22. With regard to coverage, valuation based on transfer prices is a measure affecting trade in services and is therefore covered by the GATS.[21] Contrary to what is stated by Argentina, Panama has duly identified the services affected by the measure. Given the broad scope of the measure, Panama's claim covers all services contracted between the relevant Argentine taxpayers and foreign suppliers. Argentina's attempt to introduce a "procedural legitimacy" requirement (namely, that trade must effectively exist between the complainant and the respondent) in order for the GATS to be applicable, is inappropriate. Although Argentina alleges that trade in services is not affected because Panama raises a case involving a "theoretical effect"[22], the mere existence of the legislation that gives shape to the measure is proof that there is a real effect in the Argentine market.

2.23 With regard to likeness, the premise established in the LIG is that persons from abroad that conduct transactions with Argentine residents have equal status for tax purposes. The measure establishes no qualifications or limitations on the way in which the service is to be supplied. What the measure establishes in Article 15 of the LIG is differential treatment based on the place of domicile, establishment or location of the persons from abroad that enter into contracts with Argentine residents, and that "supply the service"; in other words, based on the location of the "service suppliers". Consequently, service suppliers from the excluded countries are like those from the beneficiary countries which also conclude service transactions with relevant Argentine taxpayers, in accordance with the case law.

2.24 With regard to less favourable treatment, Panama has demonstrated that the measure imposes not one, but various additional requirements which give evidence in this case of the existence of less favourable treatment. This is so because the costs of purchasing a service will have to be supplemented by a substantial administrative burden, costs, additional work and the existence of a definite tax risk owing to the mandatory nature of the system. Argentina argues that in this case less favourable treatment has not been effectively demonstrated, since it considers that Panama has not demonstrated the existence of actual trade. However, this argument should be rejected as having no basis in the GATS or in the case law.

---

[20] As in the case of the previously mentioned measures, the Panel should reject the legal standard presented by Argentina and apply the correct legal standard developed by the case law, which has three elements and a specific order.

[21] From the consumer's standpoint, Article XXVIII(c)(i) of the GATS characterizes measures "in respect of" the *purchase* or *use* of a service as "measures by Members affecting trade in services", and these are therefore covered by the GATS by virtue of Article I:1. Moreover, from the supplier's standpoint, the measure affects the *supply* of services, in particular the sale thereof, within the meaning of Article XXVIII(d) of the GATS.

[22] Argentina's first written submission, para.145.

2.3.1.2 Nor has Argentina rebutted Panama's case that the measure in question is inconsistent with Article XVII of the GATS

2.25. Argentina does not deny that it undertook full commitments in respect of national treatment under modes 1 and 2 for virtually all the services provided for in its Schedule. However, Argentina applies valuation on the basis of transfer prices to funds from companies located in excluded countries and not to those from national companies. Consequently, Argentina accords less favourable treatment to services and service suppliers from excluded countries than that which it accords to like services and service suppliers of national origin, in a manner clearly inconsistent with Article XVII of the GATS.

2.26. In the first place, Argentina does not dispute the fact that, except in relation to certain services, Argentina has undertaken full commitments in respect of national treatment for all sectors of its Schedule under modes 1 and 2.[23] This means that, in respect of these services and modes of supply, Argentina can maintain no limitation - "None".[24] Secondly, the measure affects the supply of these services since it "has an effect on" the transaction between the service supplier and the local consumer. In the light of Article XXVIII(b) of the GATS, the measure affects the "sale" of services by suppliers from excluded countries and, in the light of Article XXVIII(c), the measure affects the "purchase" or "use" of such services by Argentine consumers, both in Argentina (mode 1) and in the territory of the country concerned (mode 2). Thirdly, given that the origin of the service supplier is the only element determining the imposition of the transfer pricing regime for the valuation of transactions, there is a verified likeness between suppliers from excluded countries and national suppliers. Finally, Argentina has not refuted the fact that the treatment accorded to services from excluded countries is not only different but also less favourable than that accorded to like services and service suppliers of Argentine origin. Given the mandatory requirement and absolute presumption of knowledge of the law, Argentine taxpayers will know that transactions with suppliers from excluded countries generate complexities, costs and possible problems with the Federal Administration of Public Revenue (AFIP), and given this regulatory disincentive, the conditions of competition between them are affected.

2.3.1.3 Argentina has failed to demonstrate that the transfer pricing regime is justified under Article XXIV(c)(i) of the GATS

2.27. Argentina has failed to prove that the transfer pricing regime is intended to secure compliance with laws and regulations which in themselves are not inconsistent with the GATS. The explanation furnished by Argentina, to the effect that its tax measures (including the valuation of transfer prices) seek to secure compliance with tax legislation, "including the prevention of 'deceptive and fraudulent practices'"[25] and that the laws and regulations with which it is sought to secure compliance are in themselves consistent with the GATS, and that therefore Argentina is entitled to establish measures that "secure compliance" with those laws and regulations"[26] is inadequate and deficient in Panama's view. According to Argentina, the law or regulation with which it is sought to secure compliance through valuation based on transfer pricing is the LIG.[27] However, in Panama's view, in order to meet the standard of Article XIV(c)(i) of the GATS, Argentina should have demonstrated that the LIG is a law with the status under Article XIV(c)(i) of a law "relating to the prevention of deceptive and fraudulent practices". Argentina made no attempt whatsoever to demonstrate that the LIG is consistent with the GATS. [28] Although Argentina asserts that its measures, including the requirement of valuation on the basis of transfer prices, secures compliance with the LIG[29], it does not clearly explain how this occurs, particularly with regard to transactions between persons that are clearly not related and to whom the measure in question is nevertheless applied. Nor has Argentina demonstrated that the presumption of unjustified increase in wealth is "necessary" to secure compliance with the LIG. Without prejudice to the foregoing, the measure constitutes a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail for the purposes of tax transparency and exchange

[23] There are some services for which commitments were not established under Modes 1 and 2. See footnote to page 420 of Panama's second written submission.
[24] Panama's second written submission, para. 2.433.
[25] Argentina's first written submission, para. 262.
[26] Ibid., para. 267.
[27] Ibid., para. 264.
[28] Appellate Body Report, *Thailand - Cigarettes (Philippines)*, para. 179.
[29] Argentina's first written submission, para. 264.

of information, as it is based on distinctions between countries that do not reflect impartial and neutral treatment with respect to countries facing similar situations.

2.3.1.4 Argentina has not demonstrated that the transfer pricing regime is justified under Article XIV(d) of the GATS

2.28. Argentina has failed to demonstrate that the requirement of transaction valuation based on transfer prices is duly justified in the light of Article XIV(d) of the GATS.[30] Valuation based on transfer prices is linked to the imposition or collection of the profits tax, which Panama recognizes as a direct tax. However, this measure bears no relation to the collection or imposition of taxes on services or service suppliers of other Members. The imposition or collection of the profits tax in regard to services that are affected under mode 1 is carried out by means of Articles 9 to 13 and Title V of the LIG. With respect to services that could be affected under mode 2 – insofar as they concern activities conducted outside Argentina - they are not taxed under the LIG by virtue of Article 5 of that law.[31] Moreover, the transfer pricing regime constitutes a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail for the purposes of tax transparency and exchange of information, in a manner inconsistent with the *chapeau* of Article XIV(d) of the GATS.

2.3.2 Argentina has failed to rebut the *prima facie* inconsistency of the transfer pricing regime with the obligations under Articles II:1, III:4 and XI:1 of the GATT, nor has it demonstrated that the measure in questions is justified under Article XX(d) of the GATT.

2.29. Regarding the obligation of MFN treatment under Article I:1 of the GATT, the requirement of valuation based on transfer prices is a measure covered by Article I:1 of the GATT which affects products from the excluded countries that are like the products from beneficiary countries, as well as products destined for the excluded countries that are like those destined for the beneficiary countries. As far as *imports* are concerned, the measure grants an advantage, favour, immunity or privilege to products from beneficiary countries, which is not extended immediately and unconditionally to the like products from excluded countries. As far as *exports* are concerned, the measure grants an advantage, favour, immunity or privilege to products destined for beneficiary countries, which is not extended immediately and unconditionally to like products destined for the beneficiary countries.

2.30. With regard to the national treatment obligation under Article III:4 of the GATT, although Argentina and Panama appear to have no differences regarding the legal standard of applicability of Article III:4 of the GATT in respect of the likeness of products, Argentina appears to suggest that rules which do not identify or distinguish specific products cannot be challenged under Article III:4 of the GATT because it is not possible to assess likeness.[32] Panama considers that a measure does not have to mention specific products as long as it affects imports in the context of Article III:4 of the GATT. If the measure makes distinctions between import "transactions" on the basis of origin, the case law has established that the measure in question adversely affects like products, as has been pointed out by Panama throughout this dispute. Although Argentina asserts that imported products from the excluded countries and those of national origin have "intrinsic" differences", it has not provided support for that assertion.

2.31. As regards the obligation to eliminate quantitative restrictions under Article XI:1 of the GATT, Argentina has indicated that the requirement of valuation based on transfer prices has the nature of a tax and is therefore not covered by the GATS.[33] However, this argument is untenable. The measure is based on methodological requirements, administrative formalities and costs, but does not impose a tax as such. Argentina establishes a limiting condition on purchases (imports) and on sales (exports), which constitutes a restriction on the importation and exportation of goods, since the compulsory nature and certain knowledge of the requirement condition the purchase of products from the excluded countries, or sales destined for those countries, on the part of an Argentine taxpayer, by means of charges and costs attached to the goods purchased from or destined for those countries.

[30] See the legal standard in footnote 19 of this executive summary.
[31] Exhibit PAN-4.
[32] Argentina's first written submission, paras. 717-720.
[33] Ibid., para. 728.

2.32. Argentina has failed to demonstrate that the requirement of valuation on the basis of transfer prices is justified under Article XX(d) of the GATT. Argentina does not even identify specific laws and regulations with which it is sought to secure compliance through implementation of the transfer pricing regime. Without this basis, it is not possible to determine whether the measure is intended, or much less necessary, to achieve the aim of compliance which is the subject of protection under Article XX(d) of the GATT. In any event, this regime does not meet objective criteria with regard to countries facing like conditions in respect of tax transparency and exchange of information, and it therefore constitutes a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail, in a manner inconsistent with the *chapeau* of Article XX(d) of the GATT.

2.4 Allocation of expenditure for transactions with persons from the excluded countries

2.33. For the purpose of determining the tax base for the profits tax, an Argentine taxpayer may deduct expenses of various kinds with a view to obtaining the net profit. In general, the basic criterion used for the allocation of earnings and expenditure is the "accrual" rule. However, in the case of payments made to persons from the excluded countries which generate a profit of Argentine origin, the Argentine tax legislation provides that the Argentine taxpayer should allocate those payments to the period of time at which they are made.

2.4.1 Argentina has failed to rebut the *prima facie* inconsistency of the allocation of expenditure to the time of payment with the MFN treatment obligation under Article II:1 of the GATS

2.34 Panama has established in this proceeding that: (i) the rule on allocation of expenditure to the time of payment for specific services from excluded countries, as derived from Article 18, last paragraph, of the LIG, is a measure affecting trade in services and is covered by the GATS; (ii) the measure affects like services and service suppliers from excluded countries and beneficiary countries; and (iii) the treatment accorded to services and service suppliers from the excluded countries is less favourable than that which is applicable to like services and service suppliers from the beneficiary countries. Therefore, the measure is inconsistent with Article II:1 of the GATS.

2.35 With regard to coverage, the measure qualifies as a measure affecting trade in services under Articles XXVIII(b), XXVIII(c)(i) and I:1 of the GATS.[34] Argentina considers that "there is no trade in services" because Panama has failed to identify the services and service modes that are relevant to this dispute. Panama has already explained that the very wording of the measure makes it a measure that applies only to some services.[35] Without prejudice to the identification of the general category of services, and of some specific services affected by the measure, Panama observes that the LIG envisages other services, whether under Title V or in other sections, which are also affected by the measure when they generate profits of Argentine origin.[36] Moreover, Panama considers that it is necessary to dismiss Argentina's argument that there is no trade in services because Panama failed to demonstrate the existence of actual trade between Panama and Argentina, or alternatively between another Member discriminated against and Argentina.

2.36. With regard to likeness, the distinction in treatment made by Argentina is based on the doubt concerning the existence of genuine transactions (case of insider loans) and not on the lack of likeness between services or service suppliers from the excluded countries compared with those from the beneficiary countries. Even if it were relevant to have recourse to other criteria in order to verify that the rule on allocation of expenditure affects services and service suppliers from the excluded countries like those from the beneficiary countries, Panama has provided numerous examples of how specific services and service suppliers that generate profits of Argentine origin should be considered like for the purposes of Article II:1 of the GATS, in accordance with the criteria used in the goods trade to determine likeness between products.

[34] From the standpoint of the consumer, this is a measure which, under Article XXVIII(c)(i) of the GATS, qualifies as a measure in respect of the purchase or use of a service, and as such must be considered a "measure[] by Members affecting trade in services". From the standpoint of the supplier, it is a measure affecting the supply of services, and in particular, in the light of Article XXXIII(b) of the GATS, the sale of services. The fiscal prejudice caused to the services covered by Title V of the LIG affects the conditions of sale of the relevant services for the service supplier abroad.

[35] Panama's second written submission, para. 2.507.

[36] Ibid., para. 2.508.

2.37. With regard to less favourable treatment, the rule on allocation of expenditure is a measure that affects conditions of competition between service suppliers from the excluded countries and those from the beneficiary countries, inasmuch as it alters the competitive opportunities for services and service suppliers from the excluded countries and objectively places them at a disadvantage compared with their competitors from beneficiary countries. Argentina has submitted only legal arguments[37] and Panama has already explained the reasons why it is inappropriate to make an assessment of less favourable treatment in terms of trade volumes actually affected, in relation to Panama or any excluded country.

2.4.2 Argentina has failed to rebut the *prima facie* inconsistency of the allocation of expenditure with the national treatment obligation under Article XVII of the GATS

2.38. Argentina does not deny that it undertook full commitments in respect of national treatment under mode 1 for certain types of services[38], the supply of and payment for which generate profits of Argentine origin. However, Argentina imposes the rule on allocation of expenditure to the time of payment solely with respect to services supplied from excluded countries and not those supplied by Argentine suppliers. Consequently, Argentina accords service suppliers from the excluded countries less favourable treatment than that accorded to like service suppliers of Argentine origin, in a manner inconsistent with Article XVII of the GATS.

2.39 The measure affects the "delivery" of these services, within the meaning of Article XXVIII(b) of the GATS, as well as the "use" of the services within the meaning of Article XXVIII(c)(i) of the GATS. Regarding likeness, the measure in question is premised on a regulatory distinction based solely on the location, place of domicile and/or incorporation of the recipient of the payments, that is the service supplier in question. Again, the origin of the service supplier is the only element which, for the Argentine taxpayer, determines the allocation of expenditure to the time of actual payment for the service or the time of accrual of the obligation to make the payment. With regard to less favourable treatment, since the measure in question can alter the net taxable income of Argentine taxpayers, this generates a disincentive for Argentine enterprises in their relations with service suppliers located in the excluded countries, which in turn affects the conditions of competition between service suppliers *vis-à-vis* like suppliers located in Argentina.

2.4.3 Argentina has not demonstrated that the allocation of expenditure to the time of payment is justified under Article XIV(c)(i) of the GATS

2.40. Panama considers that Argentina's explanation that the measure in question is intended to secure compliance with laws and regulations which in themselves are not inconsistent with the GATS is inadequate and deficient. According to Argentina, the law or regulation with which it is sought to secure compliance under the rule of allocation of expenditure at the time of payment is the LIG.[39] However, Argentina should have demonstrated that the LIG is a law that qualifies under Article XIV(c)(i) as a law "relating to the prevention of deceptive and fraudulent practices". The LIG imposes a tax on Argentine taxpayers, but is not a law relating to the prevention of certain problematical forms of conduct in the marketplace, between market players. Moreover, Argentina has not established that the rule on allocation of expenses at the time of payment is necessary to achieve any compliance objective under the LIG. Even if the measure in question constituted a means of compliance provisionally justified under Article XIV(c)(i), it would nevertheless be a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail for the purposes of tax transparency and exchange of information, in a manner inconsistent with the *chapeau* of this provision, owing to the arbitrary way in which Argentina establishes distinctions between countries.

2.4.4 Argentina has not demonstrated that the allocation of expenditure to the time of payment is justified under Article XIV(d) of the GATS

2.41. The rule on allocation of expenditure is linked to the collection of the profits tax, which Panama recognizes as a direct tax. However, this measure bears no relation to the collection or imposition of taxes on services or service suppliers of other Members. As a general matter, it is not aimed at ensuring the collection of the profits tax on persons from abroad. The imposition or

[37] Argentina's first written submission paras. 222-236.
[38] Panama's second written submission para. 2.538.
[39] Argentina's first written submission, para. 264.

collection of the profits tax in relation to services that generate profits of Argentine origin is carried out through Articles 9 to 13 and Title V of the LIG. In addition, the rule on allocation of expenditure to the time of payment constitutes a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail for purposes of tax transparency and exchange of information, since the distinctions made by Argentina do not reflect impartial and neutral treatment with respect to countries facing similar situations in this context.

2.5 Restrictions and discrimination in respect of access to the Argentine reinsurance and retrocession market

2.42. The fact that Argentina, by means of Resolution No. 38.284 of 25 March 2014, eliminated the prohibition on the provision of reinsurance services by entities of excluded countries is a step forward, since that prohibition was clearly inconsistent with Argentina's obligations under the GATS. Panama observes, however, that the Argentine measures on reinsurance continue to be discriminatory under Article II:1 of the GATS, and continue limiting access to the Argentine reinsurance market under mode 1, in breach of Article XVI of the GATS.

2.5.1 Argentina has failed to rebut the *prima facie* inconsistency of discrimination in respect of access to the Argentine market with the MFN treatment obligation under Article II:1 of the GATS

2.43. With regard to coverage, Argentina maintains that Panama "has not made a *prima facie* case that trade in services in the insurance sector exists in the non-cooperative countries and Argentina" and that "it has not demonstrated in what form [services and service suppliers] are affected by the measure it invokes."[40] However, nothing in the text, context, object and purpose of the GATS supports the existence of an alleged requirement to demonstrate the existence of specific service supply transactions in order to submit a claim under Article II:1 of the GATS. On the contrary, Argentina's argument would lead to the absurd result that any measure totally prohibiting trade in services would be immune from challenge under the GATS. The measure in question is a measure that regulates trade in reinsurance services and, as such, directly affects such trade, within the meaning of Article I:1, and the definitions contained in Articles I:2, XXVIII(b) and XVIII(c) of the GATS.

2.44. With regard to likeness, the Argentine measure provides for differential treatment for reinsurance service suppliers based solely and exclusively on their origin (*de jure* distinction*).* No other element - size, capital, number of workers, etc. - determines the practical application of one form of treatment or another to a reinsurer. For this reason, in accordance with the case law, the services and service suppliers must be found to be like. In any event, in situations where the different treatment provided for by a measure is neutral as to the origin of the services and service suppliers (*de facto* distinction), the determination of likeness must be based on factors relating to the competitive relationship[41] between them.[42] In a *de facto* case, contrary to what is argued by Argentina, no account should be taken of regulatory differences (i.e. the existence or non-existence of an agreement on information exchange with the Argentine Government) per se in the examination of "likeness". The case law has established clearly that, in *de facto* situations, services and service suppliers are like when they "are in a competitive relationship with each other (or would be if they were allowed to be supplied in a particular market)".[43] The introduction of regulatory differences as a criterion for distinguishing between service suppliers would be equivalent to reintroducing the analysis of aims and effects in the determination of likeness, an approach which, as has been said before, the Appellate Body rejected categorically.[44]

2.45. With regard to less favourable treatment, Argentina explicitly acknowledges that its measures "establish different treatment" for reinsurance service providers from excluded countries.[45] The amendments introduced by Argentina by means of Resolution No. 38.284 maintain the differential treatment of reinsurance service suppliers on the basis of their origin.

