Argentina – Measures Relating to Trade in Goods and Services

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Third Participant Submission of the United States of America

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PARTICIPANTS

H.E. Mr. Alberto Pedro D'Alotto, Permanent Mission of the Republic of Argentina

H.E. Mr. Alfredo Suescum, Permanent Mission of the Republic of Panama

THIRD PARTIES

H.E. Mr. Hamish McCormick, Permanent Mission of Australia

H.E. Mr. Marcos Galvao, Permanent Mission of Brazil

H.E. Mr. Yu Jianhua, Permanent Mission of the People's Republic of China

H.E. Mr. Juan Falconi Puig, Permanent Mission of Ecuador

H.E. Mr. Marc Vanheukelen, Permanent Mission of the European Union

H.E. Mr. Eduardo Ernesto Sperisen-Yurt, Permanent Mission of Guatemala

H.E. Mr. Dacio Castillo, Permanent Mission of Honduras

H.E. Ms. Anjali Prasad, Permanent Mission of India

H.E. Mr. Abdulla Nasser Musaliam Al Rahbi, Permanent Mission of Oman

H.E. Dr. Abdolazeez S. Al-Otaibi, Permanent Mission of the Kingdom of Saudi Arabia

H.E. Ms. Tan Yee Woan, Permanent Mission of Singapore

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China – Electronic Payment Services	Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R and Add.1, adopted 31 August 2012
China – Publications and Audiovisual Products (AB)	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
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Mexico – Taxes on Soft Drinks (Panel)	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R
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US – Clove Cigarettes (Panel)	Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R

I. INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. The United States welcomes the opportunity to provide its views on certain issues raised in this dispute, in which Panama and Argentina each appeal certain findings by the Panel. The United States has a strong interest in the proper interpretation of the *General Agreement on Trade in Services* ("GATS") and, in particular, in the development of an effective and coherent approach to interpreting Article II and Article XVII, and to interpreting Paragraph 2(a) of the *Annex on Financial Services* to the GATS. The issues presented in these appeals are issues with systemic importance to Members, including issues that touch on Members' ability to regulate services to fulfill public policy objectives.

2. Articles II and XVII both discipline a Member's treatment of the services and service suppliers of other Members, requiring that it be no less favorable than the treatment accorded to like services and service suppliers of any other Member (in the case of Article II) or to the like services and service suppliers of the Member itself (in the case of Article XVII). Application of these disciplines accordingly requires a comparison, with the treatment of one Member's services and service suppliers serving as the benchmark for treatment of another's like services and services. Likeness is obviously critical to the validity – if two things subject to comparison are dissimilar, then differences in their treatment may arise from the dissimilarities, rather than some sort of discrimination between them based on origin. Under the comparable most favored nation and national treatment disciplines in Articles I and III, respectively, of GATT 1947 and GATT 1994, panels developed a number of factors to determine whether products were sufficiently like for this comparison – physical characteristics, end uses, customer perceptions, as well as any additional relevant factors. In the services context, this inquiry would involve consideration of the nature of the services and the types of services suppliers.

3. The findings of the Panel and the arguments of the participants in this appeal present several concerns with regard to the conduct of these comparisons under the GATS, involving the identification of like services and service suppliers, as well as the comparison of the treatment accorded to services and service suppliers of another Member.

4. Under GATT 1947 and GATT 1994, Panels developed a principle that in limited circumstances, when national origin was the sole basis for treatment of imported products, a panel may assume that they were like domestic products without conducting a more detailed analysis. The Panel in this proceeding correctly rejected Panama's argument that this principle meant that treatment triggered by the nationality of the supplier (in some modes of supply) allowed an assumption that services and service suppliers were like. However, the Panel erred in then basing its likeness analysis entirely on an inquiry into whether there were factors other than nationality that determined Argentina's treatment of services and services suppliers. A proper analysis would have addressed the nature and characteristics of the services and service suppliers at issue, including any relevant regulatory characteristics, rather than the treatment of services and services not yet determined to be like.

[1] This section constitutes the executive summary of this submission. It contains 654 words.

5. In the comparison of the treatment of the services and service suppliers in question, the Panel correctly recognized that it needed to take account of the regulatory context of the measures, but did so incorrectly. The Panel incorrectly viewed Panama's regulatory framework as a competitive advantage, and found that Argentina was entitled to apply tax measures to offset that advantage. However, the key finding was that Argentina's measures were aimed at protecting its ability to assess taxes based on accurate information. In this context, Panama's refusal to share tax information was a competitive disadvantage in its service suppliers' efforts to sell to Argentine customers who sought to obey the law. Footnote 10 to Article XVII specifies that Argentina bears no obligation to compensate for this disadvantage by allowing the use of unverifiable information provided by Panamanian suppliers.

II. LEGAL ARGUMENT

A. The Panel Failed to Conduct an Analysis of "Like" Services and Service Suppliers Under Articles II:1 and XVII of the GATS

6. The Panel concluded that the services and service suppliers implicated by Argentina's measures are "like by reason of origin."[2] Argentina now appeals this conclusion as legally flawed and inconsistent with the panel's mandate under Article 11 of DSU.[3] The United States agrees that the Panel failed to conduct the legal analysis of "like" services and service suppliers required under Articles II:1 and XVII.

7. The GATS most favoured nation ("MFN") treatment and national treatment ("NT") obligations require that a Member does not discriminate among the like services and service suppliers of other Members based on their national origin. The obligations identify whether a Member accords "treatment less favourable" by comparing the like services and service suppliers of two other Members (in the case of MFN) or the services and service suppliers of another Member with like domestic services and service suppliers (in the case of NT). In each instance, the likeness requirement ensures that the services and service suppliers at issue are truly comparable, such that differences in treatment are the result of discrimination against another Member, and not the result of differences between the services and service suppliers. The MFN and NT obligations reflect the judgment of Members that *ceteris paribus*, the services and service suppliers of each Member should have the same competitive opportunities afforded to the services and service suppliers of other Members, including the Member affording the treatment. Conversely, the MFN and NT disciplines recognize that where relevant differences exist among services and service suppliers, such that they are not like, the obligation to accord "treatment no less favourable" does not attach.

8. Accordingly, evaluation of consistency with the MFN and NT obligations requires two distinct steps. First, a panel must identify the services or service suppliers of one Member

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[2] Panel Report, para. 7.185.

