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ARGENTINA - MEASURES RELATING TO TRADE IN GOODS AND SERVICES

REPORT OF THE PANEL

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Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
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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
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China — Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012

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Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998
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Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996

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US — Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010
US — Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002
US — Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998
US - Shrimp (Article 21.5 - Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001
US – Shrimp (Thailand)	Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R

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US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004
US — Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012
US — Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000

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ARG-5	OECD, Harmful Tax Competition – An Emerging Global Issue (1998)	OECD, Harmful Tax Competition – An Emerging Global Issue, 1998
ARG-6	OECD, Towards Global Tax Co-operation (2000)	OECD, Towards Global Tax Co-operation. Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs. Progress in Identifying and Eliminating Harmful Tax Practices
ARG-7	OECD, 2001 Report	OECD, The OECD's Project on Harmful Tax Practices: The 2001 Progress Report
ARG-8	Note from the Minister of the Economy and Finance of Panama to the Secretary-General of the OECD (2002)	Note from the Minister of the Economy and Finance of Panama to the Secretary-General of the OECD, 15 April 2002
ARG-9	OECD, 2004 Report	OECD, The OECD's Project on Harmful Tax Practices: The 2004 Progress Report
ARG-10	Global Forum, A Process for Achieving a Global Level Playing Field (2004)	OECD, A Process for Achieving a Global Level Playing Field, Global Forum on Taxation, Berlin, 3-4 June 2004
ARG-14	G-20, Declaration, Summit on Financial Markets and the World Economy (2008)	G-20, Declaration, Summit on Financial Markets and the World Economy, 15 November 2008
ARG-15	G-20, Leader's Statement (2009)	G-20, Leader's Statement, The Pittsburgh Summit, 24-27 September 2009
ARG-17	OECD, Global Forum, Moving Forward on the Global Standards of Transparency and Exchange of Information for Tax Purposes (2009)	OECD, Global Forum, Moving Forward on the Global Standards of Transparency and Exchange of Information for Tax Purposes, Mexico, 1-2 September 2009
ARG-19	G-20, Cannes Summit Final Declaration: Building our Common Future (2011)	G-20, Cannes Summit Final Declaration: Building our Common Future: Renewed Collective Action for the Benefit of All, 2011
ARG-20	G-20, Leaders Declaration (2012)	G-20, Leaders Declaration, Los Cabos, Mexico, 2012
ARG-21	Action Plan on Base Erosion and Profit Shifting (2013)	OECD, Action Plan on Base Erosion and Profit Shifting, 2013
ARG-22	OECD, Addressing Base Erosion and Profit Shifting (2013)	OECD, Addressing Base Erosion and Profit Shifting (BEPS), 2013
ARG-24	OECD, Behind the Corporate Veil – Using Corporate Entities for Illicit Purposes (2001)	OECD, Behind the Corporate Veil – Using Corporate Entities for Illicit Purposes, 2001
ARG-25	FATF, The FATF Recommendations (2012)	FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, The FATF Recommendations, February 2012
ARG-26	GAFISUD, *Recomendaciones del GAFI* (2012)	GAFISUD, *Estándares Internacionales sobre la Lucha contra el Lavado de Activos y el Financiamiento del Terrorismo y la Proliferación, Las Recomendaciones del GAFI*, February 2012
ARG-32	Law on concealment and laundering of money of criminal origin	Law No. 25.246 of 5 May 2000 on concealment and laundering of money of criminal origin

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ARG-36	Global Forum, Tax Transparency 2013	Global Forum on Transparency and Exchange of Information for Tax Purposes, Tax Transparency 2013: Report on Progress, 2013
ARG-40	Global Forum, Terms of Reference (2010)	OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information for Tax Purposes, 2010
ARG-41	OECD, Tax Co-operation 2009 – Towards a level playing field	OECD, Tax Co-operation 2009 – Towards a level playing field - 2009 Assessment by the Global Forum on Transparency and Exchange of Information
ARG-44	AFIP, Offshore companies – Fraudulent manœuvres and harmful tax planning	Federal Administration of Public Revenue (AFIP), *Sociedades Off-shore – Maniobras fraudulentas y planificación fiscal nociva* (Offshore companies – Fraudulent manœuvres and harmful tax planning), 2013
ARG-47	SSN Resolution No. 38.284/2014	Resolution No. 38.284 of the National Insurance Supervisory Authority (SSN) of 21 March 2014
ARG-64	IGJ Resolution No. 1/2014	General Resolution No. 1/2014 of the General Justice Inspectorate (IGJ) of 8 April 2014
ARG-71	Communication "C" No. 65366	Communication "C" No. 65366 of the Central Bank of the Argentine Republic of 26 February 2014
ARG-75	Communication "A" No. 5237	Communication "A" No. 5237 of the Central Bank of the Argentine Republic of 28 October 2011
ARG-85	G-20 Statement on Transparency and Exchange of Information for Tax Purposes (2004)	G-20 Statement on Transparency and Exchange of Information for Tax Purposes, 21 November 2004
ARG-87	G-20 Declaration, Saint Petersburg Summit (2013)	G-20 Declaration, Saint Petersburg Summit, 5-6 September 2013
ARG-88	ASSAL, General solvency criteria – Reinsurance operations	Latin American Association of Insurance Supervisors (ASSAL), *Criterios generales de solvencia – Operaciones de reaseguro* (General solvency criteria – Reinsurance operations), August 1999
ARG-90	G-20 Toronto Summit Declaration (2010)	G-20 Toronto Summit Declaration, 26-27 June 2010
ARG-94	ITIO, Leveling the playing field (2005)	International Trade and Investment Organization (ITIO), Leveling the playing field, OECD Global Tax Forum, Melbourne, 15-16 November 2005
ARG-114	Communiqué, Meeting of Finance Ministers and Central Bank Governors (2009)	Communiqué, Meeting of Finance Ministers and Central Bank Governors, United Kingdom, 2009
ARG-128	Meeting of G-20 Finance Ministers and Central Bank Governors (2014)	Meeting of G-20 Finance Ministers and Central Bank Governors, Cairns, 20-21 September 2014
ARG-135	SSN Resolution No. 38.708/2014	Resolution No. 38.708 of the National Insurance Supervisory Authority (SSN) and the Annex thereto: General Regulations for Insurance Activities (RGAA), of 6 November 2014
ARG-140	IAIS, Systemic Risk and the Insurance Sector (2009)	International Association of Insurance Supervisors (IAIS), Systemic Risk and the Insurance Sector, 25 October 2009
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PAN-47	Note by the WTO Secretariat on economic needs tests (2001)	Note by the WTO Secretariat on economic needs tests, S/CSS/W/118, 30 November 2001
PAN-83	Constitutional Principles on Tax Matters	*Principios de Derecho Constitucional Argentino en Materia Tributaria* (Principles of Argentine Constitutional Law on Tax Matters)
PAN-3 / ARG-35	Decree No. 589/2013	Decree No. 589 of the Federal Administration of Public Revenue (AFIP) of 27 May 2013
PAN-3 / ARG-37	AFIP Resolution No. 3.576/2013	General Resolution No. 3.576 of the Federal Administration of Public Revenue (AFIP) of 27 December 2013
PAN-4 / ARG-42	Gains Tax Law (LIG)	Law No. 20.628 on Gains Tax of 29 December 1973
PAN-9 / ARG-45	Law on Tax Procedure (LPT)	Law No. 11.683 on Tax Procedure of 13 July 1998
PAN-34 / ARG-43	Law on Commercial Companies (LSC)	Law No. 19.550 on Commercial Companies of 3 April 1972
PAN-36 / ARG-27	SSN Resolution No. 35.615/2011	Resolution No. 35.615 of the National Insurance Supervisory Authority (SSN) of 11 February 2011
PAN-40 / ARG-48	SSN Resolution No. 35.794/2011	Resolution No. 35.794 of the National Insurance Supervisory Authority (SSN) of 19 May 2011
PAN-45 / ARG-39	2001 Guidelines	Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS) - Adopted by the Council for Trade in Services on 23 March 2001, S/L/92
PAN-46 / ARG-79	1993 Guidelines	Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164, 3 September 1993
PAN-48 / ARG-49	Capital Market Law	Law No. 26.831 on the Capital Market of 27 December 2012
PAN-58 / ARG-50	CNV Rules 2013	Rules of the National Securities Commission, New Text 2013 (Title XI), approved by means of General Resolution No. 622
PAN-62 / ARG-33	IGJ Resolution No. 7/2005	General Resolution No. 7 of the General Justice Inspectorate (IGJ) of 25 August 2005 (Book III, Title III)
PAN-67 / ARG-69	Communication "A" No. 4662	Communication "A" No. 4662 of the Central Bank of the Argentine Republic of 11 May 2007
PAN-68 / ARG-70	Communication "A" No. 4692	Communication "A" No. 4692 of the Central Bank of the Argentine Republic of 31 July 2007
PAN-71 / ARG-31	Communication "A" No. 4940	Communication "A" No. 4940 of the Central Bank of the Argentine Republic of 12 May 2009

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AEOI	Automatic Exchange of Information
AFIP	Federal Public Revenue Administration
AML/CFT	Anti-money laundering/Combating the financing of terrorism
ASSAL	Association of Latin American Insurance Supervisors
BCRA	Central Bank of the Argentine Republic
BEPS	Base Erosion and Profit Shifting
CDD	Customer due diligence
CNV	National Securities Commission
Cooperative country	Country cooperating for tax transparency purposes
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EOIR	Exchange of information on request
FATF	Financial Action Task Force
FSRB	FATF-style regional body
G-20	Group of Twenty
GAFILAT	Financial Action Task Force of Latin America
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
Global Forum	Global Forum on Transparency and Exchange of Information for Tax Purposes
IAIS	International Association of Insurance Supervisors
ICJ	International Court of Justice
IGJ	General Justice Inspectorate
IMF	International Monetary Fund
IOSCO	Organization of Securities Commissions
LIG	Gains Tax Law
LPT	Law on Tax Procedure
LSC	Law on Commercial Companies
MFN	Most Favoured Nation
MULC	Single Free Foreign Exchange Market
Non-cooperative country	Country not cooperating for tax transparency purposes
N.T. 2013	New Text of 2013 CNV Rules
OECD	Organisation for Economic Co-operation and Development
PRP	Peer review process
RAE	*Real Academia Española* [Spanish Royal Academy]
RIG	Regulation to the Gains Tax Law
SSN	National Insurance Supervisory Authority
TBT Agreement	Agreement on Technical Barriers to Trade
WTO	World Trade Organization
Vienna Convention	Vienna Convention on the Law of Treaties

1 INTRODUCTION

1.1 Complaint by Panama

1.1. On 12 December 2012, Panama requested consultations with Argentina pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article XXII of the General Agreement on Trade in Services (GATS) with respect to the measures and claims set out below.[1]

1.2. Consultations were held in Geneva on 5 February 2013 but failed to resolve the dispute.[2]

1.2 Panel establishment and composition

1.3. On 13 May 2013, Panama requested the establishment of a panel pursuant to Article 6 of the DSU, with standard terms of reference.[3] At its meeting on 25 June 2013, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Panama in document WT/DS453/4, in accordance with Article 6 of the DSU.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Panama in document WT/DS453/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 30 October 2013, Panama requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 11 November 2013, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Pierre Pettigrew
Members:	Mr Gonzalo de las Casas Mr Rodrigo Valenzuela

1.6. Australia, Brazil, China, Ecuador, the European Union, Guatemala, Honduras, India, Oman, the Kingdom of Saudi Arabia, Singapore, and the United States notified their interest in participating in the Panel proceedings as third parties.[6]

1.3 Panel proceedings

1.7. On 12 December 2013, after consultation with the parties, the Panel adopted its Working Procedures[7] and timetable, which were subsequently revised on 24 March and 23 May 2014, respectively.

1.8. The Panel held a first substantive meeting with the parties on 23 and 24 September 2014. A session with the third parties took place on 24 September 2014. The Panel held a second substantive meeting with the parties on 27 and 28 January 2015. On 27 March 2015, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 22 May 2015. The Panel issued its Final Report to the parties on 30 June 2015.

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[1] Panama's request for consultations (WT/DS453/1).
[2] Panama's request for the establishment of a panel (WT/DS453/4).
[3] Panama's request for the establishment of a panel.
[4] See the Minutes of the Meeting of the Dispute Settlement Body held in the Centre William Rappard on 25 June 2013 (WT/DSB/M/333).
[5] Constitution of the Panel established at the request of Panama (WT/DS453/5), para. 2.
[6] Constitution of the Panel established at the request of Panama, para. 5.
[7] See the Working Procedures of the Panel in Annex A.

2 FACTUAL ASPECTS

2.1 Introduction

2.1. This dispute concerns eight financial, taxation, foreign exchange and registration measures imposed by Argentina, mostly[8] on services and service suppliers from countries which Argentina terms "countries not cooperating for tax transparency purposes"[9] (hereinafter, non-cooperative countries).[10] The classification of a country as a "country cooperating for tax transparency purposes" (hereinafter, cooperative country) is provided for in Decree No. 589/2013.[11]

2.2. In this section of the Report, the Panel will begin by describing Decree No. 589/2013, which is the common denominator for the eight measures challenged by Panama. The eight measures at issue will then be described, together with their broader factual context, which includes the relevant Argentine legislation applicable to cooperative countries, the tax transparency standards of the Global Forum on Transparency and Exchange of Information for Tax Purposes (hereinafter, the Global Forum) and the recommendations of the Financial Action Task Force (FATF).

2.3. Where the parties disagree on any factual issue that needs to be resolved, the Panel will address it in its findings.

2.2 Decree No. 589/2013

2.4. Decree No. 589/2013 is the key element of the eight measures challenged by Panama inasmuch as they all refer to services and service suppliers[12] of countries not classified as cooperative under the said Decree.[13]

2.5. Decree No. 589/2013, which is not one of the measures at issue, lays down the requirements for Argentina to grant a country, dominion, jurisdiction, territory, associate State or special tax regime the status of cooperative country.[14] Article 1 of the Decree stipulates as follows in relevant part:

> **Article 1 – ...**
>
> Countries, dominions, jurisdictions, territories, associate States or special tax regimes which have signed with the Government of the ARGENTINE REPUBLIC an agreement on exchange of tax information or a convention for the avoidance of international double taxation with a broad information exchange clause shall be considered cooperative for tax transparency purposes, provided that there is an effective exchange of information.
>
> This status shall lapse in cases where the signed agreement or convention is denounced or becomes inoperative for any reason of nullity or termination governing international agreements or if it is found that there is a lack of effective exchange of information.
>
> A country may also be recognized as cooperative for tax transparency purposes if the government concerned has initiated the required negotiations with the Government of the ARGENTINE REPUBLIC with a view to signing an agreement on exchange of tax

[8] Panama has claimed that two of the eight measures at issue (measures 2 and 3 described below) also affect trade in goods.

[9] The Panel notes that, in its arguments, Panama refers to "beneficiary countries" and "excluded countries" when referring to what Argentina calls "cooperative countries" and "non-cooperative countries", respectively. The Panel has, however, decided to use the terminology employed in Decree No. 589/2013.

[10] Certain requirements in measure 5 (requirements relating to reinsurance services) apply to all foreign countries, whether cooperative or non-cooperative.

[11] Decree No. 589 of the Federal Public Revenue Administration of 27 May 2013 (Decree No. 589/2013), (Exhibits PAN-3 / ARG-35).

[12] See footnote 8 above.

[13] See footnote 10 above.

[14] Decree No. 589/2013 replaces the references to "countries with low or no taxes" contained in the Gains Tax Law and in the Regulation thereto with "countries not considered 'cooperative for tax transparency purposes'". See Article 1 of Decree No. 589/2013, (Exhibits PAN-3 / ARG-35).

> information or a convention for the avoidance of international double taxation with a broad information exchange clause.
>
> The agreements and conventions referred to in this Article shall as far as possible comply with the international standards on transparency adopted by the Global Forum on Transparency and Exchange of Information for Tax Purposes so that by virtue of the application of their domestic rules, the respective countries, dominions, jurisdictions, territories, associate States or special tax regimes with which such agreements or conventions have been signed may not invoke banking, stock market or any other form of secrecy in response to specific requests for information from the ARGENTINE REPUBLIC.
>
> The FEDERAL PUBLIC REVENUE ADMINISTRATION, an autonomous body within the MINISTRY OF THE ECONOMY AND PUBLIC FINANCE, shall establish the criteria for determining whether or not there is effective exchange of information and the necessary requirements for initiating negotiations on the signing of the aforementioned agreements and conventions.

2.6. Article 2 of Decree No. 589/2013 empowers the Federal Public Revenue Administration (AFIP) "to draw up the list of countries, dominions, jurisdictions, territories, associate States and special tax regimes considered cooperative for tax transparency purposes, to publish it on its website (http://www.afip.gob.ar) and to keep the publication up to date in accordance with the provisions of this Decree".[15] According to Argentina, this list is updated annually at the beginning of the fiscal year.[16]

2.7. At the time of issuing this Report to the parties, the list of countries considered by Argentina to be cooperative continues to be the one published on the AFIP website on 1 January 2014 pursuant to AFIP's General Resolution No. 3.576/2013[17] and comprises the following countries: Albania, Andorra, Angola, Anguilla, Armenia, Aruba, Australia, Austria, Azerbaijan, Bahamas, Belgium, Belize, Bermuda, Bolivia, Brazil, British Virgin Islands, Canada, Cayman Islands, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Curaçao, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Faroe Islands, Finland, France, Georgia, Germany, Ghana, Greece, Greenland, Guatemala, Guernsey, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Jamaica, Japan, Jersey, Kazakhstan, Kenya, Republic of Korea, Kuwait, Latvia, Liechtenstein, Lithuania, Luxembourg, Macao, Macedonia, Malta, Mauritius, Mexico, Moldova, Monaco, Montenegro, Montserrat, Morocco, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russia, San Marino, Saudi Arabia, Singapore, Sint Maarten, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turks and Caicos Islands, Turkey, Turkmenistan, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Venezuela, and Viet Nam.

2.8. Pursuant to Article 1 of AFIP Resolution No. 3.576/2013, these cooperative countries are classified into three categories: (a) cooperative countries which have signed a double taxation convention or an information exchange agreement, with a positive assessment of effective exchange of information; (b) cooperative countries with which a double taxation convention or information exchange agreement has been signed but it has not been possible to assess effective exchange; and (c) cooperative countries with which the process of negotiating or ratifying a double taxation convention or information exchange agreement has been initiated.[18]

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[15] Article 2(b) of Decree No. 589/2013, (Exhibits PAN-3 / ARG-35).

[16] Argentina's response to Panel questions No. 9(b), para. 14, and No. 10(b)(ii) and opening statement at the second meeting of the Panel, para. 41. At the second substantive meeting, Argentina stated that "[i]n view of Panama's current position of not negotiating an agreement with Argentina, the AFIP is reviewing whether to maintain this country's [Panama's] status as a country cooperating for tax transparency purposes. This review is part of the ongoing adjustment to include and remove countries from the list of cooperative countries in this year's update, in accordance with the criteria laid down in the legislation". See Argentina's opening statement at the second meeting of the Panel, paras. 42 and 43.

[17] General Resolution No. 3.576 of the Federal Public Revenue Administration (AFIP Resolution No. 3.576/2013), of 27 December 2013, (Exhibits PAN-3 / ARG-37).

[18] AFIP Resolution No. 3.576/2013. (Exhibits PAN-3 / ARG-37).

2.3 The measures at issue

2.3.1 Introduction

2.9. Panama challenges the following eight measures in this dispute[19]:

Measure No.	Description
1	Tax treatment in the collection of gains tax on certain transactions involving non-cooperative countries (hereinafter withholding tax on payments of interest or remuneration)
2	Tax treatment imposed on entry of funds from non-cooperative countries (hereinafter presumption of unjustified increase in wealth)
3	Valuation of transactions with persons from non-cooperative countries (hereinafter transaction valuation based on transfer prices)
4	Criteria for applying deductions (hereinafter payment received rule[20] for the allocation of expenditure)
5	Measures affecting trade in reinsurance and retrocession services[21] (hereinafter requirements relating to reinsurance services)
6	Measures affecting trade in financial instruments (hereinafter requirements for access to the Argentine capital market)
7	Requirements for the registration of companies, branches and shareholders of certain foreign service suppliers (hereinafter requirements for the registration of branches)
8	Measures affecting the repatriation of investments (hereinafter foreign exchange authorization requirement)

2.10. The eight measures challenged by Panama and described below reflect the distinction between cooperative and non-cooperative countries established by Decree No. 589/2013.[22] For example, the withholding tax on payments of interest or remuneration (measure 1), the presumption of unjustified increase in wealth (measure 2), transaction valuation based on transfer prices (measure 3) and the payment received rule for the allocation of expenditure (measure 4) contain explicit references to "jurisdictions with low or no taxes", a reference that has been replaced by "jurisdictions not considered 'cooperative for tax transparency purposes'", pursuant to Decree No. 589/2013. In the case of measure 2, whose legal basis is the unnumbered article following Article 18 of the Law on Tax Procedure (LPT), there is a specific link to the Gains Tax Law (LIG) in the text of this provision.

2.11. The requirements relating to reinsurance services (measure 5) and access to the Argentine capital market (measure 6) contain a specific reference to Decree No. 589/2013. As regards the requirements for the registration of branches (measure 7), Article 192 of IGJ Resolution No. 7/2005 of the General Justice Inspectorate (IGJ) refers to "jurisdictions considered to have low or no taxes". The wording of this Article was updated by Article 1 of IGJ Resolution No. 1/2014, which introduces the expression "countries, dominions, jurisdictions, territories, associate States and special tax regimes considered non-cooperative for tax transparency purposes".[23] Lastly, the foreign exchange authorization requirement (measure 8) in Communication "A" 4940 of the Central Bank of the Argentine Republic (BCRA) refers to "dominions, jurisdictions, territories or associate States included in the list in Decree No. 1.344/98 regulating the Gains Tax Law

[19] Panama's request for the establishment of panel.

[20] Argentina also refers to this rule as the "payment received rule". See Argentina's first written submission, Explanatory Annex No. 1, para. 109. Panama, for its part, refers to the measure in abbreviated form as the rule on "deduction of costs at the time of payment". See Panama's second written submission, paras. 2.498, 2.524, 2.525-2.527, 2.533, 2.535, 2.540, 2.542, 2.544 and 2.571.

[21] The parties disagree on the inclusion of retrocession services within the scope of measure 5. The Panel will address this matter in its findings.

[22] We recall that certain requirements in measure 5 (requirements relating to reinsurance services) apply to all foreign countries, whether cooperative or non-cooperative. See footnote 10 above.

[23] General Resolution No. 1/2014 of the General Justice Inspectorate, of 8 April 2014 (IGJ Resolution No. 1/2014), (Exhibit ARG-64).

No. 20.628 and amendments thereto". This expression was replaced by means of Communication "C" 65366 of the BCRA, which introduces the terminology specific to Decree No. 589/2013.[24]

2.12. Below we shall examine the eight measures at issue.

2.3.2 Measure 1: Withholding tax on payments of interest or remuneration

2.13. Measure 1 consists of a legal presumption that payments made to creditors[25] located in non-cooperative countries as consideration for the granting of credits or loans or the placement of funds abroad represent a net gain of 100% for the purpose of determining the tax base for gains tax. Argentina applies this measure pursuant to Article 93(c) of the LIG[26], which stipulates as follows in relevant part:

> When beneficiaries abroad are paid amounts under the headings indicated below, a net gain shall be presumed against any evidence to the contrary:
>
> (c) Interest or remuneration paid on credits, loans or placements of funds of any origin or type obtained abroad:
>
> 1. Forty-three per cent (43%) when the borrower or loan or fund recipient is an entity governed by Law No. 21.526 or if the transactions involve the financing of imports of depreciable movables – except automobiles – provided by the suppliers.
>
> The presumption established in this section shall also apply if the borrower is one of the other persons covered by Article 49 of this Law, a natural person or undivided estate, provided that the creditor is a banking or financial entity based in a jurisdiction not considered to have no or low taxes[27] in accordance with the rules in this Law and its implementing regulations or in a jurisdiction that has signed an information exchange agreement with the Argentine Republic and also, by application of its domestic rules, may not involve banking, stock market or any other form of secrecy in response to request for information from the competent tax authority. The financial entities covered by this paragraph are those subject to supervision by the respective central bank or equivalent institution.
>
> The same treatment shall apply if the interest or remuneration consists of debt bonds presented in countries with which there is a reciprocal agreement on protecting investment, provided that their registration in the Argentine Republic, in accordance with the provisions of Law No. 23.576 and the amendments thereto, takes place within two (2) years following their issuance.
>
> 2. One hundred per cent (100%) when the borrower or loan or fund recipient is a person covered by Article 49 of this Law, excluding the entities governed by Law No. 21.526 and amendments thereto, a natural person or undivided estate, and the creditor does not meet the condition and requirement specified in the second paragraph of the preceding section.

2.14. Accordingly, the rule presumes, against any possibility of evidence to the contrary, a net gain in the case of interest or remuneration paid on credits, loans or placements of funds of any origin or type obtained abroad. In order to determine the tax base for purposes of the gains tax, the rule determines the percentage to be applied according to whether the creditor[28] delivering the service to the Argentine consumer is located in a cooperative or non-cooperative country: (i) if the creditor is located in a cooperative country, the net gain is presumed to be 43%; (ii) if, on the

[24] Communication "C" No. 65366 of the Central Bank of the Argentine Republic, of 26 February 2014 (Communication "C" No. 65366), (Exhibit ARG-71).

[25] Panama specifies that "[t]his category includes services provided by banks or financial entities in [non-cooperative] countries to consumers in Argentina which are not banking or financial entities". See Panama's first written submission, para. 4.9. See also first written submission, para. 4.10.

[26] Law No. 20.628 on Gains Tax, of 29 December 1973 (Gains Tax Law), (Exhibits PAN-4 / ARG-42).

[27] "Countries with low or no taxes" should be understood to mean non-cooperative countries. See footnote 14 above.