[40] Argentina's first written submission, paras. 402 and 406.
[41] To begin with, consideration could be given to the likeness criteria traditionally used in the context of trade in goods (i.e. characteristics and nature; classification; use or purpose; and consumer preferences with regard to the services in question).
[42] Panel Report, *China - Electronic Payment Services*, para. 7.702.
[43] Ibid.*,* para. 7.700
[44] Appellate Body Reports, *Japan - Alcoholic Beverages II*, p. 27 and *EC - Bananas III,* para. 241.
[45] Argentina's first written submission, para. 412. (emphasis added)

Non-compliance with these conditions entails denial of access to the Argentine reinsurance market both in cross-border mode and through commercial presence. This conditionality is contrary to Article II:1 of the GATS and its mere existence is sufficient to conclude that Argentina's measure is inconsistent with its MFN treatment obligation under the GATS.

2.5.2 Argentina has failed to rebut the *prima facie* inconsistency of the restrictions on market access with the obligations under Articles XVI:1 and XVI:2(a) of the GATS

2.46. Despite having assumed a commitment without limitations in respect of market access for the supply of cross-border reinsurance services, Argentina does not permit full access to its reinsurance market under mode 1. Argentina itself recognizes that its legislation provides for the participation of foreign enterprises in the supply of reinsurance services under mode 1 only "in a partial manner and for amounts in excess of what is considered a threshold for certain types of insurance risk".[46] Likewise, Argentina recognizes that "approved reinsurers" can only be authorized by the National Insurance Supervisory Authority (SSN) to operate in the Argentine market for risks below US$50 million "when the magnitude and characteristics of the risks ceded make it impossible for such reinsurance operations to be covered in the national reinsurance market". Therefore, it is confirmed that Argentina establishes a limitation on the number of service suppliers by requiring an economic needs test, within the meaning of Article XVI:2(a) of the GATS.[47]

2.5.3 Argentina has not demonstrated that the measure is justified under the prudential exception of paragraph 2(a) of the Annex on Financial Services to the GATS

2.47. Argentina has not justified its restriction on access to the Argentine reinsurance market by foreign suppliers through mode 1 under paragraph 2(a) of the GATS Annex on Financial Services. Consequently, it must be considered that Argentina admits that its measure, being inconsistent with Article XVI of the GATS, is not justified under the prudential exception. Argentina has also failed to demonstrate that the discrimination between reinsurers of different origins, which is inconsistent with Article II:1 of the GATS, is justified under the prudential exception. In the first place, Argentina has not proved that its measure constitutes a "domestic regulation" that falls within the scope of the prudential exception, as required by the title of paragraph 2 of the Annex. In addition, the Argentine measure in any event seeks to oblige Members to disclose information, contrary to the provisions of paragraph 2(b). Secondly, Argentina has provided no evidence that its measure was really adopted "for prudential reasons". Thirdly, since Argentina establishes its list of "cooperative countries" in a manner that would appear to be random, as it does not correspond to the effective exchange of information, Argentina has failed to demonstrate that its measure is not used as a means of evading its commitments and obligations.

2.6 Discrimination in access to the Argentine capital market

2.48. This measure is directed at securities dealers authorized to operate on the Argentine capital market and obliges them not to carry out transactions ordered by persons from excluded countries, unless they meet two conditions: (i) they must have the status in their home jurisdiction of intermediaries registered with an entity under the control and supervision of a body fulfilling similar functions to those of the National Securities Commission (CNV); and (ii) they must certify that the body in their home jurisdiction has signed a memorandum of understanding on cooperation and exchange of information with the CNV.

2.6.1 Argentina has failed to rebut the *prima facie* inconsistency of discrimination in market access with the MFN treatment obligation under Article II:1 of the GATS

2.49. Regarding coverage, by requiring Argentine securities dealers not to "sell" their intermediation services in the Argentine capital market to excluded countries, and by permitting them at the same time to carry out transactions directly when so ordered by administrators of beneficiary countries, the measure clearly "affects" those services that require access to the Argentine financial market. Argentina had no problem in identifying the trade in services relevant to this claim: portfolio management services provided to Argentine consumers by foreign suppliers in cross-border mode (mode 1).[48] In any event, and although it is not necessary to demonstrate

[46] Argentina's first written submission, para. 458. (emphasis added)

[47] This conclusion is confirmed in the light of the Note by the WTO Secretariat on economic needs tests (document S/CSS/W/118 of 30 November 2001).

[48] Argentina's first written submission, para. 142.

the existence of suppliers impacted or potentially impacted by the measure, Panama has furnished numerous examples of entities that may supply portfolio management or investment portfolio services in cross-border mode to Argentine clients.[49]

2.50. With regard to likeness, the likeness requirement for service suppliers is met because the measure provides for differential treatment of portfolio management services suppliers based exclusively on their origin (*de jure* distinction).[50] Argentina maintains that its measures do not differentiate exclusively in terms of origin, since they have an objective basis, i.e. whether or not the jurisdictions concerned are considered cooperative for tax transparency purposes. However, the *reason* why a Member distinguishes between origins is irrelevant when it comes to determining whether or not a measure is based on origin.

2.51. With regard to less favourable treatment, Argentina imposes express conditions on portfolio managers from the excluded countries wishing to gain access to the Argentine securities market. The fulfilment of those conditions - which are not imposed on administrators of other origins – will presumably be monitored by Argentine securities dealers, who will only conduct transactions when compliance with the above-mentioned conditions is certified. The case law is very clear in this respect: no Member can make the granting of advantages (in this instance, direct access to the capital market) dependent on the fulfilment of conditions.[51]

2.6.2 Argentina has not demonstrated that the measure in question is justified under the prudential exception of paragraph 2(a) of the GATS Annex on Financial Services

2.52. Argentina has failed to demonstrate that discrimination between portfolio managers of different origins, which is inconsistent with Article II:1 of the GATS, is justified under the prudential exception. In the first place, Argentina has not proved that its measure constitutes a "domestic regulation" falling within the scope of the prudential exception, as required by the title of paragraph 2 of the Annex. The measure seeks in any event to require Members to disclose information, contrary to the provisions of paragraph 2(b). Secondly, Argentina has provided no evidence that its measure was really adopted for "prudential reasons". Thirdly, in the light of the capricious system used by Argentina to list countries as "cooperative", Argentina has failed to demonstrate that its measure is not used as a means of evading its commitments and obligations under the GATS.

2.7 Discrimination in the imposition of requirements for the registration of branches

2.53. When a company from an excluded country requests branch registration in the Public Trade Register of Buenos Aires, the Argentine Companies Control Authority (IGJ) will not only demand compliance with the requirements listed in Article 188, but will also require "certification that the company effectively carries out an economically significant business activity" in its place of origin. For this purpose, the IGJ may require that the company attach the documents listed in subparagraphs (a), (b), (c) and (d) of Article 192.1 of Resolution No. 7/2005.

2.7.1 Argentina has failed to rebut the *prima facie* inconsistency of the requirements for branch registration with the MFN treatment obligation under Article II:1of the GATS

2.54 With regard to coverage, it is obvious that the registration requirements for a foreign branch to be able to operate in Buenos Aires constitute a "measure in respect of commercial presence" and, therefore, a "measure affecting trade in services" in accordance with the definitions established in Article XXVIII(c) of the GATS. Regarding likeness, the requirement that service suppliers should be like is met since the measure itself provides for differential treatment for companies supplying services solely and exclusively on the basis of their origin (*de jure* distinction). Resolution No. 7/2005 of the IGJ, by its very wording, applies general treatment to all foreign companies wishing to register a branch in the Buenos Aires registry (Article 188), but provides specific additional treatment for "companies from countries, dominions, jurisdictions, territories, associate States and special tax regimes considered not cooperative for tax transparency purposes (Article 192). If it were determined that the measure makes distinctions based not solely on origin but on other factors (*de facto* distinction), the determination of likeness

[49] Panama's first written submission, footnotes 446, 447, 448, 467 and 468.

[50] Title XI, Section III, Article 5 of the CNV Regulations.

[51] See, in the context of trade in goods, Panel Reports, *Indonesia – Autos*, para. 14.143 and *Canada – Autos*, paras. 6.13-6.15.

would have to be based on the analysis on the competitive relationship.[52] But even in a *de facto* case, no account should be taken of regulatory differences per se in the "likeness" analysis, since these are only relevant insofar as they affect the competitive relationship.[53] Given the scale of the measure, Argentina would have to prove that consumers of *any* service (legal, architectural, accounting, etc.) perceive their suppliers differently (firms of lawyers, architects, accountants, etc.) according to whether or not their respective governments have negotiated an agreement on exchange of tax information with Argentina. Regarding less favourable treatment, the different and more burdensome treatment applied to companies from excluded countries emerges from the very text of Resolution No. 7/2005. The demonstration of actual effects is not necessary, as was pointed out earlier. Finally, the concept of "less favourable treatment" under Article II:1 of the GATS, does not include an analysis of whether the harmful effect of the measure derives exclusively from a legitimate regulatory distinction, as is maintained by Argentina.

2.7.2 Argentina has not demonstrated that the measure in question is justified under Article XIV(c)(i) of the GATS

2.55. Argentina has failed to demonstrate that its measure on branch registration is "necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of [the GATS] including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts". Consequently, Argentina has failed to demonstrate that the measure is provisionally justified under Article XIV(c)(i) of the GATS. Argentina has failed to demonstrate that discrimination in regard to the registration of branches is applied in accordance with the *chapeau* of that provision. Panama contends that the Argentine measure on branch registration is applied in a manner that "constitute[s] a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail", in a manner inconsistent with the *chapeau* of Article XIV(c)(i) of the GATS.

2.8 Discrimination in the imposition of the foreign exchange authorization requirement

2.56. The Argentine measure affords different treatment in respect of the repatriation of foreign investment, on the basis of whether the beneficiary supplier from abroad is from a country considered by Argentina as cooperative or non-cooperative for tax transparency purposes. This difference in treatment occurs in all services sectors, with the exception of financial services.

2.8.1 Argentina has failed to rebut the *prima facie* inconsistency of discrimination in the foreign exchange authorization requirement with the obligation under Article II:1 of the GATS

2.57. With regard to coverage, inasmuch as Argentina's measure regulates the dismantling of commercial presence in Argentine territory, it is a measure "*in respect of* commercial presence", within the meaning of Article XXVIII(c)(iii) of the GATS. Consequently, it is a measure affecting trade in services, which therefore falls within the scope of the GATS by virtue of Article I:1 of that Agreement. As regards likeness, the measure establishes a *de jure* distinction, in which the only element that links the imposition of the additional requirement with the supplier or beneficiary is their country of origin. However, origin alone does not alter the likeness between services and service suppliers. Even if it were determined that the Argentine measure makes no distinctions based solely on origin, but on other factors (de facto distinction), the determination of likeness would have to be based on the analysis of the competitive relationship[54], without the regulatory differences being relevant *per se* in the "likeness" analysis.[55] With regard less favourable treatment, by limiting the outflow of capital once the investment has been made, the Argentine measure has the effect of discouraging *ex ante* the establishment of commercial presence in Argentina by service suppliers from excluded countries. Unlike the suppliers of beneficiary countries, their initial decision to establish commercial presence in Argentina will be negatively affected by a measure which, from the very outset, provides in general and prospective terms for discriminatory treatment in respect of the recovery of the capital invested and exit from the Argentine market.

[52] Panel Report, *China – Electronic Payment Services*, para. 7.702.
[53] Appellate Body Report, *US - Clove Cigarettes,* para. 119.
[54] Panel Report, *China – Electronic Payment Services*, para. 7.702.
[55] Appellate Body Report, *US – Clove Cigarettes*, para. 119.

2.8.2 Argentina has not demonstrated that the measure in question is justified under Article XIV(c)(i) of the GATS

2.58. Argentina has failed to demonstrate that its measure on the repatriation of investments is "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATS] including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts". Consequently, Argentina has failed to demonstrate that the measure is provisionally justified under Article XIV(c)(i) of the GATS. Nor has Argentina succeeded in demonstrating that the measure is applied in accordance with the *chapeau* of that article. It is worth underscoring that Argentina has put forward no argument relating to the *chapeau* of Article XIV in its terse defence of the measure on repatriation of investments. In Panama's opinion, the Argentine measure on the repatriation of investments is applied in a manner which "constitute[s] a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail", in a manner inconsistent with the *chapeau* of Article XIV(c)(i) of the GATS.

ANNEX B-3

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA

I. Introduction

1. This is a case that should not have been brought before the DSB. Panama's claims in this dispute seek to compare the obligations assumed by Members under the GATS and the GATT 1994 with multilateral commitments in the fight against harmful tax practices, which currently involves more than 120 countries and tax jurisdictions in the Global Forum on Transparency and Exchange of Information for Tax Purposes (the "Global Forum") – most of which are also WTO Members – as well as the mandates of the G-20 aimed at applying international standards in respect of anti-abuse rules.

2. Panama challenges Argentina's implementation of anti-abuse measures which are essential tools for enforcing national tax laws, guaranteeing taxation and tax collection, preventing fraudulent practices, tax evasion and tax avoidance, as well as the erosion of national tax bases. At the same time, they guarantee the integrity and stability of the global financial system. The challenged measures are directed to equalizing the conditions of competition on the international market for financial and other services between service suppliers from cooperative countries for tax transparency purposes, and service suppliers from non-cooperative countries for tax transparency purposes, which are not subject to supervision and control by the Argentine authorities in the non-cooperative countries, because of the absence of agreements on information exchange, while service suppliers in Argentina and service suppliers of cooperative countries are subject to permanent supervision and control. The difference in status accounts for the difference in legal treatment.

3. In its first written submission, Panama decided to bring up a new dispute, different from the one that was the subject of the request for consultations, which referred to "certain measures imposed by Argentina that affect trade in goods and services. These measures apply only to trade conducted with specific countries listed in Decree 1344/98 as amended by Decree 1037/00, which include Panama (hereinafter "listed countries")".[1]

4. Panama alleges "discriminatory treatment" in its first written submission, with respect to an alleged interest of third Members. In fact, the anti-abuse measures challenged are not currently applied to Panama, following its inclusion in the category of jurisdictions cooperating for tax transparency purposes under Decree 589/2013, as it is covered by the "initiation of negotiations" on exchange of tax information with Argentina[2] for which provision was made by the Foreign Ministers of Panama at the time of the entry into force of the said Decree, on 1 January 2014. Panama made an international commitment that defensive measures such as those at issue in this dispute must be applied against uncooperative jurisdictions, and furthermore that their application must be coordinated. In April 2012, Panama accepted the principles of the Global Forum and underscored the multilateral initiative for enforcement of the standards guaranteeing "equity and non-discrimination between all countries and jurisdictions, whether or not OECD members, with which the Republic of Panama competes substantially on international markets in the provision of international services, particularly financial and commercial services".[3] Decree 589/2013 produced a paradigm shift in Argentine legislation by according the status of cooperative country for tax transparency purposes, based on the result of joint action by Argentina and its relevant partners, inasmuch as that status derives from an agreement on

[1] Request for consultations by Panama, document WT/DS453/1.

[2] Argentina-Panama joint communiqué of 28 November 2013, Exhibit ARG-3, and communiqué of the Panamanian Ministry of Foreign Affairs of 28 November 2013, Exhibit ARG-4.

[3] In April 2012, Panama accepted the principles of the Global Forum and underscored the multilateral initiative for enforcement of the standards guaranteeing "equity and non-discrimination between all countries and jurisdictions, whether or not OECD members, with which the Republic of Panama competes substantially on international markets in the provision of international services, particularly financial and commercial services ". (Letter of 15 April 2002 from the Minister of the Economy and Finance of Panama to the Secretary-General of the OECD, page 1 *in fine* and page 2, Exhibit ARG-8).

exchange of information, from the time of its negotiation, signing and effective implementation. This legislation reflects Argentina's adjustment to trends in international law on the matter.

5. The global international crisis that started in 2007 highlighted the importance attached by the G-20 to the Global Forum initiative and the fact that failure to comply with international standards calls for the application of anti-abuse measures at the national level and on a coordinated basis, to address the risks affecting the international financial system.[4]

II. Measures at issue

6. Panama challenges various tax measures as well as measures relating to reinsurance; registration of foreign companies; repatriation of investments; and capital market instruments. The measures at issue in this dispute were developed by the Argentine Republic to address the effects of harmful tax competition and they meet prudential concerns in respect of financial regulation. These measures are closely related to a range of international anti-abuse rules and mechanisms dating back nearly 20 years.[5] The defensive measures challenged by Panama are a necessary, adequate and proportionate response to the risks created by the impossibility of accessing information on the ultimate beneficiaries in operations involving non-cooperative jurisdictions for tax transparency purposes.[6]

7. Argentina contends that Panama has not succeeded in establishing a *prima facie* case that the GATS is applicable to the measures at issue, mainly because in order for a measure to affect "trade in services," as provided in Article 1.2 of the GATS, the complaining Member must demonstrate that trade in relevant services takes places by one or more of the four modes of supply. In its first written submission, Panama does not clearly identify what it considers to be the services and modes of supply in question in the present dispute. Nor does it surpass the minimum threshold of evidence concerning the existence of trade in any of these services in the specified modes of supply. Consistent with the way in which the Appellate Body addressed this issue in *Canada – Autos*, Argentina considers that Panama has an obligation to show that the relevant services are provided from the territory of Panama into the territory of the Argentine Republic (in the case of mode 1) or by a service supplier of Panamanian origin, through commercial presence in Argentina (in the case of mode 3).[7] However, even if the threshold for application of the GATS could be established on the basis of the services and service suppliers of an origin different from the origin of the complainant, Panama has failed to demonstrate that trade takes place in any of the relevant services in the specified modes of supply. In the absence of such demonstration, Panama has failed to demonstrate the existence of trade in the relevant services and modes of supply that may be "affected" by the measures challenged in this dispute. Consequently, it has failed to make a *prima facie* case for the applicability of the GATS to the measures at issue.

8. Argentina also wishes to emphasize that it is not aware of any previous dispute in the GATS framework where a national regulatory regime has been attacked on the basis of its theoretical effect on hypothetical service suppliers, let alone on service suppliers other than the complainant.

9. Panama has not succeeded in demonstrating that like services and service suppliers of Panamanian origin receive less favourable treatment under the measures in question. Articles II and XVII of the GATS require that it be demonstrated that the measures in question accord less favourable treatment to services and service suppliers of the complaining Member. The interpretation given by the Panel and the Appellate Body *in US – Clove Cigarettes* applies with all the more force to any claim of national treatment or MFN treatment under the GATS, especially in view of the fact that the GATS (unlike the multilateral agreements on trade in goods) sets out detailed provisions on the nationality and origin of services and service suppliers. As was argued earlier, and as the Panel in *EC – Bananas III* recognized, these provisions are vital to the effective operation of the GATS and define the potential scope of any claim alleging failure to grant MFN or national treatment. It is the treatment accorded to services and service suppliers of the

[4] G-20, Leaders' Statement, London 2009, Exhibit ARG-1.

[5] The OECD's 2001 report notes that "a framework of coordinated defensive measures is a means by which countries with similar concerns can support each other's efforts to counter the effects of harmful tax practices", Exhibit ARG-7, para. 47. See Argentina's first written submission, paras. 48-51.

[6] Argentina's first written submission, paras. 102-127.

[7] See Appellate Body Report, *Canada – Autos*, para. 157.

complaining Member which must be compared with the treatment accorded to like services and service suppliers "of any other country" (in the case of Article II) or to like services and service suppliers of national origin (in the case of Article XVII).