[3] Other Appellant Submission of Argentina, paras. 1-2. Argentina also seeks modification of the basis for the Panel's conclusion under Article XVII. The United States agrees that when the Panel found that the factual basis for its likeness determination under Article II:1 does not apply in the context of Article XVII, it was required to conduct a complete like analysis in that context. *See* Other Appellant Submission of Argentina, paras. 82-88.

affected by the challenged measure and the services and service suppliers of another Member that are sufficiently "like" to permit a valid comparison. Second, the panel must evaluate whether the measure accords less favorable treatment, defined in GATS Article XVII:3 as a modification in the conditions of competition "in favour of" the applying Member's own, or another Member's, services and service suppliers that have been determined to be "like."[4] The focus of the first step is the nature and relationship among the services and service suppliers; the focus of the second step is the treatment accorded by the challenged measure.

9. It is critical to the operation of the MFN and NT obligations that the complaining Member, and ultimately the Panel on the basis of that Party's evidence and arguments, identify the relevant services and service suppliers and establish their "likeness" in the first step. An accurate assessment of the treatment accorded by a challenged measure depends on a clear and precise identification of which services and service suppliers are fairly compared. A proper determination of likeness is central to maintaining the careful balance, reflected in the MFN and NT provisions, between Members' right to draw regulatory distinctions among services and service suppliers where differences exist and their obligation not to favor services and service suppliers of a particular national origin.

1. A Panel Must Conduct a Complete Analysis of the Possible Likeness Between or Among the Services and Service Suppliers at Issue in the Dispute

10. The United States does not find objectionable many of the general aspects of the Panel's interpretation of "like" services and service suppliers under Articles II:1 and XVII.[5] It is worth noting, however, that the Panel reached its interpretation of "like" by turning immediately to discussion of interpretations by prior panels,[6] without endeavoring to interpret the ordinary meaning of the term "like" in its context and in light of the object and purpose of the GATS.[7] The Panel observed that the interpretation of likeness "is based on the competitive relationship between the relevant services and service suppliers." It also noted, correctly, that this approach would not prevent "taking into account the specific characteristics of trade in services, including in particular the intangible nature of services and the existence of four modes of supply,"[8] as well as the "circumstances of [the] case."[9] The Panel also found that "the possibility for Argentina to have access to tax information on foreign suppliers" may also be relevant, in the Panel's view, to the extent it affects the competitive relationship of services and service suppliers.[10]

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[4] The United States agrees with the Panel's recognition of "no impediment to using the definition of 'treatment no less favourable' in Article XVII in the context of Article II of the GATS." Panel Report, para. 7.220.

[5] The Panel transposed its likeness analysis under Article II:1 to the scope of Article XVII. Panel Report, para. 7.488. Accordingly, U.S. comments will address the analysis collectively, except where otherwise indicated.

[6] Panel Report, para. 7.155.

[7] In contrast, the Panel did undertake such an interpretative approach in its "less favourable treatment" analysis. Panel Report, paras. 7.204-205.

[8] Panel Report, para. 7.162.

[9] Panel Report, para. 7.163.

[10] Panel Report, para. 7.179.

11. However, establishing whether services and service suppliers are "like" under Articles II:1 and XVII requires conducting an analysis adequate to determine whether the services and service suppliers at issue are "like". The Panel failed to do this. Establishing likeness is not a simple formality. This first step in the MFN and NT analyses is an essential foundation to an accurate and complete comparison of the treatment accorded by a challenged measure. The likeness analysis requires identifying the full scope of services and service suppliers that may be like, and not only assessing the nature and characteristics of services and service suppliers, and the nature and extent of the competitive relationship. Otherwise, the basis for comparison, and any conclusions drawn from such a comparison, may be flawed.

12. The Appellate Body has found – in the context of NT under Article III:4 of the GATT 1994 and Article 2.1 of the *Technical Agreement on Barriers to Trade* ("TBT Agreement") – that the "treatment no less favourable" comparison must not be limited, necessarily, to products identified by the complaining Member, but must compare the "universe" of like products of any Member that the complaining Member has included within its claim.[11] In particular, the Appellate Body noted that:

> In sum, the national treatment obligation of Article 2.1 calls for a comparison of treatment accorded to, on the one hand, *the group of products imported from the complaining Member* and, on the other hand, the treatment accorded to the *group of like domestic products*. In determining what the scope of like imported and domestic products is, a panel is not limited to those products specifically identified by the complaining Member. Rather, a panel must objectively assess, based on the nature and extent of their competitive relationship, *what are the domestic products that are like the products imported from the complaining Member*. Once the universe of imported and domestic like products has been identified, the treatment accorded to all like products imported from the complaining Member must be compared to that accorded to all like domestic products.[12]

13. Therefore, the United States considers that an adequate analysis of likeness under Articles II and XVII must (1) identify the services and service suppliers of any Members (including the responding Member in the case of NT) that the complaining Member alleges are accorded treatment that is less favorable or more favorable; (2) identify the universe of services and service suppliers that can be characterized as like; and (3) conduct an analysis of all relevant evidence to determine whether the services and service suppliers are like.

a. The Analysis Must First Identify the Services and Service suppliers of any Member that the Complaining Member Alleges Are Accorded Treatment Less Favorable or More Favorable

[11] *US – Clove Cigarettes (AB)*, para. 190-196.

[12] *US – Clove Cigarettes (AB)*, para. 191 (emphasis added), *see also EC – Asbestos (AB)*, para. 100.

14. The evaluation of less favorable treatment compares the impact of a challenged measure on the competitive conditions of a group of services and service suppliers of one Member compared to the group of services and service suppliers of another Member that are determined to be like.[13] As a starting point, then, the complaining Member must identify the services and service suppliers of any Member that it considers are accorded treatment that is less favorable, and the services and service suppliers of any Member that it considers are accorded treatment that is more favorable.[14]

b. The Analysis Must Then Identify the Universe of Services and Service Suppliers that Can Be Characterized as Like

15. However, the services and service suppliers identified by a complaining Member may not account for the full range of services and service suppliers that fairly should be characterized as "like." A proper analysis of "treatment no less favourable" must be based on a complete comparison of differences in treatment accorded to all "like" services and service suppliers of the Members at issue. Therefore, a valid "treatment no less favourable" analysis is possible only if there is a valid "likeness" determination.

16. Similarly, in the goods context, the Appellate Body has clarified that the "[t]he products identified by the complaining Member are the starting point in a panel's likeness analysis."[15] This is because "treatment no less favourable" comparison is not limited to the treatment accorded to a *single* product of one Member versus a *single* product of another Member, or to the particular products identified by the complaining Member.[16] Rather, the Appellate Body has recognized that a finding of "treatment less favourable" is based on the treatment accorded to the full group of products of one Member compared to that accorded to the group of products of another Member that are found to be like.[17] For this reason, a panel "must assess objectively, on the basis of the nature and extent of the competitive relationship between the products in the market of the regulating Member, the universe" of products that are "like" the products any other

[13] *US – Clove Cigarettes (AB)*, para. 190-191, *US – Clove Cigarettes (Panel)*, para. 7.269.