[28] See footnote 25 above.

other hand, the creditor is located in a non-cooperative country, the presumed net gain is 100%. On these bases, Argentina applies a rate of 35% in both cases.[29]

2.15. The presumption of a net gain of 100% only applies when the recipient of the credit or loan or the investor of the funds is a person covered by Article 49 of the LIG, a natural person or an undivided estate, but not if it is a financial entity governed by Law No. 21.526.[30]

2.16. The measure applies to interest or remuneration paid on credits, loans or placements of funds of any origin or type obtained abroad.[31] Argentina points out that "[t]he compensation, cost recovery, commissions and similar payments which creditors may receive as a result of or when granting loans or credits or placing funds in the country are covered by the same regime as is applicable to the corresponding interest."[32]

2.3.3 Measure 2: Presumption of unjustified increase in wealth

2.17. Measure 2 consists of the presumption of unjustified increase in wealth applicable to any entry of funds – for the benefit of Argentine taxpayers – from non-cooperative countries in the context of an ex officio determination of the taxable subject matter by the AFIP for the purpose of gains tax. Argentina applies this measure pursuant to the unnumbered article added after Article 18 of the Law on Tax Procedure (LPT).[33] This article provides as follows:

> In the case of funds from countries with low or no taxes[34] - as indicated in Article 15 of the Gains Tax Law (consolidated text of 1997 and amendments thereto) – irrespective of their nature or purpose or the type of transaction involved, it shall be considered that such funds constitute unjustified increases in wealth for the local borrower or recipient.
>
> Unjustified increases in wealth referred to in the preceding paragraph amounting to over TEN PER CENT (10%) in the form of income disposed of or consumed as non-deductible expenditure, represent net gains during the financial year in which they occur, for the purposes of determining the gains tax and, where applicable, the basis for estimating the taxable transactions omitted from the respective marketing year in terms of value added and internal taxes.
>
> Notwithstanding the provisions in the preceding paragraphs, the Federal Public Revenue Administration shall consider as justified such entries of funds as are conclusively proven by the interested party to have originated from activities actually carried out by the taxpayer or by a third party in those countries or from placements of duly declared funds.

2.18. This presumption of unjustified increase in wealth, therefore, affects gains "irrespective of their nature or purpose or the type of transaction involved" and may be rebutted if the taxpayer "conclusively proves that the funds originated from activities actually carried out by the taxpayer or by a third party in those countries or from placements of duly declared funds".[35]

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[29] Article 91 of the LIG, (Exhibits PAN-4 / ARG-42).

[30] We note that, in Panama's opinion, if the borrower is an Argentine bank or financial entity, there is no difference in treatment pursuant to Article 93(c)(1), first sentence, of the LIG. See Panama's first written submission, footnote 68 and Exhibits PAN-4 / ARG-42.

[31] Pursuant to Article 91 of the LIG, Argentine natural or legal persons which pay taxable profits to beneficiaries abroad act as withholding agents for the tax. For beneficiaries abroad, the tax withheld is a single and final payment and fully discharges their tax obligation. See Exhibits PAN-4 / ARG-42.

[32] Argentina's first written submission, Explanatory Annex No. 1.1, para. 14.

[33] Law No. 11.683, consolidated text of 1978, and amendments thereto, approved by Decree No. 821/1998 of 13 July 1998, published in the Official Journal of the Argentine Republic on 20 July 1998 (Law on Tax Procedure), (Exhibits PAN-9 / ARG-45). Panama refers to the Law on Tax Procedure (Law No. 11.683, consolidated text of 1978, and amendments thereto, approved by Decree No. 821/1998 of 13 July 1998) as Law No. 11.683 on Tax Procedure, of 13 July 1998. See Exhibits PAN-9 / ARG-45.

[34] "Countries with low or no taxes" should be understood to mean non-cooperative countries. See footnote 14 above.

[35] Unnumbered article added after Article 18 of the LPT, (Exhibits PAN-9 / ARG-45).

2.3.4 Measure 3: Transaction valuation based on transfer prices

2.19. Measure 3 consists of applying methods for valuing transactions based on transfer prices in order to determine the tax base for the gains tax payable by Argentine taxpayers. The measure provides that this valuation method applies to transactions between Argentine taxpayers[36] and persons from non-cooperative countries irrespective of whether they are related.[37] Argentina applies this measure pursuant to Article 8, fifth paragraph, and Article 15, second paragraph, of the LIG.[38] The relevant parts of these two provisions are reproduced below:

Article 8

> Operations covered by this article that are conducted with natural or legal persons domiciled, incorporated or located in countries with low or no taxes[39] shall not be considered as consistent with normal arm's-length market practices or prices, in which case the rules of the aforementioned Article 15 shall apply.

Article 15

> Where stable institutions domiciled or located in the country or companies covered by subparagraphs (a) and (b) and trust funds referred to in the subparagraph added after subparagraph (d) of the first paragraph of Article 49, respectively, conduct transactions with natural or legal persons domiciled, incorporated or located in countries with low or no taxes[40], as referred to exhaustively in the regulations, such transactions shall not be considered to be in line with normal arm's-length market practices or prices.

2.20. Accordingly, in order to determine the net gain subject to gains tax of Argentine taxpayers' transactions between the latter and persons domiciled, incorporated or located in non-cooperative countries shall be valued following the rules and procedures for transfer prices between related parties.

2.3.5 Measure 4: Payment received rule for the allocation of expenditure

2.21. Measure 4 also concerns determination of the tax base for gains tax payable by Argentine taxpayers. In this instance, the measure consists of applying the rule of payment received when allocating expenditure for transactions between Argentine taxpayers and persons from non-cooperative countries. Argentina applies this measure pursuant to the last paragraph of Article 18 of the LIG[41], which provides as follows:

> In the case of outlays by local companies which result in profits of Argentine source for foreign persons or entities with which these companies are related or for persons or entities located, incorporated, based or domiciled in jurisdictions with low or no

[36] Specifically, the second paragraph of Article 15 of the LIG refers to "stable establishments domiciled or located in the country or companies covered by subparagraphs (a) and (b) and the trust funds referred to in the subparagraph added after subparagraph (d) of the first paragraph of Article 49". The companies covered by subparagraphs (a) and (b) are those which meet the following requirements: "(a) Having a genuine presence in the territory of residence, having then a commercial establishment where the business is managed and meeting the legal requirements on incorporation and registration and the submission of accounting statements. The assets, risks and functions assumed by the international intermediary must be commensurate with the volume of business; (b) their main activity must not consist of receiving unearned income or of intermediation in marketing goods from or to the Argentine Republic or with other members of the economically related group". With regard to the trust funds mentioned in the second paragraph of Article 15, the regulations mention "trust funds in which the trustor is a beneficiary, except for financial trust funds or where the trustor-beneficiary is a person covered by Title V". See Exhibits PAN-4 / ARG-42.

[37] The measure concerns transactions with "natural or legal persons domiciled, incorporated or located" in non-cooperative countries. See the second paragraph of Article 15 of the LIG.

[38] Gains Tax Law, (Exhibits PAN-4 / ARG-42).

[39] "Countries with low or no taxes" should be understood to mean non-cooperative countries. See footnote 14 above.

[40] "Countries with low or no taxes" should be understood to mean non-cooperative countries. See footnote 14 above.

[41] Gains Tax Law, (Exhibits PAN-4 / ARG-42).

> taxes[42], the allocation to the tax balance may only be made at the time of payment or in any of the cases covered by the sixth paragraph of this Article or, in their absence, if one of the situations indicated arises within the period allowed for submission of the sworn declaration that the respective outlay has been accrued.

2.22. Accordingly, outlays by Argentine entities which constitute profits of Argentine source for persons located, incorporated, based or domiciled in non-cooperative countries shall be allocated to the fiscal year in which payment for the transaction actually takes place (payment received rule).

2.3.6 Measure 5: Requirements relating to reinsurance services

2.23. Measure 5 consists of Argentina's imposition on foreign service suppliers and service suppliers of non-cooperative countries of requirements that they must meet in order to be able to gain access to Argentina's reinsurance services market.[43] This measure is applied pursuant to SSN Resolution No. 35.615/2011[44], as indicated by Panama in its request for the establishment of a panel.[45]

2.24. SSN Resolution No. 35.615/2011[46] has been developed and amended on several occasions: (i) in May 2011, by means of Article 4 of SSN Resolution No. 35.794/2011[47], which develops point 19 of Annex I to SSN Resolution No. 35.615/2011; (ii) in March 2014, by means of SSN Resolution No. 38.284/2014[48], which replaces points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011; and (iii) in November 2014, by means of SSN Resolution No. 38.708/2014, which, according to Argentina, provides for a regulatory reform of the reinsurance sector.[49]

2.25. Points 18, 19 and 20(f) of SSN Resolution No. 35.615/2011 as set out by Panama in its first written submission, hence, prior to the amendment introduced in March 2014 by means of SSN Resolution No. 38.284/2014, read as follows:

Point 18 of Annex I to SSN Resolution No. 35.615/2011

> No authorization may be given to branches of foreign companies based in countries where the rate of gains or similar tax is less than twenty per cent (20%) or where domestic legislation imposes secrecy in regard to the corporate structure of legal persons, or in jurisdictions, territories or States with low or no taxes, so-called "tax havens", and/or countries or territories that do not cooperate in the global fight against money laundering and terrorist financing offences according to the criteria defined by the Financial Action Task Force (FATF).

Point 19 of Annex I to SSN Resolution No. 35.615/2011

> The National Insurance Supervisory Authority, by means of a special reasoned resolution on certain reinsurance transactions duly specified by the requesting insurer, may allow authorized entities to carry out insurance operations in the country, enter into reinsurance contracts with foreign reinsurance entities which conduct their operations from their head office when the magnitude or characteristics of the ceded risks make it impossible to cover such reinsurance transactions on the national reinsurance market. The request shall be submitted prior to entering into the contract and shall be accompanied by all the evidence needed to justify the special criterion.

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[42] "Countries with low or no taxes" should be understood to mean non-cooperative countries. See footnote 14 above.

[43] The Panel will address the question of whether retrocession services are covered by measure 5 in its findings.

[44] Resolution No. 35.615 of the National Insurance Supervisory Authority, of 11 February 2011 (SSN Resolution No. 35.615/2011), (Exhibits PAN-36 / ARG-27).

[45] Panama's request for the establishment of a panel, pp. 5 and 6.

[46] SSN Resolution No. 35.615/2011, (Exhibits PAN-36 / ARG-27).

[47] Resolution No. 35.794 of the National Insurance Supervisory Authority, of 19 May 2011 (SSN Resolution No. 35.794/2011), (Exhibits PAN-40 / ARG-48).

[48] Resolution No. 38.284 of the National Insurance Supervisory Authority, of 21 March 2014 (SSN Resolution No. 38.284/2014), (Exhibit ARG-47).

[49] Argentina's responses to Panel questions No. 61, para. 3; No. 64, para. 2; and No. 66(a), para. 1.

Point 20(f) of Annex I to SSN Resolution No. 35.615/2011

> No authorization for registration as foreign reinsurance entities accepting reinsurance transactions from their country of origin may be given to establishments based in countries where the rate of gains or similar tax is less than twenty per cent (20%) or where domestic legislation imposes secrecy in regard to the corporate structure of legal persons, or in jurisdictions, territories or States with low or no taxes, so-called "tax havens", and/or countries or territories that do not cooperate in the global fight against money laundering and terrorist financing offences according to the criteria defined by the Financial Action Task Force (FATF).

2.26. Accordingly, the wording of points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011 prior to the March 2014 amendment imposed a ban on the supply of reinsurance services by (i) branches of companies in countries not cooperating for the purposes of tax transparency and the global fight against money laundering and terrorist financing offences according to the criteria defined by the FATF (point 18); and (ii) reinsurance establishments which deliver their services from their country of origin which is a non-cooperating country for the purposes of tax transparency and the global fight against money laundering and terrorist financing offences according to the criteria defined by the FATF (point 20(f)).

2.27. Point 19 of Annex I to SSN Resolution No. 35.615/2011, however, provides that the SSN may authorize reinsurance contracts with foreign reinsurance establishments which conduct their operations from their head office if the reinsurance operations cannot be covered on the national reinsurance market, because of the scale or the characteristics of the risks ceded.

2.28. On 19 May 2011, Argentina issued SSN Resolution No. 35.794/2011, which develops the provisions in point 19 of Annex I to SSN Resolution No. 35.615/2011. Article 4 of this Resolution, in particular, provides as follows:

Article 4 of SSN Resolution No. 35.794/2011

> For the purposes of point 19 of Annex I to SSN Resolution No. 35.615, it is stipulated that individual risks exceeding US$50,000,000 (FIFTY MILLION UNITED STATES DOLLARS) may be reinsured with the reinsurance entities mentioned in point 20 of the aforementioned regulations ("approved reinsurers"), for that portion which exceeds the aforementioned amount.

2.29. Consequently, Article 4 of SSN Resolution No. 35.794/2011 develops point 19 of Annex I to SSN Resolution No. 35.615/2011 by stipulating that reinsurance with foreign reinsurance entities which conduct their operations from their head office may be authorized provided that the individual risks exceed US$50,000,000 (fifty million United States dollars). In such cases, the reinsurance will be "for that portion which exceeds the aforementioned amount".

2.30. On 25 March 2014, the date on which Panama submitted its first written submission, Argentina published SSN Resolution No. 38.284/2014, Articles 1 and 2 of which order the replacement of the text of points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011, respectively, by the text set out below:

> ARTICLE 1: Replace point 18 of ANNEX I to SSN Resolution No. 35.615/2011 by the following:
>
> "Branches of foreign companies must prove that the parent company:
>
> (a) Has been incorporated and registered in countries, dominions, jurisdictions, territories or associate States considered 'cooperative for tax transparency purposes', in accordance with the provisions of Decree No. 589/2013 and supplementary regulations.
>
> If the parent company of the branch of the foreign company has not been incorporated and registered in accordance with the terms of the preceding paragraph, it must prove that it is subject to the control and supervision of a body which fulfils

functions similar to those of the NATIONAL INSURANCE SUPERVISORY AUTHORITY, and with which a memorandum of understanding on cooperation and exchange of information has been signed.

(b) Has been incorporated and registered in countries, dominions, jurisdictions, territories or associate States that cooperate in the global fight against money laundering and terrorist financing offences in accordance with the criteria defined in the public documents issued by the FINANCIAL ACTION TASK FORCE (FATF).

If the parent company of the branch of the foreign company has not been incorporated and registered in accordance with the terms of the preceding paragraph, the assessment of the request for authorization shall be subject to enhanced due diligence, proportionate to the risks, and the counter-measures indicated in Recommendation 19 of the FINANCIAL ACTION TASK FORCE (FATF) and the Interpretive Note thereto may be applied."

ARTICLE 2 - Replace subparagraph (f) of point 20 of ANNEX I to SSN Resolution No. 35.615 by the following:

"(f) Prove that they have been incorporated and registered in:

I. Countries, dominions, jurisdictions, territories or associate States considered 'cooperative for tax transparency purposes', in accordance with the provisions of Decree No. 589/2013 and supplementary regulations.

If they have not been incorporated and registered in accordance with the terms of the preceding paragraph, they must prove that they are subject to the control and supervision of a body which fulfils functions similar to those of the NATIONAL INSURANCE SUPERVISORY AUTHORITY, and with which a memorandum of understanding on cooperation and exchange of information has been signed.

II. They have been incorporated and registered in countries, dominions, jurisdictions, territories or associate States that cooperate in the global fight against money laundering and terrorist financing offences in accordance with the criteria defined in the public documents issued by the FINANCIAL ACTION TASK FORCE (FATF).

If they have not been incorporated and registered in accordance with the terms of the preceding paragraph, the assessment of the request for authorization shall be subject to enhanced due diligence, proportionate to the risks, and the counter-measures indicated in Recommendation 19 of the FINANCIAL ACTION TASK FORCE (FATF) and the Interpretive Note thereto may be applied."

2.31. Point 19 of Annex I to SSN Resolution No. 35.615/2011 and Article 4 of SSN Resolution No. 35.794/2011 were not affected by this amendment introduced by SSN Resolution No. 38.284/2014.

2.32. Accordingly, following the amendment of March 2014, points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011 provide that foreign suppliers of reinsurance services may be authorized to accept reinsurance operations from their country of origin (point 20(f)) or through a branch in Argentina (point 18) provided that they meet the following requirements: (i) Prove that they have been incorporated and registered in cooperative countries (in the case of branches, this proof applies to the parent company); and (ii) prove that they have been incorporated and registered in countries that cooperate in the global fight against money laundering and terrorist financing offences in accordance with the criteria defined in the public documents issued by the FATF (in the case of branches, such proof relates to the parent company).

2.33. If incorporation and registration of service suppliers in a cooperative country is not proven, points 18 and 20(f) provide that they must prove that they are subject to the control and supervision of a body (i) which fulfils functions similar to those of the National Insurance Supervisory Authority; and (ii) with which a memorandum of understanding on cooperation and exchange of information has been signed. If it is not proven that they have been incorporated and

registered in countries that cooperate in the global fight against the money laundering and terrorist financing offences in accordance with the criteria defined by the FATF, points 18 and 20(f) provide that the assessment of the request for authorization shall be subject to enhanced due diligence, proportionate to the risks, and that the counter-measures indicated in Recommendation 19 of the FATF and the Interpretive Note thereto may be applied.

2.34. On 6 November 2014, Argentina issued SSN Resolution No. 38.708/2014 approving the General Regulations of the Insurance Business.[50] According to Argentina, SSN Resolution No. 38.708/2014 provides for regulatory reform of the reinsurance sector.[51] Argentina explains that this Resolution includes in its "Annex in point 2.1.1 … the whole body of legislation that was previously contained in the following Resolutions: No. 35.615, No. 35.726, No. 35.794, No. 36.266, No. 36.332, No. 36.859 and No. 38.284".[52]

2.3.7 Measure 6: Requirements for access to the Argentine capital market

2.35. Measure 6 consists of imposing requirements on stock market intermediaries[53] for them to be able to engage in transactions ordered by persons from non-cooperative countries. Argentina applies this measure pursuant to Title XI ("Prevention of money laundering and financing of terrorism"), Section III, Article 5 of the Rules of the National Securities Commission (CNV)[54], which provides as follows:

> All the persons indicated in Article 1 above[55] may only engage in transactions involving the public offering of negotiable securities, forward contracts, futures or options of any nature or other financial instruments or products, when they are conducted or ordered by persons incorporated, domiciled or residing in dominions, jurisdictions, territories or associate States included in the list of cooperative countries set forth in Article 2, subparagraph (b), of Decree No. 589/2013.
>
> If such persons are not included in the above-mentioned list and in their home jurisdiction have the status of intermediaries registered with an entity under the control and supervision of a body fulfilling functions similar to those of the Commission, such transactions shall go forward only if it is certified that the aforementioned body in their home jurisdiction has signed a memorandum of understanding on cooperation and exchange of information with the NATIONAL SECURITIES COMMISSION.

2.36. Consequently, the following requirements must be met for a stock market intermediary in Argentina to engage in transactions involving the public offering of negotiable securities, forward contracts, futures or options of any nature, or other financial instruments or products, when conducted or ordered by persons incorporated, domiciled or residing in non-cooperative countries: (i) the persons incorporated, domiciled or residing in non-cooperative countries that give the order to the stock market intermediary must have the status of intermediaries registered with an entity under the control and supervision of a body fulfilling functions similar to those of the Argentine CNV; and (ii) the body in question must have signed a memorandum of understanding on cooperation and exchange of information with the Argentine CNV.

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[50] Article 1 of SSN Resolution No. 38.708/2014, (Exhibit ARG-135).

[51] Argentina's responses to Panel questions No. 61, para. 3; No. 64, para. 2; and No. 66(a), para. 1.

[52] Argentina's response to Panel question No. 66(a), footnote 25. Argentina clarifies in response to this question from the Panel that "[a]lthough the aforementioned SSN Resolution No. 38.708 does not specifically mention SSN Resolution No. 38.284, it should be understood that, in the first place, it has been tacitly repealed as it is a resolution partially amending SSN Resolution No. 35.615 and hence follows the fortunes of the main Resolution, to which it made amendments. Secondly, the text of Resolution No. 38.284 was incorporated into the new Regulation".

[53] "Stock market intermediaries" means the persons indicated in Article 1 of the Rules of the National Securities Commission (CNV), including "bargaining agents, liquidation and compensation agents, distribution and placement agents, and collective investment management agents". See Exhibits PAN-58 / ARG-50.

[54] Rules of the National Securities Commission, New Text 2013 (Title XI), approved by General Resolution No. 622 (CNV Rules 2013), (Exhibits PAN-58 / ARG-50).

[55] See footnote 53 above.

2.3.8 Measure 7: Requirements for the registration of branches

2.37. Measure 7 consists of imposing additional requirements on branches of companies from non-cooperative countries for the purpose of registration in the Public Trade Register of the Autonomous City of Buenos Aires. Argentina maintains this measure pursuant to Article 192 of IGJ Resolution No. 7/2005[56], which reads in relevant part:

> The General Justice Inspectorate shall closely review compliance with the requirements of Article 188, subparagraph 3, subsections (b) and (c)[57] by companies which, without being offshore or from offshore jurisdictions, have been set up, registered or incorporated in jurisdictions considered as having low or no taxes[58] and/or classified as not collaborating in the fight against "money laundering" and transnational crime.
>
> Accordingly:
>
> 1. Certification that the company is effectively engaged in economically significant business activities in the place where it was set up, registered or incorporated and/or in third countries shall be required, for which the company may have to provide:
>
> (a) The relevant documents showing its latest approved accounting statements;
>
> (b) A deed describing the main operations conducted during the financial year to which the accounting statements correspond or during the immediately preceding year if the accounting frequency is less, indicating the dates, parties, purpose and economic volume concerned, to be signed by the competent authority in the country of origin or by an officer of the company possessing duly accredited status and authority;
>
> (c) The deeds of ownership of the non-current (fixed) assets or the contracts conferring operating rights in such assets, if the document referred to in subparagraph (b) is considered insufficient;
>
> (d) Any other document deemed necessary for the purposes indicated.
>
> 2. Information in addition to that indicated in subparagraph 3 of 188 may be required for the purpose of obtaining personal particulars of the partners with a view to verifying their background, including information on their economic and tax status.

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[56] General Resolution No.7 of the General Justice Inspectorate (IGJ), of 25 August 2005 (IGJ Resolution No. 7/2005), (Exhibits PAN-62 / ARG-33).

[57] Subparagraphs 3(b) and 3(c) of Article 188 of IGJ Resolution No. 7/2005 provide as follows:
The following shall be submitted for the purpose of the registration provided for in Article 118, third paragraph, of Law No. 19.550:
...
3. The documents from abroad drawn up by an official of the company whose representative authority must be attested therein and authenticated by a notary or government official, certifying: ...
...
(b) That it has one or more agencies, branches or representative offices operating outside the Republic and/or non-current (fixed) assets or operating rights in such assets belonging to third parties and/or holdings in other companies not subject to public offering and/or habitually conducts investment transactions on stock exchanges or securities markets as provided for in its corporate purpose;
(c) Particulars of the persons who are partners at the time of the decision to request registration, indicating for each partner as a minimum their first name and surname or title, domicile or head office, identity card or passport number or registration, authorization or incorporation details, and the number of shares and votes and their percentage of the registered capital. This documentation need not be submitted if the personal particulars of the partners are in line with the requirement in subparagraph 2(a) and are accompanied by a statement of their means of livelihood by the company official referred to at the beginning of this subparagraph.
See IGJ Resolution No. 7/2005, (Exhibits PAN-62 / ARG-33).

[58] "Countries with low or no taxes" should be understood to mean non-cooperative countries. See footnote 14 above.

> If the jurisdictions referred to in this Article are "offshore" jurisdictions, Article 193 shall apply.

2.38. Accordingly, apart from the requirements applicable to companies in cooperative countries, branches of companies set up, registered or incorporated in non-cooperative countries shall be required to prove "that the company is effectively engaged in economically significant business activities in the place where it was set up, registered or incorporated and/or in third countries", for which the IGJ may require additional documents. The IGJ may also request additional documents in order to verify the records of the company's partners.

2.3.9 Measure 8: Foreign exchange authorization requirement

2.39. Measure 8 consists of imposing on service suppliers from non-cooperative countries the requirement to obtain prior authorization from the Central Bank of the Argentine Republic (BCRA) in order to be able to repatriate their direct investments. Argentina maintains this measure pursuant to Communication "A" 4940, Section I of the BCRA[59], which provides the following:

> Prior authorization from the Central Bank shall be required for access to the foreign exchange market in order to purchase foreign currency for the repatriation of direct and portfolio investments by non-residents covered by points 1.13 and 1.14 of Communication "A" 4662, amended by Communication "A" 4692, respectively, if the beneficiary abroad is a natural or legal person residing or incorporated or domiciled in dominions, jurisdictions, territories or associate States included in the list in Decree No. 1.344/98 regulating the Gains Tax Law No. 20.628 and amendments thereto.

2.40. This means that prior authorization from the BCRA is needed in order to repatriate the investment "when the beneficiary abroad is a natural or legal person residing or incorporated or domiciled in" a non-cooperative country.

2.4 Factual context

2.4.1 Introduction

2.41. In this section we outline certain topics which, although they do not form part of the measures at issue, have been addressed by the parties in their submissions and may be of relevance for the purposes of this Panel's findings.

2.4.2 Relevant Argentine legislation applicable to cooperative countries

2.42. The purpose of this section is to describe the relevant legislation applicable to cooperative countries in respect of the matters regulated by measures 2, 3, 4, 7 and 8 applicable to non-cooperative countries. For measures 1, 5 and 6, the treatment accorded to cooperative countries is set out in the text of the measures challenged by Panama.[60]

2.4.2.1 Presumption of unjustified increase in wealth

2.43. The Argentine regulation applicable to determining the taxable subject matter for Argentine taxpayers is contained in Article 11 of the LPT, which provides that it is the taxpayers themselves, through their sworn declarations, who determine what is subject to taxation.[61] If no sworn declarations have been submitted or those submitted are contested, the AFIP shall determine the taxable subject matter ex officio. This ex officio determination may be made directly, as a result of certain knowledge of the taxable subject matter, or by estimation.[62] In the latter case, Article 18

[59] Communication "A" No. 4940 of the Central Bank of the Argentine Republic, of 12 May 2009 (Communication "A" No. 4940), (Exhibits PAN-71 / ARG-31).

[60] See paras. 2.13, 2.30 and 2.35 above.

[61] Article 11 of the LPT provides that "[t]he determination and collection of taxes under this Law shall be based on sworn declarations to be submitted by those responsible for paying taxes in the form and within the time-limits to be established by the FEDERAL PUBLIC REVENUE ADMINISTRATION". See the Law on Tax Procedure, (Exhibits PAN-9 / ARG-45).

[62] In this connection, Article 16 of the LPT provides as follows:

of the LPT applies, which contains the presumptions to be used by the AFIP when estimating the taxable subject matter ex officio, and section (f) of which includes the presumption of unjustified increase in wealth.[63]

2.44. We recall that measure 2, contained in the unnumbered article added after Article 18 of the LPT, presumes that any entry of funds from non-cooperative countries constitutes an unjustified increase in wealth – a presumption which may be rebutted if the taxpayer "conclusively proves that the funds originated from activities actually carried out by the taxpayer or by third parties in those countries or from placements of duly declared funds" – as explained in section 2.3.3 above.