10. This interpretation affects the analysis of both "like services" and "less favourable treatment" under Articles II and XVII. As a prerequisite, the complaining Member must identify the services and service suppliers within its jurisdiction that are the subject of its claim under Article II or Article XVII, and go on to demonstrate that those services and service suppliers are "like" the proposed reference group of services and service suppliers "of any other country" (in the case of Article II) or the respondent Member's own "like services and service suppliers" (in the case of Article XVII). After establishing the "likeness" of these two groups, the complaining Member must go on to demonstrate that the services and service suppliers within its jurisdiction receive treatment that is "less favourable" than that accorded to services and service suppliers of the specified "other country", or that accorded to services and service suppliers of national origin.[8]

11. Even if Panama could invoke Articles II and XVII in relation to non-Panamanian services and service suppliers, it did not even attempt to demonstrate this point and has therefore failed to establish a *prima facie* case of inconsistency with those articles. Panama's entire argument concerning Articles II and XVII rests on the premise that it is under no obligation to demonstrate that the services and service suppliers of any WTO Member are "like" those of any other country or those of national origin, since the measures in question allegedly accord differential treatment to the services and service suppliers of certain Members "solely … by reason of their origin". Panama's assertion that the measures in question accord differential treatment exclusively on the basis of origin is no more than that – a mere assertion. Panama does not engage in any analysis of the actual basis on which Argentina determines that specific jurisdictions must be considered cooperative or non-cooperative for the purpose of establishing which services and service suppliers are subject to the application of the measures in question. Decree 589/2013 applies objective and internationally recognized criteria for determining which services and service suppliers originate in jurisdictions not participating in transparency and the effective exchange of tax information. These criteria relate to characteristics of competition and regulation of affected services and service suppliers and are not the result of differential treatment based exclusively on origin.[9]

12. Argentina considers that the regulatory differences between services and service suppliers are relevant to the examination of "likeness", although those differences are not fully reflected in the market. Regulators may have to differentiate between service suppliers, precisely because the market actors are not duly taking account of the regulatory differences affecting the nature of the service supplied. For example, consumers are not able to distinguish properly between banks that are subject to continuous prudential supervision and those that are not, or between doctors who maintain sufficient malpractice insurance and those who do not. The object and purpose of the GATS suggests that such regulatory differences must enter into the examination of "likeness" to the extent that they are relevant in a particular case, and regardless of whether such differences affect competitive relations in the marketplace. This is a case where regulatory differences significantly affect competitive relations between the services and service suppliers concerned. The services and service suppliers in jurisdictions that uphold international standards of transparency and effective exchange of tax information are in a fundamentally different competitive position from the services and service suppliers in jurisdictions which do not uphold those standards. Accordingly, although there is an important question of interpretation as to whether regulatory differences have a significance independent of the examination of "likeness" under the GATS, this is a case where the statement of the Appellate Body in *US – Clove Cigarettes* is clearly and directly applicable.[10]

13. The origin of services and service suppliers is potentially relevant to consideration of whether services and service suppliers are "like" within the meaning of Articles II and XVII. Hence, Panama errs when it asserts that no demonstration of "likeness" is required because the measures at issue in this dispute are allegedly "based on origin". Panama's citation of the statement by the Panel in *China – Publications and Audiovisual Products* represents an attempt by Panama to evade its responsibility for establishing a *prima facie* case of "likeness". The Panel in this dispute must reject this attempt at evasion. It can do so by considering that the "based on origin" principle

[8] Argentina's first written submission, paras. 162-163.
[9] Argentina's first written submission, paras. 172-174.
[10] Argentina's first written submission, paras. 187-188.

enunciated by the Panel in *China – Publications and Audiovisual Products*, irrespective of its merits in other contexts, is not applicable when the origin of services and service suppliers is potentially relevant in relation to the characteristics of the services and service suppliers concerned, and relevant for the purpose of establishing that they may be considered "like".[11]

14. In the light of Panama's failure to establish a *prima facie* case of "likeness" in its first written submission, Argentina will not, in this submission, discuss in depth whether the services and service suppliers of jurisdictions that uphold the international standards of transparency and effective exchange of tax information are "like" the services and services suppliers of jurisdictions that do not uphold those standards. This is because Argentina cannot respond to a case which Panama has not even attempted to make.[12] Without prejudice to the foregoing, Argentina endorses the general proposition that, if a jurisdiction upholds the international standards of transparency and effective exchange of tax information, this is relevant in terms of the characteristics of the services or service suppliers originating in its jurisdiction.

15. In order to assess the "likeness" of the services and service suppliers referred to in this dispute, it is worth recalling the relevant characteristics of the measures challenged by Panama under Articles II and XVII. Each of these measures distinguishes between cooperating and non-cooperating jurisdictions in order to apply a measure relating to either prevention of tax evasion or pass-through of benefits, on the one hand, or for a legitimate prudential purpose, on the other, or both.[13]

16. Regarding the analysis of the "likeness" of the services provided by each type of jurisdiction, previous panels have considered that "like services" should be examined on a case-by-case basis, focusing primarily on the nature of the competitive relationship between the services being compared.[14] In accordance with the case law developed by panels and the Appellate Body in respect of product "likeness", a previous panel considered that services are "like" between themselves "if it is determined that the services in question in a particular case are essentially or generally the same in competitive terms".[15] As noted earlier, the Appellate Body has found that regulatory differences are relevant for the analysis of "likeness" to the extent that such differences "have an impact on the competitive relationship between and among the products concerned", a proposition that applies with equal or greater force in the context of services "likeness".[16]

17. The fact that transparency and the effective exchange of information are what define the "level playing field" tells us everything we need to know about the "likeness" of these services. If the services provided from non-cooperative jurisdictions were "like" those provided by non-cooperative jurisdictions, the adherence to international standards of transparency and effective exchange of tax information would have no significant effect on the competitive relationship between these two types of jurisdiction. However, as Panama and other members of the Global Forum have recognized, precisely the opposite is the case – the adherence to internationally accepted standards of transparency and effective exchange of information fundamentally alters the nature of the services which service suppliers within these jurisdictions are capable of providing. Panama and others are concerned about a "level playing field" because they know that the services provided by non-cooperative jurisdictions are not at all "like" the services provided by jurisdictions which adhere to and enforce the international standards of transparency and effective exchange of information.[17]

18. Service suppliers in non-cooperative jurisdictions are not "like" service suppliers in non-cooperative jurisdictions, for reasons that are independently relevant to Argentina as a regulator, and also for reasons that affect the competitive relationship between service suppliers in the market. From the standpoint of Argentina's tax authorities, the difference between these two categories of service suppliers should be clear: in the case of service suppliers in cooperative jurisdictions, the Argentine fiscal authorities have the capacity to obtain the necessary information

[11] Argentina's first written submission, para. 198.
[12] Argentina's first written submission, para. 200.
[13] Argentina's first written submission, para. 202.
[14] See for example Panel Report, *China – Electronic Payment Services*, para. 7.702 ("we consider that a likeness determination should be based on arguments and evidence that pertain to the competitive relationship of the services being compared.").
[15] Ibid.
[16] Appellate Body Report, *US – Clove Cigarettes*, para. 119.
[17] Argentina's first written submission, para. 216.

for the implementation of Argentina's tax laws, while the Argentine fiscal authorities cannot obtain this information in the case of service suppliers in non-cooperative jurisdictions. This regulatory difference directly affects Argentina's capacity to enforce its tax laws and guarantee the integrity of its tax base. This means that the service suppliers in these two types of jurisdiction are "not like" from the regulatory point of view.

19. This same regulatory difference directly affects the competitive relations between service suppliers in the market. For the reasons set forth by Argentina in Part II of its first written submission, service suppliers in non-cooperative jurisdictions are capable of providing opportunities for corporate clients and individuals to transfer their earnings to jurisdictions with little or no income tax, and to participate in tax evasion and other illegal activities such as money laundering. This places service suppliers in these jurisdictions in a fundamentally different competitive position compared to service suppliers in non-cooperative jurisdictions which provide otherwise comparable services. As Argentina has demonstrated, the consumers of services are clearly aware of these differences and take them into account when making decisions as to where and with whom to do business.[18]

20. The measures in question do not accord less favourable treatment to services and service suppliers of any other Member, less still to services and service suppliers of Panamanian origin. Panama is not in a position to deny that the measures in question establish a legitimate regulatory distinction between non-cooperative and cooperative jurisdictions. As a member of the Global Forum and as a country which has committed itself to complying with its standards, Panama is aware that the capacity of the national tax authorities to obtain tax information from other jurisdictions is a regulatory distinction which the 121 members of the Global Forum consider to be important and legitimate. When Panama joined the Global Forum, it requested its fellow members in the forum to apply defensive tax measures in a coordinated manner to all jurisdictions which do not uphold the standards of the Global Forum relating to transparency and effective exchange of tax information. This is exactly what Argentina is doing through the measures in question in this dispute. Argentina's application of defensive tax measures to jurisdictions that do not uphold the Global Forum's standards of transparency and effective exchange of information is fully consistent with Panama's insistence that it is "essential that the practical implementation of the initiative proposed by the OECD should ensure equity and non-discrimination between all countries and jurisdictions, whether or not OECD members, with which the Republic of Panama substantially competes in international services markets, especially financial and trade markets".[19] Panama recognizes - and should continue recognizing - that the application of defensive tax measures in relation to non-cooperative jurisdictions does not constitute "less favourable treatment" but is necessary to re-establish a competitive balance – a "level playing field" – between services and service suppliers in cooperative and non-cooperative jurisdictions. There is no "less favourable treatment" under these measures, either with respect to Panamanian services and service suppliers, or with respect to the services and service suppliers of any other Member.[20]

III. Tax measures

1. Withholding tax on loan interest payments. Article 93(c) of the Earnings Tax Law (Ley de Impuesto a las Ganancias - LIG)

21. The tax base for determining the presumed net profit shall be forty-three percent (43%) when the borrower or loan or fund recipient is an entity governed by Law No. 21.526 or any of the other legal persons covered by Article 49 of the Earnings Tax Law (LIG), a natural person or an undivided estate, provided that the creditor is a banking or financial institution based in cooperating jurisdictions for tax transparency purposes, whereas it shall be one hundred percent (100%) when the borrower or loan or fund recipient is a legal person covered by Article 49 of the tax law, excluding 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.

[18] Argentina's first written submission, paras. 220-221.
[19] Exhibit ARG-8.
[20] Argentina's first written submission, paras. 235-236.

22. The purpose of the measure is to neutralize the erosion of the tax base that would be caused by insider loans, given the impossibility of accessing information on the share ownership of a corporate vehicle based in a non-cooperating jurisdiction for tax transparency purposes.[21]

2. Presumption of unjustified increase in wealth. Article added after Article 18 of the Law on Tax Procedure

23. The Law on Tax Procedure, Law No. 11.683 (LPT), provides that taxation is effected on the basis of sworn declarations submitted by taxpayers and that, when such sworn declarations have not been submitted or are challengeable, the fiscal authority shall determine the taxable amount, on the basis of certain knowledge or by estimation based on presumption.

24. The presumption of unjustified increase in wealth allows for the entry of funds to be condoned which the interested party can conclusively show to have originated from activities actually carried out by the taxpayer or by third parties in the countries concerned, or from placements of duly declared funds.

25. This measure addresses the observed instances of fraudulent activity by Argentine companies which use corporate vehicles under their control to divert undeclared income to non-cooperating jurisdictions for tax transparency purposes.[22]

3. Transfer pricing. Articles 8 and 15 of the Earnings Tax Law (LIG)

26. Transfer prices are defined as those values that are to be assigned to transactions between related enterprises which, when there is no opposition of interests (but rather a shared interest) between the parties concerned, do not meet the criteria used for setting prices between independent enterprises.

27. The Earnings Tax Law provides that transactions carried out by stable institutions domiciled in Argentina with natural or legal persons domiciled, established or located in non-cooperating countries for tax transparency purposes shall not be considered to be in line with normal arm's length market practices or prices.

28. When the corporate links or ultimate beneficiaries cannot be ascertained in the case of non-cooperating countries for tax transparency purposes, recourse is had to the test for transfer pricing between related enterprises.[23]

4. Allocation of deductions for payments. Article 18, last paragraph of the Earnings Tax Law (LIG)

29. The last paragraph of the article in question establishes an exception to the accrual rule: in the case of persons based in non-cooperating jurisdictions for tax transparency purposes, expenditures by local bodies that constitute earnings of Argentine origin may only be deducted in the tax year in which they accrued insofar as the payment was made during the period concerned or, failing this, if the payment takes place before expiry of the period for submission of the sworn declaration.

30. The rule does not prevent the deduction of expenses, but lays down certain conditions for such deduction to be made and to prevent situations of tax fraud that could arise if accounting entries reflect outlays in favour of foreign beneficiaries that are not actually made and it cannot be ascertained whether such transactions are genuine owing to the impossibility for the authorities to access the information in question because the country concerned is a non-cooperating country for tax transparency purposes.[24]

[21] Argentina's first written submission, paras. 108-109, 278-279 and Explanatory Annex No. 1.1.
[22] Argentina's first written submission, paras. 110, 280-281 and Explanatory Annex No. 1.2.
[23] Argentina's first written submission, paras. 111, 282, and Explanatory Annex No. 1.3.
[24] Argentina's first written submission, paras. 112, 283-285 and Explanatory Annex No. 1.4.

IV. Measures affecting the reinsurance sector, the capital market, company registration and repatriation of investments

5. Reinsurance

31. The regulatory framework for reinsurance in Argentina is governed by Resolution No. 35.615/2011, as amended by Resolution No. 38.284/2014. The former states that "local reinsurers" is understood to mean those branches of foreign reinsurance companies that operate on Argentine territory, i.e. under "Mode 3" defined as "commercial presence" in Article I:2(c) of the GATS, and "approved reinsurers" is understood to mean foreign reinsurance companies that offer reinsurance services from their central office, i.e. in accordance with "Mode 1" defined as "from the territory of one Member into the territory of any other Member" in Article I:2(a) of the GATS.[25]

32. The second paragraph of Article 18(a) requires for verification purposes that, in order to provide the service referred to, suppliers must certify that the enterprise is subject to control and supervision by a body carrying out similar functions to those of the National Insurance Supervisory Authority (SSN) and with which an understanding on information exchange has been signed. In the case of countries or jurisdictions not established in associate States cooperating in the global struggle against the crimes of money laundering and financing of terrorism according to the Financial Action Task Force (FATF), "the assessment of the request for authorization shall be subject to enhanced due diligence, proportionate to the risks …"[26]

33. The measure challenged by Panama is not in breach of GATS Article II:1, since it is clear from a reading of points 18 and 20 of Resolution No. 35615/2011 of the SSN that Argentina does not prohibit suppliers from countries considered not cooperative for tax transparency purposes from providing reinsurance services through a branch established in Argentina (local reinsurer) or under the "approved reinsurer" modality. Foreign reinsurers maintain a very high level of participation in Argentina's reinsurance and retrocession sector.[27]

34. The measure challenged by Panama is not in breach of GATS Articles XVI:1 and XVI:2. Not only are retrocession services not limited by any regulatory provision, but in practice most such services are provided by foreign enterprises (Mode 1). The regulations provide for participation by foreign enterprises in the supply of reinsurance services under Mode 1 on a partial basis and in excess of what is considered a threshold for certain types of insured risk, normally defined as "major risks".

35. Argentina considers that the Panel should interpret the provisions of the corresponding section of Argentina's schedule as part of the GATS in relation to this Member, following the rules of interpretation set forth in the Vienna Convention on the Law of Treaties, as well as the guidance of the Appellate Body, which upheld the Panel's interpretation that each schedule has its own intrinsic logic and must be interpreted according to its own conditions or merits.[28] Accordingly, the necessary interpretation must be that Argentina's commitment ("Authorization of new entities is suspended") concerning the authorization of new branches has not changed, inasmuch as its schedule remains without amendment and Argentina has expressed no intention to modify its schedule.

6. Capital market

36. Resolution No. 622/2013[29] of the National Securities Commission (hereinafter "CNV") modified the challenged regulation that was the subject of consultations and of one of the complaints included in the request for the establishment of a panel.[30] On the basis of Law No. 26.831[31] on the capital market and the provisions of Resolution No. 662/2013,

[25] Argentina's first written submission, paras. 113-117, 407 *et seq*.
[26] Exhibit ARG-25. Recommendation No. 19 (Higher-risk countries) and Interpretive Note to Recommendation No. 19 of the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation. February 2012.
[27] Argentina's first written submission, para. 438 *et seq*.
[28] Appellate Body Report, *US – Gambling,* para. 182.
[29] Exhibit ARG-28.
[30] Request for the Establishment of a Panel by Panama, point 8, p. 9.
[31] Exhibit ARG-49.

the measure challenged here comes under Title XI, Section III[32], of the specific regulations of 2013 of the National Securities Commission.

37. The persons specified in the Law on the Capital Market may only engage in transactions in the area of public supply when they are carried out or ordered by persons established, domiciled or residing in cooperating countries under Decree No. 589/2013. However, it is provided that transactions ordered by persons not included in the list of cooperating countries shall go forward provided that (i) they have the status in their home jurisdiction of intermediaries registered with an entity under the control and supervision of a body fulfilling similar functions to those of the CNV, and (ii) they certify that the body in their home jurisdiction has signed a memorandum of understanding on cooperation and exchange of information with the CNV. The measure at issue is not a prohibition, contrary to Panama's contention, since it provides an alternative for countries not included in the list under Decree No. 589/2013.[33]

7. Repatriation of investments

38. Argentina considers that the measure of the Central Bank of the Argentine Republic (BCRA) that is challenged is not covered by the GATS, given that the repatriation of investments governed by the rule is not a subject covered by the GATS, since it is not directly related to trade in services (under Articles I:1 and XXVIII of the GATS it does not affect trade in services).

39. Moreover, if the measure were considered to be covered by the GATS, Communication "A" 4940 of the BCRA and amendments does not breach the GATS. This measure establishes a requirement: prior authorization from the Central Bank of the Argentine Republic for repatriation of investments when the foreign beneficiary is a natural or legal person residing or incorporated or domiciled in countries or jurisdictions not considered "cooperative for tax transparency purposes" in the light of the provisions of Article I of Decree No. 589/2013 and supplementary rules. Nevertheless, as previously pointed out by Argentina, the verification measure of the BCRA does not "solely" target countries that are non-cooperative for tax transparency purposes.[34]

40. Thus, the banking entity places on record that it has verified the documentation submitted by the customer in order to approve the type of investment declared and that the funds used for the purchase of the foreign currency transfer come from the sale within the country of the assets realized, as well as the reasonableness and genuineness of the transaction.

41. Panama specifies no concrete cases and fails to demonstrate how the requirement of authorization for the repatriation of investments affects "direct investments in companies and/or in immovable property".

42. Furthermore, the BCRA communication challenged by Panama is fully consistent with international standards in respect of tax transparency, and yields greater efficiency in the detection and dismantling of suspected money laundering operations in accordance with the international standards of the Financial Action Task Force (FATF).[35]

8. Requirements for company registration

43. Article 118 of Argentina's Companies Law (No. 19.550) establishes the general principle that foreign companies are governed, in terms of their existence and form, by the law of the place of establishment, and that in order for a company to exercise its usual activities in accordance with its social purpose, through the establishment of a branch, base or any other type of permanent representation, it must be registered with the public trade registry in the jurisdiction where it seeks to operate. However, the challenged rule is Resolution No. 7/2005 of the Companies Control Authority (IGJ), which has been amended by Resolution No. 1/2014 in order to bring the regulations into line with Decree No. 589/2013. The purpose of that resolution is to register and

[32] Title XI, section III, Transactions carried out by clients from or operating from tax havens, or through offshore companies or shell companies. Exhibit ARG-50.

[33] Argentina's first written submission, paras. 118-123, 486 *et seq*.

[34] Argentina's first written submission, Explanatory Annex No. 2, para. 15 *et seq*.

[35] Argentina's first written submission, paras. 124-125 and Explanatory Annex 2.

supervise only commercial companies, foreign companies, civil associations and foundations incorporated in the area of the autonomous city of Buenos Aires and not in the rest of Argentina.