[14] *US – Clove Cigarettes (AB)*, para. 192 ("To be clear, a panel's duty under Article 2.1 to identify the products of domestic and other origins that are like the products imported from the complaining Member does not absolve the complainant from making a prima facie case of violation of Article 2.1. *Ordinarily, in discharging that burden, the complaining Member will identify the imported and domestic products that are allegedly like and whose treatment needs to be compared for purposes of establishing a violation of Article 2.1*.") (Emphasis added.)

[15] *US – Clove Cigarettes (AB)*, para. 192

[16] *US – Clove Cigarettes (AB)*, para. 178; *EC – Asbestos (AB)*, para. 100; *EC – Seals (AB)*, para. 2180.

[17] *EC – Asbestos (AB)*, para. 100 ("[A] Member may draw distinctions between products that have been found to be 'like' without, for this reason alone, according to the group of 'like' *imported* products 'less favourable treatment' than that accorded to the group of 'like' *domestic* products."); *see also US – Cloves (AB)*, para. 178 (Thus, the "treatment no less favourable" standard of Article III:4 of the GATT 1994 prohibits WTO Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products vis-à-vis the group of domestic like products."); *EC – Seals (AB)*, para. 2180.

Member in the treatment comparison.[18] In discharging its duty, a panel is bound neither by its terms of reference nor by the evidence presented by the complaining Member.[19]

c. The Analysis Must Then Address all Relevant Evidence to Determine Whether the Services and Service Suppliers are Like

17. To complete the like analysis, a panel must examine all relevant evidence to establish which services and service suppliers of the Members being compared are "like." Given that "like" in this context refers to something "having the same characteristics or qualities as some other" thing,[20] it is necessary to examine all potentially relevant qualities or characteristics to draw such a conclusion. Again, the Appellate Body provided guidance in the goods context on an adequate examination of likeness in *EC – Asbestos*. The Appellate Body recognized that "no one approach will be appropriate for all cases."[21] It further clarified that the criteria set out in the Report of the Working Party on *Border Tax Adjustments* are neither "treaty-mandated nor a closed list," but are "tools" to aid a panel in "sorting and examining" relevant evidence of likeness.[22] In addition, Appellate Body noted that the purpose of applying the *Border Tax* criteria is to assess the "nature and extent" of the competitive relationship between the relevant products,[23] and that the kind of evidence to be examined in assessing the 'likeness' of products will, necessarily, depend upon the particular products and the legal provision at issue."[24] The Appellate Body emphasized that the "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, all of the pertinent evidence."[25]

18. Relating this guidance to examinations of likeness under Articles II:1 and XVII of the GATS, the United States considers that whatever analytical framework is applied, a panel's task is to ascertain, on a case-by-case basis, the existence, nature, and extent of similarity between the relevant products (including any competitive relationship), "weighing all evidence" to make an "overall determination" of whether the services and service suppliers at issue can be characterized as "like"[26] in context of these provisions.

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[18] *US – Clove Cigarettes (AB)*, paras. 190, 192, 196. The Appellate Body found, with respect to Article 2.1 of the TBT Agreement which applies both MFN and national treatment, that the group of imported products of the complaining Member must be compared to the group of like domestic products and the group of like products of any other origin. Where, as here, a complaining Member alleges that less favourable treatment is accorded to another Member's services and service suppliers, the requirement would still apply to identify the groups of like services and service suppliers of any Member to be compared.

[19] US – Clove Cigarettes (AB), paras. 191-192.

[20] *New Shorter Oxford English Dictionary*, p. 1588 (1993).

[21] *EC – Asbestos (AB)*, para. 101.

[22] *EC – Asbestos (AB)*, para. 104.

[23] *EC – Asbestos (AB)*, paras. 99, 103.

[24] *EC – Asbestos (AB)*, para. 103.

[25] *EC – Asbestos (AB)*, para. 102.

[26] *EC – Asbestos (AB)*, paras. 103, 109.

19. Finally, it should be recognized that not *every* likeness determination requires lengthy or elaborate analyses under each of these steps. The nature and degree of analysis depends on the facts and circumstances of a particular dispute, and in some instances, the existence and scope of the "like" products or "like" services and service suppliers are not subject to factual or legal dispute. A panel need not conduct unneeded analysis or fact-finding. At the same time, an adequate legal analysis of likeness *requires in every case* that each of these questions or steps is satisfied.

2. Application of a "Presumption" of Likeness Must Satisfy the Requirements of the Likeness Analysis Under Articles II:1 or XVII

20. In some facts and circumstances, panels have assumed likeness between services and service suppliers and undertaken no further analysis. As Panama observes, where a measure, on its face, distinguishes between services and service suppliers based *solely* on their national origin, panels have assumed that the affected services and service suppliers were like those of the Member taking the measure. "Solely" and "on its face" are the critical concepts. Past panels have adopted this assumption only where, based on the measure at issue and facts in the dispute, there has been no question that the services and service suppliers at issue "are the same in all material respects except for origin."[27] In other words, a panel may presume likeness, but only where it is manifestly clear that there are no material differences between the relevant services and service suppliers other than national origin.

21. For example, the *China – Publications and Audiovisual Visual Products* panel presumed that services and service suppliers of the United States were like those of China where a measure prevented foreign service suppliers from establishing sound recording distribution services in China. In that instance, the Panel expressly acknowledged that it "ha[d] no reason not to believe, nor ha[d] the parties argued, that the measures do not accord different treatment to foreign suppliers based exclusively on their foreign origin."[28] It is significant that even when panels have found that a measure accords treatment based solely on nationality, they conclude that the complaining Member has met its burden of proof with respect to likeness.[29] They do not suggest that a panel may forego analysis and disregard evidence put forward by the responding party seeking to rebut the initial conclusion.

22. The Appellate Body's findings in *Canada – Autos* further illustrate the point. The panel in *Canada – Autos* found that to the extent suppliers supply the same service, they should be considered like.[30] The Appellate Body reversed the panel's conclusions under Article II:1 of the GATS, finding that the panel failed to render an interpretation of the Article based on its "core

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[27] *China – Publications and Audiovisual Services, (Panel)*, para. 7.1284.

[28] *China – Publications and Audiovisual Services, (Panel)*, para. 7.1284.