2.4.2.2 Valuation of transactions

2.45. Article 14 of the LIG establishes as a rule that transactions between an Argentine taxpayer and a foreigner shall be considered arm's-length transactions "if their services and conditions are in line with normal arm's-length market practices".[64] Where that is not the case, such services and conditions shall be governed by the provisions of Article 15 of the LIG, which empowers the AFIP "to determine the net taxable income by using averages, indices or coefficients established for this purpose on the basis of the performance of independent companies engaged in the same or similar activities".

2.46. As regards profits earned from exporting goods produced, manufactured, processed or purchased in Argentina, the second paragraph of Article 8 of the LIG provides that "the net profit shall be established by deducting from the selling price the cost of the goods, transport and insurance costs to the destination, commission and sales costs and costs incurred in the Argentine Republic as necessary in order to obtain the taxable profit". In such cases, Article 8 provides that the rules and procedures contained in Article 15 of the LIG shall apply when the transactions are with related persons or entities and the prices and conditions are not in line with arm's-length market practices.[65]

2.47. We recall that measure 3 in Article 8, paragraph 5 and Article 15, paragraph 2 of the LIG prescribes the application of methods for valuing transactions with persons from non-cooperative countries based on transfer prices in order to determine the basis of assessment for gains tax payable by Argentine taxpayers, as described in section 2.3.4 above.

If no sworn declarations have been submitted or those submitted are contested, the FEDERAL PUBLIC REVENUE ADMINISTRATION shall determine ex officio the taxable subject matter or the tax loss carry forward, where applicable, and assess the corresponding tax, either directly, as a result of certain knowledge of the tax object, or by estimation if the known elements only allow the existence and amount of the tax to be presumed.
See the Law on Tax Procedure, (Exhibits PAN-9 / ARG-45).

[63] Article 18(f) of the LPT: "Unjustified increases in wealth are:
(1) In the case of gains tax:
Net profits determined by an amount corresponding to unjustified increases in wealth, plus TEN PER CENT (10%) under the heading of income disposed of or consumed as non-deductible expenditure.
(2) In the case of value added tax:
Amounts of omitted sales determined according to the sum total of the elements stemming from the preceding point.
In these circumstances, payment of the tax shall not give rise to any tax credit.
(3) The method described in point 2 shall apply to the corresponding internal tax headings."
See the Law on Tax Procedure (LPT), (Exhibits PAN-9 / ARG-45).

[64] The third paragraph of Article 14 of the LIG provides as follows:
Transactions between a stable institution, as referred to in subparagraph (b) of Article 69 -. or a company or trust fund covered by subparagraphs (a) and (b) and the subparagraph added after subparagraph (d) of Article 49 – respectively, and related persons or entities incorporated, domiciled or located abroad shall, for all purposes, be considered as being between independent parties if their services and conditions are in line with normal arm's-length market practices, except in the cases covered by subparagraph (m) of Article 88 -. When such services and conditions are not in line with arm's-length market practices, they shall be adapted in accordance with the provisions of Article 15 -.
See (Exhibits PAN-4 / ARG-42). See also Panama's first written submission, para. 4.210 and Argentina's first written submission, Explanatory Annex No. 1.3, para. 90.

[65] Paragraph 4 of Article 8 of the LIG, (Exhibits PAN-4 / ARG-42).

2.4.2.3 Rule for the allocation of expenditure

2.48. Article 18 of the LIG provides that expenditure, in the same way as profits, shall be allocated to the fiscal year in which it accrues.[66] Accordingly, the "*accrual*" rule is considered to be the general rule for allocating income and expenditure "for third category income[67]".[68]

2.49. We recall that measure 4 in the last paragraph of Article 18 of the LIG provides for application of the rule of payment received when allocating expenditure for transactions between Argentine taxpayers and persons from non-cooperative countries, as described in section 2.3.5 above.

2.4.2.4 Requirements for the registration of branches

2.50. Article 118 of Law No. 19.550 on Commercial Companies (LSC), applicable to companies incorporated abroad, specifies the requirements to be met by a foreign company "[i]n order to engage in the customary exercise of the acts included in its social purpose, set up a branch or any other form of permanent representative office".[69] One of these requirements is to register the company incorporated in Argentina. In the Autonomous City of Buenos Aires, companies must be registered in the Public Trade Register of the City of Buenos Aires, which is governed by IGJ Resolution No. 7/2005.[70] Article 188 of this IGJ Resolution, when referring to the registration requirement in Article 118 of the LSC, specifies the documents which companies incorporated abroad must submit in order to be registered:

> Certificate proving the existence of the company and that it is not subject to liquidation or any legal proceedings involving restrictions on its assets and/or activities[71];

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[66] Article 18 of the LIG: "… the profits referred to in Article 49 shall be attributed to the tax year in which the accounting year in which they are accrued ends. … The above provisions on the allocation of profits shall apply correlatively to the allocation of expenditure, unless otherwise provided." See Exhibits PAN-4 / ARG-42.

[67] Third category income is that described in Article 18 of the LIG as "the profits referred to in Article 49" of the LIG. The types of income listed in Article 49 of the LIG are considered third category income, namely:

(a) Income received by the persons listed in Article 69 -.
(b) All income earned from any other type of company incorporated in the country or single person enterprises located there.
(c) Income earned from acting as commission agent, auctioneer, consignee or other trade auxiliaries not specifically included in the fourth category.
(d) Income earned from lots for urban planning purposes, income from building and sale of property under the regime of Law No. 13512.
Income earned from trust funds in which the trustor is a beneficiary, except in the case of financial trust funds or when the trustor-beneficiary is a person covered by Title V (Incorporated by Law 25063, Article 4).
(e) Other income not included in other categories.
Compensation in cash or kind, per diem, etc. received when carrying out activities covered by this Article shall also be considered income if it exceeds the amount deemed reasonable by the Directorate-General of Taxation for the reimbursement of expenses incurred.
Where the professional or official activity referred to in Article 79 is supplemented by a business activity or vice versa (sanatoriums, etc.), the total income earned from all these activities shall be considered third category income.
See Exhibits PAN-4 / ARG-42.

[68] Panama's first written submission, para. 4.300; Argentina's first written submission, Explanatory Annex No. 1.4, para. 110. See also Argentina's first written submission, Explanatory Annex No. 1.4, para. 119 (referring to the work of César Halladjian "*El tratamiento en el impuesto a las ganancias desde la óptica del prestatario: condiciones APRA la deducción del gasto*" [Treatment of gains tax from the standpoint of the borrower], Práctica y Actualidad Tributaria, Errepar, XIII, December 2006).

[69] Article 118 of Law No. 19.550 lays down three requirements: (1) prove the existence of the company in accordance with its country's legislation; (2) establish a domicile in Argentina, complying with the publication and registration required by law for companies incorporated in Argentina; (3) justify the decision to establish the representative office and designate the person to be responsible for it. In the case of branches, the assigned capital must also be specified, if this is required by special laws. See the Law on Commercial Companies, (Exhibits PAN-34 / ARG-43).

[70] IGJ Resolution No. 7/2005, (Exhibits PAN-62 / ARG-33).

[71] Article 188.1 of IGJ Resolution No. 7/2005, (Exhibits PAN-62 / ARG-33).

> Documents from abroad containing (a) the contract or deed of incorporation of the company and amendments thereto; (b) decision of the governing body deciding to set up the seat, branch or permanent representative office in Argentina; (c) date of closure of its financial books; (d) head office in the Autonomous City of Buenos Aires; (e) capital allocated – if applicable; and (f) designation of the representative, who must be a natural person[72];
>
> Documents from abroad drawn up by an officer of the company proving (a) that in the place it was set up, incorporated or registered, there is no ban or restriction on the company engaging in all its activities or the most important among them; (b) that it has one or more agencies, branches or representative offices in operation and/or non-current (fixed) assets or operating rights in assets belonging to third parties and/or holdings in other companies not subject to public offering and/or habitually conducts investment transactions on stock exchanges or securities markets as provided for in its corporate purpose; and (c) particulars of the persons who are partners at the time of the decision to request registration[73];
>
> Original proof of the publication required by Article 118, third paragraph, subparagraph (2) of Law No. 19.550 if it is a joint stock company, a limited liability company or a company of a type not covered by the laws of the Argentine Republic, specifying (a) with regard to the branch, agency or representative office, its head office, assigned capital where applicable and the date of closure of its financial books; (b) with regard to the representative, his/her personal data, established special domicile, period of representation if applicable, restrictions on mandate, if any, and nature of activities if more than one representative is designated; and (c) with regard to the company abroad, the information indicated in Article 10, subparagraphs (a) and (b) of Law No. 19.550 in respect of the articles of incorporation and amendments thereto, if any, in effect at the time of the request for registration[74];
>
> Document signed by the designated representative, authenticated by a notary or personally ratified prior to registration, in which the representative (a) provides his/her personal data; (b) indicates the site of the head office; and (c) the establishes a special domicile within the area of the Autonomous City of Buenos Aires.[75]

2.51. We recall that measure 7 in Article 192 of IGJ Resolution No. 7/2005[76] imposes additional requirements on branches of companies from non-cooperative countries for their registration in the Public Trade Register, as described in section 2.3.8 above.

2.4.2.5 Foreign exchange authorization requirement

2.52. Point 1.13 of Communication "A" 4662[77], as amended by Communication "A" 4692, provides that prior authorization by the BCRA is not needed "in order to purchase foreign currency for transfer abroad if the transactions are conducted by or correspond to payments in the country … of repatriation of direct investment in the non-financial private sector, in companies that do not control local financial institutions and/or in immovable property", provided that the investment has remained in Argentina for a minimum of 365 consecutive days.[78]

2.53. Point 4 of Communication "A" 4662 provides that, before proceeding with transactions exempt from prior authorization by the BCRA, the entities authorized to deal in foreign exchange must meet certain requirements.[79] In this connection, Communication "A" 5237 includes as a

[72] Article 188.2 of IGJ Resolution No. 7/2005, (Exhibits PAN-62 / ARG-33).
[73] Article 188.3 of IGJ Resolution No. 7/2005, (Exhibits PAN-62 / ARG-33).
[74] Article 188.4 of IGJ Resolution No. 7/2005, (Exhibits PAN-62 / ARG-33).
[75] Article 188.5 of IGJ Resolution No. 7/2005, (Exhibits PAN-62 / ARG-33).
[76] IGJ Resolution No. 7/2005, (Exhibits PAN-62 / ARG-33).
[77] Communication "A" No. 4662, (Exhibits PAN-67 / ARG-69).
[78] Point 1.13 of Communication "A" No. 4662, as amended by Communication "A" No. 4692, specifies the circumstances that may give rise to repatriation, namely: sale of the direct investment, definitive liquidation of the direct investment, capital reduction decided by the local company, and refund of irrevocable contributions by the local company. See Exhibits PAN-68 / ARG-70.
[79] The following are the requirements laid down in point 4 of Communication "A" No. 4662: (a) verification of the purpose declared for access to the foreign exchange market; (b) possession of

requirement for access to the local foreign exchange market for the repatriation of direct investment "proof of the entry of funds through the local foreign exchange market for all new investment derived from new contributions or purchases of shares in local companies and real estate effected in foreign currency as of 28 October 2011 by the foreign investor". Point 4 of this BCRA Communication adds that the "transactions for the repatriation of direct investment which are subject to the established requirements but cannot be shown to be compliant therewith at the date of access to the local foreign exchange market must have prior authorization from the Central Bank".[80]

2.54. We recall that measure 8, in Communication "A" No. 4940, Section I, of the BCRA requires service suppliers from non-cooperative countries to obtain prior authorization from the BCRA in order to be able to repatriate their direct investments, as described in section 2.3.9 above.

2.4.3 Global Forum on Transparency and Exchange of Information for Tax Purposes

2.55. The Global Forum is an intergovernmental body which emerged – under another name – within the Organisation for Economic Co-operation and Development (OECD) in 2001 and which in 2009, after being reorganized, adopted its current title. It is open to any jurisdiction, whether or not a member of the OECD, which commits to implementing the Global Forum's tax transparency and information exchange standards and agrees to take part in the peer review process (PRP). These reviews are currently the Global Forum's main activity.[81]

2.56. According to the Global Forum's 2014 report on progress, it has 123 members composed of 122 jurisdictions and the European Union.[82] Of the 123 members, 97 are also Members of the WTO. The WTO does not have observer status in the Global Forum.[83]

2.57. The Global Forum's terms of reference consist of promoting rapid implementation of tax transparency standards among its members. In particular, it undertakes to ensure application of the international "Exchange of information on request" standard, or EOIR for short.[84] According to the EOIR standard, there should be exchange – upon request – of foreseeably relevant information for carrying out the provisions of a tax convention or for the administration or enforcement of the domestic tax laws of a requesting party.[85] By October 2014, 89 jurisdictions members of the Global Forum had undertaken to implement a new international standard between 2017 and 2018

documents proving that the resident debtor has had access to the foreign exchange market for the purpose and amount paid to the non-resident of the country (in cases of payment in the country for imports, services, income and other current transfers from abroad and commercial and financial debts abroad); (c) sworn declaration by the customer or his/her representative in the country stating that there has been no previous transfer for the same transaction; (d) assurance that the funds received have not been used for other investment in the country from the date they were paid in the country for the purpose declared until the date of access to the local foreign exchange market; (e) certificate of prior settlement of such payments on the foreign exchange market in cases where, as a result of the sale of the investment or the payment of the credit, part or all of the payments have been received in foreign currency; (f) possession (on the part of the authority authorized to conduct foreign exchange dealings) of all the elements needed to certify the reasonableness and authenticity of the transaction and the documents required under foreign exchange regulations; and (g) verification of compliance with the other applicable foreign exchange regulations. See Exhibits PAN-67 / ARG-69.

[80] Communication "A" No. 5237, (Exhibit ARG-75).

[81] Global Forum on Transparency and Exchange of Information for Tax Purposes, *Tax Transparency – 2014 – Report on Progress*, p. 24.

[82] Global Forum on Transparency and Exchange of Information for Tax Purposes, *Tax Transparency – 2014 – Report on Progress*, p. 17.

[83] The observers include the African Tax Administration Forum, the Asian Development Bank, the Caribbean Community (CARICOM), the Commonwealth Secretariat, the European Bank for Reconstruction and Development, the European Investment Bank, the Inter-American Development Bank, the International Finance Corporation, the International Monetary Fund, the United Nations, the World Bank and the World Customs Organisation (WCO). See Global Forum on Transparency and Exchange of Information for Tax Purposes, *Tax Transparency – 2014 – Report on Progress*, pp. 48 and 77.

[84] Global Forum on Transparency and Exchange of Information for Tax Purposes, *Tax Transparency – 2014 – Report on Progress*, p. 24.

[85] Global Forum on Transparency and Exchange of Information for Tax Purposes, *Tax Transparency – 2014 – Report on Progress*, p. 25.

to complement the EOIR standard[86]: this is a global standard on automatic (and reciprocal) exchange of financial account information, or AEOI for short.[87]

2.58. The PRP is voluntary and evaluates the capacity of each Global Forum member's jurisdiction to comply with the international EOIR standard.[88] The process consists of two phases: (i) phase 1 reviews the legal framework of the jurisdiction concerned in the light of the EOIR standard; and (ii) phase 2 looks into the review of application of the EOIR standard in practice in the jurisdiction concerned. Argentina completed both phases of the PRP in June 2012 and is now classified as "largely compliant" with the EOIR international standard.[89] Panama comes under the category of jurisdictions unable to move to phase 2, given that it has not amended its regulatory framework in the light of the recommendations arising from phase 1, carried out in 2010.

2.59. The Global Forum lacks the power to impose sanctions on jurisdictions which do not apply tax transparency standards. Nor, to date has it issued any recommendations to its members either on the potential adoption of special defensive measures to counter non-application of its tax transparency standard.[90] It should be pointed out, however, that both the OECD and the G-20 have recognized the importance of defensive measures relating to tax transparency as a way of protecting public revenue and creating a level playing field.[91]

2.4.4 Financial Action Task Force (FATF)

2.60. The Financial Action Task Force (FATF) is an intergovernmental body established in 1998 by its member jurisdictions. Its mandate is to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, financing of terrorism and the proliferation of weapons of mass destruction, among other threats to the integrity of the financial system.[92] Currently, 34 jurisdictions are members, together with the Gulf Cooperation Council and the European Commission. Argentina is an FATF member, but Panama is not.[93]

2.61. The FATF Recommendations are recognized as the international standard against money laundering and the financing of terrorism.[94] The text of these recommendations in force at the time of drafting this Report is that of 2012. The measures established in the FATF Recommendations must be applied by all its members and by the FATF-Style Regional Bodies

[86] Global Forum on Transparency and Exchange of Information for Tax Purposes, *Tax Transparency – 2014 – Report on Progress*, p. 81.

[87] According to the AEOI (automatic exchange of information) standard, the exchange will be on a regular basis (for example, yearly) and will cover a previously defined type of information. Argentina is one of the jurisdictions that will commence the first phase of this exchange of information in 2017. Panama is one of the jurisdictions that has not yet indicated whether it will commence this exchange in 2017 or 2018 or has not yet committed to this automatic exchange. See Global Forum on Transparency and Exchange of Information for Tax Purposes, *Tax Transparency – 2014 – Report on Progress*, p. 38.

[88] Global Forum on Transparency and Exchange of Information for Tax Purposes, *Tax Transparency – 2013 – Report on Progress*, (Exhibit ARG-36), p. 17.

[89] In phase 2, each of the components of the EOIR standard is given one of the following classifications: compliant, largely compliant, partially compliant or non-compliant. See Global Forum on Transparency and Exchange of Information for Tax Purposes, *Tax Transparency – 2013 – Report on Progress*, (Exhibit ARG-36), pp. 17 and 20.

[90] Argentina's response to Panel question No. 46(a), para. 2.

[91] Argentina's response to Panel question No. 46(a), para. 4 (citing the 2000 OECD report *Towards Global Tax Co-operation*, (Exhibit ARG-6), available at http://www.oecd.org/tax/transparency/44430257.pdf (exhibit provided in English; Spanish text available at http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx). See also Argentina's response to Panel question No. 46(a), paras. 5, 6 and 9 (referring to OECD, *OECD's Project on Harmful Tax Practices, The 2001 Progress Report*, (Exhibit ARG-7), available at http://www/oecd.org/ctp/harmful/2664450.pdf (exhibit provided in English; Spanish text available at http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx); *Communiqué*, *Meeting of Finance Ministers and Central Bank Governors, UK,* 2009, (Exhibit ARG-114); OECD, *OECD's Project on Harmful Tax Practices, The 2004 Progress Report*, (Exhibit ARG-9), available at http://www/oecd.org/ctp/harmful/2664450.pdf (exhibit provided in English; Spanish text available at http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx); and Argentina's response to Panel question No. 71 (citing OECD, *Towards a Level Playing* Field, Global Forum on Taxation, Berlin, 3-4 June 2004, Exhibit ARG-10, para. 28).

[92] FATF, International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation – The FATF Recommendations (FATF Recommendations), February 2012, (Exhibit ARG-25), p. 7.

[93] http://www.fatf-gafi.org/pages/aboutus/membersandobservers.

[94] FATF, FATF Recommendations, (Exhibit ARG-25), p. 7.

(FSRBs), including the Financial Action Task Force of Latin America (GAFILAT), previously known as GAFISUD, of which Argentina and Panama are members.[95]

2.62. Implementation of the FATF Recommendations is assessed rigorously through mutual evaluation processes and by the IMF and the World Bank on the basis of the FATF's common assessment methodology.[96]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Panama requests that the Panel find that:

a. Measure 1 (withholding tax on payments of interest or remuneration) is inconsistent with Argentina's obligations under Article II:1 of the GATS inasmuch as it alters the conditions of competition between like services and service suppliers by according less favourable treatment to services and service suppliers of non-cooperative countries.[97]

b. Measure 2 (presumption of unjustified increase in wealth) is inconsistent with Argentina's obligations under:

   i. Article II:1 of the GATS, inasmuch as it constitutes a disincentive to contracting services that imply a transfer of funds from non-cooperative countries, thus modifying the conditions of competition and according less favourable treatment to services and service suppliers of non-cooperative countries than that granted to like services and service suppliers of cooperative countries;

   ii. Article XVII of the GATS, inasmuch as it constitutes a disincentive to contracting services that imply a transfer of funds from non-cooperative countries, thus altering the conditions of competition between like services and service suppliers of Argentina and those of non-cooperative countries;

   iii. Article I:1 of the GATT 1994, inasmuch as the advantage, favour, privilege or immunity accorded to payments received from cooperative countries for exports to those countries is not accorded to exports of like products to non-cooperative countries (which entail payments from non-cooperative countries).[98]

c. Measure 3 (transaction valuation based on transfer prices) is inconsistent with Argentina's obligations under:

   i. Article II:1 of the GATS, inasmuch as it creates disincentives that imply less favourable treatment for services and service suppliers from non-cooperative countries;

   ii. Article XVII of the GATS, inasmuch as, with regard to the full commitments made by Argentina on national treatment, it leads to a disincentive to purchase or contract from suppliers of non-cooperative countries, placing them in a less favourable position than like domestic suppliers;

   iii. Article I:1 of the GATT 1994, inasmuch as imports/exports of products from/to cooperative countries may be valued as transactions in line with normal market practices or prices, unlike imports/exports from/to non-cooperative countries, which are subject to the transfer pricing valuation regime;

[95] GAFISUD – International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, FATF Recommendations, February 2012, (Exhibit ARG-26). See also http://www.gafilat.org/content/observadores.

[96] FATF, FATF Recommendations, (Exhibit ARG-25), p. 8.

[97] Panama's first written submission, para. 5.1.a; second written submission, para. 3.1.a. See also Panama's request for establishment of a panel, p. 2.

[98] Panama's first written submission, para. 5.1.b; second written submission, para. 3.1.b. See Panama's request for establishment of a panel, p. 3.

iv. Article III:4 of the GATT 1994, inasmuch as the measure places products imported from non-cooperative countries in a less favourable position than that of like domestic products; and

v. Alternatively, Article XI:1 of the GATT 1994, inasmuch as the measure establishes limiting conditions on the import/export of products from/to non-cooperative countries.[99]

d. Measure 4 (payment received rule for the allocation of expenditure) is inconsistent with Argentina's obligations under:

i. Article II:1 of the GATS, inasmuch as it limits the possibility of deducting payments for services provided by service suppliers of non-cooperative countries, according them less favourable treatment than that accorded to like service suppliers of cooperative countries; and

ii. Article XVII of the GATS, inasmuch as, with regard to the full commitments made by Argentina on national treatment, the current restriction on deducting payments for services provided by service suppliers of non-cooperative countries accords them less favourable treatment than that accorded to domestic like services and service suppliers.[100]

e. Measure 5 (requirements relating to reinsurance and retrocession services)[101] is inconsistent with Argentina's obligations under:

i. Article II:1 of the GATS, inasmuch as access to the Argentine reinsurance market for suppliers of non-cooperative countries is subject to compliance with conditions, and this gives rise to uncertainty that alters the conditions of competition between reinsurance service suppliers of non-cooperative countries and those of cooperative countries[102];

ii. Article XVI:1 and XVI:2(a) of the GATS, inasmuch as Argentina restricts the number of foreign service suppliers and accords them treatment less favourable than that specified in its Schedule of Commitments.[103]

f. Measure 6 (requirements for access to the Argentine capital market) is inconsistent with Argentina's obligations under Article II:1 of the GATS, inasmuch as it accords to service suppliers of non-cooperative countries seeking access to the Argentine capital market in

[99] Panama's first written submission, para. 5.1.c; second written submission, para. 3.1.c. See also Panama's request for establishment of a panel, pp. 4 and 5. It should be pointed out, however, that in Panama's request for establishment of a panel, reference is made to Article II:2 instead of Article II:1 of the GATS, owing to a typographical error.

[100] Panama's first written submission, para. 5.1.d; second written submission, para. 3.1.d. See also Panama's request for establishment of a panel, p. 5.

[101] The changes to measure 5 and their impact on the Panel's terms of reference, as well as the disputed inclusion of retrocession services in this measure, will be addressed in the section of the Report containing the Panel's findings.

[102] Panama's second written submission, para. 2.612. It should be pointed that Panama indicates that, although SSN Resolution No. 38.284/2014 amended SSN Resolution No. 35.615/2011 in March 2014 by lifting the ban on access to the Argentine reinsurance market by service suppliers of non-cooperative countries, the discrimination persists and, therefore, Panama's claims under Article II:1 of the GATS are maintained. See Panama's response to Panel question No. 60.

[103] Panama's first written submission, para. 5.1.e; second written submission, para. 3.1.e. See also Panama's request for establishment of a panel, p. 6. It should be pointed out in this connection that Panama has indicated that it withdraws its claims under Articles XVI:2(a) and XVI:1 of the GATS in respect of the supply of reinsurance services by suppliers of non-cooperative countries under mode 3 (point 18 of Annex I to SSN Resolution No. 35.615/2011) and mode 1 (point 20(f) of Annex I to SSN Resolution No. 35.615/2011). Likewise, Panama has emphasized that it maintains its claims "under Article XVI of the GATS in respect of point 19 of Annex I to SSN Resolution No. 35.615". See Panama's response to Panel question No. 60.

order to provide their services treatment less favourable than that accorded to like service suppliers of cooperative countries.[104]

g. Measure 7 (requirements for the registration of branches) is inconsistent with Argentina's obligations under Article II:1 of the GATS, inasmuch as it establishes additional requirements which alter the conditions of competition and accords less favourable treatment to service suppliers of non-cooperative countries compared to service suppliers of cooperative countries.[105]

h. Measure 8 (foreign exchange authorization requirement) is inconsistent with Argentina's obligations under Article II:1 of the GATS, inasmuch as it accords service suppliers of non-cooperative countries seeking to repatriate their investments in Argentina less favourable treatment than that accorded to like service suppliers of non-cooperative countries.[106]

3.2. Panama further requests, pursuant to Article 19.1 of the DSU, that:

a. The Panel recommend that Argentina bring its measures into conformity with its WTO obligations[107], and that

b. The Panel make suggestions regarding implementation of the recommendations made pursuant to the authority given by the second sentence of Article 19.1 of the DSU[108] and, more concretely, suggest "the elimination of the less favourable treatment of the goods and services" of non-cooperative countries as the most appropriate way of bringing the challenged measures into conformity with Argentina's obligations under the GATS and the GATT 1994.[109]

3.3. Argentina requests that the Panel reject Panama's claims in this dispute in their entirety.[110]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the Kingdom of Saudi Arabia, Brazil, the United States and the European Union are reflected in their executive summaries provided to the Panel in accordance with paragraph 21 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3 and C-4). Australia, China, Ecuador, Guatemala, Honduras, India, Oman and Singapore did not submit written arguments to the Panel.