44. Panama claims that companies from cooperative countries for tax transparency purposes receive less favourable treatment in the registration process, and that the measures are therefore in violation of Article II:1 of the GATS. This treatment is alleged to manifest itself in the additional requirements that are not requested of companies supplying like services from countries that cooperate for tax transparency purposes. As Argentina has indicated and demonstrated in its first written submission[36], Argentina does not accord less favourable treatment to companies from countries that do not cooperate for tax transparency purposes. The IGJ makes no distinction between foreign companies when collecting information, since the importance of ascertaining the economically significant activity of the company is common to all commercial companies that seek lawful registration with the IGJ.

V. Alternatively, the challenged measures are justified by virtue of the relevant exceptions of the GATS

45. Argentina maintains that: (1) the services and service suppliers of cooperative and non-cooperative tax jurisdictions are not "like", nor are they alike to the services and service suppliers of Argentina; (2) the measures in question do not modify the conditions of competition to the detriment of like services and service suppliers of any other Member; and (3) Argentina's treatment of services and service suppliers from cooperative and non-cooperative tax jurisdictions is based on a legitimate regulatory distinction, which has been developed over a period of nearly 20 years of international cooperation in the framework of the Global Forum initiative under OECD auspices, in order to address harmful tax competition, and the same legitimate distinction applies to services and service suppliers from non-cooperative countries for tax transparency purposes, with respect to services and service suppliers from Argentina.[37]

46. As a subsidiary argument, and in the unlikely event that the Panel were to find that the measures in question are inconsistent with the GATS, the measures in any case are justified under Article XIV(c) and (d) of the GATS and Article 2(a) of the Annex on Financial Services to the GATS.

47. Argentina emphasizes, however, that it is not necessary for the Panel to address itself to these topics unless and until Panama has conclusively established that: (1) the measures in question are measures "affecting trade in services" under Article I.1 and are therefore covered by the GATS; (2) the measures in question extend less favourable treatment to services and service suppliers from Panama; and (3) under any comparison, the services and service suppliers that allegedly receive less favourable treatment by virtue of the measures at issue are "like" the services and service suppliers of Argentine or other origin which allegedly receive more favourable treatment.

48. Argentina has established defensive fiscal measures "necessary to achieve enforcement" of Argentine tax laws and regulations, including the "prevention of deceptive and fraudulent practices"; therefore, in the unlikely event that the Panel were to find that Panama has demonstrated a violation of Articles II:1 and XVII of the GATS and of Articles I:1, III:4 and XI:1 of the GATT 1994, the Argentine measures are justified by Article XIV(c) and (d) of the GATS.

49. Each measure promotes the application of tax laws and regulations by reducing the scope for deceptive and fraudulent transactions involving Argentine taxpayers and related enterprises located in non-cooperative tax jurisdictions, whose only purpose is to evade taxes and/or circumvent the enforcement of Argentina's tax laws and regulations. The defensive tax measures adopted by Argentina for the necessary purpose of enforcing its tax laws and regulations include the following: (1) the imposition of withholding taxes at source on payments to residents of non-cooperative tax jurisdictions; (2) the reversal of the burden of proof for determining the tax base for transactions which potentially take advantage of harmful tax practices: (3) the application of transfer pricing standards in order to counter harmful tax competition; (4) restrictions on deductions for payments to entities in non-cooperative tax jurisdictions; and (5) increased auditing

[36] Argentina's first written submission, para. 572.
[37] Argentina's first written submission, para. 238.

and licensing requirements for subsidiaries of entities based in tax havens. These measures are justified under Article XIV(c) of the GATS.[38]

50. In the process of "weighing and balancing" as a means of determining whether a measure is necessary[39], the Appellate Body has stated that this analysis must weigh up: (1) the contribution of each of the defensive tax measures to the enforcement objectives of fiscal legislation; (2) the degree of importance of the interests at stake; and (3) the possible restriction on trade entailed by the tax defence measures in question.

51. Given that (1) transactions between Argentine taxpayers and entities based in non-cooperative tax jurisdictions pose a greater risk of tax evasion, tax avoidance and fraud; and that (2) it is not possible for the Argentine authorities to determine whether (a) the transaction has a legitimate commercial purpose, or whether (b) the transaction is aimed exclusively at avoiding the payment of taxes in Argentina, it can be concluded that: Argentina's defensive tax measures considerably reduce these risks by eliminating the possible tax benefits that Argentine taxpayers would derive exclusively for the purpose of avoiding the payment of taxes in Argentina through simulating transactions with related entities based in non-cooperative tax jurisdictions.

52. The measures are not excessively restrictive on trade in financial services from service suppliers located in non-cooperative tax jurisdictions, nor do they impede the provision of services in Argentina by such suppliers.[40] The defensive measures are applied in conformity with the chapeau of Article XIV which stipulates that the measures justified by that provision shall not be 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".[41] In this dispute, the distinction made between service suppliers in cooperative and non-cooperative jurisdictions can hardly be seen as "arbitrary" or "unjustifiable" since it is entirely based on internationally accepted and recognized principles of the Global Forum and the OECD, to which Panama has duly subscribed. Indeed, when Panama joined the Global Forum, it expressly indicated that it accepted the rules of that forum and requested its fellow members of the forum to apply a coordinated set of defensive measures to all jurisdictions that did not adhere to the standards of the Global Forum. From the standpoint of Argentina's tax authorities, the two categories of suppliers entail different degrees of risk for the enforcement of tax laws: with respect to cooperative jurisdictions, the Argentine tax authorities have the capacity to obtain the necessary information to implement Argentine tax laws, while in the case of suppliers in non-cooperative jurisdictions, they are not capable of obtaining that information, and this situation entails potentially serious consequences for the Argentine tax base.

53. The measure relating to the request for prior authorization from the Central Bank of the Argentine Republic (BCRA) for the sale of foreign exchange to non-residents for the repatriation of direct investments is a measure – in case the Panel considers that it is covered by the rules of the GATS – "necessary to secure compliance with laws or regulations" of Argentina within the meaning of Article XIV(c) of the GATS concerning the "prevention of deceptive and fraudulent practices", commonly associated with the concealment and laundering of assets of criminal origin.

54. The measure contributes to the objective of ensuring compliance with Argentina's laws and regulations on prevention of the laundering of assets of criminal origin, as it is in line with the international criteria of the FATF under Law No. 25246 of the Argentine Republic.

55. Moreover, Argentina invokes in the alternative Article XIV(d) applicable to direct taxes in circumstances of non-compliance with Article XVII, in the hypothetical event that the Panel were to consider that the Argentine defensive measures (measures 2, 3 and 4) of Panama's request should be justified in Panama's claims under Article XVII instead of as measures "necessary to secure compliance" with the tax laws and regulations of Argentina within the meaning of Article XIV(c) of the GATS, including the "prevention of deceptive and fraudulent practices" commonly associated with transactions with non-cooperative tax jurisdictions.

[38] Argentina's first written submission, para. 258.
[39] Appellate Body Report, *Korea – Various Measures on Beef.*
[40] Argentina's first written submission, paras. 298-302.
[41] See Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, para. 339.

56. Argentina maintains that the defensive measures challenged are justified under subparagraph (d) of the GATS as measures which establish *the difference in treatment [which] is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members*, within the meaning of that provision, whether envisaged individually or in the context of a comprehensive policy to address the risks posed by harmful tax practices.

57. These measures, in turn, make an important contribution to ensuring the effective imposition or collection of direct taxes in respect of services or service suppliers of other Members, inasmuch as they limit the possible tax benefits of simulated transactions between Argentine taxpayers and related entities located in non-cooperative tax jurisdictions exclusively for the purpose of evading taxes in Argentina and eroding the Argentine tax base.

Argentina's financial service measures are justified under the prudential exception

58. Furthermore, in the event that this Panel were to find that Panama has demonstrated that the measures at issue are inconsistent with Articles II:1, XVI:1 and XVII of the GATS, Argentina argues, in the alternative, that the additional requirements imposed on entities domiciled in non-cooperative jurisdictions for the provision of reinsurance and retrocession services in Argentina (measure 5)[42] and the conditions for proceeding with securities transactions undertaken or ordered by persons domiciled in non-cooperative jurisdictions (measure 6)[43] are justified by virtue of Article 2(a) of the Annex on Financial Services to the GATS (the "prudential exception").

59. Pursuant to the foregoing, Article 2(a) provides for an exception in respect of different GATS-inconsistent measures taken for "prudential reasons". The ordinary meaning of the term "prudential" indicates that these are measures taken by WTO Members for prudential or precautionary purposes. Article 2(a) establishes a non-exhaustive list (which contains no limitation in principle on the types of measure to which a WTO Member may have recourse for prudential reasons) of measures that can be used for prudential purposes, including measures "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". These provisions indicate that the measures adopted "for prudential reasons" include measures aimed at safeguarding the interests of consumers of financial services, and/or protecting the financial system against systemic risks. "The most important aspect of this exception is that it does not restrict in principle the freedom of regulatory authorities with respect to the types of measures that can be adopted for prudential reasons".[44]

60. The second sentence of Article 2(a) also stipulates that GATS-inconsistent measures adopted for prudential reasons "*shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement*". This anti-abuse provision is functionally analogous to the chapeau of Article XIV of the GATS. It is required that any WTO-inconsistent measures adopted for prudential reasons shall not in effect be measures adopted for the purpose of evading the GATS disciplines.

61. On the basis of all of the foregoing, a Member seeking to justify a measure otherwise inconsistent with the GATS under the prudential exception needs to establish two elements. First, the Member must demonstrate that the measure was adopted "for prudential reasons", as it contributes to the achievement of a prudential or precautionary objective. Secondly, the Member State must demonstrate a logical relationship between the measure and its prudential objective; and thirdly, whether the measure is being used as a means of evading the Member's obligations under the Agreement.

62. As Argentina has demonstrated, the restrictions on reinsurance and retrocession services from non-cooperative jurisdictions (measure 5) and the conditions for processing securities transactions from non-cooperative jurisdictions (measure 6) are suitably consistent with the requirements of the prudential exception.

[42] In the light of Panama's first written submission.
[43] Idem.
[44] Report to the TPRB from the WTO Director-General on the Financial and Economic Crisis and Trade-Related Developments, WT/TPR/OV/W/2, 15 July 2009, para. 80.

VI. Claims under the GATT

63. Argentina does not discriminate with respect to the presumption of an unjustified increase in wealth. The presumed inconsistency with Article I:1 of the GATT 1994 is incorrect. The measure challenged stands outside the scope of application of that Agreement and is not covered by Article I:1, inasmuch as the tax burdens to which economic operators are regularly made subject in Argentina cannot be treated as equivalent to restrictions on trade in goods.

64. The measure does not affect international trade transactions because the tax is declared at a later time, once the foreign trade transaction is completed; it is unrelated to other aspects of the importation of the product, nor does it affect actual imports. A specific tax imposed by law on the assets of a domestic taxpayer cannot in any sense be considered "another aspect of importation".

65. Argentina does not discriminate with respect to measure 3 on transfer pricing. It is not correct to assert that Argentina "*requires that*" transactions with persons domiciled, incorporated or residing in non-cooperative countries should be valued in accordance with pricing methods for transfers. The measure challenged by Panama does not apply to goods valuation for the purpose of applying the customs tariff, but to the determination of value for the purpose of calculating the basis of assessment of a tax.

66. The requirements for goods export and import transactions, depending on whether they are conducted with persons in cooperative or non-cooperative countries, are not intended for customs valuation purposes and do not imply the granting of any advantage, favour, privilege or immunity with respect to customs duties or charges of any kind.

67. Nor does the challenged measure affect the sale, offer for sale, purchase, transport, distribution or use of these products in the domestic market,. The measure does not directly govern the conditions of purchase or sale of products, nor does it adversely modify the conditions of competition between domestic and imported products.

68. Rather than any product in particular, the measure targets transactions with natural or legal persons from non-cooperative countries. No distinction is made between "products" and there is no criterion for distinguishing between "products", but rather for precisely determining the earnings derived from an economic activity. It is therefore not possible to have a reference product with which to compare likeness. Panama's claim concerning the likeness of the products at issue has no normative basis whatsoever.

69. The measure in question does not have the effect of according imports or exports to the listed countries treatment less favourable than that accorded to like products of domestic origin in the same condition.

70. Panama has failed to demonstrate that the challenged measures establish "*restrictive conditions*". Article XI:1 of the GATT 1994 explicitly excludes "*duties, taxes or other charges*" from its scope of application, so that the challenged measure, being a tool for determining the basis of assessment of the earnings tax, would not be covered by the provisions of that article.

71. Even in the unlikely event that the fiscal measure is not considered a tax, it is also not included in the scope of application of Article XI:1 as it is not a restriction or prohibition on the import or export of goods.

72. The measure is not a "condition" for the import or export of products that is applied prior to import or export. It is not applied as an exclusive condition for the entry of products from the listed countries, rather it is applied *ex post,* i.e. once the products have entered the market and exclusively for purposes of control and revenue collection in respect of taxpayers' economic activity.

73. In order for a "restriction" to be subject to Article XI, it must be one that "is expressed in terms of quantity" or one that is "quantifiable". There is no claim or any evidence from Panama to show that the regulation challenged imposes a restriction on imports or exports that is expressed in terms of quantity.

Justification of the challenged measures under Article XX(d) of the GATT

74. In the unlikely event that the Panel were to reach the conclusion that the Argentine measure linked to the presumption of an unjustified increase in wealth in transactions related to trade in goods with persons from non-cooperative countries for tax transparency purposes is inconsistent with Article I:1 of the GATT 1994 and that the Argentine measure linked to transfer pricing is inconsistent with Articles III:4 and XI:1 of the GATT, the measures in question are justified under the general exceptions set forth in Article XX(d) of the GATT 1994.

75. The challenged measures are necessary to ensure compliance with Argentina's tax laws and regulations, as well as to prevent deceptive tax practices. The underlying reason for the measures relates to the need to guarantee equitable tax treatment, prevent tax fraud and access information which the tax authority could not otherwise obtain.

76. The challenged measures meet the double test of the Article XX *chapeau*. They are not applied arbitrarily or unjustifiably, since they are applied when specific circumstances make it impossible to access tax information from another country, as in the case of non-cooperative countries, or when the fact of transactions taking place between related enterprises makes it impossible to verify the economic reality of the transaction. Such circumstances are explicitly provided for in the Argentine regulations and in no sense constitute a disguised restriction on international trade.

77. In conclusion, Argentina respectfully requests the Panel to find that Panama has failed to establish a *prima facie* case under the GATS by not having submitted evidence or arguments specifically related to the treatment accorded by Argentina to trade in services and goods from Panama. In the hypothetical event that it were acceptable for Panama to challenge the treatment accorded to services and service suppliers of non-Panamanian origin, Argentina would welcome a finding that Panama has also failed to make a *prima facie* case regarding such services and service suppliers. In the unlikely event that the Panel were to consider that Panama has succeeded in making such a *prima facie* case, Argentina requests that the Panel finds that (i) the services in question are not like services and (ii) there is no less favourable treatment since any difference in treatment is based on legitimate regulatory distinctions. By the same token, in its claims under the General Agreement on Tariffs and Trade (GATT), Panama has also failed to establish a *prima facie* case, and Argentina similarly requests that, if the Panel considers that, in the matter of trade in goods, Panama has succeeded in making such a case, the Panel should find that there is no less favourable treatment since any difference in treatment is based on legitimate regulatory distinctions. Failing this, if the Panel were to find violations of the relevant rules of the GATS or the GATT, Argentina respectfully requests the Panel to find that: (a) measures 1, 2, 3, 4, 7 and 8 are justified by Article XIV(c) of the GATS; (b) if the Panel were to find a violation of Article XVII, measures 2, 3 and 4 are justified under Article XIV(c) of the GATS and alternatively under Article XIV(d) of the GATS; and (c) measures 5 and 6 are justified by Article 2(a) of the Annex on Financial Services.

78. On the basis of the foregoing, Argentina requests the Panel to reject in their entirety Panama's claims relating to the Argentine measures challenged on grounds of alleged violations of Articles II.1, XVI.1, XVI.2(a) and XVII of the GATS, and Articles I:1, III:4 and XI:1 of the GATT.

ANNEX B-4

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA

I. Introduction

1. In its second written submission, Argentina remarks on Panama's line of conduct during the negotiations with Colombia which culminated in the signing of a Memorandum of Understanding in which both countries "undertake to conclude the negotiation of the agreement [on double taxation] and proceed to the signing thereof by 30 September 2015".[1] The Agreement includes a clause on exchange of information.

2. As it had done with regard to its negotiations with Argentina, Panama subsequently played down the agreement reached with Colombia by asserting in a communiqué from its Ministry of Foreign Affairs, issued at the time of the signing of the above-mentioned Memorandum, that "it was agreed to explore the viability of an agreement to prevent double taxation, in which guarantees for the users of the Panamanian services platform are preserved".[2]

3. Argentina lays stress on Panama's public recognition of its conviction that the conclusion of an information exchange agreement with Colombia "would disadvantage" corporate and financial service suppliers operating in Panama.[3] In fact, the Panamanian authorities have indicated that one of Panama's priority objectives is to preserve the existing conditions of competition for the Panamanian services platform and that exchange of information and fiscal transparency are perceived by its authorities as a threat which would undermine the competitive position of Panamanian services and service suppliers.

4. However, Panama continues to deny, for the purposes of this case, that the existence or nonexistence of effective exchange of information with a particular jurisdiction affects the assessment as to whether the services and service suppliers may be considered "like".

5. Panama acknowledges that the regulatory issues underlying a measure are relevant for an assessment of likeness, as a minimum, to the extent that those issues are reflected in the conditions of market competition. This must be assessed in particular in the context of Panama's own statements, which reveal that the existence of effective exchange of information is a regulatory factor affecting the conditions of competition for service suppliers in the marketplace.[4]

6. Panama admits that it has signed information exchange agreements with numerous jurisdictions located almost exclusively outside Latin America.[5] This makes it clear that Panama's strategy is to attempt to preserve its "competitive position" with respect to service suppliers in the countries of the region.

II. Panama has failed to establish a *prima facie* case of inconsistency with respect to its claims under Articles II and XVII of the GATS

7. Panama's claims under Articles II and XVII of the GATS, which underpin its entire case against the measures at issue[6], are based entirely on the proposition that the Panel should simply ignore the fact that the regulatory issues underlying a measure are relevant for an assessment of likeness. To that end, it relies on a single statement by a single panel in a case where "likeness" was not even in dispute. Panama has taken the position that it has no obligation to establish

[1] Memorandum of Understanding between the Government of the Republic of Colombia and the Government of the Republic of Panama on cooperation between administrative authorities in the matter of money laundering and other topics, and on an agreement to avoid double taxation. (Exhibit ARG-122)

[2] Argentina's second written submission, para. 5.

[3] Communiqué from the Government of the Republic of Panama, Ministry of Foreign Affairs, dated 8 October 2014. (Exhibit ARG-119)

[4] Argentina's second written submission, para. 11.

Panama's response to question No. 44. Of the 30 countries listed by Panama, only Mexico is a Latin American country.

[6] Argentina's second written submission, para. 10.

a *prima facie* case that the services and service suppliers at issue in this dispute are "like", on the sole basis that the principle enunciated by the Appellate Body *US – Clove Cigarettes* is not applicable when the measure at issue discriminates "*de jure*" on the basis of origin.[7]

A. Panama has failed to establish the applicability threshold of the GATS

8. For the reasons explained in its first written submission, Argentina considers that Panama has failed to make a *prima facie* case for the applicability of the GATS to the measures at issue. Moreover, the positions of the parties on this issue have been presented clearly in their respective responses to the Panel's questions following the first substantive meeting. Consequently, Argentina has made no additional comments on these issues in its second written submission.

B. Panama has failed to establish a *prima facie* case that the allegedly affected services and service suppliers are "like"

9. Panama's claims under Articles II and XVII of the GATS are based on the proposition that the measures at issue discriminate "*de jure*" against services and service suppliers on the basis of their origin, relying on a certain line of authority developed in the framework of multilateral agreements on trade in goods, in a simplistic attempt to transpose that line of authority to the totally different context of trade in services.