[29] *E.g.*, *China – Publications and Audiovisual Services (Panel)*, para. 7.975 ("When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the 'like service suppliers' requirement is met.")

[30] Appellant's Submission of Panama, para. 3.1, citing to Panel Report, para. 7.156, quoting Panel Report, *Canada – Autos*, para. 10.248.

legal elements," to render factual findings, and to apply its legal interpretation to the facts found;[31] in particular, the Appellate Body criticized the panel for failing to examine the nature and relationship of service suppliers in the relevant market, and found that the panel:

> [D]id not identify any evidence defining the relationship between manufacturers and wholesale trade service suppliers of motor vehicles in the Canadian market. Furthermore, the Panel did not examine, *in concreto*, the structure of competition in the wholesale trade services market for motor vehicles in Canada.[32]

23. It is worth noting that the presumption of likeness advocated by Panama does not appear in the text of the GATS itself. It is an approach developed first in the context of GATT 1947, and then utilized in the analysis of Article XVII of the GATS,[33] to simplify the likeness analysis in a defined situation – namely, where there is no controversy that the measure itself distinguishes among service and service suppliers based solely on national origin. And, as a tool, it is useful only where it advances the legal analysis of the underlying obligation, and not where it would prevent or distort the analysis. Accordingly, once doubt is raised, the question of whether a measure accords treatment that is *de jure* based solely on origin must not pre-empt or replace an identification of the relevant services and service suppliers and an analysis of the similarities and competitive relationship between them. In this regard, the United States agrees with Argentina that a "presumption of likeness" should not apply automatically or as a matter of right, and must not relieve the complaining Member of its burden to prove likeness. [34] The presumption must not prevent a complete and accurate determination of like services and service suppliers.

24. The panel's approach in *China – Electronic Payment Systems* demonstrates that where a measure does not on its face draw distinctions solely based on national origin, the likeness between relevant services and service suppliers cannot be presumed, and must be established. Once the panel in that dispute identified the possibility that an "other factor" (besides national origin) was relevant, its analysis pivoted from focusing on the *treatment accorded* by the measure to conducting the required likeness analysis.[35] The panel assessed the ordinary meaning of the term "like" in light of its context, applied its interpretation to the facts, and assessed the competitive relationship among the relevant services – independent of the particular treatment accorded by the measure.[36] The Panel in this dispute should have taken the same approach. Once the Panel identified doubt as to whether Argentina's measures, on their face, accord treatment based solely on national origin, the Panel should have ended its "presumption of

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[31] *Canada – Autos (AB)*, para. 171.

[32] *Canada – Autos (AB)*, para. 171.

[33] To our knowledge, no previous panel has applied the presumption of likeness in analysis of Article II of the GATS

[34] *See* Other Appellant Submission of Argentina, para. 62, 65-66.

[35] *China – Electronic Payment Services (Panel)*, paras. 7.697-701.

[36] *China – Electronic Payment Services (Panel)*, paras. 7.697-704.

likeness" inquiry and conducted a broader inquiry into likeness based upon the similarity of the relevant services and service suppliers.

3. The Panel Conducted an Incorrect and Incomplete Analysis of Likeness

25. Argentina appeals the Panel's likeness analysis as legally incorrect and incomplete. The United States agrees. As an initial matter, the Panel did not expressly set out the framework it would apply to identify services and service suppliers and compared them. Rather, after completing a general discussion, the Panel approached the circumstances in the present dispute by utilizing the categories of "cooperating" and "non-cooperating" countries to define the relevant services and service suppliers, and by reacting to the assertion of Panama that the key question of "likeness" is whether the treatment accorded by the challenged measures is based on origin.[37] Once the Panel engaged this question, it never actually reached its basic task: identifying like services and service suppliers with respect to each of the challenged measures. The approach the Panel employed was to (1) identify the services and service suppliers in terms of the treatment that distinguishes them; (2) determine whether a presumption of likeness applies in the context of the GATS where a measure *de jure* discriminates based solely on origin;[38] and (3) determine whether the treatment accorded under the eight challenged measures, based on the classifications in Decree No. 589/2013 is exclusively linked to origin or may also be due to "other factors."

26. The Panel erred in centering its analysis on the test that it found inapplicable in the context of the GATS – whether origin was the sole basis for according the treatment challenged by Panama. Its search for "other factors" that might have triggered Argentina's "defensive tax measures" led it to overlook the inquiry into likeness mandated by Articles II:1 and XVII – identification of the domestic or foreign services and service suppliers "like" the services and services subject to each challenged measure.

a. The Panel Failed to Identify and Assess the Likeness of Services and Service Suppliers Relevant to Each of the Challenged Measures

27. The Panel began its analysis incorrectly by identifying the universe of relevant services and service suppliers, pursuant to Decree No. 589/2013 ("the Decree"), as those of "cooperating" or "non-cooperating" counties. The Panel in essence identified the *treatment* that distinguishes services and service suppliers. However, the Panel was required to identify, with respect to each of the eight measures, the relevant services and service suppliers themselves.[39] According to the Panel's findings, the Decree is "a key element of the eight measures" but is not, itself, "one of the [challenged] measures at issue."[40] Articles II:1 and XVII require a comparison of the

[37] Panel Report, paras. 7.163-164.

[38] Panel Report, para. 7.165.

[39] Panel Report, para. 7.165.

[40] Panel Report, para. 2.4-2.5.

treatment accorded by a challenged measure to like services and service suppliers. The starting point to identifying the "universe" of like services and service suppliers with respect to a measure is to assess the group of services and service suppliers that the complaining Member alleged are accorded less favorable treatment by the challenged measure.

28. Panama provided information as to the modes and services relevant to each challenged measure.[41] However, the Panel did not conduct an analysis of nature and characteristics of these services; identify service suppliers that supply the services; or identify which services and service suppliers of any other Member compete with these services such that they may be characterized as "like." [42] The Panel did not endeavor to ascertain, and Panama did not endeavor to establish as a matter of fact, that the services and service suppliers affected by each measure are "like" in the context of Article II:1 of the GATS.

29. Moreover, Argentina provided evidence that a lack of transparency in a host jurisdiction may affect the "likeness" of services or service suppliers that otherwise may appear similar. Argentina submitted, for example, that such lack of transparency constitutes a characteristic of a service in that it "offers a way to minimize taxes and to obtain financial confidentiality" which can affect consumer perceptions of the service; the consumers to which a service appeals; and the manner in which a consumer uses the services and to what end.[43] Argentina cites trust fund management as just one example of a financial service that has a definitively different use and appeal depending on the transparency of the jurisdiction from which the service operates.

