Argentina – Measures Relating to Trade in Goods and Services

(DS453)

Third Party Integrated Executive Summary
of the United States

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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 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.