10. The idea of a measure that discriminates "*de jure*" with respect to goods on the basis of their origin derives from the fact that the GATT 1994 focuses exclusively on the characteristics of goods and not on the characteristics of the *producers of goods*. The GATS is fundamentally different from the multilateral agreements on trade in goods in that respect. For this reason, the idea of a measure that discriminates "*de jure*" against services and service suppliers on the basis of their origin has little relevance in the context of the GATS and must be transposed to the GATS with extreme caution.

11. Argentina gave a detailed account of the jurisprudential origins of the argument that likeness may be presumed when a measure accords differential treatment to goods, exclusively, on the basis of origin.[8] This argument - which is at best no more than a presumption - derives from the fact that the origin of a good does not usually affect its characteristics as a good. This fact is reflected in the text of the GATT 1994 and the other multilateral agreements on trade in goods, which refer solely to "like goods" and not, for instance, to "producers of like goods". In this context, it is presumed that a measure that offers differential treatment exclusively on the basis of origin discriminates with respect to goods that are "like" except in this respect.

12. Argentina has emphasized that this presumption cannot be transposed to the context of trade in services. To begin with, Articles II and XVII of the GATS, unlike the corresponding articles in the multilateral agreements on trade in goods, do not refer to goods but refer to "like services and service suppliers". This is a fundamental difference between the GATS and the multilateral agreements on trade in goods which Panama constantly overlooks. This difference is of central importance for an understanding of why the principle of "distinction based on origin" cannot be transposed directly to the context of trade in services, as suggested by Panama.

13. The reference to "services *and service suppliers*" in the GATS demonstrates that the origin of a service or service supplier is not presumed to be irrelevant for the purpose of a "likeness" assessment. Unlike the GATT 1994, the characteristics of the service supplier must be examined in any assessment of "likeness". The relevant characteristics of a service supplier are frequently seen to be affected, or even determined, by the jurisdiction in which the service supplier is located, i.e. by the origin of the service supplier.

14. Moreover, Panama has also made no effort to take account of the evidence presented by Argentina, which demonstrates that the distinction between cooperative and non-cooperative jurisdictions in fact has a significant impact on conditions of competition in the marketplace.

[7] Argentina's second written submission, para. 11.

[8] Argentina's opening statement at the second substantive meeting, para. 5, and its second written submission, paras. 25-34.

15. Finally, Panama's assertion that it has no obligation whatsoever to demonstrate likeness in the present dispute is even more untenable in the light of the history of the GATS negotiations. The issue placed before the Panel, namely how defensive measures against non-cooperative jurisdictions under Articles II and XVII of the GATS are to be assessed, was specifically considered in the course of the negotiations. The Chairperson's statement in document MTN.GNS/49 clearly indicates that the drafters of the Agreement considered how fiscal measures against non-cooperative jurisdictions were to be assessed under the provisions of the GATS, and concluded that such measures would normally not be inconsistent with the above-mentioned provisions, since services and service suppliers in cooperative and non-cooperative jurisdictions cannot be considered "like".[9] Pursuant to Article 32 of the Vienna Convention on the Law of Treaties, this element of the GATS negotiation "confirms the meaning" of Articles II and XVII of the GATS that derives from the application of Article 31 of the same Convention.[10]

16. Furthermore, Argentina has referred to the importance to be attached to the "time of conclusion" of an agreement (in this case the GATS), bearing in mind that it is central to the analysis serving to confirm the final intent of the negotiators as set out in the text of the Agreement for the purposes of its subsequent interpretation.[11]

17. Argentina has pointed out that it is obvious that Panama has no explanation for the history of the negotiation and expects the Panel simply to ignore it. The negotiating history provides confirmation of what is already clear from a proper implementation of the principles of treaty interpretation set out in Article 31 of the Vienna Convention. The legal affirmation – an unfounded one – on which Panama has based its entire case is utterly refuted by an interpretation of the rules that is fully in accordance with the negotiating history.[12]

18. In Argentina's opinion, the Panel's analysis of Panama's claims under Articles II and XVII can and must end on this point. Panama was obliged to establish a *prima facie* of likeness under Articles II and XVII, and has failed to do so. This is the correct and necessary basis on which Panama's claims under Articles II and XVII are to be rejected.

1. Decree No. 589/13 and the other measures in question refer to the relevant commercial and regulatory characteristics of services and service suppliers

19. Panama has emphasized that the proposition that the measures at issue in this dispute "discriminate *de jure*" against services and service suppliers on the grounds of origin is based on the interpretation of Decree No. 589/13, as if the latter established a "list of countries" with no type of connection with the relevant commercial and regulatory characteristics of services and service suppliers from those countries.[13]

20. However, Panama explicitly recognizes that Argentina "distinguishes between countries on the basis of whether or not they cooperate with Argentina in the area of fiscal transparency"[14], a distinction characterized as being "based on objective criteria and including legitimate reasons".[15] Thus, Panama itself appears to acknowledge that Decree No. 589/2013 does not distinguish between categories of services and service suppliers solely on the basis of origin, either *de jure* or in any other way.

[9] Statement by the Chairman of the Group of Negotiations on Services (GNS), document MTN.GNS/49, 11 December 1993.

[10] Argentina's comments on Panama's responses to the Panel's set of questions to the parties, comment on the response to question No. 70, para. 1.

[11] Argentina's comments on Panama's responses to the Panel's set of questions to the parties, comment on the response to question No. 70, para. 4 and footnote on page 8 of the Panel Report, *EC – Chicken Cuts* (Complaint by Brazil).

[12] Argentina's opening statement at the second substantive meeting of the Panel, para. 11 and Argentina's comments on Panama's responses to the Panel's set of questions to the parties, comment on the response to question No. 70, para. 8.

[13] Argentina's second written submission, para. 21.

[14] Panama's response to question No. 36.

[15] Panama's response to question No. 37(a).

21. In addition, and without prejudice to the burden of proof which Panama has failed to meet, Argentina takes the liberty of pointing out that, as it has argued and documented at length, Decree No. 589/13 distinguishes between jurisdictions that participate in the effective exchange of information with Argentina and those that do not so participate. The distinction made by Decree No. 589/13 between cooperative and non-cooperative jurisdictions is directly relevant to the commercial and regulatory characteristics of services and service suppliers from those jurisdictions. Panama has failed to refute the fact that a characteristic of a jurisdiction - in this case, whether or not it is involved in the effective exchange of information with Argentina - may at the same time be a characteristic of services and service suppliers from that jurisdiction.[16]

22. If a jurisdiction participates in the effective exchange of information with the authorities of other countries, it directly affects the commercial and regulatory characteristics of services and service suppliers originating in that jurisdiction. In the present case, the existence or non-existence of effective exchange of information is clearly relevant in terms of the commercial and regulatory characteristics of the services and service suppliers originating in the jurisdictions concerned. In any event, the distinction between cooperative and non-cooperative jurisdictions affects the conditions of competition in the marketplace and is therefore relevant for the examination of "likeness".[17]

23. Lack of fiscal transparency and non-exchange of information provide an additional attraction for service suppliers from non-cooperative countries in relation to competing suppliers from cooperative jurisdictions, which consists in the absence of any obligation to disclose the identity of the owner or final beneficiary, or the characteristics of the operations in which they engage, regardless of the service concerned. This is a factor of attraction for capital and investors, which benefits the financial and corporate services platform of non-cooperative jurisdictions and sets them apart from cooperative jurisdictions.

24. Argentina notes that, after the first substantive meeting, Panama openly recognized that regulatory differences may be relevant for an assessment of the "likeness" of services and service suppliers, to the extent that such differences affect the conditions of competition in the marketplace.[18] In this connection, Panama appears to have accepted the fact that the Appellate Body precedent in *US – Clove Cigarettes* applies with equal force to the context of trade in services.[19]

25. It is not surprising, however, that Panama has sought to evade any discussion of whether the regulatory differences between cooperative and non-cooperative jurisdictions are reflected in the conditions of competition for services and service suppliers in the market.

26. Panama has not even attempted to rebut the evidence[20] referred to in the conclusions reached by Johannesen and Zucman on how the effect of this type of information exchange agreement would place Panamanian services and service suppliers at a disadvantage. These conclusions are, moreover, fully consistent with the statements made by Panama when it joined the Global Forum[21] and in regard to the negotiation with Colombia.[22]

27. As Argentina documented in its first written submission, the Global Forum's initiative to level the playing field is largely based on the fact that non-cooperative countries give up a competitive advantage for their services and service suppliers when they agree to enter into information exchange agreements with other jurisdictions.

[16] Argentina's second written submission, para. 40.
[17] Ibid. para. 41.
[18] Panama's response to question Nos. 31 and 33(a).
[19] Argentina's second written submission, para. 45.
[20] Argentina would point out that, given that the study by Johannesen and Zucman was based on *all* bilateral bank deposits held in 13 different non-cooperative jurisdictions, it covers the effect produced by information exchange agreements on deposits held by Argentine nationals in those jurisdictions. Therefore, the Johannesen-Zucman study provides evidence of the effect produced by information exchange on both conditions in the Argentine market and, more broadly, conditions on the global financial services market.
[21] Letter of 15 April 2002 from the Minister of the Economy and Finance of Panama to the Secretary-General of the OECD (Exhibit ARG-8).
[22] Argentina's second written submission, paras. 1-9.

28. Undoubtedly, the distinction between cooperative and non-cooperative jurisdictions has an impact on the competitive relationships between services and service suppliers in the marketplace. Consequently, that distinction is directly relevant for the purposes of an assessment as to whether these services and service suppliers may be considered "like".

29. Argentina has demonstrated that the services and service suppliers in question are not "like"[23] owing to the effect produced by regulatory differences in cooperative and non-cooperative jurisdictions with regard to their competitive position in the marketplace.

III. Panama has failed to demonstrate that Argentina acted inconsistently with Articles XVI:1 and XVI:2(a) of the GATS

30. Panama has not proved its argument that the Argentine regulations are inconsistent with Articles XVI:1 and XVI:2(a).[24] The fact is that Article XVI:2(a) is not applicable in the present case. This is another of the instances in which the Panel should not go beyond making this finding.

31. In fact, the measure challenged by Panama is not inconsistent with Articles XVI:1 and XVI:2(a) of the GATS for the simple reason that the measure is not covered by those obligations. The obligations in question prohibit limitations on the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service providers or the requirements of an economic needs test, in sectors where a Member has undertaken market access commitments. Article XVI:2(a) refers explicitly to limitations on the number of "service suppliers". If a challenged measure does not limit the number of service suppliers *per se*, the measure is not one of the measures covered by Article XVI:2(a) of the GATS. This circumstance obtains in the present case.

32. In *US – Gambling*, the Panel, in a finding not reversed by the Appellate Body, indicated that, in the context of paragraph 2(a) of Article XVI, a panel must first and foremost determine whether the challenged measures contain limitations on "service suppliers".[25]

33. The Panel referred to the definition of service supplier in Article XXVIII and went on to refer to subparagraph (j) of Article XXVIII which provides that the term person "means either a natural person or a juridical person". From this it concluded that, in order for a measure to be covered by Article XVI:2(a) of the GATS, it must impose a limitation on the number of natural or juridical persons that supply services, and this type of measure must not be confused with others of a quantitative nature which impose limitations not specifically directed at the number of natural or juridical persons supplying services.

34. The measure challenged by Panama is not directed at specifically limiting the number of "natural or juridical persons that supply reinsurance services". In fact, the measure is not directed at natural or juridical persons at all. On the contrary, the regulation governs reinsurance operations relating to the coverage of individual risks.

35. Such operations are not the "service suppliers" referred to in Article XVI:2(a), but are reinsurance service operations, and the measure therefore stands outside the scope of that provision.

36. Panama bases its claim concerning Articles XVI:1 and XVI:2(a) on point 19 of Annex I to Resolution No. 35.615/2011 and Article 4 of Resolution No. 35.794/2011.[26] With regard to point 19 of Resolution No. 35.615/2011 (contained in point 4.1 of the Regulatory Framework for Reinsurance), this provision entitles the SSN to issue resolutions on "reinsurance operations" and

[23] Argentina's responses to the Panel's set of questions to the parties (13 February 2015), response to question No. 71, paras. 8-58.

[24] Argentina's first written submission, paras.401 to 466. Argentina's second written submission, paras. 52-54.

[25] Panel report, *US – Gambling*, para. 6.320.

[26] Under the regulatory reform carried out by the National Insurance Supervisory Authority (SSN) pursuant to SSN Resolution No. 38708, in force since 1 December 2014, the regulatory provisions on reinsurance (previously contained in SSN Resolution Nos. 35.615/2011, 35.794/2011 and 38.284/2014, among others), are now contained in the Annex to the General Regulations of the Insurance Business, point 2.1.1, Regulatory Framework for Reinsurance. SSN Resolution No. 38708/2014 does not represent a substantive change in the regulations on insurance activity, but rather a rearrangement and systematization of all the rules previously issued by the body concerned.

authorizes insurers that so request to enter into "reinsurance contracts" with foreign reinsurance entities operating from their central offices. Reinsurance operations and reinsurance contracts are not "natural person[s] or … juridical person[s]" and do not therefore constitute reinsurance "suppliers". Regarding Article 4 of Resolution No. 35.794/2011 (contained in point 4.2 of the Regulatory Framework for Reinsurance), this article explicitly refers to the "reinsurance" of "individual risks". Again, the reinsurance of individual risks is not "a natural person or a juridical person" that provides reinsurance services and is not therefore a reinsurance service supplier. There is no doubt that this measure refers to service operations and not at all to the service suppliers mentioned in Article XVI:2(a).

37. It should be emphasized that Panama, in its second written submission, recognizes the existence of a limitation on the "supply of services" but not on service suppliers, although this does not prevent it from reaching the forced and totally illogical conclusion that there is a limitation on the number of "service suppliers".[27]

38. Regarding the reference made by Panama in various passages to the existence of an economic needs test in the Argentine regulations, the existence or non-existence of an economic needs test is irrelevant to the present claim since, as has been pointed out, the measure challenged by Panama stands outside the scope of Article XVI:2(a). This is because it is not a measure limiting the number of "service suppliers".[28]

39. The Argentine measure does not impose a numerical limitation on reinsurance providers above or below the threshold of 50 million. In any event, it is not necessary to enter into that analysis, since "[f]irst, the Panel must determine whether the challenged measures contain limitations on "service suppliers"[29] and Argentina has demonstrated that the challenged measure contains no limitations on "service suppliers".[30]

40. Argentina emphasized, in addition, that the measure challenged by Panama is clearly a qualitative measure outside the scope of Article XVI:2(a). The relevance of Article 4 of Resolution No. 35.794 (point of the Regulatory Framework for Reinsurance) does not lie in the figure (US$50 million) in particular, but in the fact that this figure represents a qualitative parameter which meets the specific characteristics of reinsurance and the risks that it is sought to insure.

41. The eligibility for direct sourcing of reinsurance policies with entities having no presence in the country, as stipulated in Article 19 of Resolution No. 35615/2011 (point 4.1 of the Regulatory Framework for Reinsurance) does not correspond to a quantitative criterion, as alleged by Panama. The rule establishes that the criteria are: (a) magnitude and (b) the characteristics of the risk to be insured. The characteristics of a risk have little or nothing to do with the term "quantitative restriction" in the GATS context. The most aptly applicable sense of the term "magnitude" is that of the "importance of something". Nor is this a term of a quantitative nature.

42. Contrary to Panama's assertion[31], even if it were accepted that the Argentine measure in some way restricts access to its reinsurance market, such restriction does not operate on the basis of a quantitative criterion, a criterion which under the prevailing WTO interpretation has a precise scope and significance, of a numerical nature. A proper analysis, in line with the rules of interpretation of the Vienna Convention on the Law of Treaties, must consider not only the text of the specific provision (Article 4 of SSN Resolution No. 35.797/2011), which is purely instrumental and operational in nature, but also the legal source of the obligation that is applied for the purpose of properly assessing its nature, which in this case is qualitative.

[27] Panama's second written submission, para. 2.628.

[28] WTO Secretariat Note on "Economic Needs Tests", S/CSS/W/118, 30 November 2001, para. 5 (cited by Panama), which assists in identifying which economic needs tests are covered by Article XVI:2(a). According to the note, the economic needs tests that are prohibited, except where a member includes the test in its schedule, are those specifying an "exact number" of suppliers. In this connection, see Argentina's responses to the Panel's set of questions, response to question No. 76, para. 28.

[29] Panel report, *US – Gambling*, para. 6.320.

[30] Argentina's responses to the Panel's set of questions to the parties, 13 February 2015, response to question No. 76, para. 31.

[31] Panama's second written submission, paras. 2.628 to 2.630.

IV. In the alternative, the measures at issue are justified by virtue of the relevant exceptions of the GATS

43. In the unlikely event that it were necessary to consider Argentina's affirmative defences, Argentina offers a brief commentary on issues raised by Panama with respect to those defences, in particular with regard to the general exception under Articles XIV(c) and the prudential exception (prudential carve-out) in paragraph 2(a) of the GATS Annex on Financial Services.[32]

A. The measures in question are justified by virtue of Article XIV(c) of the GATS

44. Argentina has opted to present its arguments collectively[33] and considers that nothing in the text of Article XIV(c) requires a respondent Member to invoke that defence separately for each violation claimed by the complainant Member; nor did the Panel in *China – Auto Parts* suggest the contrary.

45. In accordance with the case law on Article XX(d) of the GATT in relation to the GATS, a Member that seeks to justify a measure otherwise inconsistent with WTO rules under Article XIV(c) of the GATS must establish that the measure in question is designed to "secure compliance" with laws or regulations which are not *per se* inconsistent with the GATS.

46. In this connection, Panama criticizes Argentina mainly for being insufficiently specific in identifying the provisions of domestic law with which it is sought to secure compliance. From the time of its first written submission, Argentina has explained that all its defensive tax measures are designed to secure compliance with its national tax laws, in particular the Earnings Tax Law (LIG).

47. Accordingly, it is not legally feasible to argue for the separate treatment of tax regulations which are meant to be enforced jointly and systematically. The Earnings Tax Law and its implementing regulations, particularly Articles 1, 2, 5, 17, 80, 91, 92, 127, 129 and 130, establish the tax in accordance with the requirements of the National Constitution (Articles 4, 16, 17 and 75(2)), while the procedural provisions regarding the Earnings Tax Law, in the same way as for other taxes, are laid down in Tax Procedure Law No. 11.683, a text harmonized in 1998, and the amendments thereto (Articles 33, 38, 39, 45 and 46). The specific provisions on tax offences in relation to non-compliance with the Earnings Tax Law, as in the case of other taxes, are established in Criminal Tax Law No. 24.759 (Articles 1, 2 and 6).[34]

48. Similarly, Argentina has clearly indicated that most of the information requirements for the establishment of branches in Buenos Aires are designed to implement Article 118.3 of the Commercial Companies Law and Article 188 of Resolution of No. 7/2005, and that the requirement of authorization for the repatriation of investments is designed to enforce Law No. 25.246 on the concealment and laundering of assets in Argentina.