30. The United States takes no position with regard to Argentina's claim that the Panel did not comply with the instructions in Article 11 of the DSU. However, the United States notes that the evidence cited by Argentina includes the types of information that might be relevant to a rigorous analysis to identify the services and service suppliers of other Members, or of Argentina, that were "like" in respect of the eight challenged measures.

b. The Panel Incorrectly Analyzed The Treatment Accorded Rather Than Services and Service Suppliers

31. Instead of undertaking an analysis that would identify and assess the nature of relevant services and service suppliers and the competition between them, the Panel focused its likeness analysis entirely on the treatment accorded by Argentina's measures. It is worth noting that the text of the Decree sets out criteria, relating to the availability of tax information, according to which services and service suppliers obtain favorable treatment.[44] Nevertheless, the Panel's approach to the likeness analysis was targeted exclusively at assessing whether the treatment accorded by the measures is based solely on origin.

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[41] Panel Report, para. 7.97

[42] For example, because of the deficiency of its likeness analysis, the Panel is forced to identify, in the context of determining whether Measure 6 accords "treatment no less favourable", what services actually are implicated. Panel Report, para. 7.334. ("We wish first of all to address the question of the services affected by this measure.")

[43] Other Appellant Submission of Argentina, paras. 104-107.

[44] Panel Report, para. 2.5.

32. The Panel considered, and correctly rejected, Panama's argument that likeness under Article II:1 of the GATS must be presumed where a measure is *de jure* discriminatory based solely on national origin.[45] It also correctly rejected Panama's assertion that, in fact, Argentina's measures are discriminatory based solely on origin.[46] At this point, the Panel should have ceased its analysis of the nature and impact of the *treatment accorded* by the measures, and evaluated which services and service suppliers were like those allegedly subject to less favorable treatment.

33. Instead, the Panel persisted with an analysis of whether the treatment accorded by the measures is based solely on origin or any other factor.[47] It determined that the availability of tax information for services and service suppliers might affect the competitive relationship among services and service suppliers, such as through consumer preferences.[48] However, the Panel did not, in fact, compare the competitive relationship between any services and service suppliers identified as relevant to any of the eight specific challenged measures. Rather, the Panel examined how the Decree was implemented.[49] Noting that Argentina may designate a country as "cooperating" in anticipation of having access to the required tax information, the Panel concluded that in light of this inconsistency "current circumstances make it impossible to compare the relevant services and services in order to evaluate relevant 'other factors' in addition to their origin."[50] In other words, the Panel determined, based on the *treatment accorded* by Argentina's under the Decree, that the services and service suppliers affected by the eight measures are "like by reason of origin."[51]

34. The Panel erred by exhausting its likeness analysis through the question of whether the treatment accorded by the measures (as determined by the Decree) is based solely on origin. The question of whether the treatment accorded by a measure is based solely on origin has no inherent relevance to the likeness of services and service suppliers. Indeed, if a Member accords treatment to the services of another Member based on the conclusion that they are not like other services, an analysis based exclusively on whether nationality was a criterion would disregard the possibility that the services were actually different. The Panel did not explain how an assessment of the treatment accorded by the measures would satisfy the interpretation of "likeness" it adopted. In framing its inquiry around whether the treatment accorded is based solely on origin, rather than on a comparison of services and service suppliers implicated by the particular challenged measures, the panel failed to identify all of the relevant services and service suppliers and assess all of the potentially relevant indicia and factors of likeness with respect to each measure.

35. Interpreting the nature and effect of the treatment accorded by a measure is the task of the second step in the analysis under Articles II and XVII, which is distinct from the preliminary,

[45] Panel Report, para. 7.165.

[46] Panel Report, para. 7.166.

[47] Panel Report, para. 7.165.

[48] Panel Report, para. 7.179.

[49] Panel Report, para. 7.183.

[50] Panel Report, para. 7.184

[51] Panel Report, para. 7.185.

threshold question of whether the services and service suppliers at issue are "like." The Panel needed to identify the nature and quality of the services and service suppliers affected or potentially affected by each measure in order to make a judgment about their similarity, taking account relevant factors and circumstances. The Panel's mistaken focus on the treatment accorded led the Panel not to address these critical issues or to sort and evaluate the evidence relevant to likeness.

4. The Panel's Failure to Conduct a Correct and Complete Likeness Analysis Is Analogous to Panel's Failure in *EC – Asbestos*

36. The Panel's failure to evaluate the similarity of the services and service suppliers, including the competitive relationship among the services at issue, is analogous to the panel's failure to examine all the relevant criteria and evidence of likeness in *EC – Asbestos*. The Appellate Body in *EC – Asbestos* found that the panel failed to apply the legal framework it adopted in a manner that would ascertain whether the relevant products are properly characterized as "like." The Appellate Body affirmed that a determination of likeness is a critical, separate inquiry from the question of "treatment no less favourable," and that a panel does not fulfill its duty to conduct a careful and thorough analysis by relying on a single factor of likeness or partial analysis of the evidence.[52]

37. The issue in *EC – Asbestos* was whether asbestos, and products containing asbestos, were "like" certain domestic substitutes such as PVA, cellulose and glass ("PCG") fibres, and products containing such fibres. That panel cited the approach outlined by the working party in *Border Tax Adjustments*, which considered: (1) the properties, nature and characteristics of the products, (2) the end uses, (3) consumer perceptions and behaviors, and (4) tariff classification. The panel found that the products were "like," primarily on the basis of their substitutability for "a small number" of end-uses.[53]

38. The Appellate Body found that the panel committed legal error by failing to properly apply the legal framework it had adopted, and, in so doing, failing to examine the relevance of the health risk associated with asbestos. The Appellate Body critiqued the panel analysis for setting out a framework – the *Border Tax* criteria – and then ignoring and conflating the distinct elements of the framework.[54] In the view of the Appellate Body, the health risk associated with asbestos was a relevant "physical property" under the first *Border Tax* criterion, which constituted strong evidence weighing against likeness.[55] The Appellate Body further considered

[52] *EC – Asbestos (AB)*, para. 109.

[53] *EC – Asbestos (AB)*, para. 125.

[54] *EC – Asbestos (AB)*, para. 125 ("[T]he Panel disregarded the quite different 'properties, nature and quality' of chrysotile asbestos and PCG fibres, as well as the different tariff classification of these fibres; it considered no evidence on consumers' tastes and habits; and it found that, for a "small number" of the many applications of these fibres, they are substitutable, but it did not consider the many other end-uses for the fibres that are different. Thus, the only evidence supporting the Panel's finding of "likeness" is the "small number" of shared end-uses of the fibres.")