6 INTERIM REVIEW

6.1 Introduction

6.1. On 22 May 2015, the Panel submitted its Interim Report to the parties. On 5 June 2015, Panama informed the Panel that it did not intend to request a review of any precise aspects of the Interim Report. Argentina did submit a written request for the review of precise aspects of the

[104] Panama's first written submission, para. 5.1.f; second written submission, para. 3.1.f. See also Panama's request for establishment of a panel, p. 7.
[105] Panama's first written submission, para. 5.1.g; second written submission, para. 3.1.g. See also Panama's request for establishment of a panel, p. 6.
[106] Panama's first written submission, para. 5.1.h; second written submission, para. 3.1.h. See also Panama's request for establishment of a panel, p. 7.
[107] Panama's first written submission, para. 5.2; second written submission, para. 3.1.
[108] Panama's first written submission, para. 5.3; second written submission, para. 3.1.
[109] Panama's first written submission, para. 5.4; second written submission, para. 3.1.
[110] Argentina's first written submission, para. 756; second written submission, para. 102.

Interim Report. Neither party requested an interim review meeting. On 12 June 2015, Panama submitted comments on Argentina's request for review.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report contains the Panel's response to Argentina's request, made at the interim review stage, that precise aspects of the Report should be reviewed. The Panel modified aspects of its Report in the light of the parties' comments where it considered it appropriate, as explained below. The Panel also corrected a number of typographical and other non-substantive errors, including those identified by Argentina. References to sections, paragraph numbers and footnotes in this section relate to the Interim Report. Where appropriate, references to the paragraphs and footnotes to the Panel Report to be circulated to Members are included.

6.2 The question of whether measure 5 covers retrocession services

6.3. With regard to paragraph 7.37, Argentina requests the inclusion of part of its response to Panel question No. 64. Argentina argues that the Panel had not added this response to the paragraph despite having addressed the question of retrocession services and the scope of the Note contained in Chapter III of SSN Resolution No. 35.615. Panama makes no objection in this regard. The Panel notes that paragraph 7.37 does include part of Argentina's response to this question from the Panel, as indicated in footnote 149. Nevertheless, the Panel sees no impediment to expanding the summary of Argentina's response to Panel question No. 64, as reflected below in paragraph 7.37 of its Report.

6.3 Panama's claims under Article II:1 of the GATS

6.4. With regard to paragraph 7.45, Argentina considers that there is an error of syntax in the Spanish text of the paragraph's second sentence and suggests alternative wording. Panama has no objections in this regard. The Panel notes that the text in question is in the third sentence of paragraph 7.45. To avoid confusion, the Panel has modified the wording of that sentence in paragraph 7.45 of its Report.

6.5. Concerning paragraphs 7.142 and 7.280, Argentina requests that additional text be included to reflect the scope of its arguments. Panama considers that the text added by Argentina is repetitive because it is already contained in paragraph 7.141. The Panel agrees with Panama that the inclusion of all of the text suggested by Argentina could be redundant. Accordingly, the Panel will complete the first sentence of paragraph 7.141 of its Report along the lines of the relevant text in Argentina's first written submission. The Panel considers, however, that the text of paragraph 7.280 should not be modified because it refers solely to the no less favourable treatment obligation in Article II:1 of the GATS.

6.6. With regard to paragraph 7.164, and footnotes 324 and 325 in particular, Argentina requests the inclusion of references to its responses to Panel questions. Panama makes no objection in this regard. The Panel considers Argentina's request to be pertinent and therefore adds the references requested to footnotes 325 and 326 of its Report.

6.7. Regarding paragraph 7.189, and footnote 361 in particular, Argentina requests the Panel to add another paragraph to the reference in this footnote. Panama makes no objection in this regard. The Panel accepts the request and, therefore, modifies footnote 362 of its Report.

6.8. With reference to paragraph 7.355, Argentina requests the addition of a sentence and accompanying footnote explaining its position with respect to the application of the GATS to measure 8. Panama makes no objection in this regard. The Panel considers that the second sentence of paragraph 7.355 already adequately reflects Argentina's position in this respect. Nevertheless, the Panel deems it useful to supplement the relevant references in footnote 528 of its Report.

6.9. With regard to paragraphs 7.280, 7.296, 7.305, 7.313, 7.325, 7.333, 7.343 and 7.355, Argentina considers that its arguments have not been reproduced in full and asks the Panel to add an identical phrase (and the corresponding footnote) on the relevance of the legitimate regulatory distinctions, for the purpose of examining no less favourable treatment, to each and every one of the aforementioned paragraphs. Panama makes no objection in this regard. The Panel notes that

the reference cited by Argentina in the footnote it wishes to add refers to an entire section of its first written submission (Section III.D), without specifying any paragraph in particular, and to paragraph 7.142 of the Panel's Report. The Panel considers that this paragraph adequately reflects Argentina's arguments in this respect and that it is therefore not necessary to repeat them, as requested by Argentina.

6.10. As regards paragraphs 7.292, 7.301, 7.309, 7.319, 7.329, 7.339, 7.351 and 7.360, Argentina asks that the last sentence of these paragraphs in relation to the updating of the list of cooperative countries be modified. Panama considers that such a change is not appropriate because the wording proposed by Argentina refers to the way in which the Panel assessed the facts and not to Argentina's arguments. The Panel shares Panama's view and does not therefore consider it appropriate to make the modifications suggested by Argentina.

6.4 Panama's claims under Article XVII of the GATS

6.11. With reference to paragraph 7.524, Argentina requests that the text of the Panel's conclusion be modified. Panama considers that the modification requested by Argentina is of dubious value from the syntactical standpoint even though it is not opposed to changes in the wording of this paragraph to make it easier to understand. The Panel understands the confusion which its conclusion might cause because of the use of the terminology of Article XVII ("treatment no less favourable") and agrees with Argentina on the need to make the modification requested. The Panel is therefore modifying paragraph 7.524 of its Report.

6.5 Argentina's defence under Article XIV(c) of the GATS

6.12. As regards paragraph 7.526, Argentina requests that a sentence be added concerning the Panel's findings under Article XVII of the GATS. Panama objects to such an insertion because Argentina is proposing to add a finding by the Panel to a paragraph which explains Argentina's arguments on its defence under Article XIV(c) of the GATS. The Panel agrees with Panama and hence does not consider the modification requested by Argentina to be pertinent.

6.13. With regard to paragraphs 7.635, 7.636 and 7.639, Argentina requests modifications to the text in order to clarify the principle of tax equality. Panama is opposed because it considers that in these paragraphs the Panel is examining an exhibit submitted by Panama and Argentina is attempting to introduce an assessment of the facts that differs from that of the Panel. The Panel agrees with Panama and hence does not consider the modifications requested by Argentina to be pertinent.

6.14. Concerning paragraph 7.753, and footnote 916 in particular, Argentina requests that the reference be completed in order to reflect fully its arguments on the designation of countries that have initiated negotiations on the signature of a tax information exchange agreement as cooperative countries. Panama makes no objection in this regard. The Panel sees no problem in adding the reference requested and therefore amends footnote 918 of its Report.

6.6 Argentina's defence under Article XIV(d) of the GATS

6.15. With respect to paragraphs 7.780 and 8.5, Argentina requests the Panel to modify the explanation of its conclusion on the irrelevance of the analysis of Argentina's defence under Article XIV(d) of the GATS. Panama makes no objections in this regard. The Panel agrees with Argentina on the relevance of the suggested change to these paragraphs, but prefers to use slightly different language to that proposed. The Panel therefore modifies paragraphs 7.780 and 8.5 of its Report.

6.7 Argentina's defence under paragraph 2(a) of the Annex on Financial Services (the prudential exception)

6.16. As regards paragraph 7.781 and footnote 949, Argentina requests that the wording of this paragraph be modified to clarify the scope of Argentina's defence in relation to measures 5 and 6 under the prudential exception. Argentina also requests that the existing reference in footnote 949 be supplemented. Panama does not object to this. The Panel therefore considers the suggested

changes by Argentina to be pertinent and thus modifies paragraph 7.781 and footnote 951 of its Report.

6.17. With regard to paragraph 7.787, Argentina requests the addition of its arguments under the prudential exception in relation to the claims under Articles XVI:1 and XVI:2(a) of the GATS. Panama considers that this amendment interrupts the flow of the text. The Panel considers the amendment proposed by Argentina in order to complete its arguments to be pertinent and therefore adds a new paragraph 7.788 to its Report.

6.18. In connection with paragraph 7.898 and footnote 1129, Argentina requests that "to guarantee the integrity of the market" be included as a prudential reason for measure 5. Panama makes no comments in this regard. The Panel accepts Argentina's suggestion and therefore amends paragraph 7.899. and footnote 1134 of its Report.

6.19. With regard to paragraph 7.900, Argentina requests that a reference be added in a footnote where the Panel cites the Association of Latin American Insurance Supervisors (ASSAL). Panama makes no objection in this regard. The Panel agrees to Argentina's request and includes a new footnote 1140 in its Report.

6.8 Panama's claims under Article I:1 of the GATT 1994

6.20. Concerning paragraph 7.960, Argentina requests the Panel to clarify its position with regard to the nature of measure 2. Panama does not make any comments in this regard. The Panel accepts Argentina's suggestion and therefore modifies paragraph 7.961, adding footnote 1215 to its Report.

6.21. With regard to paragraph 7.967 and footnote 1228, Argentina requests the Panel to complete the references in footnote 1228 of its Interim Report. Panama does not make any comments in this regard. The Panel accepts Argentina's suggestion and therefore amends footnote 1236 of its Report.

6.22. As regards paragraph 7.985, Argentina requests the Panel to modify its reading of certain case law. Panama objects to the modification suggested by Argentina, which it does not consider to be pertinent. The Panel considers that the modification requested by Argentina alters the Panel's reading of the case law in question and therefore rejects the modification of this paragraph.

6.23. Argentina requests the Panel to amend certain terms in paragraphs 7.988 and 7.996. Panama objects to the change suggested by Argentina, considering it unnecessary. The Panel considers that the changes proposed by Argentina are appropriate as they make the Panel's reasoning clearer. The Panel therefore amends paragraphs 7.989 and 7.997 of its Report.

6.24. As regards paragraph 7.989, Argentina requests the inclusion of a footnote so that its arguments on the requirement to keep supporting documents for transactions are reflected in full. Panama submits no comments in this regard. The Panel accepts Argentina's request and therefore inserts footnote 1264 in its Report.

6.9 Argentina's request for editorial and typographical amendments

6.25. Argentina requests a series of editorial and typographical amendments to paragraphs 7.191, 7.244 and 7.621, 7.568, 7.617, 7.869 (and footnote 1084) and 7.1054. Panama does not object to Argentina's request regarding the aforementioned paragraphs. The Panel accepts Argentina's request in respect of most of the aforementioned paragraphs, except for the references to Article 15 of the LIG for practical reasons, and paragraph 7.191 the wording of which remains unchanged for grammatical reasons.

7 FINDINGS

7.1 Preliminary issues

7.1. Before starting to examine the various claims submitted by Panama and the defence put forward by Argentina, the Panel wishes to clarify the scope of its terms of reference in these

proceedings. We shall begin by examining the claim made by Argentina in its first written submission according to which Panama, in its first written submission, allegedly brought up a new dispute, different from the one that was the subject of its request for consultations.

7.2. We shall continue with two questions that concern one of the measures at issue, measure 5 (requirements relating to reinsurance services). The Panel considers, in particular, that it should pronounce itself on what aspects of measure 5 fall within its terms of reference and whether or not retrocession services are included in this measure.

7.3. We shall commence by examining whether, as asserted by Argentina, Panama raised a new issue in its first written submission.

7.1.1 The question of whether Panama raised a new issue in its first written submission

7.4. In its first written submission, Argentina alleges that "[i]n its first written submission, Panama decided to bring up a new dispute, different from the one that was the subject of the request for consultations".[111] According to Argentina, the dispute that was the subject of the request for consultations "referred to *'certain measures imposed by Argentina that affect trade in goods and services. These measures only apply to trade conducted with specific countries listed in Decree No. 1344/1998 as amended by Decree No. 1037/00, which include Panama (hereinafter the 'listed countries')".*[112] Even though Argentina does not appear to argue anything more in this respect, we consider that this matter should be clarified.

7.5. It is our understanding that this allegation by Argentina refers to the fact that the request for consultations (and the panel request) mentions Decree No. 1344/1988, as amended by Decree No. 1037/2000, which regulated the distinction between cooperative and non-cooperative countries[113], before being replaced by Decree No. 598/2013, which is the Decree that currently regulates this distinction. Panama refers to the latter in its written submissions and other pleadings.

7.6. We shall therefore consider whether this change in the reference to the system regulated by Decree No. 1037/2000, which came to be regulated by Decree No. 589/2013 in the period between the request for consultations (and the panel request) and the submissions presented by Panama, means that Panama brought up "a new dispute, different from the one that was the subject of the request for consultations".[114]

7.7. We begin by considering what the change in the Argentine regulations involved. In the first instance, Argentina excluded countries from its general regime by means of a positive exclusion system, in other words, those countries specifically mentioned in a list were excluded from the general treatment habitually granted by Argentina and were, therefore, made subject to the eight measures at issue in this dispute. Non-cooperative countries were listed in Decree No. 1344/1998.[115] This was the situation at the time the Panel was established.[116] At that time, Panama was one of the non-cooperative countries.

7.8. However, in early 2014, after this Panel had been established[117] and composed[118], Argentina amended Decree No. 1344/1998[119], introducing a negative exclusion system such that only the countries included in a list – cooperative countries – would receive general treatment. Argentina thus moved from a system of positive exclusion lists (i.e. listing non-cooperative countries) to one

[111] Argentina's first written submission, para. 13.
[112] Argentina's first written submission, para. 13. (emphasis original)
[113] We recall that the term used in Decree No. 1344/1998, as amended by Decree No. 1037/2000, is "countries with low or no taxes". Decree No. 589/2013 replaces this term by "countries not considered 'cooperative for tax transparency purposes'". See Exhibits PAN-1 and PAN-3 / ARG-35.
[114] Argentina's first written submission, para. 13.
[115] Decree No. 1344 establishing the Regulation to the Gains Tax Law, of 19 November 1998 (RIG), (Exhibit PAN-1).
[116] See para. 1.3 above.
[117] See para. 1.3 above.
[118] See para. 1.5 above.
[119] Decree No. 589/2013, amended Argentina's positive list system by replacing the seventh unnumbered article incorporated by Decree No. 1037/2000 after Article 21 of the RIG by a rule which defines countries considered cooperative for tax transparency purposes.

of negative exclusion lists (listing cooperative countries). The list of cooperative countries in effect at the time its first written submission was presented included Panama, so it was not excluded from general treatment as it had been at the time of the request for consultations (and the establishment of this Panel).

7.9. We therefore agree with Argentina that the regulations governing determination of the categories of cooperative and non-cooperative countries in effect at the time of the request for consultations (and the panel request) were not the same as those referred to by Panama in its first written submission (and in its subsequent arguments). We shall now consider whether this change signifies, as Argentina claims, that Panama has brought up a new and different dispute. By "new dispute" we understand that Argentina means a new "matter referred to the DSB".

7.10. The legal provision governing what a "matter referred to the DSB" consists of is Article 7.1 of the DSU.[120] This provision specifically refers to the document containing the panel request, governed by Article 6.2 of the DSU.[121] The Appellate Body has explained that the "matter" consists of two elements: the measures at issue and the legal basis of the complaint.[122]

7.11. We recall that Decree No. 589/2013 is not a measure at issue. As explained in section 2.2 above, however, Decree No. 589/2013 is the key element of the eight measures challenged by Panama because they all include the distinction between cooperative and non-cooperative countries established pursuant to that Decree.

7.12. In our view, this key role is the same as that performed by its predecessor, Decree No. 1037/2000, which is mentioned in the request for consultations and the panel request, although in that case the measures referred to the list of non-cooperative countries contained therein.

7.13. The foregoing leads us to the following conclusions. On the one hand, as it does not concern measures at issue or obviously, the legal basis of the complaint, it is not possible to conclude that Panama's reference to Decree No. 589/2013 in its first written submission means that the matter has changed and that there is a new dispute. On the other hand, if we analyse the change that occurred in Argentina's regulations as a result of Decree No. 589/2013, this consists simply of the transition from a system of positive exclusion to one of negative exclusion. In other words, there is still one group of cooperative countries versus another group of non-cooperative countries. One additional element to be taken into account is that this change in Argentina's legislation did not involve any change to the substance of the eight measures at issue, but merely adjustments of form to replace references to "jurisdictions with low or no taxes" in Decree No. 1037/2000 by "jurisdictions not considered 'cooperative for tax transparency purposes'" in Decree No. 589/2013.[123]

7.14. We therefore consider that the change to the rules governing the system for deciding which countries are cooperative or non-cooperative did not involve any substantive change in the formulation of the eight measures at issue and, consequently, does not mean that in its first written submission Panama brought up "a new dispute, different from the one that was the subject of the request for consultations". Likewise, bearing in mind our terms of reference, we consider that the change in this legislation does not prevent us from examining the eight measures at issue in the light of the system introduced by Decree No. 589/2013 inasmuch as it distinguishes between cooperative and non-cooperative countries.

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[120] Article 7.1 of the DSU provides as follows:

Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

[121] See paragraph 7.23 below.

[122] Appellate Body report, *Guatemala – Cement I*, para. 72.

[123] Decree No. 589/2013 replaces the references to "countries with low or no taxes" contained in the Gains Tax Law and the Regulation thereto by "countries 'not considered cooperative for tax transparency purposes'". Article 1 of Decree No. 589/2013, (Exhibits PAN-3 and ARG-35).

7.15. In view of the foregoing, we conclude that the replacement of Decree No. 1344/1998, as amended by Decree No. 1037/2000, by Decree No. 589/2013 does not prevent us from examining the eight measures at issue in the light of the system introduced by Decree No. 589/2013 inasmuch as it distinguishes between cooperative and non-cooperative countries.

7.1.2 Aspects of measure 5 included in our terms of reference

7.1.2.1 Introduction

7.16. Measure 5 has been the subject of development and legislative amendments which occurred before and after the establishment of this Panel. In this section, we shall examine these changes and decide to what extent they are relevant for the purposes of our terms of reference.

7.1.2.2 Development and amendment of measure 5

7.17. In its panel request, Panama states that measure 5 is applied pursuant to SSN Resolution No. 35.615/2011.[124] In its first written submission, Panama also refers to SSN Resolution No. 35.794/2011, which is not mentioned in its panel request. As explained in the descriptive part of this Report[125], Article 4 of SSN Resolution No. 35.794/2011 develops point 19 of Annex I to SSN Resolution No. 35.615/2011, allowing cross-border supply (mode 1) of reinsurance services in the Argentine market for individual risks exceeding US$50 million but only for the portion which exceeds that amount.[126] In response to a question from the Panel, both parties agreed that SSN Resolution No. 35.794/2011 is a relevant legal instrument for evaluating the measure challenged by Panama and thus forms part of this Panel's terms of reference.[127]

7.18. On 21 March 2014, after this Panel had been established, Argentina amended SSN Resolution No. 35.615/2011 by means of SSN Resolution No. 38.284/2014, replacing points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011.[128] The new wording of these points, as amended, is explained in detail in the descriptive part of this Report.[129] In its second written submission, Panama explains that its panel request identified SSN Resolution No. 35.615/2011 and "any possible amendments, extensions or additions", for which reason, in its opinion, the amendment to SSN Resolution No. 35.615/2011 introduced by SSN Resolution No. 38.284/2014 forms part of this Panel's terms of reference.[130] Consequently, as of its second written submission, Panama adapted its arguments with respect to this measure, taking into account the amendments introduced by SSN Resolution No. 38.284/2014. Argentina, for its part, does not object to the inclusion of SSN Resolution No. 38.284/2014 in the Panel's terms of reference and refers to this Resolution in its arguments.[131]

7.19. On 6 November 2014, Argentina adopted SSN Resolution No. 38.708/2014 which, according to Argentina, provides for a regulatory reform of the reinsurance sector.[132] In its responses to questions from the Panel in connection with the second substantive meeting, Argentina explained that point 2.1.1 of the Annex to this Resolution includes the rules contained in SSN Resolutions Nos. 35.615, 35.726, 35.794, 36.266, 36.332, 36.859 and 38.284.[133] In its comments on

[124] Panama's request for the establishment of a panel, pp. 5 and 6.
[125] See paras. 2.28-2.29 above.
[126] Panama's second written submission, paras. 2.585 and 2.586. See also SSN Resolution No. 35.794/2011, (Exhibits PAN-40 / ARG-48).
[127] Panama's response to Panel question No. 61 and Argentina's response to the same question.
[128] See para. 2.30 above.
[129] See para. 2.30 above.
[130] Panama's second written submission, para. 2.576 (referring to its request for the establishment of a panel, p. 7).
[131] We note that Argentina was in fact the first to mention this Resolution when clarifying that "in order to adapt the regulations on reinsurance to the new rule established by Decree No. 589/2013, the SSN issued Resolution No. 38.284/2014, which partly amends Resolution No. 35.615/2011, challenged by Panama as of 25 March 2014". See Argentina's first written submission, para. 411.
[132] Argentina's response to Panel questions Nos. 61, 64 and 66.
[133] Argentina's response to Panel question No. 66(a), footnote 25. Argentina clarifies in response to this question from the Panel that "[a]lthough the aforementioned SSN Resolution No. 38.708 does not specifically mention SSN Resolution No. 38.284, it should be understood that, in the first place, it has been tacitly repealed as it is a resolution partially amending SSN Resolution No. 35.615 and hence follows the fortunes of the main Resolution, to which it made amendments. Secondly, the text of Resolution No. 38.284 was incorporated into the new Regulation".

Argentina's responses relating to the second substantive meeting, Panama did not challenge the explanation given by Argentina, nor did it request the Panel to include SSN Resolution No. 38.708/2014 in its terms of reference. The Panel, therefore, will not consider this latest amendment in its analysis of Panama's claims relating to measure 5.[134]

7.20. We therefore identify the two legal instruments which develop or amend SSN Resolution No. 35.615/2011, which are not mentioned in the panel request and which, according to Panama's arguments, form part of our terms of reference: SSN Resolution No. 35.794/2011 and SSN Resolution No. 38.284/2014.

7.21. Although Argentina is not opposed to the inclusion of these instruments in our terms of reference, given that the identification of the measure is of key relevance to our jurisdiction, we are duty bound to examine whether the measures at issue have been identified with sufficient precision, in the light of Article 6.2 of the DSU[135], to enable both Resolutions to be included in our terms of reference, as is requested by Panama.

7.22. Before considering the appropriateness of including these provisions in our terms of reference, we begin by examining the relevant legal provision.

7.1.2.3 The relevant legal provision

7.23. Article 6.2 of the DSU provides in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.24. The language of Article 6.2 of the DSU reveals "two key requirements" that a complainant must satisfy in its panel request, namely, the identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint (i.e. the claims) that is sufficient to present the problem clearly.[136] This provision, therefore, serves a "pivotal function"[137] in WTO dispute settlement by defining "the scope of the dispute between the parties, thereby establishing and delimiting the panel's jurisdiction and serving the due process objective of notifying the respondent and third parties of the nature of the case".[138] As stated by the Appellate Body in *US – Carbon Steel*, compliance with the requirements of Article 6.2 "must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".[139] The Appellate Body added in this connection that the examination of the panel request must be based "on its face as it existed at the time of its filing".[140]

7.25. In the present case, our examination focuses on compliance with the first key requirement in respect of the two measures not included in the panel request but which, in principle, develop or amend one of the measures included in the request.

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[134] In any event, the Panel points out that the evidence on this new SSN Resolution No. 38.708/2014 was included on the record of these proceedings after the second substantive meeting, so the parties had no opportunity to put forward their arguments in this regard.

[135] Appellate Body Report, *US – Carbon Steel*, para. 123. We also recall that the Appellate Body has clarified that "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it". See Appellate Body Report, *US – 1916 Act*, footnote 30. We agree with the panel in *US – Upland Cotton* that the specific identification of the measures at issue is a question which goes to our jurisdiction and does not depend on whether a party requests a ruling in a timely manner. See Panel Report, *US – Upland Cotton*, para. 7.153.

[136] Appellate Body Report, *China – Raw Materials*, para. 219. Article 6.2 of the DSU also requires that the panel request be made in writing and indicate whether any consultations were held.

[137] Appellate Body Report, *China – Raw Materials*, para. 219.

[138] Appellate Body Report, *Argentina – Import Measures*, para. 5.39 (citing Appellate Body Report, *US - Countervailing and Anti-Dumping Measures (China)*, paras. 4.6 and 4.7).

[139] Appellate Body Report, *US – Carbon Steel*, para. 127.

[140] Appellate Body Report, *Argentina – Import Measures*, para. 5.48 (citing Appellate Body Report, *US - Countervailing and Anti-Dumping Measures (China)*, para. 4.9).

7.26. The Appellate Body has explained that, in order for changes introduced into a measure after establishment of a panel to be considered as part of its terms of reference, such changes must not have altered the "essence" of the measure. The Appellate Body considered that "[i]f the terms of reference in a dispute are broad enough to include amendments to a measure … and if it is necessary to consider an amendment in order to secure a positive solution to the dispute … then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute."[141]

7.27. In this connection, as pointed out by Panama with regard to SSN Resolution No. 38.284/2014, its panel request refers to "any possible amendments, extensions or additions". We shall therefore examine whether this reference to "any possible amendments, extensions or additions" is sufficient for the changes introduced by SSN Resolution No. 35.794/2011 and SSN Resolution No. 38.284/2014 to be considered within our terms of reference, in the light of the circumstances of this case in particular, and whether the resolutions in question do not alter the essence of SSN Resolution No. 35.615/2011.

7.28. We start by examining the relationship between SSN Resolution No. 35.794/2011 and SSN Resolution No. 35.615/2011. As explained in the descriptive section[142], Article 4 of SSN Resolution No. 35.794/2011, in particular, provides as follows:

> For the purposes of point 19 of Annex I to SSN Resolution No. 35.615, it is stipulated that individual risks exceeding US$50,000,000 (FIFTY MILLION UNITED STATES DOLLARS) may be reinsured with the reinsurance entities mentioned in point 20 of the aforementioned regulations ("approved reinsurers"), for that portion which exceeds the aforementioned amount.