49. Regarding Communication "A" 4940, which is challenged by Panama, Argentina reiterates the statement from its first written submission that the repatriation of investments governed by this rule is an investment matter and is not covered by the GATS since it does not affect trade in services.[35] In this connection, the requirement of prior consent of the Central Bank of the Argentine Republic (BCRA) for the repatriation of direct investment to non-cooperative countries - which, as previously stated, implies a more detailed review of the operation by that body - makes it possible to analyse its economic rationale and to exercise tighter control so that access to the exchange market can be granted for operations that genuinely involve repatriation of a foreign investment in a local enterprise that really exists and that produces goods or provides services, involving funds transmitted to a foreign enterprise that also really exists.[36] Hence, such repatriation is consistent with the rules whereby access to the local exchange market is allowed for

[32] Argentina's second written submission, para. 78.
[33] Panama's opening statement at the first substantive meeting of the Panel, para. 48.
[34] Argentina's opening statement at the second substantive meeting of the Panel, para. 26. Argentina's responses to the Panel's set of questions (13 February 2015), response to question No. 82, para. 11.
[35] Argentina's first written submission, para. 124; and Explanatory Annex No. 2 of Argentina's first written submission, paras. 27-29.
[36] Argentina's responses to the Panel's set of questions to the parties (13 February 2015), response to question No. 71, measure 8, paras. 48 and 57.

the repatriation of funds, while operations that do not meet these economic conditions are discouraged by having to undergo a more detailed review by the Central Bank.[37]

50. Moreover, neither of the two challenged measures has the effect attributed to them by Panama. Panama has cited no specific case - because none exists - where a foreign company has been denied the right to be registered in the city of Buenos Aires or to repatriate its investments.[38]

51. Panama also claims that Argentina has failed to explain how less favourable treatment in fiscal and administrative matters can contribute to securing compliance with Argentina's laws and regulations.[39] This argument, too, is unconvincing. Argentina submitted evidence showing how transactions with non-cooperative jurisdictions expose Argentina to a greater risk of tax evasion and erosion of its tax base.[40] Argentina's defensive tax measures are geared to making an important contribution to the mitigation of those risks, as they reduce the opportunities for evading the payment of taxes in Argentina through transactions with entities located in non-cooperative jurisdictions. At the same time, Argentina's defensive tax measures can eliminate the tax benefits that Argentine taxpayers would derive from transactions with entities located in non-cooperative jurisdictions, or else require the taxpayer to submit evidence demonstrating that the transactions reflect a legitimate commercial purpose, rather than being for tax evasion purposes.[41] In both cases, evasion of the payment of taxes in Argentina is made more difficult, and this in turn contributes to ensuring compliance with the country's tax laws and regulations.

52. With regard to Panama's argument concerning the existence of less trade-restrictive alternatives for securing compliance with Argentina's laws and regulations, Argentina would emphasize that it lies with Panama to specify what alternatives are reasonably available. Moreover, Panama has totally misinterpreted Argentina's argument. It is *precisely* because cooperative jurisdictions provide the Argentine tax authorities with access to information about taxes that it is possible to enforce Argentina's tax laws in transactions between Argentine taxpayers and entities located in those jurisdictions, whereas if this is not possible, preventive measures - the rules that are challenged - have to be taken *ex ante* in order to reduce the opportunities for tax evasion in Argentina.

53. Lastly, with regard to Panama's argument as to whether the Argentine measures are applied in such a manner as to constitute arbitrary or unjustifiable discrimination between countries where like conditions prevail, as referred to in the chapeau of GATS Article XIV, and that there is no reason for Argentina to discriminate between, on the one hand, countries that have no information exchange agreement with Argentina and, on the other hand, countries that have also not entered into an agreement of that kind, but have begun negotiating one with Argentina[42], Argentina explained[43] that the rationale for distinguishing between cooperative and non-cooperative jurisdictions in Decree No. 589/2013 relates to Argentina's capacity to access information necessary to secure compliance with Argentina's laws and regulations. Therefore, if a country has reached an agreement on exchange of effective tax information with Argentina, or is likely to do so in the near future, as negotiations to that end have begun, Argentina considers that there is a low risk of its not being able to access the information required to determine whether the operation in question reflects legitimate commercial objectives rather than being guided by tax evasion purposes. Argentina considers that the hypothesis of the initiation of negotiations acts as a sufficient incentive in most cases to encourage the conclusion of this type of agreement. In this connection, Argentina has concluded agreements providing for retroactive cooperation with respect to periods preceding their entry into force.

54. On the other hand, if a country has not participated in negotiations for the signing of an information exchange agreement with the fiscal authorities of Argentina, the Argentine authorities have no reason to believe that they will be capable of accessing the information required for those same purposes. Consequently, from the standpoint of the risk that the Argentine authorities might not have access to the information needed to secure compliance with

[37] Argentina's first written submission, Explanatory Annex No. 2, para. 69.
[38] Argentina's opening statement at the second substantive meeting of the Panel, para. 26.
[39] Panama's opening statement at the first substantive meeting of the Panel, para. 51.
[40] Argentina's second written submission, para. 73.
[41] Ibid.
[42] Panama's opening statement at the first substantive meeting of the Panel, para. 53.
[43] Argentina's responses to the Panel's set of questions to the parties (13 February 2015), response to question No. 49.

Argentina's laws and regulations, these two categories of countries are undoubtedly in a situation that is not like.

55. For these reasons, in the unlikely event that the Panel finds that Panama has demonstrated that Argentina acted inconsistently with Articles II.1 and XVII of the GATS, Argentina has shown that its defensive tax measures, the requirements for the establishment of companies in the city of Buenos Aires, and the authorization of repatriation of investments are justified under Article XIV(c) of the GATS.

B. The measures at issue are justified by virtue of the prudential carve-out of paragraph 2(a) of the Annex on Financial Services

56. Concerning measure 5 (alleged restrictions on access to the Argentine reinsurance and retrocession market), Argentina has invoked the prudential carve-out with respect to the alleged violation of the most-favoured-nation obligation under Article II of the GATS as well as with respect to the alleged violation of Article XVI of the GATS.[44]

57. The measure in question is a measure adopted for the following prudential reasons referred to in paragraph 2(a) of the Annex on Financial Services: first, to ensure the integrity and stability of the financial system; secondly, for the protection of policy holders or persons to whom a fiduciary duty is owed by a financial service supplier; and thirdly, for the protection of investors and depositors.

58. Argentina considers that the requirement that insurers provide certain supplementary information to the National Insurance Supervisory Authority (SSN) in order to receive authorization to conduct reinsurance transactions with foreign reinsurance entities from their country of origin involving individual risks lower than US$50 million establishes a reasonable threshold which contributes to the prudential objective of strengthening reinsurers that operate in the national territory, thereby creating an active, sound and competitive domestic sector capable of coping with systemic risks and guaranteeing the solvency necessary for reinsurers which operate in that sector.

59. The parties are not in disagreement as to the fact that the list of prudential reasons mentioned in the prudential carve-out is not exhaustive. This was explicitly indicated by Panama.[45]

60. The experience of the financial crisis points to the likelihood that some insurance companies may become involved in certain activities, frequently of themselves unrelated to insurance, and may therefore also become originators and amplifiers of systemic risks.[46]

61. Owing to the impact that the reinsurance sector may have on the financial sector and given the possibility that reinsurers may become originators and amplifiers of systemic risks and their capacity to cause disruptions in the primary insurance sector and the economy in general, the strengthening of entities operating in the domestic reinsurance market and guaranteeing their solvency are a measure adopted to "ensure the integrity and stability of the financial system", as provided for in paragraph 2(a) of the Annex on Financial Services.

62. The measure in question also meets the prudential objective of "protection of … policy holders or persons to whom a fiduciary duty is owed by a financial service supplier", as referred to in paragraph 2(a) of the Annex on Financial Services. A domestic market made up of weak reinsurance entities liable to insolvency may be responsible for the non-fulfilment of their coverage obligations with respect to the primary insurers that are policy holders, which in turn could fall into financial distress and see their own lines of direct insurance jeopardized.

63. This measure meets the prudential objective of "protection of investors [and] depositors" mentioned in paragraph 2(a) of the Annex on Financial Services. As indicated earlier, in line with the thinking of the International Association of Insurance Supervisors (IAIS), a crisis generated by a failing in the reinsurance sector that might in turn generate a loss of confidence or a disruption

[44] Argentina's first written submission, paras. 566 and 568. Argentina's second written submission, para. 84.

[45] Panama's second written submission, para. 2.660.

[46] Idem. p. 13.

in the primary insurance sector could create the conditions for a financial crisis in the event that the insurance sector loses its ability to invest in financial instruments.[47]

64. The prudential carve-out, unlike other provisions of the GATT or the GATS, does not require that the measure be "necessary" to achieve the established objective. Third parties such as the United States agreed, the European Union expressed a similar opinion and Brazil considered that the prudential carve-out gives Members ample policy space to adopt comprehensive measures designed to protect against various risks to financial stability.[48]

65. If the drafters of the prudential carve-out had intended that it apply more strictly, they would have provided a less deferential standard, such as that of "necessity".

66. The interpretation of the prudential carve-out in this case must take account, in addition to the above, of the particular circumstance that Argentina is a developing country. The establishment of a threshold for foreign reinsurance contracts is a specific regulation adopted by a developing country like Argentina for a prudential purpose related to the strengthening of reinsurers operating in the national territory, so as to generate a more active, robust and competitive domestic sector capable of coping with systemic risks, as well as to guarantee the necessary solvency of reinsurers.

67. Argentina has invoked the prudential carve-out also with regard to the alleged violation of GATS Article II in relation to the alleged restrictions on access to the capital market for suppliers from non-cooperative countries – measure 6 – and has indicated that the objectives of the measure include prevention of risks related to money laundering and financing of terrorism[49], preservation of the integrity and stability of the financial market[50], protection of financial consumers[51], protection of investors[52], monitoring of transactions involving negotiable securities[53], ensuring transparency[54] and the integrity, stability and efficient functioning of the capital market.[55]

68. The Financial Action Task Force (FATF) recognizes the duty to counter "threats to the integrity of the financial system" caused *inter alia* by money laundering. For its part, the International Organization of Securities Commissions (IOSCO), the international body recognized worldwide as having responsibility for the adoption of global standards for the securities sector, has required regulators like Argentina's National Securities Commission to establish policies and procedures to minimize the risk of intermediaries being used as vehicles for money laundering.

C. Panama has failed to demonstrate that the measures at issue are inconsistent with Articles I:1, III:4 and XI:1 of the GATT 1994

69. In addition, Panama has failed to demonstrate that Argentina's treatment of the entry of funds as a presumptively unjustified increase in wealth, or its transfer pricing regime, are inconsistent with Articles I:1, III:4 and XI:1 of the GATT 1994.

1. Panama has failed to demonstrate that the measures at issue are inconsistent with Articles I:1 and XI:1 of the GATT 1994

70. With regard to Panama's allegations based on Articles I:1 and XI:1 of the GATT 1994, Argentina has explained that both the presumption of unjustified increase in wealth and the transfer pricing regime are not measures "imposed on or in connection with importation or exportation" under Article I:1, or measures maintained "on the importation" or "on the exportation" of any product under Article XI:1. Both measures lay down methods for the

[47] "Hence, in the area of investment activity, the insurance industry can act as an amplifier of systemic risk." See International Association of Insurance Supervisors (IAIS), "Systemic risk and the insurance sector", 25 October 2009, para. 18; see Exhibit ARG-140.

[48] Argentina's responses to the Panel's set of questions to the parties, 13 February 2015, paras. 32, 33 and 34; response to question No. 85.

[49] Argentina's first written submission, paras. 524-531.

[50] Ibid. paras. 499-517, 564 and 567.

[51] Ibid paras. 518-519.

[52] Ibid paras. 520-522 and 562.

[53] Ibid paras. 532-546.

[54] Ibid paras. 548-549.

[55] Ibid paras. 562-563 and 566.

determination of revenue subject to internal taxation in Argentina. The fact that such revenue may derive in part from import or export transactions does not mean that Argentina's domestic tax measures are border measures subject to the disciplines of Articles I:1 and XI:1 of the GATT 1994, nor is it sufficient to demonstrate that the "centre of gravity" of taxes on earnings in Argentina is the importation or exportation of goods[56], in accordance with the criterion established by the Appellate Body in *China – Auto Parts*.

71. With regard to the legal background to measure 2 (presumption of unjustified increase in wealth) within the scope of application of Article I:1, Panama has stated that this measure is a "rule and formality in connection with exportation" and cites paragraph 7.410 of the Panel report in *US – Poultry (China)*, without offering any kind of argument regarding the applicability of that case to the measure at issue.

72. Argentina has indicated that, regardless of any claim under Article I:1 in that dispute and in the present case, the fact is that there are elements of analysis central to each of the measures which show a clear contrast between the two cases, such as may be seen in their object, architecture and design, their context and the effect and scope of each of them. In this connection, Argentina considers that Panama has not provided arguments as to how that Panel's finding can apply to this specific case. Moreover, it added that it is reasonable to presume that the analytical framework under which the Panel analysed Article 727, as well as its conclusions, do not have the same degree of applicability in the present dispute.[57]

73. Argentina has pointed out in particular, with regard to the scope and effect of measure 2, that the real effect of the measure is that all taxpayers are required equally to keep documentary evidence of the transactions they carry out[58], in order to keep available the normal and customary details needed to verify the tax position of all taxpayers and to be able to determine the object of taxation.

74. Moreover, with respect to measure 3, Argentina has emphasized that the determination of transfer prices makes it possible to establish the basis of assessment for the earnings tax. Argentina has explained that the basis of assessment is integral to the tax, and that the measure is therefore excluded from the scope of Article XI:1 of the GATT 1994.[59]

75. Argentina has also pointed out, as Panama confirmed in the document entitled "Constitutional principles in the matter of taxation" (Exhibit PAN-83), that the rule requiring conformity with statute establishes that "there can be no tax without a legal basis", for which reason "*in order for a tax to be imposed, it must conform to the formal requirements of a law*", and that "*the law must define the taxable transaction and the elements thereof: subject, object, tax base, tax rate*".[60]

76. In short, Argentina maintains that the measure in question is a tax measure relating to the determination of the basis of assessment for the tax, and this is expressly acknowledged by Panama when it states that this measure "affects the tax base on which the earnings tax is computed".[61]

77. Without prejudice to the foregoing and in the hypothetical event that the Panel were to consider that the measure in question does not constitute a tax and is subject to the application of Article XI:1 of the GATT 1994, Argentina has pointed out that the measure in question, which consists in providing a certain type of information to the tax administration, would also not be inconsistent with Article XI:1 of the GATT 1994, because the measure challenged does not in itself have the effect of restricting imports or exports as such.

[56] Panama appears to be in agreement with Argentina. See Panama's first written submission, para. 4.263.
[57] Argentina's responses to the Panel's set of questions, response to question No. 92.
[58] Ibid.
[59] Argentina's responses to the Panel's set of questions, response to question No. 93.
[60] Ibid.
[61] Argentina's responses to the Panel's set of questions, response to question No. 92.

2. Panama has failed to demonstrate that Argentina's transfer pricing regime is inconsistent with Article III:4 of the GATT 1994

78. Nor has Panama been able to demonstrate that Argentina's transfer pricing rules are inconsistent with Article III:4 of the GATT 1994. Argentina's transfer pricing rules constitute rules relating to the calculation of income subject to tax in Argentina in transactions between Argentine taxpayers and related parties located abroad. This measure sets out the criteria for establishing the real value of the transaction as if it were an arm's length transaction for the purpose of assessing and collecting earnings taxes in Argentina. In terms of their application, these are not measures "affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use" of products in Argentina, within the meaning of Article III:4 of the GATT 1994.[62]

79. However, even assuming, only for the sake of argument, that Argentina's transfer pricing regime is in some way a measure that falls within the scope of Article III:4, Panama has failed to demonstrate that the products in question are "like" within the meaning of Article III:4 of the GATT. As was noted previously, the Appellate Body in *US – Clove Cigarettes* explained that the regulatory concerns underlying a measure may be relevant to an analysis of the "likeness" criteria under Article III:4 of the GATT 1994, *to the extent they have an impact on the competitive relationship between and among the products concerned*".[63] The regulatory concerns that led Argentina to distinguish between cooperative and non-cooperative jurisdictions directly impact the conditions of competition between products from those categories of jurisdictions, and this suggests for the same reasons that these products are not "like" in the sense of Article III:4 of the GATT 1994.[64]

80. In order to assert that measure 3 tends to favour products of national origin, it is not enough to state that the measure grants less favourable treatment, but it ought to have been demonstrated – and this was not done – that measure 3, combined with a direct tax applied to all Argentine taxpayers, applies to imported products in such a way as to protect local production.[65]

81. In the unlikely event that the Panel were to find that Argentina acted inconsistently with Articles I:1, III:4 and XI of the GATT, Argentina has demonstrated that its measures were justified under Article XX(d) of the GATS. Argentina includes for reference the arguments it made in connection with Article XVI(c) of the GATS as a basis for concluding that the treatment it applies to the entry of funds as an unjustified increase in wealth and its transfer pricing regime are "necessary to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT.[66]

V. Conclusions

82. The defensive anti-abuse measures are not WTO-inconsistent, and only an erroneous interpretation like the one promoted by Panama could generate such inconsistency and call into question the progress made by the Global Forum and the G-20 in respect of transparency and exchange of tax information.[67] A systemic interest is at stake in this dispute: the efforts of the international community led by the Global Forum and with G-20 encouragement, in the area of fiscal cooperation and transparency.[68]

83. Argentina has endorsed the statement by Panama to the effect that "there is no possible conflict of rules between the WTO legal order and the commitments of the member jurisdictions of

[62] Argentina's second written submission, para. 99.
[63] Appellate Body report, *US – Clove Cigarettes*, para. 119. Panama appears to be in agreement on this matter. See Panama's responses, response to question Nos. 31 and 33.
[64] Argentina's second written submission, para. 100.
[65] Argentina's comments on Panama's responses to question No. 91, and Argentina's responses to the Panel's set of questions to the parties, responses to question Nos. 83 and 84.
[66] Argentina's second written submission, para. 101.
[67] See Argentina's comments on Panama's responses to the Panel's set of questions, comment on response No. 67.
[68] Second substantive meeting of the Panel, Argentina's closing statement.

the Global Forum", and has consistently expressed views along these lines in its previous statements.[69]

84. All the members of the Global Forum, including Panama, know that there will be no effective forward movement on the international cooperation agenda on transparency and exchange of information for tax purposes in the absence of defensive measures against those jurisdictions that refuse to exchange tax information. For this reason, any restriction of this kind that might occur in the WTO framework would jeopardize the effort at international coordination that has been so effective in promoting tax transparency.[70]

85. For the foregoing reasons, Argentina respectfully requests the Panel to reject in their entirety Panama's claims and allegations concerning the Argentine measures challenged on grounds of alleged violations of the GATS and the GATT 1994. In the unlikely event that the Panel were to consider that Argentina acted inconsistently with Articles II:1, XVI and XVII of the GATS, Argentina has established, in the alternative, that the measures are justified, as has been shown in each case, under Article XIV(c) or, alternatively, under Article XIV(d) of the GATS, and Article II(a) of the Annex on Financial Services of the GATS. Should the Panel consider that Argentina acted inconsistently with Articles I:1, III:4 and XI:1 of the GATT 1994, Argentina has demonstrated that its measures are justified under Article XX(d) of the GATT 1994.[71]

---

[69] See Argentina's comments on Panama's responses to the Panel's set of questions, comment on response No. 67.

[70] See Argentina's comments on Panama's responses to the Panel's set of questions, comment on response No. 67.

[71] Argentina's second written submission, para. 102.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE KINGDOM OF SAUDI ARABIA*

I. INTRODUCTION

1. Thank you Mr. Chairman, and Members of the Panel. The Kingdom of Saudi Arabia would like to take this opportunity to provide its views on one particular systemic issue relating to the interpretation of the General Agreement on Tariffs and Trade 1994 ("GATT") which has been raised in this dispute: the meaning and proper application of GATT Article XI.

2. The Kingdom recognizes that GATT Article XI is not at the core of this dispute, which involves primarily rights and obligations under the General Agreement on Trade in Services (GATS). In fact, the GATT Article XI claim has been presented as an "alternative" claim in this case, and an alleged violation that occurs as a consequence of the measures' effect on service suppliers engaged in trading goods. However, not being at the core of the case does not mean that the GATT Article XI claim is unimportant or that the interpretation and application of the provision can be any less rigorous. The Panel's analysis of Article XI must be just as rigorous as it would be if it were the primary basis of the alleged violations in this dispute.

3. The Kingdom will address two specific points relating to the proper interpretation of GATT Article XI: first, the specific type of "restrictions" prohibited by GATT Article XI; and second the requirement to satisfy an appropriate burden of proof for establishing a violation of GATT Article XI.