[55] *EC – Asbestos (AB)*, para.

that the health risk posed by asbestos would very likely shape consumer choices.[56] It applied a methodical analysis to assess the "categories of characteristics" that the products may share, e.g., the physical properties of the products; the extent to which the products are capable of serving the same or similar end-uses; and the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand.[57]

39. The task of sorting and examining evidence to determine likeness is no less critical in the context of Articles II:1 and XVII of the GATS, with respect to services and service suppliers. The Appellate Body's findings with respect to determining likeness under the Article III:4 of the GATT are directly relevant. The essence of the analysis is a comparison of the nature and extent of similarity, including the competitive relationship between relevant services and service suppliers. Any framework adopted to aid that assessment must be methodically applied to enable an assessment of all relevant evidence.

5. Interpretation of Regulatory Characteristics in the Context of Articles II:1 and XVII of the GATS Is Analogous to Interpretation of Physical Properties in the Context of Article III:4 of the GATT 1994

40. The Appellate Body's interpretation and application of the "physical properties" criterion in *EC – Asbestos* suggests how a regulatory characteristic might enter into the analysis under Articles II:1 and XVII of the GATS. As the Panel noted, one of the distinct aspects of services is their intangible nature. Therefore, prior panel reports have referred to the "nature" of services rather than to their physical characteristics. In addition, the supply of a service often is shaped by a regulatory framework, such that the framework may define one or more of the characteristics or properties of the service and service supplier. The framework may define, for example, the uses for which a service is capable of being applied (e.g., "end-uses"); how consumers perceive and use the service; the context in which a consumer would use a service; or otherwise may affect the conduct of a service or service supplier in the marketplace. In this sense, the relevance of regulatory characteristics in defining the nature of a service and service supplier varies depending on the characteristics' significance, in the same way that the relevance of physical characteristics in defining the nature of a product varies depending on the characteristics' significance. For example, the Appellate Body considered that the carcinogenicity of asbestos was a "defining aspect of the physical properties" and a "highly significant physical difference."[58] By contrast, in *Mexico – Soft Drinks*, the panel considered that the different physical properties of beet sugar, cane sugar, and high fructose corn syrup were of no consequence.[59]

41. In this dispute, Argentina argued that the lack of transparency in a home jurisdiction affects the nature of the affected services and service suppliers. This might be a relevant factor of likeness, not because it defines the *treatment accorded* (as the Panel interpreted and applied

[56] *EC – Asbestos (AB)*, para. 121.

[57] EC Asbestos (AB), para.

[58] *EC – Asbestos (AB)*, para. 114.

[59] *Mexico – Soft Drinks (panel)*, para. 8.103.

the factor) but with respect to how a lack of transparency shapes or affects the nature and competitive relationship of the services and service suppliers. The Panel's failure to consider that possibility invalidates its conclusion.

B. The Panel's "Treatment No Less Favourable" Analysis Under Article XVII Correctly Accounted for Regulatory Context but Misconstrued Its Meaning

42. The United States confines its observations with respect to the Panel's analysis of "treatment no less favourable" to Article XVII. Panama claimed that three of Argentina's tax measures – Measures 2, 3, and 4 – impose higher burdens and costs on services and service suppliers of non-cooperating Members than on like domestic services and service suppliers.[60] The Panel agreed, but concluded that such treatment is not "less favourable" within the meaning of Article XVII, because the measures are "designed precisely to guarantee that the competitive relationships between Argentine services and service suppliers and those of any other Member […] is on an equal footing" and "to address risks caused by lack of transparency in their respective markets."[61] Panama appeals this conclusion, finding error in (1) the Panel's decision to take account of regulatory aspects of Argentina's treatment of services and service suppliers in its analysis of whether that treatment was more favorable;[62] and (2) the basis for the Panel's finding that Argentina's measures were designed to offset a competitive advantage conferred by Panama's refusal to share tax information with foreign jurisdictions.[63]

43. Panama's criticisms are largely misplaced. With regard to the first point, the treatment in question is part of Argentina's tax system, and to seek to analyze it outside of that regulatory context would risk misunderstanding its effect on both domestic and foreign services and service suppliers. With regard to the second point, Panama correctly finds error in an aspect of the Panel's findings; however, the United States notes the key finding that Argentina's measures were aimed at protecting its ability to assess taxes based on accurate information. In this context, Panama's refusal to share tax information was a competitive *dis*advantage in its service suppliers' efforts to sell to Argentine suppliers who sought to obey the law. Footnote 10 to Article XVII specifies that Argentina bears no obligation to offset this disadvantage by allowing the use of unverifiable information provided by Panamanian suppliers.

1. The Panel Found Incorrectly that Argentina's Tax Measures Were Designed to Affect the Competitive Relationship Between Services and Service Suppliers

44. It is useful to begin with Panama's second objection. The United States agrees that the Panel lacked a valid and coherent basis to conclude that measures 2, 3 and 4 were designed to affect the nature of the competitive relationship among services and service suppliers. As Panama notes, the finding created a contradiction in the Report, insofar as the Report concluded

[60] Panel Report, para. 7.640.

[61] Panel Report, para. 7.521.

[62] Appellant's Submission of Panama, para. 4.24.

[63] Appellant's Submission of Panama, para. 4.40.

elsewhere that the exchange of tax information is *not* reflected in the competitive relationship between services and services of cooperating and non-cooperating countries. Panama also notes correctly that, in support of its finding on competitive relationship, the Panel Report does not cite to evidence pertaining to Argentina's particular measures and market, but generalized statements and reports by the OECD and G-20 as to the nature and purpose of defensive tax measures in general.[64]

45. The United States would note further that, where the Panel Report *does* cite to evidence pertaining to Argentina's particular measures, the rationale reflected is to protect against risks to the Argentina's tax collection system. For example, the Panel describes Measure 2 as "an instrument used to respond to the existence of certain tax situations which Argentine authorities perceive to be a risk for the tax collection system, with lack of tax transparency being the trigger[…]."[65] Measures 3 and 4 are described in similar terms.[66] Likewise, when the Panel explains the purpose of the measures in the context of the analysis of Article XX(c), it notes that the measures are designed to prevent tax avoidance and other harmful practices.[67] In the view of the United States, the Panel properly should have concluded that Argentina imposed stricter tax measures on services and service suppliers for which it lacked access to tax information for the purpose of protecting the integrity of its tax system. The Panel was incorrect to interpret the nature of the measures as an intervention in the competitive relationship among services and services of domestic and non-cooperating countries.