7.29. We note that this provision, which contains an explicit reference to point 19 of Annex I to SSN Resolution No. 35.615/2011, develops this point by introducing the magnitude of the individual risk which may be reinsured with foreign reinsurance entities: US$50,000,000 (fifty million United States dollars). Article 4 also provides that the reinsurance shall be "for that portion which exceeds the aforementioned amount". It is our understanding that this development does not alter the "essence" of measure 5 because it continues to regulate the cross-border supply of reinsurance services, in other words, the delivery of a service in the same sector, and through the same mode of supply (i.e. cross-border supply or mode 1).

7.30. As regards the relationship between SSN Resolution No. 38.284/2014 and SSN Resolution No. 35.615/2011, the text of the former stipulates in relevant part:

> ARTICLE 1: Replace point 18 of ANNEX I to SSN Resolution No. 35.615/2011 by the following:
>
> "Branches of foreign companies must prove that the parent company:
>
> (a) Has been incorporated and registered in countries, dominions, jurisdictions, territories or associate States considered to be 'cooperative for tax transparency purposes', in accordance with the provisions of Decree No. 589/2013 and supplementary regulations.
>
> If the parent company of the branch of the foreign company has not been incorporated and registered in accordance with the terms of the previous paragraph, it must prove that it is subject to the control and supervision of a body which fulfils functions similar to those of the NATIONAL INSURANCE SUPERVISORY AUTHORITY, and with which a memorandum of understanding on cooperation and exchange of information has been signed.
>
> (b) Has been incorporated and registered in countries, dominions, jurisdictions, territories or associate States that cooperate in the global fight against money laundering and terrorist financing offences, in accordance with the criteria defined in the public documents issued by the FINANCIAL ACTION TASK FORCE (FATF).

[141] Appellate Body Report, *Chile – Price Band System*, para. 144. (emphasis original)
[142] See para. 2.28 above.

> If the parent company of the branch of the foreign company has not been incorporated and registered in accordance with the terms of the preceding paragraph, the assessment of the request for authorization shall be subject to enhanced due diligence, proportionate to the risks, and the counter-measures indicated in Recommendation 19 of the FINANCIAL ACTION TASK FORCE (FATF) and the Interpretive Note thereto may be applied."
>
> ARTICLE 2 - Replace subparagraph (f) of point 20 of ANNEX I to SSN Resolution No. 35.615 by the following:
>
> "(f) Prove that they have been incorporated and registered in:
>
> I. Countries, dominions, jurisdictions, territories or associate States considered 'cooperative for tax transparency purposes', in accordance with the provisions of Decree No. 589/2013 and supplementary regulations.
>
> If they have not been incorporated and registered in accordance with the terms of the preceding paragraph, they must prove that they are subject to the control and supervision of a body which fulfils functions similar to those of the NATIONAL INSURANCE SUPERVISORY AUTHORITY, and with which a memorandum of understanding on cooperation and exchange of information has been signed.
>
> II. They have been incorporated and registered in countries, dominions, jurisdictions, territories or associate States that cooperate in the global fight against money laundering and terrorist financing offences in accordance with the criteria defined in the public documents issued by the FINANCIAL ACTION TASK FORCE (FATF).
>
> If they have not been incorporated and registered in accordance with the terms of the preceding paragraph, the assessment of the request for authorization shall be subject to enhanced due diligence, proportionate to the risks, and the counter-measures indicated in Recommendation 19 of the FINANCIAL ACTION TASK FORCE (FATF) and the Interpretive Note thereto may be applied."

7.31. We note that Articles 1 and 2 of the aforementioned Resolution replace the text of points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011. The remainder of SSN Resolution No. 35.615/2011 remains unchanged, except for the development introduced by SSN Resolution No. 35.794/2011.

7.32. As explained in the descriptive part of this Report, the new text of points 18 and 20(f) of SSN Resolution No. 35.615/2011 lifts the ban on supplying reinsurance services through cross-border trade and commercial presence for entities of countries that do not cooperate for the purposes of tax transparency and the global fight against money laundering and terrorist financing offences according to the FATF's criteria. Instead, the new text of points 18 and 20(f) provides for the possibility of supplying such services provided that the parent companies of the branches of companies of non-cooperative countries (mode 3) and the reinsurance entities that deliver their services directly from non-cooperative countries (mode 1) comply with certain requirements. It is our understanding that such an amendment made by means of SSN Resolution No. 38.284/2014 does not alter the "essence" of measure 5 because it continues to regulate the delivery of the same service in the same sector and through the same modes of supply.

7.33. Consequently, we consider it appropriate for us to rule on measure 5, as developed by Article 4 of SSN Resolution No. 35.794/2011 and in accordance with the amendment introduced by SSN Resolution No. 38.284/2014 in order to "secure a positive solution to the dispute" and to make "sufficiently precise recommendations and rulings so as to allow for prompt compliance".[143] Furthermore, as we have already indicated, the parties to this dispute do not object to our doing so.[144]

[143] Appellate Body Report, *Chile – Price Band System*, para. 143.
[144] See paras. 7.20-7.21 above.

7.34. In the light of the foregoing, we conclude that measure 5, as developed by Article 4 of SSN Resolution No. 35.794/2011 and in accordance with the amendment introduced by SSN Resolution No. 38.284/2014, forms part of this Panel's terms of reference.

7.1.3 The question of whether measure 5 covers retrocession services

7.35. We shall now consider the scope of the services covered by measure 5. The parties disagree, in particular, on the scope of measure 5 with regard to retrocession services. On the one hand, Panama considers that such services are governed by measure 5 and relies in this regard on a note contained in Chapter III of SSN Resolution No. 35.615/2011, which provides that "[h]ereinafter, the scope of the terms reinsurance and reinsurer shall extend to the terms retrocession and retrocessionaire at all levels" for the purposes of that Resolution.[145] We recall that only points 18, 19 and 20(f) in Chapter IV of Annex I to SSN Resolution No. 35.615/2011 are part of measure 5. According to Panama, the note applies to the whole of SSN Resolution No. 35.615/2011.[146]

7.36. Argentina, on the other hand, in its first written submission, contends that retrocession services are not included within the scope of measure 5, as "the retrocession regime … is regulated in SSN Resolution No. 35794, which was not contested by Panama in this case".[147] This statement, however, appears to contradict Argentina's response to a question from the Panel in which it explains, in connection with measure 5, that the "measure identified by Panama refers specifically to the delivery of reinsurance and retrocession services"[148] and confirms that "Argentina considers that, by virtue of the measure identified by Panama in its panel request …, SSN Resolution No. 35794 forms part of the Panel's terms of reference".[149]

7.37. Despite the foregoing, in response to a question from the Panel, Argentina explained that the note contained in Chapter III of Annex I to SSN Resolution No. 35.615/2011 only applies to that Chapter, which deals exclusively with intermediaries.[150] Argentina explains that Chapter III, including the aforementioned note, was entirely incorporated into SSN Resolution No. 35.615/2011 by SSN Resolution No. 36.266/2011. Thus, according to Argentina, the content of this note does not inform the provisions of Chapter IV, which include the relevant points in relation to measure 5.

7.38. Our work, therefore, consists of deciding whether the note contained in Chapter III of Annex I to SSN Resolution No. 35.615/2011 informs not only the provisions of Chapter III but also those which compose measure 5 and which are included in Chapter IV. The scope of that note will, therefore, determine whether retrocession services fall within the scope of measure 5.

7.39. In *US – Carbon Steel*, the Appellate Body clarified what elements a panel must examine in order to determine the meaning of the municipal law and indicated that those elements vary from one case to another.[151] The Appellate Body explained that, whereas in some cases the text of the relevant legislation may suffice to clarify the scope and meaning of the relevant legal instruments, in other cases the complainant will also need to support its understanding of the scope and meaning of such legal instruments with "evidence of the consistent application of such laws, the

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[145] Panama's first written submission, footnote 311 (citing Exhibit PAN-36).

[146] Panama contends that "according to the Note contained in Chapter III of SSN Resolution No. 35.615 … 'the scope of the terms reinsurance and reinsurer extends to the terms retrocession and retrocessionaire at all levels', *for the purposes of that Resolution*. See Panama's first written submission, footnote 311 (citing Exhibit PAN-36). (emphasis added)

[147] Argentina's first written submission, para. 443. (footnote omitted)

[148] Argentina's response to Panel question No. 61.

[149] Argentina's response to Panel question No. 61. (footnote omitted)

[150] Argentina's response to Panel question No. 64.

[151] The Appellate Body found as follows:

> The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.

See Appellate Body Report, *US – Carbon Steel*, para. 157. (footnote omitted) See also Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.92. (footnote omitted)

pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars".[152] In the present case, Panama has only provided us with the text of the Argentine legislation in question. We shall therefore consider whether the actual wording of the legislation is sufficiently clear to determine whether measure 5 covers retrocession services.

7.40. We start by considering the note at the beginning of Chapter III of Annex I to SSN Resolution No. 35.615/2011[153], which, as we have already stated, stipulates the following:

> CHAPTER III. INTERMEDIARIES
>
> *(Chapter replaced by Article 1 Resolution No. 36.266/2011 of the National Insurance Supervisory Authority, O.J. 23/11/2011)*
>
> Note: Hereinafter the scope of the terms reinsurance and reinsurer shall extend to the terms retrocession and retrocessionaire at all levels.

7.41. We observe that the note in question is placed just below the title of Chapter III which, by its own terms, is intended to regulate intermediaries, and below a clarification in brackets concerning the latest regulatory developments affecting Chapter III. We also observe that the Chapter in question is found within the Regulatory Framework for Reinsurance contained in Annex I to SSN Resolution No. 35.615/2011, which only consists of four chapters. After Chapter III, entitled "Intermediaries", there is only one more chapter, Chapter IV, entitled "General Provisions", in which the provisions composing measure 5 are to be found.

7.42. The Panel notes that the terms retrocession and retrocessionaire are not defined in SSN Resolution No. 35.615/2011. Among the exhibits furnished by the parties, we find a definition of the concept of retrocession in the "Introduction to Reinsurance" of the MAPFRE Foundation. This document defines retrocession as "reinsurance ceded by a reinsurer to another insurance or reinsurance company in order to release a part of the risks it has written and, in this way, stabilizing its results and homogenizing its liabilities. It is reinsurance for the reinsurer".[154]

7.43. In considering the wording of the note at the beginning of Chapter III, we understand that the pertinent question is the interpretation of the words "*en adelante*" (hereinafter). The *Diccionario panhispánico de dudas* of the Spanish Royal Academy defines "*en adelante*" as "*a partir del momento que se toma como referencia*" [from the moment taken as reference].[155] We see that the note in question does not limit the extension of the scope of the terms reinsurance and reinsurer to the terms retrocession and retrocessionaire at all levels. The note could, for example, explicitly limit this extension to the purposes of Chapter III or some of its provisions. Accordingly, the note in itself appears to indicate that it applies to Annex I as from the moment it appears in the text, which would give cause to think that it could also include Chapter IV. In this connection, Panama's interpretation that this note applies to the whole of SSN Resolution No. 35.615/2011, which would also include the chapters preceding Chapter III, does not appear to us to be correct. On the contrary, the note in question applies "hereinafter", in other words, from the moment it appears in the text of SSN Resolution No. 35.615/2011. We therefore have to decide whether the note applies only up to the end of Chapter III or, on the contrary, whether "hereinafter" also means that it applies to the provisions in Chapter IV and, hence, measure 5.

7.44. In order to resolve this question, we deem it useful to examine the title of Chapter III, which is "Intermediaries". In our view, the location of this note below the title and not in another part of the text indicates that its purpose is to shed light on the subject dealt with in this Chapter,

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[152] Appellate Body Report, *US – Carbon Steel*, para. 157. In *US – Countervailing and Anti-Dumping Measures (China)*, referring to its report in *US – Carbon Steel*, the Appellate Body explained that "in determining the meaning of municipal law, a panel may need to evaluate several elements, including the text of the law on its face, the pronouncements of domestic courts, and the practice of administering agencies". See Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.92.

[153] Annex I to SSN Resolution No. 35.615/2011 contains the "Regulatory Framework for Reinsurance", as established by Article 1 of that Resolution. See SSN Resolution No. 35.615/2011, (Exhibits PAN-36 / ARG-27).

[154] MAPFRE Foundation, Introduction to reinsurance, (Exhibit PAN-35), p. 18.

[155] *Diccionario panhispánico de dudas*, 1st edition, *Real Academia Española* (Santillana, 2005), available at http://lema.rae.es/dpd/?key=adelante.

namely, "intermediaries", from the moment (hereinafter) it appears in the text. We thus consider that the note in question applies to Chapter III and Chapter IV inasmuch as it concerns regulation of the activities of "intermediaries". It is our opinion that this focus would make possible an harmonious interpretation of Chapters III and IV. Accordingly, although we agree with Argentina that the extension of the scope of the terms reinsurance and reinsurance to include the terms retrocession and retrocessionaire at all levels pursuant to the note is limited to regulation of the intermediaries[156], we do not share its view that this conclusion would restrict the note to Chapter III.

7.45. Indeed, Chapter IV also includes provisions which mention the term "intermediary". As an example, point 10, entitled "Additional information" refers to the solvency of the "registered intermediary". A reading of Chapter IV in its entirety shows that it does not include rules governing the registration of intermediaries. On the other hand, points 5 and 8 of Chapter III do include rules governing the registration of intermediaries in the Register kept for the purpose by the Argentine National Insurance Supervisory Authority. In our view, in order to be able to understand the meaning of the concept of "registered intermediary" in point 10 of Chapter IV, it is necessary to look at the rules governing the registration of intermediaries in Chapter III. The inclusion of the reference to a "registered intermediary" in Chapter IV leads us to consider that the logical conclusion would be that the intermediaries referred to in relation to reinsurance in the general provisions of Chapter IV are the same as those regulated by Chapter III. We do not think it reasonable to interpret the note in a way which would suggest that Chapter III regulates the registration of intermediaries in respect of reinsurance and retrocession services, pursuant to the note, while Chapter IV applies only to intermediaries registered in accordance with Chapter III in respect of reinsurance services, excluding those registered in accordance with Chapter III in respect of retrocession services.

7.46. The note in question therefore informs the provisions in Chapter IV, whose purpose is to regulate the activities of intermediaries. Consequently, in order to determine whether the note applies to the provisions of Chapter IV which compose measure 5, we need to ascertain whether the purpose of those provisions is to regulate the activities of intermediaries.

7.47. First of all, we note that the "intermediaries" referred to in both Chapter III and Chapter IV are not, in fact, direct suppliers of reinsurance or retrocession services. They are "agents" (referred to in point 6(I)(a) of Annex I to SSN Resolution No. 35.615/2011 and "brokers" (specifically mentioned in the preamble and points 5(d) and 5(f) of Annex I to SSN Resolution No. 35.615/2011, as well as in Annex II). In this connection, one of the preambular paragraphs specifically provides that "it is necessary to establish an appropriate regulatory framework for reinsurance brokers".[157]

7.48. This is not the case, however, for the provisions composing measure 5. Point 18 of Annex I to SSN Resolution No. 35.615/2011 concerns "branches of foreign companies", while points 19 and 20(f) of the same Resolution refer to "foreign reinsurance entities". In both cases, the provisions composing measure 5 regulate entities which provide reinsurance services directly.

7.49. Secondly, and as background to this discussion, we note that SSN Resolution No. 35.794/2011, Article 4 of which forms part of the Panel's terms of reference[158], establishes a specific regulatory framework for the direct supply of retrocession services, which differs from the provisions on reinsurance services in points 18, 19 and 20(f) of SSN Resolution No. 35.615/2011.[159]

7.50. In the light of the foregoing, we conclude that measure 5 applies only to reinsurance services and does not, therefore, cover retrocession services.

[156] Argentina's response to Panel question No. 64.
[157] SSN Resolution No. 35.615/2011, (Exhibits PAN-36 / ARG-27).
[158] See the decision of the Panel in this regard in para. 7.33 above.
[159] Argentina's first written submission, paras. 443-446; and Argentina's response to Panel question No. 18.

7.2 Order of analysis

7.51. Having established the boundaries of measure 5 in relation to our terms of reference, and before continuing with the claims put forward by Panama and the related defence arguments invoked by Argentina, we shall consider the order of our analysis.

7.52. As we explain in the descriptive part of this Report, in its panel request Panama presented claims under the GATS and the GATT 1994 relating to eight measures applied by Argentina. Panama considers that each of the challenged measures violates one or more specific provisions of the GATS and/or the GATT 1994. The provisions invoked by Panama under the GATS are Articles II:1, XVI:1, XVI:2(a) and XVII. Under the GATT 1994, Panama alleges that certain measures are inconsistent with Articles I:1, III:4 and XI:1.

7.53. In its defence, Argentina replies, *inter alia,* that its measures are justified by the exceptions relating to services in Articles XIV(c) and XIV(d) of the GATS and paragraph 2(a) of the GATS Annex on Financial Services, which contains the so-called "prudential exception"; as well as the exception in Article XX(d) of the GATT 1994 with regard to the claims under this Agreement.[160]

7.54. The possibility that a measure may be inconsistent with the GATS and the GATT 1994 at the same time has already been accepted by the Appellate Body in previous disputes. Indeed, the Appellate Body considered that obligations under the GATS and the GATT 1994 may coexist[161] and that a measure may fall simultaneously within the scope of both Agreements, even though the specific aspects of the measure that are to be examined under each Agreement may differ.[162]

7.55. One issue we must resolve in regard to the legal claims is whether there is a specific sequence to be followed when examining Panama's claims and Argentina's response. Inasmuch as Panama made claims under both the GATS and the GATT 1994, the first thing we have to decide is whether we should start our analysis by examining the claims made under the GATS or those made under the GATT 1994. We note that both parties began their arguments with the claims and corresponding defences under the GATS, before turning to the claims and defences under the GATT 1994. Once it is decided which Agreement to examine first, we have to settle the order of precedence of the provisions to be considered under each Agreement.

7.56. Together with the decision on which provisions of which Agreement are to be examined first, we also face the task of deciding on the approach to be followed in our analysis. Panama urges us to examine its claims and Argentina's corresponding defences separately in relation to each measure at issue, which would lead us to repeat a large part of our analysis. In its view, this approach would give the Panel a better understanding of the facts and would help it to identify the relevance of the legal arguments. Panama also raised considerations of due process, arguing that it has requested findings, rulings, recommendations and, where applicable, suggestions for each of the measures at issue.[163] Argentina considers that, in view of the nature of Panama's claims in this dispute, it would be appropriate for the Panel to follow the order of analysis proposed by Panama.[164]

7.57. We start by considering the order of analysis that we must follow with regard to the claims under the GATS and the GATT 1994. As we have already indicated, both parties commence their arguments by referring to Panama's claims under the GATS. We see no problem in following the order proposed by the parties, particularly bearing in mind that Panama's claims under the GATS are more numerous and cover all the measures at issue.

7.58. As is explained in detail in section 7.3.1 below, even though Panama contends that the eight measures at issue are covered by the GATS, Argentina maintains that Panama has not established a *prima facie* case that the measures at issue are covered by the GATS as it has not proved that

[160] Argentina's first written submission, paras. 237-400, 551-568 and 745-751. See also first written submission, Explanatory Annex No. 2, paras. 52-73.

[161] Appellate Body Report, *Canada – Periodicals*, p. 20 (confirming the statement of the Panel; see Panel Report, *Canada – Periodicals*, para. 5.17).

[162] Appellate Body Report, *EC – Bananas III*, para. 221.

[163] Panama's response to Panel question No. 5.

[164] Argentina's response to Panel question No. 5.

there is "trade in services" within the meaning of Article I:2 of the GATS.[165] We shall therefore begin by examining as a threshold issue whether the GATS is applicable to each of the eight measures at issue.[166] Should this be the case, we would continue our analysis by examining Panama's claims under the GATS, followed by Argentina's defences under the same Agreement. After completing our analysis under the GATS, we would address Panama's claims and Argentina's corresponding defences under the GATT 1994.

7.59. As regards the order of analysis of Panama's claims under the GATS and the corresponding defences, the parties' arguments have as a rule dealt first with the claims regarding most-favoured-nation treatment (Article II:1) and, depending on the measure, national treatment (Article XVII), followed, where appropriate, by claims relating to market access (Articles XVI:1 and XVI:2(a)). Following on from the corresponding claim, the parties' arguments, where relevant, have concerned the exceptions invoked by Argentina under Articles XIV(c) and XIV(d) of the GATS and paragraph 2(a) of the Annex on Financial Services (the so-called "prudential exception").

7.60. If we examine the various provisions invoked by Panama under the GATS, we see how Article II of the GATS contains a general obligation, applicable to all the sectors covered by the GATS. On the other hand, the other provisions invoked by Panama under the GATS, Articles XVI and XVII, contain obligations that only concern the sectors and subsectors included in the Members' Schedules of Commitments, under the modes indicated, and subject to the "terms, limitations and conditions" (for Article XVI) and "conditions and qualifications" (for Article XVII) set out in the Schedules of Commitments. The order followed by the parties therefore appears to us to be appropriate.

7.61. After examining the claims under the GATS, we shall turn to the defences put forward by Argentina. We also think it appropriate to follow the order proposed by the parties and to commence our analysis of these defences under Article XIV(c), followed by Article XIV(d) of the GATS, inasmuch as the latter defence has been invoked in the alternative.[167] We shall go on to examine the "prudential exception" in paragraph 2(a) of the Annex on Financial Services hereunder.

7.62. As regards the order of analysis of Panama's claims under the GATT 1994, the question of the order of precedence would arise only in relation to measure 3 (transaction valuation based on transfer prices), as Panama has made only one claim in relation to measure 2 (presumption of unjustified increase in wealth) under Article I:1 of the GATT 1994. As regards measure 3, Panama has put forward claims of inconsistency with Articles I:1 and III:4 and, in the alternative, under Article XI:1 of the GATT 1994.

7.63. Concerning the order of analysis between Articles I:1 and III:4 of the GATT 1994, we note that both provisions contain two different expressions of the fundamental principle of non-discrimination: most-favoured-nation treatment (Article I:1) and national treatment (Article III:4). We do not find in the text of these two provisions or in the case law any indication of the existence of a relationship between them which would determine the order of analysis to be followed. We must bear in mind that the order we choose may also have an impact on the potential to apply judicial economy when making our determinations in this case.[168] Nonetheless, the difference in the nature of the two provisions means that a finding of violation of the MFN treatment obligation does not result in securing a positive solution to the dispute with regard to the national treatment obligation. The order of precedence does not, therefore, in principle, have an impact in terms of the exercise of judicial economy. Consequently, there do not appear to be any reasons preventing the Panel from following the order of analysis indicated by the complaining party, which consists in first examining the claim under Article I:1 and then the claim under Article III:4 of the GATT 1994. After our analysis under Article III:4 of the GATT 1994 has been

[165] Argentina's first written submission, paras. 139-141.

[166] This sequence appears to us to coincide with the comments of the Appellate Body in *Canada – Autos*. In that dispute, the parties disagreed on whether the measures in question were covered by the GATS. The Appellate Body indicated that "… here, the fundamental structure and logic of Article I:1, in relation to the rest of the GATS, require that determination of whether a measure is, in fact, covered by the GATS must be made *before* the consistency of that measure with any substantive obligation of the GATS can be assessed". See Appellate Body Report, *Canada – Autos*, para. 151. (emphasis original)

[167] Argentina's first written submission, paras. 353-400.

[168] Panel Report, *India – Autos*, para. 7.161.

completed and only if we find that measure 3 is not inconsistent with that provision, we shall examine the claim under Article XI:1, which has been submitted in the alternative.

7.64. Once the claims under the GATT 1994 have been examined and if there is a finding of inconsistency with Articles I:1, III:4 or, alternatively, XI:1 of the GATT 1994, we shall examine the defence put forward by Argentina under Article XX(d) of the GATT 1994.

7.65. After our order of analysis has been decided in relation to the order of precedence of claims and defences, it remains for us to decide whether we shall undertake this analysis measure by measure, i.e., analyse all the relevant claims and defences under the GATS and the GATT 1994 presented in connection with a single measure at issue; or, on the contrary, if we shall examine each of the provisions invoked by Panama in respect of all the measures it has challenged, as the case may be.

7.66. The Panel has carefully reviewed the reasons put forward by Panama for proceeding measure by measure. In the circumstances of this dispute, where there are claims common to more than one measure, including a principal claim under Article II:1 of the GATS which concerns all the measures at issue, we are not convinced that the measure-by-measure approach suggested by Panama would contribute to a better understanding of the facts or help to identify the relevance of the legal arguments in comparison with the claim-by-claim approach. Nor do we consider that a claim-by-claim approach would have an effect on due process in the terms proposed by Panama since, in our opinion, it would not prevent findings being reached for each of the measures at issue, as Panama has requested. What does concern us, on the other hand, is preparing excessively long and repetitive findings if we were, for example, to analyse Panama's claims under Article II:1 of the GATS separately for each of the eight measures. This would lead us to our repeating our analysis over and over again, as the complainant has done in its second written submission or, to avoid this, introducing an excessive number of cross references, which would complicate the reading and understanding of the text.

7.67. In our view, our task will be fulfilled more effectively if we opt for a claim-by-claim analysis in which, after establishing the legal standard to be applied in our interpretation of a specific provision, we then apply it to our examination of the consistency of each of the measures challenged with that provision. The same procedure would apply when examining the defences put forward by Argentina. The Panel recalls that it has the autonomy to decide on the order of its analysis[169] and, therefore, may opt for an order that is different to the one proposed by Panama. In our view, the interpretation or correct application of the legal provisions concerned does not require a measure-by-measure examination of Panama's claims and the corresponding defences.[170]

7.68. We therefore begin our analysis with the threshold question of whether the GATS is applicable to the measures at issue.

[169] The Appellate Body recognized this autonomy in *Canada – Wheat Exports and Grain Imports* when it stated that "[a]s a general principle, panels are free to structure the order of their analysis as they see fit. In so doing, panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member." See Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

[170] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 277. In *India – Autos*, the panel clarified that the order of analysis could also have an impact on the exercise of judicial economy. See in this connection Panel Report, *India – Autos*, para. 7.161.