II. GATT ARTICLE XI:1 DOES NOT PROHIBIT ALL RESTRICTIONS

4. Turning to the first point, GATT Article XI does not prohibit all restrictions. GATT Article XI:1 forbids "prohibitions or restrictions" on imports or exports, but "duties, taxes or other charges" on imports or exports are expressly excluded from this proscription. The permissibility of duties, taxes or other charges is unqualified. Thus, even if such duties, taxes or other charges are designed to restrict the quantity of imports or exports, they are not prohibited by GATT Article XI.

5. Also, GATT Article XI prohibits only quantitative restrictions. The Appellate Body explained in *China – Raw Materials* that GATT Article XI:1 imposes a "general obligation to eliminate quantitative restrictions".[1] The Appellate Body added that "the use of the word 'quantitative' in the title of the provision informs the interpretation of the words 'restriction' and 'prohibition' in Article XI:1 and XI:2", and therefore that "Article XI of the GATT 1994 covers those *prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported*".[2]

6. The provisions of GATT Article XI must be interpreted in light of their stated purpose to eliminate *quantitative* restrictions. Any interpretation of GATT Article XI that expands its coverage to all prohibitions or restrictions, whether or not related to import or export quantities, would contradict the Appellate Body's ruling and render the Article's title meaningless.

7. As a result, in assessing whether a measure is an impermissible restriction on imports or exports under GATT Article XI:1, a panel should first determine whether the measure is expressly outside of the Article's proscriptions because it is a duty, tax, or other charge. If the challenged measure is not expressly permitted by GATT Article XI:1, the panel should next determine whether the measure imposes a formal quantitative restriction, such as a set numerical limitation or prohibition on imports or exports. If the measure does not impose such a formal quantitative restriction, the panel then should examine the measure's design, architecture and structure in order to determine whether it has a "limiting effect" on import or export quantities. If, after such

* This text was originally submitted in English by the Kingdom of Saudi Arabia. The Kingdom of Saudi Arabia requested that its oral statement serve as its integrated executive summary.

[1] Appellate Body Report, *China – Raw Materials*, paras. 319-320.

[2] Ibid. para. 320. (emphasis added)

an examination the panel cannot conclude that the measure is a quantitative restriction, the measure is not prohibited by GATT Article XI:1.

III. A PARTY MUST MEET ITS BURDEN OF PROOF THAT A MEASURE IMPOSES A PROHIBITED QUANTITATIVE RESTRICTION

8. I would also like to address briefly the issue of the burden of proof. The complainant bears the burden to establish a *prima facie* case of a violation for each element of each claim, based on factual evidence and legal arguments.[3]

9. In the case of an alleged violation of GATT Article XI:1, the complaining party has the burden to establish that the challenged measure is not a duty, tax or other charge, and that it is a prohibited quantitative restriction on imports or exports. Although this requirement may in some cases be difficult, the complexity of a measure, or its interaction with other measures, does not diminish the complaining party's burden of proof. GATT Article XI should not be extended to prohibit measures that are not quantitative restrictions.

10. This issue of evidentiary burden is all the more important in a case in which a violation of GATT Article XI is presented as an alternative claim and as a consequence of violation of GATS provisions, as in the present matter. A measure which is not a quantitative restriction based on an analysis of its design, architecture and structure is not prohibited by Article XI:1, even if one might speculate that the operation of the measure may at some point lead to less trade.

IV. CONCLUSION

11. Mr. Chairman, Saudi Arabia respectfully requests the Panel to confirm that GATT Article XI:1 prohibits only quantitative restrictions on imports or exports, and only those quantitative restrictions not in the form of a duties, taxes or other charges. This is what the treaty requires, as explained by the Appellate Body.

12. This concludes the statement of the Kingdom of Saudi Arabia. I thank you for your attention.

[3] Appellate Body Report, *US – Gambling*, paras. 140-141.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL*

1. Brazil hereby presents its integrated executive summary, where it provides a brief description of the main points presented in its Third Party Submission and Oral Statement.

(a) The prevention of fiscal fraud and other deceptive practices and the protection of the financial system are legitimate objectives to be pursued by Members

2. Brazil believes that international efforts to regulate financial services are crucial not only for the stability of the international financial system, but also for the security of economies worldwide. As markets are intertwined at unprecedented levels, crises in the financial system can rapidly spill over to other sectors of the economy and generate severe impacts on income, employment and trade.

3. Brazil is convinced that guidelines and regulations derived from such international efforts can be fully designed and adopted harmoniously with WTO law. Specifically on what concerns the measures under dispute, Brazil considers that the objectives they pursue can be justified under the disciplines of the GATS, particularly under the Annex on Financial Services. In this sense, it is worth recalling that the GATS itself recognizes the utility of international standards of relevant international organizations in assessing whether domestic regulations from a Member are consistent with its obligations under the Agreement, as expressed in its Article VI:5 (b).

(b) The GATS grants Members significant discretion to regulate and protect the financial system

4. As Brazil recalled in its Third Party Submission, the idea that service regulations could distinguish service providers based on objective criteria lies on the very basis of the commitments under the GATS. Accordingly, already during the preparatory works, it was understood that such distinctions would not even require further justification under Article XVI inasmuch as they would not violate obligations or commitments under the Agreement, particularly, under Article XVII (NT) and Article II (MFN).[1]

5. Brazil believes that, even if a challenged measure adopted under the auspices of international efforts to regulate financial services were found to be inconsistent with Articles II and XVII of GATS, it could still be justified under GATS, particularly under Articles XIV (c) and (d), and under its Annex of Financial Services, paragraph 2. If read and interpreted harmonically, in Brazil´s views, these three provisions can justify measures necessary to prevent deceptive and fraudulent practices, or aimed at ensuring the equitable or effective imposition or collection of direct taxes, or taken for prudential reasons or to ensure the integrity and stability of the financial system.

6. Article XIV(d), for instance, allows for Members to adopt measures to equalize levels of taxation between domestic and foreign service providers, thus levelling the playing field with regard to taxes and letting comparative advantages be more effective. In this sense, it could be considered similar to a "Border Tax Adjustment" under the GATT, that is, a corrective charge targeting discrepancies in taxation.

7. Moreover, Brazil believes that the Annex of Financial Services of the GATS give Members a greater margin of control over financial services and institutions and oversight of these operations, as measures affecting the supply of financial services have a direct impact on the economic system. Accordingly, there is a specific exception under this Annex, in its paragraph 2(a), that allows Members to adopt measures for "prudential reasons", "[n]otwithstanding any other provisions of the Agreement".

---

* This text was originally submitted in English by Brazil.

[1] MTN.GNS/W/210. Note by the Secretariat. Applicability of the GATS to Tax Measures. 1 December 1993.

8. As Brazil indicated in its Written Submission, one of such prudential reasons, as exemplified by the provision, is to "ensure the integrity and stability of the financial system". This seems to give Members a rather large policy space to take comprehensive actions designed to protect the financial stability from various risks. More importantly, it allows that instead of reacting to individual risks posed in specific sectors or areas of the financial world, Members may act preemptively and plan ahead, since many of the threats to financial stability may come from multiple and complex factors in various markets, as the recent global financial crisis of 2008 demonstrated.

9. Accordingly, Brazil understands that the only limitation imposed on a Member by this exception is not to adopt measures for prudential reasons "as a means of avoiding the Member's commitments or obligations under the Agreement". Thus, any Member invoking the prudential exception would bear the burden of proving that this right was properly used – for which international standards, guidelines and practices would be useful.

10. In addition, Brazil understands that, differently from other exceptions under the GATS, the prudential exception does not require proving necessity (e.g. as under the General Exceptions – Article XIV), or proportionality (e.g. as under the Restrictions to Safeguard the Balance of Payments – Article XII).

(c) The fact that two services are in a competitive relation in the relevant market may not be enough to render them "like" in the case of financial services.

11. Even though the concept of "likeness" in trade in services has not been analyzed as thoroughly as the same concept in connection with trade in goods by the WTO Dispute Settlement System, Brazil still believes that there may be some similarities in the assessment of likeness between these two sectors, such as whether the goods or services in question are in a competitive relationship in the relevant market, so as to be considered "like". Nonetheless, there could be factors irrelevant in respect of the "likeness" analysis of goods which may be determinative in respect of "likeness" in services, such as those related to the characteristics of the service providers under analysis and the regulatory framework of the territory where the provider is located – inasmuch as such framework affects the way such provider operates in the market.

12. In this sense, given the intangible nature of services, the fact that two services are in a competitive relation in the relevant market may not be enough to render them "like" in the case of financial services. As the global financial crisis of 2008 demonstrated, reckless management, such as inappropriately low capitalization and excessive leveraging, aggravated by poor government oversight and insufficient requirements on transparency, is a very undesirable characteristic from the point of view of both the consumers and the governments, as it increases the risk of the services provided. Consequently, the aforementioned characteristics of the providers and the regulatory framework of the territory where they are located – to the extent that such framework affects operations – could be viewed as elements relating to the characteristics of the service, just as the physical properties of goods are a key element to identify the relevant characteristics of a product.

13. In this regard, Brazil also recalls that the Panel in the China – Electronic Payment Service dispute has clarified that in some instances a separate inquiry into the "likeness" of the service suppliers may be necessary, inasmuch the presumption that service suppliers that provide "like services" are also "like" may not be applicable to all cases. Despite the apparent utility of this second criterion, Brazil would like to emphasize that its applicability still needs to be considered on a case-by-case basis, in order to avoid that inappropriately strict criteria render "unlike" all service providers in a given segment.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES[*]

I. Interpretative Questions Under Articles II and XVII of the GATS

1. *De jure* versus *de facto* less favourable treatment. The United States considers that there is a difference between treatment based on origin alone, and treatment based on origin-neutral factors related to services or service suppliers of a particular Member or Members. For example, if a Member simply bans cross-border construction services supplied from certain WTO Members in its regulations, this differential treatment could be said to be based exclusively on origin, consistent with the reasoning in *China – Publications and Audiovisual Products*. However, if a country determines that it will only allow construction service suppliers with experience using a particular type of material, and that material is only found in specific countries, this would not be differential treatment based *exclusively* on origin.

2. That Argentina's measures distinguish among regulatory conditions in the home jurisdictions of service suppliers (and thus the measure designates countries as "cooperating" or "non-cooperating") means that the treatment accorded by the measures is not exclusively linked to the origin of the service suppliers, and that the measures do not accord *de jure* differential treatment based on origin. The EU's argument to the contrary – that the distinction is based on origin because the measures list countries as "cooperating" or "non-cooperating" – misconstrues the meaning of "based on origin." The measure itself indicates differentiation based on *conditions* that prevail in particular jurisdictions and raise concerns regarding the authorities' ability to tax payments for services supplied from those jurisdiction. The listing of countries is thus simply a means for the regulator to identify which payments raise those concerns.

3. "Like services" and like service suppliers" analyses. An issue before the panel in this dispute with respect to likeness is whether the regulatory framework in a service supplier's home jurisdiction can render two services or service suppliers not "like" for purposes of Article II or XVII of the GATS. In the U.S. view, this may be the case if the regulations in question affect the supply of the service in the relevant market.

4. Even if the two services were in direct competition and could be considered like, however, the United States considers that the difference in regulatory treatment of the two suppliers may nonetheless render the two service suppliers unlike. As the panel in *China – Electronic Payment Services* stated, the fact that two or more service suppliers provide the same service may give rise to a presumption that the service suppliers themselves are also "like". But this presumption may be overcome if the responding party demonstrates that the service suppliers are not like, despite the likeness of the services provided.

5. Given a difference in regulatory treatment by their home country authorities, it may be that a Member complained against views the two suppliers as unlike and accords differential treatment on that basis. Where such a difference in regulation affects the service suppliers *as service suppliers*, in that the regulations affect how they supply the service, a panel may find that those service suppliers are not like for purposes of Articles II.1 and XVII of the GATS. Other factors may also affect the likeness of service suppliers, such as their size or relevant experience. Regulations, including those concerning fiscal transparency, could affect the way in which the service is supplied. Regulations concerning fiscal transparency in a home jurisdiction could affect, for example, the risks associated with the supply of a service. Such a risk may constitute a factor of likeness, even it if does not affect consumer perceptions or otherwise affect the competitive relationship between the services or services suppliers.

6. The United States notes that a regulatory differentiation, such as a risk or potential risk associated with the supply of a service, may be a relevant factor under more than one provision of the GATS (for example, the "likeness" analysis, "less favourable treatment" analysis, and the analyses under the prudential exception or other exceptions). The Appellate Body has observed

[*] This text was originally submitted in English by the United States.

that the same evidence may be relevant to "different inquiries" under "different Articles" and may serve a "different purpose." Argentina appears to identify a risk associated with the supply of services by suppliers from "non-cooperating" countries that may not be associated with the supply of services by suppliers from "cooperating" countries, including the risk that Argentina will not be able to enforce its taxation laws and guarantee the integrity of its taxable base.

7. The United States does not take a position on Argentina's views but does consider that, as a general matter, regulatory differentiations based on the risks or potential risks posed by a service or service supplier compared to the risks or potential risks posed by another service or service supplier can be factors of "likeness" under the national treatment or most-favoured-nation provisions of the GATS. The Appellate Body found in *EC – Asbestos* that the relative risks associated with particular products can be a relevant – and even dispositive – factor of likeness. The Appellate Body reasoned that it can be presumed in the context of Article III.4 of the GATT 1994 that risk factors associated with a product will affect the physical properties of the product or consumer tastes and habits and that, therefore, such risks need not be analyzed as a separate criterion of likeness.

8. Similarly, in the context of Articles II and XVII of the GATS, such relative risks or other bases for regulatory differentiations may be factors in the analysis of whether services or service suppliers are "like." In addition, it cannot necessarily be presumed that risks or other bases for regulatory differentiations among services and service supplier will affect consumer tastes and habits (or otherwise affect the competitive relationship among services or services suppliers). The supply of services often is highly regulated precisely because key differences among services or suppliers are not readily apparent to consumers, and regulation in part seeks to ensure that services meet certain standards and requirements. A likeness analysis may need to consider such factors as: how a service or service supplier is regulated; the nature and character of that service or service supplier; how that service or service supplier is perceived by consumers; and the nature and extent of a competitive relationship between services or service suppliers. Each of these factors, though at times related, is potentially relevant by itself to whether services or services suppliers are "like." An analysis focused solely on the nature and extent of a competitive relationship may not adequately take account of all the relevant factors of likeness.

9. Relevance of approach to interpreting Article 2.1 of the TBT Agreement. Articles II and XVII of the GATS should be interpreted using customary rules of interpretation of public international law (DSU Article 3.2) – that is, in accordance with the ordinary meaning of their terms, in their context, and in light of the treaty's object and purpose. Context includes the preamble, as well other covered agreements. Article 2.1 of the TBT Agreement is relevant context, and the Appellate Body's approach to that interpreting that provision may provide a useful perspective when interpreting the "less favourable treatment" concept in Articles II and XVII of the GATS.

10. In *US – Clove Cigarettes,* the Appellate Body set out observations on the specific contextual factors informing its interpretation of the national treatment obligation – and specifically the concept of "less favorable treatment" – under the TBT Agreement. Among the specific contextual factors that the Appellate Body considered were: the preamble of the TBT Agreement; the unique characteristics of the subject covered under the provision at issue (in that case, technical regulations); and the relationship between the TBT Agreement and other covered agreements and the availability of exceptions.

11. Preamble. The Panel's analysis of less favorable treatment should reflect the object and purpose of the GATS, as set forth in the preamble, to, *inter alia*, balance progressive trade liberalization with Members' right to regulate to meet national objectives. The third recital of the preamble affirms the Members' desire to achieve "progressively higher levels of liberalization of trade in services." The sixth 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 […]." An analysis consistent with this object and purpose should take into consideration that a measure taken to meet certain national policy objectives – including other regulatory objectives – does not necessarily accord "less favourable treatment" even where it modifies the conditions of competition to the advantage of some domestic services or service suppliers compared to a like services or service suppliers of another Member.

12. The Appellate Body applied this approach in interpreting less favorable treatment under TBT Article 2.1 in *US – Clove Cigarettes*. First, the Appellate Body observed that the preamble of the

TBT Agreement reflects both a "trade liberalization" objective and an aim at "reducing obstacles to international trade", qualified and counterbalanced by the affirmation of Members' right to regulate to "fulfill certain legitimate policy objectives." This observation led in part to the Appellate Body's finding that, "the object and purpose of the TBT Agreement is to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate. This object and purpose therefore suggests that Article 2.1 should not be interpreted as prohibiting any detrimental impact upon competitive opportunities for imports in cases where such a detrimental impact on imports stems exclusively from a legitimate regulatory distinction." The preamble of the GATS, recognizing the objective to balance progressive trade liberalization with Members' right to regulate to meet national objectives similarly supports an interpretation of less favorable treatment that requires more than a simple finding of detrimental impact in order to find a breach of the national treatment provision.

13. Nature of the covered subject. In interpreting TBT Article 2.1, the Appellate Body considered it significant that the TBT Agreement concerns *only* technical regulations, which are defined as "document[s] which lay[] down product characteristics […]." The Appellate Body observed that, by their very nature, technical regulations (unlike the broader scope of measures covered under Article III.4 of the GATT 1994) draw distinctions among products. Article XVII of the GATS, like Article III.4 of the GATT 1994, applies to *all* measures (not to a particular type of measure, like Article 2.1 of the TBT Agreement). While there is no separate agreement covering an analogue to technical regulations in the services context, there are many types of measures that may, in a similar way, draw distinctions among services or services suppliers. In fact, the supply of services is carefully regulated, and services and services suppliers are often defined and distinguished by the particular regulatory framework to which they are subject. Thus, measures affecting trade in services may have unique characteristics that could inform the "like services", "like services suppliers" or "less favorable treatment" analyses.

14. Relationship to other covered agreements and the availability of exceptions. The Appellate Body in *US – Clove Cigarettes* also considered the TBT Agreement's relationship to the GATT 1994, and the fact that the GATT 1994 contains general exceptions while the TBT Agreement does not. With respect to the relationship, the Appellate Body noted that technical regulations are subject to the national treatment obligations in both agreements, and that the national treatment provisions "are built around the same core terms, namely, `like products' and `treatment no less favourable.'" The Appellate Body further noted that the national treatment obligation in the GATT 1994 is counterbalanced by general exceptions, while the national treatment provision in the TBT Agreement is not. The language of the general exceptions in the GATT 1994 is largely reflected, however, in the sixth recital to the TBT Agreement.

15. Applying a similar analysis to the GATS, it should be noted that, unlike the preamble to the TBT Agreement, the preamble of the GATS does *not* enumerate particular policy objectives. The general exceptions to the GATS, which are part if the context in which to interpret Articles II and XVII, are in the form of a closed list, and they do not necessarily cover all of the "national policy objectives" referenced in the preamble or all of the regulatory objectives reflected in the provisions of GATS. For one, there are exceptions in the GATS in addition to the general exceptions. And other provisions reflect additional regulatory objectives, such as transparency (Article III), ensuring the competence and ability of service suppliers (Article VI:4), competition (Article IX), and access to public telecommunications access (Annex on Telecommunications). Therefore, an interpretation of Articles II and XVII of the GATS, in light of the right to regulate set out in the preamble, would need to take account of all potential bases for regulation and not only those reflected in the general exceptions.

16. The Panel's interpretation of Articles II and XVII of the GATS should take account of any relevant regulatory distinctions among services and services suppliers. In interpreting Article 2.1 of the TBT Agreement, the Appellate Body factored in legitimate regulatory distinctions in its analysis of less favorable treatment. For the reasons set out above, the United States considers that, in the context of measures affecting trade in services, regulatory differentiations among services or services suppliers are relevant as a factor in the analysis of which domestic service or service supplier is "like" the foreign service or service supplier.