2. The Panel Misconstrued the Significance of the Regulatory Aspects of Services and Service Suppliers from Jurisdictions Lacking Tax Transparency

46. Turning to Panama's first objection, the United States considers that the Panel was correct to take into account the regulatory aspects of services' and service suppliers' host jurisdictions. However, the Panel misconstrued the relevance of another Member's regulatory framework to the less favorable treatment analysis under Article XVII and in the given circumstances. The regulatory regime of a Member that does not share tax information does not constitute the legal basis for Argentina to intervene in conditions of competition as between its own services and service suppliers and like services and service suppliers from the other Member. Rather, the regulatory framework of a non-cooperating Member is relevant because it is the basis or reason for possible disadvantages its services and service suppliers experience in jurisdictions that require greater transparency.

47. Argentina's tax measures apply an adjustment where Argentina lacks access to verifiable tax information regarding transactions. When Argentina has access to tax information, the stricter treatment is not accorded. The Panel acknowledged that Argentine services and service suppliers are accorded the same treatment as the services and service suppliers of cooperating

[64] Appellant's Submission of Panama, para. 4.37; Panel Report, para. 7.509-7515.

[65] Panel Report, para. 7.517.

[66] Panel Report, paras. 7.517-518.

[67] Panel Report, paras. 7.637-518-640.

countries, because Argentina is able to access the tax information of its own services and service suppliers.[68] Therefore, the relative burdens or advantages that a service or service supplier may experience in this instance result from the level of tax transparency of its host jurisdiction. Article XVII does not require a Member to shape or adjust its measures to compensate for a disadvantage owing to a service or service supplier's foreign character. The text of Article XVII makes clear, in footnote 10, that:

> Specific commitments assumed under this Article shall not be construed to require any Member to compensate for inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

48. Footnote 10 clarifies that Argentina would not be required to modify its tax measures to compensate for the competitive disadvantages of services or service suppliers resulting from their foreign character due to their home regulatory regimes. In this respect, the interpretation of footnote 10 in Panama's submission is exactly backwards. Panama posits that the lack of transparency in the regulatory regime of another Member constitutes an "inherent competitive advantage" for its service suppliers vis à vis service suppliers subject to more transparent regimes.[69] Panama's submission interprets footnote 10 incorrectly to mean that a Member seeking to impose transparency requirements with respect to *all* services and service suppliers, irrespective of origin, must not apply such a measure if it would minimize or neutralize an "inherent competitive advantage" of a service or service supplier obtained by virtue of the foreign regulatory regime. While supplying a service on terms that tax authorities will not be able to verify might be an advantage in sales to customers seeking to obscure their tax liability, it is a disadvantage from the perspective of law-abiding Argentine customers and Panamanian suppliers that seek to comply with Argentine laws.

C. The Panel Correctly Determined That Paragraph 2(a) of the Annex on Financial Services Covers All Forms of Measures Affecting the Supply of Financial Services and Is Not Limited to Measures That Have Particular Effects on That Supply

49. With respect to Panama's claims regarding measure 5 (requirements relating to reinsurance services) and measure 6 (requirements related to the Argentine capital market), Argentina has invoked the prudential exception found in paragraph 2(a) of the GATS Annex on Financial Services.

50. Panama now appeals one narrow aspect of the Panel's interpretation of the exception, and the observations that the United States offers here are limited to the Appellate Body's analysis of that narrow question. Specifically, Panama requests that the Appellate Body "reverse the Panel's finding that the prudential exception 'covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a) of the . . . Annex [on Financial

[68] Panel Report, para. 7.486.

[69] Appellant's Submission of Panama, para. 4.29.

Services],' as set out in paragraph 7.847 of the Report."[70] Panama argues that the exception does not cover "all types of measures" because the title of the exception, "Domestic Regulation," limits the exception's scope to measures that do not "impose[] restrictions on the entry of foreign suppliers into a market."[71] Panama emphasizes that Article VI of the GATS also has the title "Domestic Regulation."

51. Panama's analysis is flawed. Paragraph 2(a) makes clear, as the Panel recognized, that the prudential exception covers all forms of measures affecting the supply of financial services and is not limited to measures that have particular effects on financial service suppliers or on the supply of financial services. Panama's reasoning is also inconsistent with the context of this provision, and with the aim of the exception, as reflected in the text, to recognize in broad and flexible terms the ability of Members to take measures for prudential reasons.

1. The Text of the Prudential Exception Makes Clear That the Exception Covers All Forms of Measures

52. By its terms, the prudential exception applies to all "measures" that are taken "for prudential reasons" and not "used as a means to avoid of avoiding the Member's commitments or obligations" under GATS:

> Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking *measures* for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where *such measures* do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

53. The exception twice refers to "measures" without limitation to a particular form or type that the measures must take. The first sentence of the exception provides that "a Member shall not be prevented from taking *measures* for prudential reasons," while the second sentence refers back to "such *measures*," creating a linkage to the first sentence.

54. "Measures" is defined in Article XXVIII of GATS to mean "any measure by a Member, *whether in the form* of a law, regulation, rule, procedure, decision, administrative action, *or any other form*." The definition is clear that "measures" includes all possible forms of measures, without limitation to a subset of measures that do or do not have a particular effect on a service supplier or on the supply of a service. Because the Annex on Financial Services "applies to measures affecting the supply of financial services,"[72] the term "measures" in the prudential exception means all forms or types of "measures affecting the supply of financial services."

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[70] Appellant's Submission of Panama, para. 6.33.

[71] Appellant's Submission of Panama, para. 6.27.

[72] *See* GATS Annex on Financial Services, para. 1(a).

55. The only other GATS provision that expressly refers to prudential matters confirms this intention. That provision, found in paragraph 3 of the Annex on Financial Services and entitled "Recognition," twice refers to "prudential measures" without limitation to a subset of such measures. Subparagraph 3(a) provides that "[a] Member may recognize prudential measures of any other country in determining how the Member's measures relating to financial services shall be applied" and subparagraph 3(c) refers to situations "[w]here a Member is contemplating according recognition to prudential measures of any other country."

2. The Title of Paragraph 2 of the Annex on Financial Services Does Not Limit the Breadth of the Prudential Exception

56. Although a title can be useful to confirm an interpretation of a provision or resolve ambiguity in a provision, it is not intended to take the place of the detailed text of the provision itself. In each of the disputes that Panama cites,[73] the Appellate Body noted that the title of a provision was consistent with the interpretation of the text of the relevant provision. The title did not limit the ordinary meaning of the provision's terms or otherwise imbue the provision with a new and alternative meaning. And certainly the parties to those disputes did not ask the Appellate Body to replace the meaning of a defined term with their own novel interpretation based on the title.