7.3 Findings under the GATS

7.3.1 The question of whether the GATS is applicable to the measures at issue

7.3.1.1 Main arguments of the parties

7.3.1.1.1 Panama

7.69. Panama asserts that the GATS is applicable to the eight measures at issue.[171] As regards the applicable legal standard under Article I:1 of the GATS, Panama asserts that in order to determine whether a measure "affect[s] trade in services" two key legal questions have to be examined, namely: (i) whether there is "trade in services" within the meaning of Article I:2 of the GATS; and (ii) whether the measure "affect[s]" such trade in services within the meaning of Article I:1 of the GATS.[172] As regards the first question, Panama argues that "trade in services" is defined as the "supply of a service" through one of the four modes specified in subparagraphs (a) to (d) of Article I:2 of the GATS. Consequently, for trade in services to exist a service must be supplied under one of the four modes.[173] As far as the second question is concerned, Panama contends that the word "affect", in its ordinary meaning, denotes a measure that has "an effect on" a service, which implies a "broad scope of application". According to Panama, nothing in the GATS suggests that its scope is limited.[174]

7.70. Panama considers that Argentina's argument to the effect that Panama has failed to demonstrate that there is effective trade between Panama and Argentina has no legal support in the text of the GATS. In Panama's opinion, neither Articles I and XXVIII of the GATS nor the case law make application of the GATS conditional in all cases on the exhaustive enumeration of each and every one of the services possibly affected by a measure. According to Panama, imposing such a requirement would run counter to the object and purpose of the GATS. Panama considers that, as there may exist measures of a cross-cutting nature which affect a whole range of services or even all services on which a Member has made a commitment (for example, a general ban on setting up branches in the national territory), it would not be necessary to require that the applicability of the GATS be subject to separate identification of each and every one of the services that might be affected by such a measure. Panama also points out that, in its first written submission, Argentina submitted a table of the services and modes of supply relevant to this dispute, which, in Panama's opinion, shows that Argentina has fully understood the scope of its claims in connection with trade in services.[175]

7.71. According to Panama, accepting Argentina's argument would mean that any illegal measure would be immune from the disciplines of the GATS, because in preventing effective transactions between the complaining party's suppliers and the defending party's consumers, the GATS would never be applicable.[176] Panama adds that the context provided by other GATS rules and the history of its negotiation show that it was the negotiators' intention to give the GATS the broadest possible scope and it also recalls that the Appellate Body has already stated that nothing in the GATS suggests that its scope is limited.[177]

7.72. Panama argues that Argentina's pretension to require proof of effective transactions is based on an erroneous reference to the Appellate Body Reports in *Canada – Autos* and *EC – Bananas III* inasmuch as, in both cases, the Appellate Body did not establish a general rule that the existence of specific transactions binding on the complainant had to be proven as a requirement for applicability of the GATS, but examined specific factual situations relating to the specific markets in question. Panama points out that the Appellate Body's reference in *Canada – Autos* to whether there is "trade in services" has to be understood as an obligation to explain

[171] Panama's first written submission, paras. 4.13 and 4.14 (measure 1); 4.106-4.109 (measure 2); 4.245 (measure 3); 4.308 (measure 4); 4.336 and 4.337 (measure 5); 4.393-4.395 (measure 6); 4.418-4.420 (measure 7); and 4.446-4.448 (measure 8).

[172] Panama's first written submission, para. 4.13; and second written submission, para. 2.28.

[173] Panama's first written submission, para. 4.13 (citing Appellate Body Report, *Canada – Autos*, para. 156).

[174] Panama's first written submission, para. 4.13 (referring to Appellate Body Reports, *Canada – Autos*, para. 155, and *EC – Bananas III*, para. 220).

[175] Panama's second written submission, paras. 2.10 and 2.11.

[176] Panama's second written submission, paras. 2.12 and 2.13.

[177] Panama's second written submission, paras. 2.15-2.17.

which services and modes of supply would be relevant in the light of the actual measure being challenged. In Panama's opinion, the fact that there are suppliers in the complaining Member which, at the time of the dispute, are supplying the services in question to consumers in the respondent Member is one element that could assist such identification, but it is not a requirement for application of the GATS.[178] In any event, Panama states that, even accepting Argentina's contention for the sake of argument, it has presented proof of the specific impact on Panama's service suppliers, as regards both the services supplied and the modes of supply used.

7.73. Panama maintains that, while Argentina admits that the coverage of the GATS extends to potential suppliers, it is unable to explain what would be the difference between the effect of the measures on potential suppliers – which it does consider acceptable – and the "theoretical effect" of the measures on the same type of suppliers. Panama claims that Argentina's argument is purely rhetorical as there is no way of showing the effect on potential suppliers which, by definition, are not present on the market in question, other than by means of a theoretical explanation of how the measures in question exert their effects. In any event, Panama contends that it has explained, measure by measure, how each of them has an effect on the services and service suppliers in question, and has put before the Panel for its consideration evidence concerning the actual effect on certain service suppliers. According to Panama, its rights as a WTO Member are being seriously affected and it cannot accept that observance of the most-favoured-nation clause by Argentina is made subject to compliance with certain conditions imposed unilaterally.[179]

7.74. With regard to the foreign exchange authorization requirement (measure 8), Panama considers that it has an *ex ante* impact on business planning in Argentina because it affects the decision on whether to establish a commercial presence in Argentina. Panama argues that, although the additional requirement for repatriation of investments does not directly affect the inflow of investment into Argentine territory, by affecting the outflow of such investment the measure has an effect on the business planning of any company and on the decision to supply services through a commercial presence in Argentina.[180]

7.3.1.1.2 Argentina

7.75. Argentina contends that Panama has not established a *prima facie* case that the measures at issue are covered by the GATS as it has not shown that there is "trade in services" within the meaning of Article I:2 of the GATS[181] and puts forward its claims purely on the basis of the "theoretical" effect of the measures at issue on alleged services and service suppliers of non-Panamanian origin.[182]

7.76. According to Argentina, Panama has not provided sufficient evidence to show that there is trade in any of these services under the modes of supply identified. Referring to the Appellate Body Report in *Canada – Autos*, Argentina considers that Panama has the obligation to prove that the relevant services are supplied to the territory of the Argentine Republic from the territory of Panama, in the case of mode 1, or by a service supplier of Panamanian origin through a commercial presence in Argentina, in the case of mode 3. It is Argentina's opinion that, even if the threshold for application of the GATS could be established on the basis of services and service suppliers of an origin other than that of the complainant, Panama has failed to show that there is trade in any of the relevant services in the modes of supply identified. Argentina considers that Panama's case is based solely on the theoretical impact of the measures at issue on trade in services; an impact which Panama has not even shown to exist.[183]

7.77. Argentina argues that, since Panama has failed to show that the relevant services are actually supplied through cross-border trade (mode 1) or commercial presence (mode 3), Panama has not demonstrated that there is trade in services that might be "affected" by the measures challenged in this dispute. Argentina recognizes that the Appellate Body has taken a broad view of what constitutes a measure "affecting trade in services" and that at least one panel has held that

[178] Panama's second written submission, paras. 2.20-2.24; and response to Panel question No. 24.
[179] Panama's second written submission, paras. 2.25-2.27.
[180] Panama's second written submission, paras. 2.780 and 2.783.
[181] Argentina's first written submission, paras. 139-141.
[182] Argentina's second written submission, para. 14.
[183] Argentina's first written submission, paras. 143 and 144 (citing Appellate Body Report, *Canada – Autos*, para. 157); and opening statement at the first meeting of the Panel, paras. 23-27.

GATS coverage extends to potential service suppliers. Argentina explains, however, that it is not aware of any dispute in the GATS context in which any Member has attacked a national regulatory system on the basis of its theoretical effect on potential service suppliers. In Argentina's opinion, allowing a Member to invoke the GATS solely on the basis of the theoretical effect of the measures in question could have serious repercussions.[184]

7.78. With regard to measure 8, Argentina argues that the foreign exchange authorization requirement is not covered by the GATS. According to Argentina, the measures affecting the repatriation of investment are not directly related to trade in services and, therefore, do not affect trade in services within the meaning of Articles I:1 and XXVIII of the GATS. In Argentina's view, this measure does not affect the establishment of a company in the country or the delivery of services by that company, but implies closer scrutiny of access to the local foreign exchange market for the transfer of equity funds invested in the country if it is decided to repatriate them.[185]

7.3.1.2 Assessment by the Panel

7.3.1.2.1 Introduction

7.79. Panama has submitted a number of claims under the GATS with regard to the eight measures at issue, contending that that Agreement applies to all of them.[186] Argentina, however, argues that Panama has not established a *prima facie* case that the measures at issue are covered by the GATS as it has not demonstrated that there is "trade in services" within the meaning of Article I:2 of the GATS.[187]

7.80. As we also explained in section 7.2 above, in order to determine whether the GATS is the agreement which covers the eight measures at issue specifically and in more detail, we must first examine whether the GATS is applicable to each of them. To do so, in the manner established by the Appellate Body, as a preliminary matter we shall examine the question of the applicability of the GATS to the measures at issue before evaluating their consistency with the substantive obligations invoked by Panama.[188]

7.81. We start by examining the relevant legal provision.

7.3.1.2.2 The relevant legal provision

7.82. Article I of the GATS, entitled *Scope and Definition*, provides as follows:

> 1. This Agreement applies to measures by Members affecting trade in services.
>
> 2. For the purposes of this Agreement, trade in services is defined as the supply of a service:
>
> (a) from the territory of one Member into the territory of any other Member;
>
> (b) in the territory of one Member to the service consumer of any other Member;

[184] Argentina's first written submission, paras. 144 and 145.
[185] Argentina's first written submission, Explanatory Annex No. 2, paras. 27-35; and response to Panel question No. 71.
[186] We note that Panama does not put forward separate claims under Article I:1 of the GATS in respect of that Agreement's application to the challenged measures. Nevertheless, Panama discusses the application of the GATS in the context of its arguments under Articles II and XVII of the GATS. Both provisions require, as a first step, that the complaining party prove that the challenged measure is "covered by this Agreement" (Article II) or affects the supply of services, as required by Article XVII ("in respect of all measures affecting the supply of services").
[187] Argentina's first written submission, paras. 141-143.
[188] In *Canada – Autos*, the parties disagreed on whether the measures at issue were covered by the GATS. The Appellate Body indicated that "… here, the fundamental structure and logic of Article I:1, in relation to the rest of the GATS, require that determination of whether a measure is, in fact, covered by the GATS must be made *before* the consistency of that measure with any substantive obligation of the GATS can be assessed". See Appellate Body Report, *Canada – Autos*, para. 151. (emphasis original)

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

3. For the purposes of this Agreement:

(a) "measures by Members" means measures taken by:

(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

(b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;

(c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

7.3.1.2.3 The legal standard under Article I of the GATS

7.83. We recall that, in *Canada – Autos*, the Appellate Body identified two key legal issues which a complainant must establish in order to prove that a measure is covered by the GATS:

> "[T]wo key legal issues must be examined to determine whether a measure is one "affecting trade in services": first, whether there is "trade in services" in the sense of Article I:2; and, second, whether the measure in issue "affects" such trade in services within the meaning of Article I:1.[189]

7.84. Guided by this finding by the Appellate Body, we shall successively examine whether Panama has proved that (i) there is "trade in services" in the sense of Article I:2 of the GATS, and (ii) whether the measure at issue "affect[s]" such trade in services within the meaning of Article I:1 of the GATS.

7.3.1.2.3.1 First question: Whether there is "trade in services" in the sense of Article 1:2 of the GATS

7.85. We note that the main reason for the dispute between the parties concerns this first key legal issue of the legal standard established by the Appellate Body in *Canada – Autos*. Argentina claims that the complainant must demonstrate that there is effective trade in services, either between the complainant and the respondent or between other Members and the respondent.[190] At the first substantive meeting, Argentina raised the possibility of showing the existence of potential trade in services but, in that case, Argentina considers that the complainant has to identify specific services and service suppliers duly attributable to a Member, in one or more of the four modes of supply and in respect of which it has been shown that they are potentially affected by the measures at issue.[191]

[189] Appellate Body Report, *Canada – Autos*, para. 155.
[190] Argentina's first written submission, paras. 143 and 144. See also Argentina's response to Panel question No. 24(a)(i).
[191] Argentina's response to Panel question No. 24(a)(i).

7.86. Panama responds that Argentina's interpretation of this first element is erroneous as the requirement of the existence of effective trade has no legal basis in the text of the GATS.[192] Panama asserts that the Appellate Body's reference to whether "there is 'trade in services'" should be understood as a need to identify the relevant services and modes of supply in the light of the specific measure challenged. In Panama's opinion, the fact of whether or not there are service suppliers of the complaining Member which, at the time of the dispute, are supplying the services concerned to consumers in the defending Member does not prevent the relevant "trade in services" from being identified. Panama argues that Argentina's interpretation could lead to the absurd result that, even if a measure has the specific objective of regulating trade in service "X" and does in fact regulate such trade, it would have to be demonstrated in addition that "there is 'trade in services'" in order for the GATS to be applicable.[193]

7.87. We recall that the relevant text of the GATS stipulates that the Agreement "applies to measures by Members affecting trade in services" (Article I:1 of the GATS) and defines "trade in services" as "the supply of a service" through four modes of supply (Article I:2 of the GATS). Pursuant to Article XXVIII(c) of the GATS, the expression "measures by Members affecting trade in services" covers measures in respect of: (i) the purchase, payment or use of a service; (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally; and (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member.

7.88. In our view, it cannot be inferred from the wording of Article I:1 that the GATS is only applicable between two Members when there are actual flows of services between them or when "suppliers of specific services attributable" to a Member seek to supply services in the market of the defending Member. The ordinary meaning of Article I:1 of the GATS rather indicates that the GATS applies to measures which affect "trade in services", defined in the following subparagraph as the supply of services through four modes. The wording of Article I:1, therefore, does not refer to measures that specifically affect actual services and service suppliers of the complaining Member or of any other Member.[194]

7.89. By way of context, we note that, according to Article XVII, paragraph 1, of the GATS, the Article applies to "all measures affecting the supply of services", irrespective of whether service suppliers of the complaining party are engaged in trade or seeking to engage in trade with the Member applying the measure.[195] Likewise, paragraph 3 of the Article requires consideration of whether a measure "modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member". In our view, the context afforded by Article XVII indicates that the analysis must hinge on the conditions of competition and not on the actual effects on specific service suppliers. We agree with one of the third parties that the WTO obligations protect equality of competitive opportunities rather than actual trade volumes.[196]

7.90. The existing case law with regard to trade in goods appears to support this approach. With reference to the GATT 1994, the Appellate Body confirmed in an early decided case that:

> "[I]t is irrelevant that 'the trade effects' of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III [of the GATT 1994] protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."[197]

7.91. We note also that Article XXIII:1 of the GATS, which is the dispute settlement provision applicable to disputes arising in relation to the GATS, stipulates as follows:

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[192] Panama's second written submission, para. 2.13.

[193] Panama's second written submission, paras. 2.20-2.24 and response to Panel question No. 24.

[194] United States' third-party submission, para. 4.

[195] We note that the United States makes the same analysis. See United States' third-party submission, para. 4.

[196] European Union's third-party submission, paras. 39 and 40 (referring to Appellate Body Reports, *EC – Seal Products*, paras. 5.82 and 5.87; *Japan – Alcoholic Beverages II*, p. 16 and *US – FSC (Article 21.5 – EC)*, para. 215; and Panel Reports, *US – Clove Cigarettes*, paras. 7.348-7.445 (in relation to Article 2.1 of the TBT Agreement) and *EC – Bananas III (US)*, para. 7.320 (in relation to Article XVII of the GATS)).

[197] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16.

> "*If any Member should consider that any other Member fails to carry out its obligations or specific commitments* under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU." (emphasis added)

7.92. Accordingly, the context afforded by Article XXIII:1 of the GATS indicates that Members have broad discretion when reporting to the DSB to claim alleged violations of the GATS. A complainant may resort to the DSB if it "considers" that another Member "fails to carry out its obligations or specific commitments" under the GATS. Article XXIII of the GATS does not contain any other condition and does not, therefore, require that non-compliance with the said obligations or commitments have trade effects for the complainant.

7.93. We note that in *EC – Bananas III*, in language similar to that used in Article XXIII of the GATT 1994[198], the Appellate Body emphasized that "a Member has broad discretion in deciding whether to bring a case against another Member under the DSU" and agreed with the Panel that "with the increased interdependence of the global economy, ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly."[199] In our view, this reasoning also applies in the context of the GATS.

7.94. Accordingly, we agree with the position expressed by one of the third parties[200] that acceptance of Argentina's argument that Panama must identify "actual" services and service suppliers operating in the Argentine market and being affected by the challenged measures would mean adding a requirement to Article I:1 of the GATS rather than treating it as an additional element of evidence. Furthermore, Argentina's argument would lead to an absurd situation in which the GATS would apply to measures provided that there is actual trade in services but would not apply to the most trade-restrictive measures, that is, bans on supplying services, which, by their very nature, prevent actual flows of services. We believe that such an outcome would serve to weaken the GATS and would clearly be contrary to the object and purpose of the Agreement, whose preamble states, *inter alia*, that Members wish "to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization …".

7.95. Nor do we share Argentina's interpretation of the Appellate Body Report in *Canada – Autos*.[201] Like Panama, we understand that, in *Canada – Autos*, the Appellate Body did not establish a general rule that the existence of specific transactions between the complainant and the respondent has to be proved but ruled on the factual situation in the market in question.[202] We also note that none of the four subsequent Panels which adjudicated disputes under the GATS required the complaining party to prove the existence of specific transactions between the complainant and the respondent (or between the latter and other Members).[203] Such precedents confirm, in our view, that none of these Panels interpreted the Appellate Body Report in *Canada –*

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[198] Article XXIII:1 of the GATT 1994 provides as follows: "If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded …".

[199] Appellate Body Report, *EC – Bananas III*, paras. 135 and 136 (referring to Panel Reports in that dispute, para. 7.50).

[200] United States' third-party submission, paras. 4 and 6.

[201] In that dispute, the parties disagreed as to whether the measure at issue – namely, exemption from import duty on motor vehicles covered by the GATT 1994 – could also affect the supply of distribution services and thus be covered by the GATS. When considering whether there was "trade in services", the Appellate Body referred to the definitions of "trade in services" in Article I:2, noted that the mode concerned was defined in Article I:2(c), namely, mode 3, and also recalled the definition of commercial presence in Article XXVIII(d). Subsequently, the Appellate Body found that the complainants had identified the relevant sector on the basis of the Central Product Classification (CPC) and the respondent had not denied that there was a commercial presence on the part of the complainant's service suppliers on its territory. The Appellate Body concluded, therefore, that "the 'trade in services' here in issue is wholesale trade services of motor vehicles supplied by service suppliers of certain Members through commercial presence in Canada". See Appellate Body Report, *Canada – Autos*, paras. 156 and 157.

[202] Panama's second written submission, para. 2.20.

[203] Two Panels (*US – Gambling* and *China – Publications and Audiovisual Products*) made a summary examination of the applicability of the GATS, and two other Panels (*Mexico – Telecoms* and *China – Electronic Payment Services*) did not examine this question at all.

Autos as requiring the complainant to prove the existence of "actual" transactions as a prerequisite for determining application of the GATS.

7.96. In fact, in justifying the measures at issue in this dispute, Argentina itself appears to admit that there is – or there may be – trade in services between Argentina and other WTO Members – including Panama. For example, Argentina explains at the beginning of its first written submission that "[t]he defensive anti-abuse measures such as those at issue in this dispute" are "essential tools for … equalizing the conditions of competition on the international market for financial and other services".[204] Accordingly, if Argentina considers it necessary to apply defensive anti-abuse measures to "equaliz[e] the conditions of competition on the international market for financial and other services", it is because, in the first place, such trade in services with Argentina exists – or may exist.

7.97. The Panel notes that, for each of the eight measures at issue, Panama has identified the relevant services and modes of supply.[205] The information in this regard is shown in the following table:

No.	Description	Services and modes affected
1	Withholding tax on payments of interest or remuneration	*Claim under Article II:1 of the GATS* **MODE** Mode 1[206] — **SECTOR** Lending, credit services (CPC 8113) and those involving placement of funds in Argentina[207]
2	Presumption of unjustified increase in wealth	*Claim under Article II:1 of the GATS* **MODE** Mode 1[208] — **SECTOR** All sectors of services where supply or delivery requires the entry of funds into Argentina[209] *Claim under Article XVII of the GATS* **MODE** Mode 1[210] — **SECTOR** Maritime and air transport insurance services and reinsurance and retrocession services[211]

[204] Argentina's first written submission, para. 10.

[205] See in particular Panama's second written submission, paras. 2.90 and 2.91 (measure 1); paras. 2.254 and 2.255 (measure 2); paras. 2.401-2.403 (measure 3); paras. 2.507 and 2.508 (measure 4); paras. 2.594 and 2.595 (measure 5); paras. 2.692-2.694 (measure 6); para. 2.730 (measure 7); paras. 2.776-2.779 (measure 8). Moreover, Panama has also provided examples of actual supply by suppliers from Panama and/or non-cooperative countries for various measures. See in particular Panama's second written submission, paras. 2.93-2.99 (measure 1); paras. 2.256-2.261 (measure 2); paras. 2.405 and 2.406 (measure 3).

[206] Panama's second written submission, para. 2.91.

[207] Originally Panama stated that these were classified in sector 7.B (see Panama's first written submission, para. 4.30). Argentina clarified that the broad meaning of this term covers "deposits and other forms of attracting funds from financial institutions" (which are identified as services in provisional CPC codes 8115–8119), "or [receiving funds from] other sources (issue and placement of negotiable bonds, trust securities of financial trust funds, etc.)". See Panama's second written submission, para. 2.91 (referring to Argentina's first written submission, Explanatory Annex No. 1, para. 15).

[208] Panama's second written submission, para. 2.249.

[209] Panama considers this sector to be a general category. Panama also mentions that lending, insurance and reinsurance, and retrocession services, as specific services, confirm the existence of the general category. See Panama's second written submission, para. 2.254.

[210] Panama's first written submission, para. 4.152. See also Panama's second written submission, para. 2.303.

[211] Panama's first written submission, paras. 4.133 and 4.152. See also Panama's second written submission, para. 2.304.

No.	Description	Services and modes affected
3	Transaction valuation based on transfer prices	*Claim under Article II:1 of the GATS* **MODE** **SECTOR** Modes 1 and 2[212] All services[213] *Claim under Article XVII of the GATS* **MODE** **SECTOR** Modes 1 and 2[214] All services on which Argentina undertook full national treatment commitments under modes 1 and 2[215]
4	Payment received rule for the allocation of expenditure	*Claim under Article II:1 of the GATS* **MODE** **SECTOR** Mode 1[216] All services whose payment generates revenue of Argentine source for the service supplier[217] *Claim under Article XVII of the GATS* **MODE** **SECTOR** Mode 1[218] Services whose payment generates revenue of Argentine source for the service supplier and for which Argentina adopted a full commitment under mode 1[219]
5	Requirements relating to reinsurance services	*Claim under Article II:1 of the GATS* **MODE** **SECTOR** Modes 1 and 3[220] Reinsurance services[221] *Claim under Articles XVI:1 and XVI:2(a) of the GATS* **MODE** **SECTOR** Mode 1[222] Reinsurance services[223]

[212] Panama's second written submission, paras. 2.402 and 2.413.
[213] Panama's second written submission, paras. 2.398 and 2.401.
[214] Panama's second written submission, paras. 2.402 and 2.413.
[215] Panama's second written submission, footnote 420:
In mode 1, the only sectors in which Argentina did not undertake national treatment commitments are the following: life, accident and health insurance services; non-life insurance services; acceptance of deposits and other repayable funds from the public; lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transactions; financial leasing with a purchase option; all payment and money transmission services; guarantees and commitments; trading for own account or for account of customers on the money market (cheques, bills, certificates of deposit, etc.), foreign exchange, derivative products, including, but not limited to, futures and options, exchange rate and interest rate instruments, such as swaps, forward interest-rate agreements, etc., transferable securities and other negotiable instruments and financial assets, including bullion; participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues; money broking; asset management; settlement and clearing services for financial assets; new financial services. In mode 2, the only sectors in which Argentina did not undertake national treatment commitments are the following: life, accident and health insurance services; non-life insurance services; and new financial services" (emphasis original).
See Argentina's Schedule of Specific Commitments, (Exhibit PAN-19).
[216] Panama's second written submission, paras. 2.507 and 2.516.
[217] Panama presents this category as a general services category which would cover services referred to in Title V of the LIG, including lending, consumer credit and other services involving the placement of funds. See Panama's second written submission, paras. 2.507 and 2.516.
[218] Panama's second written submission, paras. 2.507 and 2.516.
[219] Panama's second written submission, paras. 2.507 and 2.516. By way of example, Panama mentions insurance services (provisional CPC 81293) and reinsurance services (provisional CPC 81299*); financial consultancy services (provisional CPC 8131 or 8133); technical consultancy or other consultancy services provided from abroad (including management consulting services (provisional CPC 865)). See Panama's second written submission, para. 2.538.
[220] Panama's second written submission, para. 2.595. See also second written submission, para. 2.594.
[221] Panama's second written submission, para. 2.595. See also second written submission, para. 2.594. In this connection, we recall that the Panel has concluded that measure 5 does not cover retrocession services. See section 7.1.4 above.
[222] Panama's second written submission, para. 2.615.
[223] Panama's second written submission, para. 2.615. In this connection, we recall that the Panel has concluded that measure 5 does not cover retrocession services. See section 7.1.4 above.

No.	Description	Services and modes affected
6	Requirements for access to the Argentine capital market	*Claim under Article II:1 of the GATS* **MODE** Mode 1[224] **SECTOR** Portfolio management services[225]
7	Requirements for the registration of branches	*Claim under Article II:1 of the GATS* **MODE** Mode 3[226] **SECTOR** All sectors[227]
8	Foreign exchange authorization requirement	*Claim under Article II:1 of the GATS* **MODE** Mode 3[228] **SECTOR** All sectors (except for financial services)[229]

7.98. In the light of the foregoing, the Panel considers that Panama has demonstrated that the eight measures at issue apply to services supplied pursuant to Article I:2 of the GATS and that Panama has therefore demonstrated that there is trade in services within the meaning of Article I:2 of the GATS.

7.3.1.2.3.2 Second question: Whether the measures in question "affect" trade in services within the meaning of Article I:1 of the GATS

7.99. We continue our analysis with the second key legal issue under the legal standard established by the Appellate Body in *Canada – Autos*, namely, whether the challenged measures "affect" trade in services within the meaning of Article I:1 of the GATS.