II. Article XIV(c)

17. Article XIV(c) of the GATS allows Members to take measures that would otherwise be inconsistent with the GATS, if those measures are necessary to secure compliance with laws or regulations that are not themselves inconsistent with GATS. In its third party submission, the EU states that Article XIV(c) "would appear to permit measures to secure compliance with law or regulations that address concerns from the perspective of the *service user*", such that "a measure that only addresses concerns of the tax authorities to collect revenue would not appear to fall under the scope of this provision." The United States does not consider that the text of Article XIV(c) of the GATS supports the interpretation proposed by the EU. While each of the concerns listed in the subparagraphs of Article XIV(c) would *include* concerns relating to the users of services, nothing in the text of the provision suggests that these concerns would be *limited* to services users only. Indeed, Article XIV(c) does not mention "users" or "consumers" in any of its subparagraphs, including subparagraph (i), at issue here. Therefore, in determining whether a measure relates to "the prevention of deceptive and fraudulent practices", the Panel's analysis should not depend on the intended target of such practices. Rather, findings under Article XIV(c) should rest solely on whether the underlying measure is WTO-consistent, without regard to who the measure protects.

III. Article XIV(d)

18. Article XIV(d) states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures … (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members." Footnote 6 then provides a list of illustrative measures that would satisfy that condition. Therefore, any measure found to be inconsistent with Article XVII must either fall into one of the measure descriptions in the footnote, or otherwise be "aimed at the equitable or effective imposition or collection of direct taxes." The exception does not require that the measure be "necessary to" achieve the equitable or effective imposition or collection of direct taxes. Therefore, it is not necessary to demonstrate that no other less trade restrictive alternative measure is available. If the measure is in fact aimed at the equitable or effective imposition or collection of direct taxes within the meaning of footnote 6, the measure will satisfy the first step in the GATS Article XIV analysis, and a panel must then continue its analysis to determine compliance with the requirements of the chapeau.

IV. Paragraph 2(a) of the Annex of Financial Services

19. The Panel posed two questions to third parties concerning paragraph 2(a) of the GATS Annex on Financial Services (the "prudential exception"). The Panel first asked for views on the "steps" that "should be followed by the Panel in its analysis" of the prudential exception. The Panel also asked for views on the EU's suggestion that the second sentence of the prudential exception requires an assessment as to "whether the measure at issue, as it is effectively applied, genuinely pursues a prudential objective or, to the contrary, if it is used as a means to avoid the commitments and obligations of the respondent." In that regard, the Panel sought input on the EU's suggestion that the rationale of the sentence is "comparable" to that of the chapeau to the general exceptions in Article XX of GATT 1994 and Article XIV of GATS.

20. This dispute raises an issue of first impression, the resolution of which will have important systemic implications. WTO Members consider this to be a critical exception with respect to commitments undertaken in the GATS, and in discussions on financial services in meetings of the Council for Trade in Services, Members have recognized the prudential exception's broad scope and have chosen not to limit expressly the measures that Members may take under the exception. At a more basic level, Members' broad conception of the prudential exception informed the scope of the commitments and country-specific limitations that they negotiated and inscribed in their schedules of specific commitments and MFN exemptions because, as the Council for Trade in Services has stated, "any measure taken in accordance with paragraph 2(a) of the Annex on Financial Services constitutes an exception to the agreement and should not be scheduled." Members have also incorporated and relied on the exception or similar exceptions in numerous bilateral and plurilateral trade and investment agreements. The United States therefore considers that the context of this dispute warrants a cautious approach.

21. In the event that the Panel must analyze the prudential exception in this case, it should interpret the actual text of the exception, rather than importing standards derived from the differently worded texts of other GATT and GATS provisions. As the Appellate Body has made clear, interpretation of a WTO provision "must be based above all upon the text of the treaty." The Appellate Body has further stated that "[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purposes of the states parties to the treaty must first be sought." In that way, it is "the task of the treaty interpreter to give meaning to *all* the terms of the treaty."

22. Paragraph 2(a) of the Annex on Financial Services provides that "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." Thus, according to the text, for a Member's measure to fall within the exception, the Member must, as an initial matter, identify a "prudential reason" "for" which the measure was "tak[en]." These reasons are not exclusive; the exception makes clear that its scope is broad and encompasses other prudential reasons or considerations beyond those expressly listed in the provision. This is a critical point in the view of the United States.

23. By its terms and unlike the general exceptions, the prudential exception provides that a measure must be taken "*for* prudential reasons." That text neither requires nor permits an assessment of "the extent to which the measure contributes to the realization of the end pursued," whether under a test related to "necessity," or whether the measure is "relating to" a particular end (*e.g.*, "rational relationship" or "reasonableness" test). With respect to the prudential exception, Members considered preliminary suggestions to include a reasonableness requirement but ultimately rejected the limitation and omitted it from the exception. Where the Member identifies a prudential reason for which the challenged measure was taken, the Panel must then, in accordance with the second sentence of the exception, consider whether the measure is "used as a means of avoiding the Member's commitments or obligations under the Agreement."

24. In the U.S. view, there is no basis to apply a test developed from the language of the chapeau in the general exceptions in GATT and GATS – which enumerates multiple circumstances under which those exceptions would not apply – to the much more narrowly focused anti-abuse language in the prudential exception. Indeed, with respect to the chapeau to the general exceptions, the Appellate Body has explained that, although the chapeau represents "one expression of the principle of good faith," it is the actual text of the provision that matters because the "task" at hand "is to interpret the language of the chapeau." By contrast, the anti-abuse provision of the prudential exception states only that measures "shall not be used as a means of avoiding" GATS commitments. Together with the first sentence of the exception, which requires only that a measure be "tak[en] … for prudential reasons," this provision does not permit the "taking" of a measure in order to circumvent a Member's GATS commitments.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION*

1. INTRODUCTION

1. The European Union would like to stress that it shares the concerns of Argentina about tackling tax evasion and avoidance, including aggressive tax planning and harmful tax practices. The European Union considers that WTO Members have a wide range of measures at their disposal to achieve such an objective, including improving information exchange between tax authorities and appropriate anti-abuse measures. However, in taking such measures, WTO Members must comply with their obligations under WTO law.

2. CLAIMS UNDER THE GATS

2.1. ARTICLE II:1 OF THE GATS (MFN)

2. The obligation of MFN treatment in Article II:1 of the GATS is part of the general obligations and disciplines contained in Part II of the GATS. Hence, in contrast to the obligations of market access in Article XVI of the GATS and national treatment in Article XVII of the GATS, it applies regardless of any specific commitments made by the WTO Member in question. Nonetheless, a WTO Member may maintain measures inconsistent with the MFN obligation in Article II:1 if such measures are listed in the Member's Annex on Article II exemptions, or if they are consistent with any of the exceptions under the GATS.

3. The analysis of a measure under Article II:1 involves three steps: (i) it must be determined whether the measure is covered by the GATS; (ii) it must be examined whether the services or suppliers at stake are "like"; and (iii) it must be established that the measure treats the services or suppliers from one WTO Member less favourably than the like services or suppliers from another country.

4. (i) The European Union recalls that the absence of *actual* trade effects does not preclude a WTO Member from successfully bringing a claim against a measure under WTO law. It is thus not necessary to show actual trade effects to substantiate a claim under a WTO provision prohibiting discrimination. However, a careful analysis of the contested measure and of its implications in the marketplace based on its design, structure and expected operation is needed. The European Union considers that the measures at issue are covered under the GATS.

5. (ii) It is necessary to determine whether the services or service suppliers are "like". Article II:1 of the GATS refers to likeness of *services* as well as of *service suppliers*. A situation where such presumption of "likeness" of service suppliers could apply is in cases, like the present one, where the distinction made by the measures at issue is exclusively based on the supplier's origin. It appears that the measures at issue operate *de jure* by reason of origin. Given the design of Argentina's measures, the European Union considers it irrelevant at this stage of determining likeness how the list was drawn up. To the extent the market where the measure at issue operates considers that suppliers from jurisdictions with laws and regulations that hamper cooperation against tax fraud or tax evasion are not in a competitive relationship with suppliers from jurisdictions that facilitate such cooperation, the suppliers can be considered to be "unlike".

6. (iii) WTO Members have the obligation to accord any more favourable treatment given to any country "immediately and unconditionally" to other WTO Members. The Panel needs to determine whether the measures at issue modifies the conditions of competition to the detriment of foreign services or service suppliers, and whether such an effect can be attributed genuinely to the measures at issue. In the European Union's view, the fact that Argentina maintains discretion in selecting the countries falling under the category of "beneficiary countries" may be relevant for the Panel's analysis. In this respect, the European Union doubts that Argentina applies "objective criteria" when selecting the countries that are included in the list in question. Whereas the criteria

* This text was originally submitted in English by the European Union.

established by the Global Forum may be considered as "objective", Argentina may include a country in the list when the country at issue merely accepts to starting negotiations with a view to concluding a bilateral agreement to exchange information on tax matters. That is, Argentina may include a country in the list regardless of whether the country at issue meets the objective criteria of the Global Forum or whether it commits to comply with them. Such a wide discretion may lead to discrimination. There may indeed be other countries that are currently not on the list of "cooperating" jurisdictions, but would be ready to initiate a process of negotiations.

2.2. ARTICLE XVII OF THE GATS (NATIONAL TREATMENT)

7. In order to establish a violation under Article XVII:1 of the GATS, the complainant needs to demonstrate the existence of three elements: (i) it must be determined whether Argentina has undertaken national treatment commitments with respect to the services sector and mode of supply at stake; (ii) it needs to be demonstrated that the measures at issue affect trade in services; and (iii) it must be established that the measures accord less favourable treatment to services or service suppliers of other Members, in comparison to like domestic services or suppliers.

8. (i) In respect of maritime and transport insurance services, as well as reinsurance and retrocession services, Argentina inscribed "none" for modes 1 to 3. Hence, in respect of these services and modes of supply, Argentina has a full national treatment commitment, without any limitations. (ii) It is not necessary to show actual trade effects to substantiate a claim under a WTO provision prohibiting discrimination. (iii) The European Union recalls that Article XVII:1 of the GATS refers to the treatment of both services and service suppliers. To determine likeness of services, the panel should take into account the "nature and characteristics" of the services transactions at stake. If the services "are essentially or generally the same in competitive terms", they should be considered "like services". With respect to the likeness of service suppliers, the determination of the existence of "like services" raises a presumption that the suppliers that provide these services are also "like". In cases where the distinction made by the measure at issue is exclusively based on the suppliers' origin and the suppliers under the measure "are the same in all material aspects except for origin", the "like service suppliers" requirement is met. Once the "likeness" of the services or suppliers is established, it must finally be considered whether the measures at issue "modif[y] 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", as specified in Article XVII:3 of the GATS.

2.3. ARTICLE XVI OF THE GATS (MARKET ACCESS)

9. The market access obligation in Article XVI of the GATS applies only to the extent Argentina has made a specific commitment to apply this obligation in the services sector and mode of supply at stake, and subject to the terms, limitations and conditions specified in Argentina's Schedule of specific commitments. Where Argentina has made a market access commitment for the service sector and mode of supply at stake, this entails an obligation not to restrict market access through the use of six types of measures.

10. In the European Union's view, the analysis under Article XVI requires (i) an examination of the precise terms of Argentina's Schedule of commitments to determine whether there is with respect to the services and mode of supply at issue a market access commitment; and (ii) a determination that the challenged measures constitute impermissible limitations falling within the scope of one of the measures listed in sub-paragraphs (a) to (f) of Article XVI:2 of the GATS.

11. (i) As indicated in Article XX:3 of the GATS, WTO Members' Schedules of commitments are an integral part of the GATS. With respect to the services sector at issue – reinsurance and retrocession – Argentina's Schedule of specific commitments specifies the entry "None" for market access in Mode 1. This means that Argentina made a full market access commitment, without limitations. With regard to Mode 3, Argentina has specified that "[t]he authorisation of the establishment of new entities is suspended". This limitation does not indicate any end date for the suspension of granting new authorisations. The fact that Argentina's domestic legal framework for reinsurance changed in 1998, and became more open to the establishment of new entities, does not affect the obligations Argentina undertook in the framework of the GATS. Argentina's commitments in its Schedule of commitments are the minimum liberalisation commitments to which Argentina has bound itself internationally. Unilateral liberalisation does not affect the extent

of Argentina's international obligations. It is immaterial, absent any specific commitment in that regard, to conduct an analysis of the modifications in the domestic legislation of the WTO Member that made the commitments at issue. The commitments in the Schedule represent the only possible benchmark for the evaluation of whether less favourable treatment occurred.

12. (ii) It must be established that the challenged measures constitute a limitation falling within the scope of sub-paragraph (a) of Article XVI:2 of the GATS. The European Union wonders whether the measure at issue as it is described by Panama, *i.e.* the prohibition to supply reinsurance and retrocession services by means of Modes 1 or 3 in case the suppliers originate in the excluded countries, qualifies as a measure that imposes a quantitative limit on the number of service suppliers in the sense of Article XVI:2(a) of the GATS. The measure appears to impose a qualitative requirement, namely that the reinsurance and retrocession service suppliers must not originate in countries that fail to meet the minimum transparency standards in respect of tax information. There is no limit on the total number of service suppliers that could provide their reinsurance or retrocession services in Argentina through Modes 1 or 3. Therefore, the Panel may find it appropriate to scrutinise this measure only under Article II:1 of the GATS rather than under Article XVI:2(a) of the GATS.

2.4. ARTICLE XIV OF THE GATS (EXCEPTIONS)

13. Article XIV of the GATS has a two-tiered structure. A panel must examine *first*, whether a measure is provisionally justified under one of the paragraphs of Article XIV; and, *second*, whether the measure meets the requirements of the chapeau of Article XIV.

14. In order to assess the measures at issue under subparagraph (i) of Article XIV(c) of the GATS, the Panel must determine whether (i) they are adopted to *secure compliance* with laws and regulations which are not inconsistent with the provisions of the GATS; (ii) they are adopted to ensure the enforcement of laws and regulation that *relate to the prevention of deceptive and fraudulent practices*; and, (iii) they are *necessary* to secure compliance.

15. The European Union questions whether measures that seek to protect a WTO Member's tax revenues fall under Article XIV(c) of the GATS. Subparagraphs (i) to (iii) in Article XIV(c) appear to specify measures posing concerns to the users of the services in question. In other words, Article XIV(c) would appear to permit measures to secure compliance with law or regulations and that address concerns from the perspective of the *service user*. In this respect, a measure that only addresses concerns of the tax authorities to collect revenue would not appear to fall under the scope of this provision.

16. Even if the scope of Article XIV(c) would extend to measures that concern tax matters, it is not obvious that Argentina's measures would qualify under subparagraph (i) of that provision. The European Union considers that particular attention should be paid to the question whether the laws and regulations with which the measures at issue allegedly seek to secure compliance aim at preventing *deceptive or fraudulent practices*. It is not straightforward whether some of the practices that taxpayers adopt in order to pay fewer taxes in accordance with the relevant laws are deceptive or fraudulent; or rather concern tax *avoidance* practices. It does not seem that the measures mentioned in subparagraph (i) of Article XIV(c) encompass also measures relating to the prevention of tax avoidance.

17. Once it would be determined that the measure at issue qualifies under subparagraph (i) of Article XIV(c), the Panel must determine whether the measure is applied in a manner that meets the conditions in the chapeau of Article XIV. The chapeau requires that the measures are not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail or a disguised restriction to trade in services.

18. In this respect, the European Union considers that the apparent discretion in the decision by Argentina whether to designate a territory as a "cooperating" jurisdiction for the purpose of tax information matters raises concerns as to whether the manner in which the measures are applied violates the conditions in the chapeau of Article XIV.

19. Article XIV(d) of the GATS contains an exception for measures that are found to be inconsistent with the national treatment obligation of Article XVII of the GATS. Hence, it does *not* provide a justification for violations of any other GATS obligations. A measure will be justified

provided the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members. The third measure described in footnote 6 indeed concerns measures that apply to non-residents or residents "in order to prevent the avoidance or evasion of taxes, including compliance measures". Thus, Article XIV(d) directly speaks to measures adopted with the aim of preventing tax evasion or tax avoidance, hence WTO Members are legitimately entitled to adopt measures in order to prevent tax evasion or tax avoidance insofar as they do so in a WTO compatible manner.

20. Once it is established that the measure at issue qualifies as a measure under paragraph (d) of Article XIV of the GATS, the panel must assess the application of this measure under the chapeau of Article XIV.

2.5. PARAGRAPH 2 (A) OF THE GATS ANNEX ON FINANCIAL SERVICES (PRUDENTIAL EXCEPTION)

21. The European Union first of all notes that the scope of the prudential exception is determined by the scope of the GATS Annex on Financial Services, in which it is contained. Paragraph 1(a) of the Annex indicates that it "applies to measures affecting the supply of financial services". The European Union does not consider that this means that only measures directly regulating the financial services sector would be caught within the scope of the prudential exception. Nonetheless, a Member invoking Paragraph 2(a) is required to establish how such measures "affect[] the supply of financial services".

22. *First*, the party that invokes the provision has to demonstrate that the measure adopted is taken for prudential reasons. Paragraph 2(a) provides an indicative list of such prudential reasons. *Second*, the last sentence of Paragraph 2(a) specifies that where the measures at issue "do not conform with" the GATS, "they shall not be used as a means of avoiding the Member's commitments or obligations under the [GATS]". Hence, even if a measure violating the GATS pursues a prudential objective, it must be determined whether, through the use of this measure, the Member is trying to avoid its commitments and obligations under the GATS.

3. CLAIMS UNDER THE GATT 1994

3.1. ARTICLE I:1 (MFN)

23. Article I:1 of the GATT 1994 does not require that any advantage has to apply in the exact and same manner to all imports irrespective of their source. Members are allowed to introduce legislation of any kind as long as they do not modify the conditions of competition to the detriment of like imported products. Article I:1 preserves the equality of competitive opportunities for like imported products from all Members and, thus, prohibits imposing conditions that have a detrimental impact on the competitive opportunities for like imported products from any Member.

3.2. ARTICLE III:4 (NATIONAL TREATMENT)

24. In the European Union's view, requiring additional information from imported products (when compared to the information requested from domestic products) may alter the conditions of competition and, ultimately, may cause less favourable treatment contrary to Article III:4 of the GATT 1994.

3.3. ARTICLE XI:1 (QUANTITATIVE RESTRICTIONS)

25. Article XI:1 of the GATT 1994 contains one the general prohibition of quantitative restrictions. The provision encompasses a limiting condition on the importation, thereby covering those prohibitions and restrictions that have a limiting effect on the quantity or value of a product being imported or exported. It forbids any measure instituted or maintained by a Member, irrespective of its legal status, that prohibits or restricts the importation of products. A measure is thus inconsistent with Article XI:1 of the GATT 1994 when it bans the importation of products or includes a condition that limits importation or restricts market access for imported products.

26. The Panel should determine whether the measure at issue affects the importation of goods or imported products. The target in Article XI:1 is exclusively those restrictions which relate to the importation itself, and not to already imported products.

3.4. ARTICLE XX (D) OF THE GATT 1994 (GENERAL EXCEPTIONS)

27. Article XX (d) imposes a "two-tiered" test. It must first be established whether the measure is provisionally justified under paragraph (d). Second, the measure must be examined under the introductory clause (the "chapeau") of Article XX.

28. With regard to the first tier of the test, two elements must be shown: (i) 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; and (ii) the measure must be "necessary" to secure such compliance.

29. The European Union does not question the need for WTO Members to adopt measures in order to fight against tax fraud or avoid the legitimate collection of taxes. However, the European Union wonders to which extent the measures at issue contribute to the mentioned objective if Argentina can select countries, such as Panama, that do not meet the relevant international transparency requirements.

30. Even if Argentina succeeds in demonstrating that the measures at issue are provisionally justified under subparagraph (d) of Article XX, the Panel would still need to analyse whether the measure meets the requirements in the chapeau of Article XX, which prevents a WTO Member from applying measures in a manner that constitutes (a) "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or (b) "a disguised restriction on international trade". The Panel should thus evaluate whether the distinctions that Argentina draws do not amount to arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction of international trade.

4. CONCLUSION

The European Union considers that this case raises important questions on the interpretation of various provisions of the GATS and the GATT. While not taking a final position on the merits of the case, the European Union requests the Panel to carefully review the scope of the claims in light of the observations made in this submission.