57. Nothing about the particular title at issue in this dispute suggests that a different approach is appropriate here. Panama argues that the title "defines the type of measures that may be covered,"[74] apparently meaning that the exception applies only to instruments that take the form of "regulations." This is, in fact, one meaning of the term "regulation."[75] However, in light of the breadth of the provisions under that heading, the more relevant definition is "[t]he action or process of regulating a thing or person; the state of being regulated."[76] Thus, the title is more properly understood as referring to what the measures do (regulate a thing or person) rather than the form they take. Panama also seeks to differentiate "regulations" from market access measures covered by GATS Article XVI,[77] but nothing in either provision supports such a distinction. Quantitative restrictions or corporate form requirements may play a role in "regulating a thing or person." If so, they would potentially be subject to both Article XVI *and* Article VI.

58. The breadth and flexibility of the term "domestic regulation" is confirmed by the unqualified use of the defined term "measures," as discussed above, as well as other elements of the provision's text. At the very outset, the text of the provision makes clear that Members intended that it apply to all of GATS. The first sentence begins by stating that "[n]otwithstanding *any other provisions of the Agreement*, a Member shall not be prevented from

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[73] Appellant's Submission of Panama, para. 6.17 (citing *China – Raw Materials* (AB), *US – Carbon Steel* (AB), *US – Softwood Lumber* IV (AB)).

[74] Appellant's Submission of Panama, para. 6.17.

[75] *New Shorter Oxford English Dictionary*, p. 2350 (1993) ("A rule prescribed for controlling some matter, or for the regulation of conduct; an authoritative direction, a standing rule.").

[76] *New Shorter Oxford English Dictionary*, p. 2350 (1993).

[77] Appellant's Submission of Panama, para. 6.27.

taking measures for prudential reasons." The second sentence of the exception also refers to "*the* provisions of the Agreement" without limitation. Subparagraph 2(b), which is also under the same "Domestic Regulation" title and provides an additional exception related to the disclosure of information, also applies to "the Agreement" in its entirety. Accordingly, the concept of "domestic regulation" in the context of Paragraph 2 of the Annex on Financial Services includes measures that may be inconsistent with any of the obligations of GATS, including, for example, measures that have an effect on the supply of a service inconsistent with the market access obligations of Article XII.

59. The prudential exception also includes a broad, non-exhaustive list of "prudential reasons" for which measures may be taken: "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 reasons are not exclusive, and the exception makes clear that its scope is broad and encompasses other prudential reasons or considerations beyond those expressly listed.[78] As with other elements of the provision, the list of prudential reasons places no limitation on the form that a measure may take or on the effect that a measure may have on services or service suppliers. And by specifying measures taken "to ensure" a particular outcome, the list indicates that the opposite is true, and that measures taken for prudential reasons may have a broad range of possible effects on services and service suppliers.

60. The analytical test that the text of the provision establishes also demonstrates Members' intent to establish a broad and flexible scope for the exception as a whole. The prudential exception recognizes a Member's ability to take measures "for prudential reasons" so long as they are not "used as a means of avoiding the Member's commitments or obligations" under the GATS. In those plain terms, the provision focuses the inquiry on the reasons for taking a measure and ensures a high degree of deference will be afforded to a Member in determining whether the measure, as a whole, falls within the exception.

61. With respect to Panama's arguments concerning Article VI, it is clear that the title "Domestic Regulation" has not reduced the scope of measures covered by that provision, either. Instead, the text of Article VI refers to a wide range of measures, with a variety of potential effects, including "all measures of general application affecting trade in services" (Article VI:1); "administrative decisions affecting trade in services" (Article VI:2); "procedures" (Article VI:2); "authorization . . . for the supply of a service" (Article VI:3); and "qualification requirements and procedures," "technical standards," and "licensing requirements" (Articles VI:4 and VI:5). As with the prudential exception, where Members intended a particular scope for a provision, they identified that scope in the text of the provision itself.

3. Panama's Interpretation Would Frustrate the Aim of the Exception, as Reflected in its Text, to Preserve Members' Ability to Take Measures for Prudential Reasons

62. Panama's interpretation of the title would also fundamentally frustrate the object and purpose of the exception as reflected in its text. It is well recognized by WTO Members that the

[78] *See* Panel Report, paras. 7.868-7.875.

prudential exception preserves the broad discretion of national authorities to protect the financial system, and includes measures directed at individual financial institutions or cross-border financial service suppliers and measures to promote systemic stability. In discussions on financial services in meetings of the Council for Trade in Services, for example, 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.[79]

63. As the Panel recognized in this dispute,[80] 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."[81]

64. Finally, to the extent that Panama's asserts that the Panel "failed to give effect to the term 'domestic regulation'"[82] because it did not specifically "define" the title as a separate element, that assertion is without support.[83] The Panel specifically noted that it "must take into account the heading" of the prudential exception "in interpreting the terms of paragraph 2(a)"[84] and incorporated the provision text, the title, and the larger GATS context into its determination. That mode of interpretation is consistent with Appellate Body practice, including in the cases cited by Panama,[85] and nothing required the Panel to define the title as an element separate from the prudential exception as a whole.

65. In sum, the unqualified use of the defined term "measures" in the prudential exception leaves no doubt that the exception covers all forms of measures, no matter their particular effect on services or service suppliers. This interpretation is confirmed by the broader textual context of GATS and the object and purpose of the prudential exception. The Panel thus correctly determined that the prudential exception "covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a) of the . . . Annex [on Financial Services]," and the Appellate Body should decline Panama's request to reverse the Panel's finding in this regard.

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[79] *See* Council for Trade in Services, Special Session, "Report of the Meeting Held on 3-6 December 2001" (S/CSS/M/13, 26 February 2002), paras. 267, 268, 271, 272, and 275.

[80] Panel Report, paras. 7.849-7.850.

[81] *See* Council on Trade in Services, "Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS)" (S/L/92, 28 March 2001), para. 21.

[82] Appellant's Submission of Panama, para. 6.2

[83] Appellant's Submission of Panama, para. 6.31.

[84] Panel Report, para. 7.840.

[85] Appellant's Submission of Panama, para. 6.17 (citing *China – Raw Materials* (AB), *US – Carbon Steel* (AB), *US – Softwood Lumber* IV (AB)).

III. CONCLUSION

66. The United States wishes to thank the Appellate Body for its consideration of the views set out in this submission. The United States also may take the opportunity of its oral statement to address other issues of systemic importance raised in the appeals of the Panel Report in this dispute.