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

(DS453 / AB-2015-8)

# Third Participant Oral Statement of the United States of America

January 28, 2016

1. Mr. Chairman, members of the Division:

2. It is sometimes remarked in legal circles that *bad (or tragic) facts make bad law*. The saying captures the notion that when the facts are "bad" – that is, they are unusual or extreme – legal approaches based on these types of factual situations often prove to be ill-suited for the usual course of things, precisely because they were developed and found suitable in the context of an unusual course of things.

3. The facts in this dispute are certainly unusual. Panama challenged Argentine measures that accord differential treatment based on "cooperating" and "non-cooperating" country designations.[1] Argentina responded that the measures do not differentiate based on national origin, *per se*, but on the availability of pertinent tax-related information.[2] Panama does not make such information available.[3] Early in the proceedings, Panama nonetheless appeared on an updated "cooperating country" list based on a purported negotiation, which Panama contends is not occurring.[4] Although Panama may not be the only country designated as "cooperating" without actually sharing information, it is the only country so identified in the Panel Report.[5]

4. We note that this final fact – Panama's designation as "cooperating" when it was not actually sharing tax information with Argentina – appears to have provided the basis for each of the Panel's adverse findings with respect to Argentina's measures – under GATS[6] Articles II, XVII, XIV and paragraph 2(a) of the Annex on Financial Services.[7] In particular, the Panel did not take issue with Argentina's treatment of one regulatory category compared to the other. What the Panel found problematic was uneven treatment within the established categories – i.e., misplaced favorable treatment. But differential treatment among services and service suppliers from jurisdictions that do not share information was never Panama's claim or concern.

5. In short, legal approaches that were developed in the context of this unique fact pattern may not provide the best framework to deal with more ordinary situations and courses of events. In this vein, the United States considers that the circumstances here would weigh in favor of the use of judicial economy where appropriate because resolution of a legal issue on appeal is not necessary to resolve the dispute, especially in light of the systemically significant legal issues that are implicated, including interpretation for the first time of the "prudential exception," Paragraph 2(a) of the Annex on Financial Services.

6. Turning to the legal questions at issue in this appeal, the United States is particularly troubled by the Panel's analysis of "like services and service suppliers" under GATS Articles II and XVII. This dispute is the first to require a careful focus on interpretation of the term "like" in the context of trade in services – an interpretation that is fundamental to Members' obligations. The Panel failed in this interpretive task. The United States does not take a position

[1] Panel Report, paras. 7.118, 7.164.
[2] Panel Report, paras. 7.137, 7.179.
[3] Panel Report, para. 7.291.
[4] Panel Report, paras. 7.195, 7.291.
[5] Panel Report, para. 7.291.
[6] *General Agreement on Trade in Services* (GATS).
[7] Panel Report, paras. 7.179-7.185, 7.293, 7.761, 7.919.

regarding the existence of likeness between or among the relevant services and service suppliers at issue in this dispute. The point is that the Panel's flawed analytical approach provides no basis to form a conclusion one way or another. The Panel never addressed the essential issue of identifying the services and service suppliers relevant to each of the eight challenged measures and comparing their characteristics and qualities.

7. The Panel never reached this issue because, throughout its analysis, the Panel incorrectly assumed that "likeness" must be *inferred* from the treatment accorded to the things that are being compared and how that treatment may affect the conditions of competition between and among them. The Panel made the same legal error as the panel in *EC – Asbestos* by failing to apply an analytical framework in a way that would allow for a proper characterization of likeness.[8]

8. The Panel's analysis hinged on a misapplication of the so-called "presumption" of likeness "by reason of [treatment based on] origin." There is no textual basis to infer or presume "likeness" between services and service suppliers based on the *treatment* accorded by a measure. Certainly, there is no basis to craft an entire interpretation of "likeness" around ascertaining the basis for the treatment. It is difficult to comprehend how a question having nothing to do with characteristics or qualities of services and service suppliers consumed the entire likeness analysis.

9. In any event, the Panel Report makes clear that Decree No. 589/2013 is *not* a measure which, on its face, discriminates exclusively based on national origin. The Decree sets out criteria pertaining to the exchange of tax-related information and a regulatory distinction that applies not just to countries but to "dominions, jurisdictions, territories, associate States or tax regimes."

10. The Appellate Body's basis for reversing the panel's determination in *EC – Asbestos* was that a likeness determination requires examination of *all relevant evidence* bearing upon the *characteristics or qualities of the products* being compared, the full assessment of which allows an interpreter to discern the "nature and extent of the competitive relationship between and among" the products. By means of such analysis, the interpreter then can determine whether the products are properly characterized as "like."[9] The Appellate Body's interpretation in *EC – Asbestos* supports an approach to likeness that, at the most basic level, must be centered upon evaluation of the characteristics and qualities of the relevant things being compared – be they products, services, or services suppliers. [10]

11. The Panel in this dispute conducted a likeness analysis without identifying a single characteristic or quality of any service or service supplier. Argentina argued to the Panel and now argues on appeal that the availability of tax-related information is a relevant characteristic or quality of the services subject to the challenged measures. The Panel was required to address this question with respect to each of the challenged measures and to weigh the significance and importance of its finding in light of other characteristics and qualities. The Panel never reached

[8] *EC – Asbestos* (AB), para. 109.
[9] *EC – Asbestos* (AB), paras. 101-103, 109.
[10] *EC – Asbestos* (AB), paras. 92, 99, 101-103.

these pertinent interpretive and fact-finding tasks – and never required that Panama make any showing of likeness – because the test the Panel applied had nothing to do with the nature of services and service suppliers (i.e., the things to be compared) and had everything to do with how the application of the measures affected conditions of competition. In other words, the Panel effectively endeavored to determine likeness by applying what should be part of an analysis of "treatment no less favorable".

12. The analysis of likeness is separate and distinct from the analysis of "less favorable treatment". The likeness analysis concerns the characteristics and qualities of the services or service suppliers that would be subject to a less favorable treatment comparison. A sufficient analytical framework must maintain this critical distinction between the nature and degree of likeness of services and service suppliers, on one hand, and the effect of a measure on the conditions of competition between or among like services and service suppliers, on the other hand.