7.100. We recall that Panama argues that, as stated by the Appellate Body in *EC – Bananas III*, Article I:1 of the GATS ensures the broadest possible coverage of the Agreement precisely because of its reference to measures that "affect" trade in services. The GATS thus not only covers measures which directly "govern" or "regulate" trade in services, but also any other type of measure which, even if it has been designed for other purposes (such as trade in goods) nevertheless "affects" trade in services.[230]

7.101. Argentina responds that, inasmuch as Panama has failed to prove that the relevant services are supplied from the territory of Panama – or of any other Member – to the territory of Argentina through modes 1 and 3, Panama has not shown that there is trade in relevant services and modes which may be "affected" by the measures challenged in this dispute.[231] Argentina puts forward separate and additional arguments for measure 8 and claims that the repatriation of investments is not directly related to trade in services and, therefore, does not affect trade in services within the meaning of Articles I:2 and XXVIII of the GATS. Argentina concludes that measure 8 is not covered by the GATS.[232]

7.102. The Panel recalls that in *EC – Bananas III*, the Appellate Body considered that no measures are excluded *a priori* from the scope of the GATS. According to the Appellate Body,

> The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the

[224] Panama's second written submission, para. 2.692. See also second written submission, paras. 2.694 and 2.695.
[225] Panama's second written submission, para. 2.692. See also second written submission, paras. 2.694 and 2.695.
[226] Panama's second written submission, para. 2.730.
[227] Panama's second written submission, para. 2.730.
[228] Panama's second written submission, para. 2.787. See also second written submission, para. 2.790.
[229] Panama's second written submission, para. 2.787. See also second written submission, para. 2.790.
[230] Panama's first written submission, para. 4.13; response to Panel question No. 24(b).
[231] Argentina's first written submission, para. 144.
[232] Argentina's first written submission, Explanatory Annex No. 2, paras. 27-41.

> supply of a service or whether it regulates other matters but nevertheless affects trade in services.[233]

7.103. As regards the term "affect", the Appellate Body explained that:

> In our view, the use of the term "affecting" reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing".[234]

7.104. According to Argentina, Panama failed to prove this second issue inasmuch as it did not demonstrate that there is trade in services and did not identify "specific" Panamanian service suppliers.[235] As we concluded above, for the purposes of establishing application of the GATS to the measures at issue, Article I:1 of the GATS does not require the complainant to prove the existence of specific services or service suppliers, or the existence of actual transactions. We also note that, except as concerns measure 8, to which we shall refer later, Argentina does not appear to deny that the measures at issue "affect" trade in services. Indeed, on various occasions Argentina explains that the rationale for the measures at issue is to equalize the conditions of competition between, on the one hand, services and service suppliers of Argentina and/or other cooperative countries and, on the other, services and service suppliers of non-cooperative countries.

7.105. For example, by arguing that the defensive anti-abuse measures are necessary to "equaliz[e] the conditions of competition on the international market for financial and other services"[236], Argentina acknowledges not only that there is – or there may be – trade in services in these sectors, but also that, by equalizing the conditions of competition on the international market for services, these measures govern – or at least affect – trade in these services. At the Panel's first meeting with the parties, Argentina stated that "at the time the Agreement on Services was negotiated … during the Uruguay Round, the right of Members to adopt [defensive tax measures against non-cooperative jurisdictions] was totally and clearly understood by them".[237] At the same meeting, Argentina explained that "[t]he criteria on the basis of which Argentina distinguishes between cooperative and non-cooperative jurisdictions are the objective reflection of intractable and fundamental regulatory differences between the services and service suppliers of cooperative jurisdictions and those of non-cooperative jurisdictions".[238] Likewise, in its second written submission, Argentina explicitly recognizes that measures 5 and 6 – those on access to the Argentine reinsurance services market and to the Argentine capital market – affect the supply of financial services, that is, trade in financial services within the meaning of Article I:2 of the GATS. In Argentina's words:

> First of all, the measures in question undoubtedly affect "the supply of financial services" within the meaning of paragraph 1(a) of the Annex on Financial Services. In fact, both "reinsurance and retrocession" services and the trade in "transferable securities" are specifically listed in the definitions of financial services in paragraph 5(a) of the Annex on Financial Services.[239]

7.106. In our view, such arguments show that, for Argentina itself, the purpose of the measures at issue is to govern or – at least – to "affect" service suppliers of other Members that supply

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[233] Appellate Body Report, *EC – Bananas III*, para. 217 (citing Panel Reports, *EC – Bananas III (Ecuador)*, para. 7.285; *EC – Bananas III (Mexico)*, para. 7.285; and *EC – Bananas III (United States)*, para. 7.285).

[234] Appellate Body Report, *EC – Bananas III*, para. 220.

[235] See Argentina's first written submission, para. 140 ("It is with regard to the first element of this proof [as to whether there is 'trade in services' within the meaning of Article I:2 of the GATS] that Panama's first written submission is flawed") (referring to Appellate Body Report, *Canada – Autos,* para. 155).

[236] Argentina's first written submission, para. 10. See para. 7.96 above.

[237] Argentina's opening statement at the first meeting of the Panel, para. 18. See also opening statement at the first meeting of the Panel, paras. 34-36 (referring to the Chairman's Statement, Informal Meeting of the Group of Negotiations on Services, 10 December 1993, MTN.GNS/49, p. 2).

[238] Argentina's opening statement at the first meeting of the Panel, para. 12.

[239] Argentina's second written submission, para. 85.

services in Argentina and, consequently, such measures adopted by Argentina "affect" the supply of services within the meaning of Article I:1 of the GATS.

7.107. The Panel notes that Argentina presents separate and additional arguments with regard to measure 8. As explained in the descriptive section[240], measure 8 consists of imposing on service suppliers from non-cooperative countries the requirement to obtain prior authorization from the BCRA in order to be able to repatriate their direct investments. Argentina applies this measure pursuant to BCRA Communication "A" 4940, Section I.[241]

7.108. Argentina contends that the prior authorization from the BCRA to repatriate investments, as imposed by measure 8, is not covered by the GATS as it is not directly related to trade in services and, therefore, does not affect trade in services within the meaning of Articles I:1 and XXVIII of the GATS. In Argentina's view, the measure does not affect the establishment of a company in the country or the delivery of services by such a company, but implies closer scrutiny of access to the local foreign exchange market for the transfer of equity funds invested in the country if it is decided to repatriate them.[242]

7.109. Panama responds that the foreign exchange authorization requirement has an *ex ante* impact on business planning in Argentina because it affects the decision on establishing a commercial presence in Argentina. Panama argues that, although the additional requirement for the repatriation of investments does not directly affect the inflow of investment into Argentine territory, by affecting the outflow of such investment the measure has an effect on the business planning of any company and on the decision to supply services through a commercial presence in Argentina. Panama argues that in *Argentina – Import Measures,* the panel found that Argentina's requirements on operators to refrain from repatriating profits when their level of exports is not sufficient to compensate for their imports "have a limiting effect on imports". In Panama's view, if the restrictions on repatriation affect the import of goods, they all the more affect foreign service suppliers which establish a commercial presence in Argentina.[243]

7.110. The Panel notes that, judging by its terms, Communication "A" 4940 requires that prior authorization from the BCRA be obtained "when the beneficiary abroad is a natural or legal person". Pursuant to Article XXVIII(d) of the GATS, "'commercial presence' means any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person … within the territory of a Member for the purpose of supplying a service". The wording of Communication "A" 4940 shows that the foreign exchange authorization requirement applies, *inter alia*, to service suppliers which, having established a commercial presence[244] in Argentina, possibly decide to withdraw from the Argentine market and, hence, to repatriate their investment.

7.111. The Panel also recalls that, pursuant to Article XXVIII(c) of the GATS, "measures by Members affecting trade in services include measures in respect of …. (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member". In Spanish, the term "*referente a*" ("in respect of") is defined as *"[q]ue refiere o que expresa relación a algo*" [referring or expressing a relationship to something].[245] We thus consider that the concept of "measures … affecting trade in services" covers measures related to the "constitution" or "acquisition" of a legal person within the territory of a Member for the purpose of supplying a service. In our view, this is the case for the foreign exchange authorization requirement.

[240] See paras. 2.39 and 2.40 above.
[241] Communication "A" 4940, (Exhibits PAN-71 / ARG-31).
[242] Argentina's first written submission, Explanatory Annex No. 2, paras. 27-35; and response to Panel question No. 71.
[243] Panama's second written submission, paras. 2.780, 2.783 and 2.784 (citing Panel Report, *Argentina – Import Measures*, para. 6.259).
[244] Article XXVIII(d) of the GATS defines "commercial presence" as "any type of business or professional establishment, including through: (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service".
[245] *Diccionario de la Lengua Española*, 23rd edition, *Real Academia Española* (Espasa Calpe, 2014), Vol. II, p. 1875.

7.112. The fact that this requirement does not apply at the time of establishing a commercial presence in Argentina but rather at the time of withdrawing the investment from the Argentine market does not prevent this requirement from being related to the supply of services through commercial presence, in accordance with the definition of this mode in Article I:2 of the GATS. Indeed, such a measure may have an impact on a service supplier's decision to invest in the market or, in the terms of the GATS, to establish a commercial presence. In our view, a measure which, for example, totally prohibits repatriation of invested capital at the time of withdrawal from the market would most likely influence the supplier's decision as to whether or not to establish a commercial presence in that market. It is our view that a determination which implies leaving outside the scope of the GATS those measures which apply at the time when a legal person withdraws from a market could open up a breach in the Agreement, as it would mean that measures which influence the decision to set up in the territory of a Member would not be covered by the Agreement. For the foregoing reasons, we consider that measure 8 affects trade in services in the sense of Article I:1 and is thus covered by the GATS.

7.113. In the light of the foregoing, the Panel concludes that the eight measures at issue "affect" trade in services within the meaning of Article I:1 of the GATS.

7.3.1.2.4 Conclusion

7.114. Having determined that Panama has demonstrated that there is trade in services and that the eight measures at issue in this dispute "affect trade in services" within the meaning of Article I:1 of the GATS, the Panel finds that the GATS is applicable to measure 1 (withholding tax on payments of interest or remuneration), measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on price transfers), measure 4 (payment received rule for the allocation of expenditure), measure 5 (requirements relating to reinsurance services), measure 6 (requirements for access to the Argentine capital market), measure 7 (requirements for the registration of branches) and measure 8 (foreign exchange authorization requirement).

7.115. We therefore proceed to examine Panama's claims under the GATS, starting with those made under Article II of that Agreement.

7.3.2 Panama's claims under Article II:1 of the GATS

7.3.2.1 Main arguments of the parties

7.3.2.1.1 Panama

7.116. Panama claims that the eight measures at issue are inconsistent with Article II:1 of the GATS because they accord less favourable treatment to services and service suppliers of non-cooperative countries than that accorded to like services and service suppliers of cooperative countries.[246]

7.117. As regards the arguments as to whether the measures at issue fall within the scope of Article II:1 of the GATS, we refer to section 7.3.1 above.

7.118. With regard to whether the services and service suppliers concerned by the measures at issue are like, Panama claims that the regulatory distinction established by the Argentine measures at issue is based solely and exclusively on the origin of the service supplier.[247] Panama argues that in situations such as the present one, where the regulatory distinction is based exclusively on the origin, as established in the text of the measure itself[248], the likeness is presumed and there is no need to make casuistic demonstrations that the services and/or service suppliers are like or to examine the competitive relationship between services and service

[246] Panama's first written submission, paras. 5.1.a, 5.1.b(i), 5.1.c(i), 5.1.d(i), 5.1.e(i), 5.1.f, 5.1.g and 5.1.h.

[247] Panama's first written submission, paras. 4.16-4.18, 4.34, 4.110, 4.112, 4.156-4.158, 4.246, 4.256, 4.309, 4.317, 4.339, 4.397, 4.422-4.423 and 4.449. See also second written submission, paras. 2.30, 2.38, 2.42, 2.54, 2.602. 2.697, 2.733 and 2.787.

[248] Panama's response to Panel question No. 32.

suppliers.[249] Panama bases itself on the statement in this regard made by the panel in *China – Publications and Audiovisual Products*. According to that panel, when origin is the only factor on which a measure bases a difference of treatment between suppliers, the service suppliers are like, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin.[250]

7.119. Panama adds that the existence of reasons (whether or not legitimate) justifying the distinction between service suppliers according to their origin is not relevant to the determination of their likeness.[251] Panama considers that, if they exist, such reasons must be examined under the exemptions to the GATS.[252]

7.120. Even though in Panama's view the distinction between service suppliers in this dispute is based exclusively on their origin, Panama considers that, if the Panel wishes to examine the likeness of service suppliers in more detail, it could resort, not without first making certain adjustments, to the four traditional likeness criteria used in trade in goods: the nature of the services, their purpose, consumer preferences, and any possible governmental classification.[253] In any event, Panama fails to understand how the existence or non-existence of an agreement on the exchange of tax information could have an impact on any of these four criteria[254] and considers that to accept this fact would imply making the likeness analysis subject to the unilateral will of each Member.[255]

7.121. Contrary to the view expressed by Argentina, Panama asserts that the regulatory background is a factor external to the service supplier and could only be relevant insofar as it is perceived by the market and, hence, affects the competitive relationship between suppliers.[256] Argentina's interpretation, on the other hand, would entail a likeness assessment based on the "aims and effects" of the regulations, an approach that has repeatedly been rejected by the Appellate Body.[257] In Panama's opinion, the regulatory objectives of the measure should not be taken into account in like likeness analysis.[258]

7.122. As to whether the measures at issue accord less favourable treatment to like services and service suppliers, Panama contends that the challenged measures accord less favourable treatment to services and service suppliers of non-cooperative countries compared to that accorded to like services and service suppliers of cooperative countries because they modify the conditions of competition to the detriment of services and service suppliers of non-cooperative countries *vis-à-vis* like suppliers of cooperative countries.[259]

7.123. Panama considers that, in order to examine whether there is less favourable treatment under Article II of the GATS, it is not necessary to assess whether the detrimental effect of a measure stems exclusively from a legitimate regulatory distinction.[260]

7.124. Panama also considers that, contrary to what is stated by Argentina, the existence of less favourable treatment should not be examined before and after having examined the "likeness"

[249] Panama's response to Panel question No. 33. See also responses to Panel questions Nos. 27 and 28 (citing Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.164).
[250] Panama cites Panel Report, *China – Publications and Audiovisual Products*, para. 7.975.
[251] Panama's second written submission, paras. 2.46 and 2.47; and response to Panel question No. 28.
[252] Panama's second written submission, paras. 2.128, 2.274, 2.421, 2.522 and 2.608; and response to Panel question No. 29.
[253] Panama's second written submission, paras. 2.131, 2.276, 2,524 and 2.604. See also responses to Panel questions Nos. 23, 30 and 69.
[254] Panama's response to Panel question No. 69.
[255] Panama's responses to Panel questions Nos. 29 and 69.
[256] Panama's second written submission, paras. 2.266, 2.412, 2.515, 2.701, 2.735 and 2.789. See also response to Panel question No. 31.
[257] Panama's second written submission, paras. 2.129, 2.275, 2.422, 2.523 and 2.605.
[258] Panama's response to Panel question No. 29.
[259] Panama's first written submission, paras. 4.36-4.41, 4.113-4.127, 4.247- 4.248, 4.310- 4.311, 4.340-4.343, 4.398-4.403, 4.424-4.436 and 4.450-4.457.
[260] Panama's second written submission, paras. 2.73, 2.612, 2.706, 2.744 and 2.796 (referring to its response to Panel question No. 41, which in turn refers to Appellate Body Report, *EC – Seal Products*, para. 5.125).

element.[261] According to Panama, the legal standard enshrined in the case law indicates that the likeness element should be examined before examining the less favourable treatment element.[262]

7.125. More specifically, as regards the existence of no less favourable treatment for each of the measures at issue, Panama asserts in relation to measure 1 that payments for services rendered by service suppliers from non-cooperative countries are subject to a heavier tax burden than that imposed on payments for services contracted with suppliers of cooperative countries.[263] Panama considers that this heavier tax burden on payments for services rendered by suppliers of non-cooperative countries "nullifies equality of competitive conditions in the Argentine market" between services and service suppliers of cooperative countries and like services and service suppliers of non-cooperative countries, thus resulting in less favourable treatment of the latter.[264]

7.126. With regard to measure 2, Panama claims that the services rendered from non-cooperative countries entail a heavier burden on the consumer of the service as the AFIP presumes an unjustified increase in wealth. This presumption would have to be rebutted by the consumer by presenting the relevant documents proving the existence of a legitimate transaction.[265] Panama claims that, in the first place, this measure discourages the consumption of services provided by suppliers of non-cooperative countries because it represents an administrative burden and generates a tax risk. In Panama's opinion, even if the consumer of the service successfully rebuts the presumption, its mere existence in itself implies less favourable treatment for non-cooperative service suppliers inasmuch as it raises the possibility that a negative determination may be made. Secondly, Panama points out that the consumer has to take additional steps (the presentation of the documents to rebut the presumption), which are not required if services are contracted from like service suppliers of cooperative countries. For all these reasons, Panama considers that the measure accords less favourable treatment to services and service suppliers of non-cooperative countries.[266]

7.127. As far as measure 3 is concerned, Panama asserts that application of this valuation regime involves additional charges for those Argentine taxpayers who decide to contract with service suppliers of non-cooperative countries. According to Panama, this more burdensome regime would not apply if the Argentine taxpayer contracted services from a supplier situated in a cooperative country.[267] In Panama's opinion, this additional requirement clearly modifies the conditions of competition to the detriment of services and service suppliers of non-cooperative countries as contracting them becomes more burdensome in comparison with services and service suppliers of cooperative countries. Panama thus considers that Argentina accords to services and service suppliers of non-cooperative countries treatment less favourable than that accorded to like services and service suppliers of cooperative countries.[268]

7.128. With regard to measure 4, Panama contends that "for Argentine taxpayers, purchasing services from persons in [non-cooperative countries] involves a clear tax, accounting and economic disadvantage in terms of the allocation of expenditure", inasmuch as expenditure incurred with suppliers of non-cooperative countries may only be allocated to the time of payment of the service and not to the period in which the obligation accrues, as is the case for service suppliers of cooperative countries. Panama considers that the disincentive generated by the "distortion of accounting-tax management" as a result of applying this measure modifies the conditions of competition between foreign like services and service suppliers and accords less favourable treatment to service suppliers of non-cooperative countries in comparison with that accorded to like service suppliers of cooperative countries.[269]

7.129. Concerning measure 5 following the March 2014 amendment, Panama contends that Argentina allows suppliers of cooperative countries to provide reinsurance services through

[261] Panama's second written submission, para. 2.56.
[262] Panama's second written submission, para. 2.63.
[263] Panama's first written submission, para. 4.37; and second written submission, para. 2.139.
[264] Panama's first written submission, para. 4.38.
[265] Panama's first written submission, para. 4.114.
[266] Panama's first written submission, paras. 4.118, 4.119, 4.124 and 4.126; and second written submission, paras. 2.280 and 2.281, and 2.285.
[267] Panama's first written submission, para. 4.247; and second written submission, para. 2.426.
[268] Panama's first written submission, para. 4.248; and second written submission, para. 2.427.
[269] Panama's first written submission, paras. 4.310 and 4.311; and second written submission, paras. 2.532 and 2.533.

cross-border trade (mode 1) or commercial presence (mode 3), while it establishes conditions for the supply of such services by service suppliers of non-cooperative countries. These conditions are that the entity (or its parent company) supplying the service must be subject to the control and supervision of an institution which fulfils functions similar to those of the SSN and with which a memorandum of understanding has been signed.[270] Panama considers that the less favourable treatment takes the form of the uncertainty surrounding compliance with the conditions laid down, which entails an impairment of the conditions of competition.[271]

7.130. With regard to measure 6, Panama claims that there is less favourable treatment for suppliers of portfolio management services as the restrictions applicable to stock market intermediaries place them at a disadvantage *vis-à-vis* like service suppliers of cooperative countries. This is so because registered intermediaries (which provide stockbroking services) may only conduct transactions on the Argentine capital market if these are ordered by persons from cooperative countries.[272] In Panama's opinion, the measure "limits the investment options of portfolio managers of the [non-cooperative] countries" by restricting their access to essential auxiliary services such as stockbroking. Panama contends that the measure gives portfolio management service suppliers of cooperative countries an advantage that is not extended immediately and unconditionally to like suppliers of non-cooperative countries.[273]

7.131. As regards measure 7, Panama alleges that the mere fact that there is an additional requirement for branches of companies from non-cooperative countries "is a significant sign" of the existence of less favourable treatment.[274] Panama maintains that less favourable treatment is given to service suppliers of non-cooperative countries as the required certification that the company is effectively engaged in economically significant business activities in the place where it was incorporated (i) limits the development of certain kinds of business which involve the parallel creation of several commercial establishments, and (ii) entails an additional administrative burden.[275]

7.132. Concerning measure 8, Panama considers that the mere fact that the regulations impose an additional requirement (prior authorization from the BCRA) indicates that there is less favourable treatment.[276] Panama contends that this regulation, by restricting the repatriation of direct investments, discourages the establishment of service suppliers of non-cooperative countries.[277] Panama adds that the restriction is compounded by uncertainty as to whether the BCRA will ultimately authorize access to the Single Free Foreign Exchange Market (MULC). In Panama's opinion, this discretionary power to grant authorization for access to the MULC also has negative repercussions for service suppliers of non-cooperative countries *vis-à-vis* like service suppliers of cooperative countries.[278] Panama states that the fact of bearing an additional administrative burden (the request for authorization from the BCRA) and the uncertainty surrounding the authorization process places suppliers of non-cooperative countries at a competitive disadvantage compared to like service suppliers of cooperative countries.[279]

7.133. With regard to the question of whether no less favourable treatment is immediately and unconditionally accorded to like services and service suppliers, Panama asserts that measure 1 establishes a condition for according to service suppliers of non-cooperative countries the more favourable treatment accorded to cooperative countries. This condition is that the home jurisdiction of the supplier must have signed an agreement on information exchange with Argentina and that, by application of its domestic regulations, it may not invoke banking, stock market or any other form of secrecy in response to a request for information.[280] As regards

[270] Panama's second written submission, para. 2.610.
[271] Panama's second written submission, para. 2.612.
[272] Panama's first written submission, paras. 4.398 and 4.399.
[273] Panama's first written submission, para. 4.402 (footnote original) Title XI, Section III, Article 5 of the Rules of the CNV (Exhibit PAN-58).
[274] Panama's second written submission, para. 2.739 (citing Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 138). See also first written submission, para. 4.417.
[275] Panama's first written submission, para. 4.425.
[276] Panama's first written submission, para. 4.445. See also second written submission, para. 2.792.
[277] Panama's first written submission, para. 4.451. (footnote original) Point 1.13 of Communication "A" 4662, amended by point 1 of Communication "A" 4692 (Exhibits PAN-67 and PAN-68).
[278] Panama's first written submission, paras. 4.453 and 4.454.
[279] Panama's first written submission, para. 4.455.
[280] Panama's first written submission, para. 4.41.

measures 5 and 6, Panama contends that conditions are imposed on service suppliers of non-cooperative countries in order to be eligible for access to a benefit. In the case of measure 5, the benefit consists of access to the Argentine reinsurance market, while for measure 6 it consists of access to the Argentine securities market. In Panama's opinion, the granting of benefits may not be made subject to any condition, so the very existence of a condition conduces to the conclusion that the measure is inconsistent with Article II:1 of the GATS.[281]

7.3.2.1.2 Argentina

7.134. Argentina maintains that the eight measures at issue are not inconsistent with Article II:1 of the GATS inasmuch as Panama has not established a *prima facie* case that the GATS applies to these measures or that the treatment accorded to services and service suppliers of non-cooperative countries is less favourable than that accorded to like services and service suppliers of cooperative countries.[282] Argentina also contends that, even if Panama had established a *prima facie* case of less favourable treatment, it has not established a *prima facie* case that the services and service suppliers are like.[283]

7.135. Regarding the arguments as to whether the measures at issue fall within the scope of Article II:1 of the GATS, we refer back to section 7.3.1 above.

7.136. With regard to whether the services and service suppliers concerned by the measures at issue are like, Argentina asserts that the regulatory differences between the service suppliers being compared are relevant to the likeness determination inasmuch as they affect the way in which suppliers operate on the market.[284] Argentina considers that the Appellate Body's jurisprudence on trade in goods to the effect that regulatory differences are relevant to likeness to the extent that "they have an impact on the competitive relationship between and among the products concerned"[285] is applicable to the GATS.[286] Argentina also asserts that these regulatory differences are relevant to the likeness analysis "even though these differences are not fully reflected in the market" and "even when these regulatory differences do not affect the essential features of the service".[287] In any event, Argentina states that, in this case, the regulatory differences between suppliers of the services in question affect the way in which the supplier supplies the service and thus affect the competitive relationship.[288]

7.137. Argentina claims that the cooperative or non-cooperative nature of a jurisdiction is "an essential feature of the service which consumers of services are seeking when they choose to do business in a non-cooperative jurisdiction".[289] Argentina thus considers that exchange of tax information is a feature of the services and service suppliers that is reflected in the conditions of competition.[290] Argentina argues that, if Panama wished to rebut its argument, it would have to prove that the regulatory distinction applied by the measure at issue does not affect the commercial or regulatory characteristics of the services or service suppliers.[291]

7.138. Argentina contends that the origin of a service or service supplier is a relevant factor in determining likeness as it may affect the characteristics of the service supplier.[292] In this connection, Argentina clarifies that it does not rule out the possibility of there being situations where the principle of origin is applicable, even though this is not the case in this dispute as the measures at issue are objectively related to the services and service suppliers in question.[293] In any event, Argentina considers that the *de jure/de facto* distinction developed by the case law in

[281] Panama's first written submission, para. 4.402; and second written submission, paras. 2.611 and 2.705.
[282] Argentina's first written submission, Sections III and III.A.
[283] Argentina's first written submission, Section III.B.
[284] Argentina's response to Panel question No. 31.
[285] Argentina refers to Appellate Body Report, *US – Clove Cigarettes*, para. 119.
[286] Argentina's first written submission, para. 185.
[287] Argentina's response to Panel question No. 29. See also Argentina's first written submission, para. 187 and response to Panel question No. 31.
[288] Argentina's first written submission, paras. 188 and 210. See also response to Panel question No. 33.
[289] Argentina's first written submission, para. 210.
[290] Argentina's second written submission, para. 9. See also response to Panel question No. 71.
[291] Argentina's second written submission, para. 35.
[292] Argentina's second written submission, paras. 10, 24 and 34.
[293] Argentina's first written submission, para. 196; and response to Panel question No. 32(a).

relation to trade in goods cannot be directly applied to the GATS since Articles I and III of the GATT 1994 only refer to "like products" whereas the GATS refers to "like services and service suppliers".[294]

7.139. Likewise, Argentina asserts that the use of the conjunction "and" in the expression "like services and service suppliers" in Articles II and XVII of the GATS indicates that likeness should be assessed taking into account the relevant characteristics of both the services and the service suppliers.[295] In Argentina's opinion, this is because the characteristics of a service are often inseparable from the characteristics of the supplier.[296]

7.140. As regards whether the measures at issue accord no less favourable treatment to like services and service suppliers, Argentina contends that the differential treatment existing in this dispute is the result of its adherence to effective tax information exchange rules in effect at international level. Argentina maintains that, in principle, these standards may be adopted by any Member.[297]

7.141. Argentina considers that Panama has not established a *prima facie* case that services and service suppliers of Panamanian origin receive less favourable treatment compared to like services and service suppliers of any other country or of Argentine origin. This is because Argentina has designated Panama as a cooperative jurisdiction.[298] In this connection, Argentina contends that the services and service suppliers which should be compared in order to determine the existence of no less favourable treatment within the meaning of Article II of the GATS are, on the one hand, those of the complaining Member and, on the other, like services and service suppliers of any other Member which allegedly receive more favourable treatment.[299]

7.142. Argentina asserts that the expression "treatment no less favourable" in Article II (and Article XVII) of the GATS should be interpreted in the same way as in Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement), that is, in the sense that there is no less favourable treatment if the negative impact of the measure on the conditions of competition in the Argentine market for services and service suppliers of non-cooperative countries "stems exclusively from a legitimate regulatory distinction".[300]

7.143. Moreover, Argentina asserts that the regulatory distinction between cooperative and non-cooperative jurisdiction is a legitimate one and that the challenged measures are based on internationally recognized objective criteria which can be met by any Member.[301]

7.144. Argentina submits no arguments concerning the granting of no less favourable treatment *immediately and unconditionally* under Article II of the GATS.

7.3.2.2 Assessment by the Panel

7.3.2.2.1 Introduction

7.145. The question before the Panel is whether the eight measures at issue are inconsistent with Article II:1 of the GATS. In response to Panama's claims, Argentina asserts that its measures are not inconsistent with Article II:1 of the GATS as Panama has not established a *prima facie* case that the GATS is applicable to those measures, that the services and service suppliers are like or that there is less favourable treatment.[302]

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[294] Argentina's second written submission, paras. 24, 26 and 31.
[295] Argentina's first written submission, para. 184. However, it should be pointed out that Argentina does not consider it necessary for the Panel to decide whether the likeness analysis should be conducted on a cumulative basis (taking into account both the service and the service supplier) or on a disjunctive basis (taking into account the service or the service supplier). See Argentina's first written submission, footnote 131.
[296] Argentina's first written submission, paras. 182-184; and second written submission, para. 33.
[297] Argentina's first written submission, para. 196.
[298] Argentina's first written submission, paras. 165 and 166.
[299] Argentina's first written submission, paras. 149 and 154.
[300] Argentina's first written submission, paras. 228 and 229.
[301] Argentina's first written submission, paras. 231 and 232.
[302] Argentina's first written submission, Sections III, III.A and III.B.

7.146. We shall start by examining the wording of Article II:1 of the GATS in order to establish the applicable legal standard, taking into account the paucity of case law in this respect. Bearing this in mind, we shall then determine whether the eight measures at issue violate this provision.[303]

7.3.2.2.2 The relevant legal provision

7.147. Article II:1 of the GATS provides as follows:

> With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

7.148. Article II:1 enshrines the general principle of most-favoured-nation (MFN) treatment, imposing a general and unconditional obligation to grant MFN treatment, which applies irrespective of whether there are specific commitments in the sector(s) in question. This MFN treatment obligation applies to all service sectors, unless a Member has registered MFN exemptions in the Annex on Article II Exemptions, as provided in Article II:2 of the GATS.[304] We note that Argentina has not registered any relevant MFN exemption in the instant case.

7.3.2.2.3 The legal standard under Article II:1 of the GATS

7.149. The wording of Article II:1 of the GATS suggests that, in order to make a *prima facie* case, Panama must demonstrate that: (i) first, the measures at issue are covered by Article II:1 of the GATS; (ii) second, the relevant services and service suppliers are "like"; and (iii) third, the measures at issue accord "immediately and unconditionally" "treatment no less favourable" to like services and service suppliers.

7.150. We turn to a separate analysis of whether Panama has complied with these requirements.

7.3.2.2.3.1 First requirement: whether the measures at issue are covered by Article II:1 of the GATS

7.151. Regarding compliance with this first element, we refer to section 7.3.1 above, in which we conclude that, having determined that Panama has demonstrated that there is "trade in services" and that the eight measures at issue in this dispute "affect" trade in services within the meaning of Article I:1 of the GATS, the Panel finds that the GATS is applicable to these measures. Panama has, therefore, complied with the first requirement of proving that the eight measures at issue are covered by the GATS.

7.152. We therefore continue by examining the second requirement, namely, whether Panama has proved that services and service suppliers of cooperative and non-cooperative countries are like.

7.3.2.2.3.2 Second requirement: whether the services and service suppliers are like

7.153. We recall that Panama claims that the regulatory distinction established by the Argentine measures at issue is based solely and exclusively on the origin of the service supplier[305] and that,

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[303] We find the statement by the Appellate Body in *Canada – Autos* to be particularly useful as regards how a panel should address analysis of the consistency of a measure with Article II:1 of the GATS. According to the Appellate Body, after having responded positively to the threshold questions of whether there is "trade in services" and whether the measure under review "affects" trade in services, a panel should interpret the text of this article. Once it has been interpreted, the panel must make "factual findings as to treatment of services and service suppliers … [in dispute]" and, as a last step, apply its interpretation of Article II:1 to the facts as it found them. See Appellate Body Report, *Canada – Autos*, paras. 170 and 171.

[304] Article II:2 provides as follows:

> A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

[305] Panama's first written submission, paras. 4.16-4.18, 4.34, 4.110, 4.112, 4.156-4.158, 4.246, 4.256, 4.309, 4.317, 4.339, 4.397, 4.422- 4.423, and 4.449. See also second written submission, paras. 2.30, 2.38, 2.42, 2.54, 2.602. 2.697, 2.733 and 2.787.

consequently, there is no need to make casuistic demonstrations that the services and/or service suppliers are like or to examine the competitive relationship between services and service suppliers.[306]

7.154. Argentina, for its part, argues that the regulatory differences between the service suppliers being compared are relevant to the likeness determination inasmuch as they affect the way in which suppliers operate on the market.[307] Argentina also disagrees with Panama regarding the transposition to the GATS of the *de jure/de facto* distinction developed in the case law in relation to trade in goods. In this connection, Argentina maintains that this distinction cannot be directly applied to the GATS as the GATS refers to "like services and service suppliers", whereas Articles I and III of the GATT 1994 refer only to "like products".[308]

7.155. We shall commence our analysis of the likeness requirement under Article II:1 of the GATS by referring to the dearth of existing jurisprudence on trade in services, which would serve as a guide in our interpretative exercise. The first of the few disputes in which the question of "likeness" was addressed in connection with the GATS was *EC – Bananas III*. In that case, the panel, in a finding that was not subsequently examined on appeal, considered relevant "the nature and the characteristics" of the services in question when determining likeness. The panel also concluded that, to the extent that entities provide such like services, they are like service suppliers.[309]

7.156. As regards the likeness of service suppliers, in *Canada – Autos* the panel followed the approach taken in *EC – Bananas III* and considered that "to the extent that the service suppliers concerned supply the same services, they should be considered 'like' for the purpose of this case".[310] The same approach was subsequently followed by the panel in *China – Publications and Audiovisual Products,* in its likeness examination under Article XVII of the GATS. In that dispute, in which the parties did not contest the likeness of the service suppliers, the panel concluded that when the "only factor" on which a measure bases a difference of treatment between domestic and foreign suppliers is "origin", the likeness requirement is met. Specifically, the panel found as follows:

> 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, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin.[311]

7.157. Panama referred to this element of case law on several occasions, arguing that, in the case before us, the difference in treatment is based exclusively on the origin of the service suppliers and, therefore, likeness must be presumed.[312]

7.158. In *China – Publications and Audiovisual Products*, however, the panel also pointed out that:

> [I]n cases where a difference of treatment is not exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis would probably be required to determine whether service suppliers on either side of the dividing line are, or are not, "like".[313]

7.159. The panel focused precisely on these "other factors" in *China – Electronic Payment Services*. In that dispute, the panel undertook a more detailed analysis of likeness, considering

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[306] Panama's response to Panel question No. 33. See also responses to Panel questions Nos. 27 and 28 (citing Panel Report, *Canada – Wheat Exports and Grain* Imports, para. 6.164).

[307] Argentina's response to Panel question No. 31

[308] Argentina's second written submission, paras. 26 and 31.

[309] Panel Report, *EC – Bananas III*, para. 7.322.

[310] Panel Report, *Canada – Autos*, para. 10.248.

[311] Panel Report, *China – Publications and Audiovisual Products*, para. 7.975 (citing Panel Reports, *Canada – Wheat Exports and Grain Imports*, paras. 6.164-6.167 and *Argentina – Hides and Leather*, paras. 11.168 and 11.169). (footnote omitted)

[312] Panama's first written submission, paras. 4.16, 4.110, 4.149, 4.246, 4.256, 4.265, 4.277- 4.278, 4.309, 4.317, 4.339, 4.397, 4.423 and 4.449; and second written submission, paras. 2.30, 2.32, 2.38, 2.45, 2.297-2.298, 2.600-2.601, 2.697, 2.733 and 2.787.

[313] Panel Report, *China – Publications and Audiovisual Products*, para. 7.975.

that the difference in treatment was not exclusively linked to the origin of the service suppliers but to "other factors".[314] After examining the ordinary meaning of the term "like" and the context of the expression "like services" in Article XVII of the GATS, the panel concluded that "like services are services that are in a competitive relationship with each other (or would be if they were allowed to be supplied in a particular market)".[315]

7.160. We agree with the panel in *China – Electronic Payment Services* that interpretation of the expression "like services and service suppliers" should be based on the ordinary meaning of its terms, taking into account the context of Article II itself, as well as other provisions of the GATS. Consequently, we see no obstacle to using the same likeness interpretation as that used by the panel in *China – Electronic Payment Services*, even though it was developed in relation to Article XVII of the GATS.

7.161. In our view, the likeness analysis under Article II of the GATS does not differ from the likeness analysis under Article XVII of the GATS in the sense that it requires an approach based on the competitive relationship. Although the Appellate Body has exercised caution with regard to the direct transposition to Article II of all interpretations developed under Article XVII of the GATS[316], we consider the context afforded by this provision to be useful inasmuch as the Appellate Body has transposed interpretations developed under Article XVII to Article II of the GATS.[317] Indeed, not only is the term to be interpreted the same but the context afforded by the term "treatment no less favourable" also informs the likeness determination in both cases. This has also been the view of previous panels and the Appellate Body in connection with Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement.

7.162. While we are aware of the risks involved in directly transposing the case law of other covered agreements to the GATS[318], we are of the view that, in the context of a likeness determination, there are sufficient elements in common in these three Agreements to make it possible to adopt an interpretation of likeness based on the competitive relationship between the relevant services and service suppliers. In our view, this approach does not prevent us 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.[319]

7.163. Taking as a starting point the competitive relationship between the services and service suppliers, we continue our likeness analysis taking into account the particular circumstances of our case[320] and considering all the arguments and evidence that pertain to the competitive relationship between the services and service suppliers being compared.[321] Like the parties, we understand that the likeness analysis under Article II:1 of the GATS concerns, on the one hand, services and service suppliers of non-cooperative countries and, on the other, services and service suppliers of cooperative countries. We recall that this distinction is reflected in each and every one of the measures at issue by virtue of the provisions of Decree No. 589/2013.[322]

7.164. As we have already seen, Panama considers that origin is the only reason for the differences in treatment and therefore requests us to apply the presumption of likeness based on

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[314] Panel Report, *China – Electronic Payment Services*, para. 7.697.

[315] Panel Report, *China – Electronic Payment Services*, para. 7.700.

[316] In this connection, the Appellate Body stated that "provisions elsewhere in the GATS relating to national treatment obligations, and previous GATT practice relating to the interpretation of the national treatment obligation of Article III of the GATT 1994 are not necessarily relevant to the interpretation of Article II of the GATS". See Appellate Body Report, *EC – Bananas III*, para. 231.

[317] For example, the Appellate Body held that Articles II and XVII of the GATS cover both *de jure* and *de facto* discrimination. See Appellate Body Report, *EC – Bananas III*, paras. 233 and 234.

[318] In this connection, the panel in *China – Electronic Payment Services* warned of the risks of directly transposing case law on likeness under the GATT 1994 to the area of trade in services. See Panel Report, *China – Electronic Payment Services*, para. 7.698.

[319] Panel Report, *China – Electronic Payment Services*, para. 7.698.

[320] Panel Report, *China – Electronic Payment Services*, para. 7.701.

[321] It should be pointed out that this statement was made in a context in which the Panel considered that the difference in treatment was not exclusively linked to origin and, therefore, examined in detail the relationship of this difference in treatment to "other factors". See Panel Report, *China – Electronic Payment Services*, para. 7.702. (footnote omitted)

[322] See section 2.2 above. We recall that Article 1 of Decree No. 589/2013 provides for the replacement of the references to "countries with low or no taxes" by "countries not considered as 'cooperating for tax transparency purposes'". See exhibits PAN-3 / ARG-35.

origin applicable under the GATT 1994.[323] Argentina considers that this presumption cannot be transposed directly to the GATS context because Articles II and XVII of the GATS, unlike their counterparts in the case of goods, refer to "like services and service suppliers".[324] Argentina considers that the issue is not just one of the origin of the service or service supplier, but also has to do with the characteristics which are intrinsically linked to the origin of the said service or supplier.[325] These characteristics are defined, *inter alia*, by aspects of the regulatory framework in their countries of origin that affect the supply of the services. More specifically, Argentina refers in this dispute to the aspects of the regulatory framework relating to tax transparency.[326]

7.165. We agree with Argentina that the presumption of likeness based on origin applicable in the context of the GATT 1994 is not directly transposable to the context of the GATS because the reference to "like services and service suppliers" in the GATS has no equivalent in the GATT 1994, which only refers to "like products". As the Panel explained in *China – Electronic Payment Services*, therefore, we have to determine whether the difference in treatment may also be due to "other factors".[327] To that end, we shall first examine whether the difference in treatment between cooperative and non-cooperative countries is due to origin. If we conclude that this difference is not due exclusively to origin, we shall continue our analysis by examining whether there is also another factor or "other factors" linked to the difference in treatment between services and service suppliers of non-cooperative countries and services and service suppliers of cooperative countries.

7.166. As regards the origin rule, as we have already mentioned, the eight measures challenged by Panama distinguish between services and service suppliers of cooperative and non-cooperative countries. In our view, the mere fact that differential treatment is accorded depending on whether or not a country is included in a list is closely linked to origin. This implies that any service supplier based in Panama – or in any other country considered by the Argentine authorities to be a cooperative country – is subject to the same treatment because it is based in that country. We therefore consider that the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is due to origin. However, even though the origin rule is applied in the form of a list of cooperative countries, it is not origin *per se* which determines that certain countries are on the list and others not, but the regulatory framework inextricably linked to such origin. This raises a doubt as to whether the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is based *exclusively* on origin, as asserted by Panama, or whether there is also some "other factor" explaining the difference in treatment, as we shall consider below.

7.167. We recall that Panama contends that, when discrimination according to origin is already established in the law itself, there is no need to examine any other factor in order to determine the likeness of services and service suppliers.[328] Argentina responds that the origin of a service or service supplier is a relevant factor for determining likeness inasmuch as it may affect the characteristics of the service supplier.[329] Argentina does not rule out the possibility of there being situations where the principle of origin is applicable, but contends that this is not the case in this dispute as the measures at issue are objectively related to the services and service suppliers in question.[330] In any event, Argentina considers that the *de jure/de facto* distinction developed by the case law in relation to trade in goods cannot be directly applied to the GATS since Articles I and III of the GATT 1994 only refer to "like" products, whereas the GATS refers to "like services and service suppliers".[331]

7.168. Given that there are doubts regarding the existence of "other factors", we shall follow previous case law on trade in services and turn to consider whether, in addition to origin, there are

[323] See Panama's first written submission, paras. 4.16-4.18, 4.34, 4.110, 4.112, 4.156-4.158, 4.246, 4.256, 4.309, 4.317, 4.339, 4.397, 4.422-4.423, and 4.449. See also second written submission, paras. 2.30, 2.38, 2.42, 2.54, 2.602. 2.697, 2.733 and 2.787.

[324] Argentina's second written submission, paras. 26 and 31.

[325] Argentina's first written submission, paras. 185-210. See also second written submission, paras. 9, 10, 24, 26, 31 and 34; and responses to Panel questions Nos. 29, 31, 32 and 71.

[326] Argentina's second written submission, para. 9. See also response to Panel question No. 71.

[327] Panel Report, *China – Electronic Payment Services*, para. 7.697.

[328] Panama's response to Panel question No. 29.

[329] Argentina's second written submission, paras. 10, 24 and 34.

[330] Argentina's first written submission, para. 196; and response to Panel question No. 32.

[331] Argentina's second written submission, paras. 26 and 31.

other factors relevant to the examination of the likeness of services and service suppliers in this dispute.

7.169. The main difficulty we encounter in determining whether the difference in treatment is solely and exclusively based on origin lies in the fact that, in order to make such a determination, difference in treatment based on "other factors" has to be set aside and, in the context of the GATS, it is not specified what "other factors" are to be examined.[332]

7.170. The only panel which has to date examined this question is the one in *China – Electronic Payment Services*.[333] In its analysis of "other factors", the panel exercised caution when transposing the traditional likeness criteria of the GATT 1994 to the GATS because of the "important dissimilarities" between the two Agreements. In particular, the panel highlighted differences regarding the intangible nature of services, their supply through four different modes, and the ways in which trade in services is conducted and regulated.[334] In order to try to identify the "other factors" to be considered when determining the likeness of the relevant services, the panel turned to the context of the expression "like services" provided by Article XVII of the GATS. The panel indicated, more generally, that a likeness determination should be made on a case-by-case basis[335] and be based on "arguments and evidence that pertain to the competitive relationship of the services being compared".[336]

7.171. As regards the likeness of service suppliers, the panel in *China – Electronic Payment Services* established that there is a presumption that service suppliers are like "if, and to the extent that, they provide like services", even though, depending on the circumstances, a "separate inquiry into the 'likeness' of the suppliers may be called for".[337] In essence, the panel focused on the similar description of activities by the suppliers and the fact that they were perceived as competitors in the same market[338] and concluded that the relevant service suppliers in that dispute were like "at least to the extent that they provide 'like' services".[339]

7.172. The panel in *China – Electronic Payment Services* stated, in line with what had been established by previous panels and the Appellate Body, that any determination of likeness must be made on a case-by-case basis.[340] We therefore turn to examine whether, in this dispute, there are "other factors" to be considered and, if that is the case, whether they have any impact on the competitive relationship of the services and service suppliers concerned.

7.173. In this dispute, the parties have devoted part of their meetings with the Panel and their submissions to discussing a question that we might treat as one of those "other factor(s)" referred to by the panel in *China – Electronic Payment Services.* Argentina, in particular, contends that the distinction established by Decree No. 589/2013 reflects a regulatory difference that has to be taken into account by the Panel as an "other factor".[341] This "other factor" would be the possibility of access by Argentina to tax information on foreign suppliers. We note that this is not the case for Panama, which has cooperative country status despite having denied that it initiated negotiations

[332] The panel in *China – Publications and Audiovisual* Products left the door open to consideration of "other factors" in the likeness analysis, indicating that "in cases where a difference of treatment is not exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis would probably be required". See Panel Report, *China – Publications and Audiovisual Products*, para. 7.975.

[333] Although it considered the possibility of "other factors", the panel in *China – Publications and Audiovisual Products* did not consider it necessary to address this aspect.

[334] Panel Report, *China – Electronic Payment Services*, para. 7.698.

[335] Panel Report, *China – Electronic Payment Services*, para. 7.701.

[336] Panel Report, *China – Electronic Payment Services*, 7.702. (footnote original) This is also consistent with the criterion adopted in relation to goods. See Appellate Body Reports, *EC – Asbestos*, paras. 99 and 103; and *Philippines – Distilled Spirits*, footnote 211.

[337] Panel Report, *China – Electronic Payment Services*, para. 7.705. The Panel based itself on Panel Report, *EC – Bananas III*, para. 7.322.

[338] Panel Report, *China – Electronic Payment Services*, para. 7.706.

[339] Panel Report, *China – Electronic Payment Services*, para. 7.708.

[340] See, for example, Appellate Body Reports, *EC – Asbestos*, para. 101 and *Japan – Alcoholic Beverages II*, p. 20 (in relation to the GATT 1994) and Panel Report, *China – Electronic Payment Services*, paras. 7.701 and 7.705 (in relation to trade in services).

[341] Argentina's response to Panel question No. 29.

with Argentina on the signing of a tax information exchange agreement and, thus, on the effective exchange of information with Argentina.[342]

7.174. Argentina maintains that this factor corresponds to an "objective basis" on which to establish the distinction.[343] Argentina also emphasizes that the need to examine (or not examine) "other factors" in the determination of likeness "has to be established in each case, depending on: (a) the nature of the services in question, and (b) the particular circumstances of the case".[344]

7.175. Panama considers that the expression "other factors" should refer to factors that are "neutral as to origin" and that the "other factor" identified by Argentina does not fall within this category. As an example of a factor that is neutral as to origin, it refers to the case of *China – Electronic Payment Services*, in which the differences in treatment related to whether one company in particular (China UnionPay (CUP)) was or was not the domestic or foreign supplier.[345]

7.176. In the case before us, the "other factor" identified by one of the parties (access to tax information on foreign service suppliers) is of a regulatory nature. We therefore deem it useful to recall what was stated by the panel in *EC – Asbestos* and, more recently, in *US – Clove Cigarettes*. In our view, this Appellate Body case law is of particular relevance to this case as in both those disputes the Appellate Body addressed the regulatory concerns of Members in the determination of likeness to the extent that these affect the competitive relationship.[346] In this connection, we note that regulatory concerns play a key role in the scope of the GATS as this Agreement refers not only to services but also to service suppliers. To this must be added the fact that the GATS regulates four modes of supply, two of which (modes 1 and 2) refer to service suppliers outside the territory of the Member "importing" the service and are thus subject to the regulations of that other Member.

7.177. In *EC – Asbestos*, in the context of Article III:4 of the GATT 1994, the Appellate Body recognized that the examination of certain regulatory concerns (such as the risk posed to human health by the product in question) could be relevant "in assessing the *competitive relationship in the marketplace* between allegedly 'like' products"[347], and, ultimately, in determining likeness. In that dispute, the risks posed by asbestos to human health were examined in relation to two of the likeness criteria traditionally used under the GATT 1994: the physical properties of the product and consumers' tastes and habits.[348]

7.178. In *US – Clove Cigarettes*, the Appellate Body did not consider that the concept of "like products" in Article 2:1 of the TBT Agreement "lends itself to distinctions between products that are based on the regulatory objectives of a measure".[349] According to the Appellate Body, consideration of the objectives of a measure would distort the comparison under the "no less favourable treatment" analysis. The Appellate Body nevertheless indicated that this approach does not mean that the regulatory concerns underlying the measures at issue play no role in the determination of likeness. Following the lines set out in *EC – Asbestos*, the Appellate Body found that "regulatory concerns and considerations may play a role in applying certain of the 'likeness' criteria (that is, physical characteristics and consumer preferences) and, thus, in the determination of likeness".[350] The Appellate Body clarified that regulatory concerns play a role in determining likeness "[t]o the extent that they are relevant to the examination of certain 'likeness' criteria and are reflected in the products' competitive relationship".[351]

7.179. Applying the Appellate Body's reasoning to our case, it appears to us that the possibility for Argentina to have access to tax information on foreign suppliers may be considered to be an "other factor" to be taken into account in our likeness analysis, provided that it is reflected in the competitive relationship between services and service suppliers of cooperative and non-cooperative countries. This being said, it lies with Argentina to prove that this "other factor"

[342] Panama's response to Panel question No. 7.
[343] Argentina's response to Panel question No. 32(b).
[344] Argentina's response to Panel question No. 29.
[345] Panama's response to Panel question No. 28.
[346] Appellate Body Reports, *EC – Asbestos*, para. 115; and *US – Clove Cigarettes*, para. 119.
[347] Appellate Body Report, *EC – Asbestos*, para. 115 (emphasis original).
[348] Appellate Body Report, *EC – Asbestos*, para. 113.
[349] Appellate Body Report, *US – Clove Cigarettes*, para. 116.
[350] Appellate Body Report, *US – Clove Cigarettes*, paras. 116-117.
[351] Appellate Body Report, *US – Clove Cigarettes*, para. 120.

affects the competitive relationship between services and service suppliers, for example, by showing its effect on the characteristics of the service and consumers' preferences.

7.180. According to Argentina, in the instant case, the fact that the service suppliers may or may not be situated in jurisdictions subject to the effective exchange of information is a characteristic that is directly reflected in the conditions of competition on the market.[352] Argentina contends that the different regulatory context in which services and service suppliers of cooperative and non-cooperative countries find themselves as regards the exchange of tax information affects the way in which the supplier supplies the service, and thus affects the competitive relationship.[353] Argentina sees lack of transparency and effective exchange of information as the main competitive advantage for services and service suppliers originating from non-cooperative countries[354], and this is also acknowledged by Panama.[355]

7.181. As we explained in the descriptive part, the distinction made by Argentina is a function of its access (or lack of access) to tax information on service suppliers. According to Argentina's claims, the possibility of access to tax information falls into the following two categories: cooperative countries (there is access to tax information) and non-cooperative countries (there is no access to tax information).

7.182. Decree No. 589/2013 lays down the conditions for a country to be considered cooperative, namely: (i) to have signed with Argentina an agreement on exchange of tax information or a convention on avoidance of international double taxation with a broad information exchange clause, provided that there is effective exchange of information; or (ii) to have initiated with Argentina the negotiations necessary for concluding such an agreement and/or convention.[356] If one of these requirements is not met, the country is considered to be non-cooperative.[357]

7.183. In looking at how Decree No. 589/2013 has been implemented in practice, we note that the current list of cooperative countries includes countries that have not signed a double taxation convention or an information exchange agreement and with which there is no exchange of tax information, as well as countries which have in fact concluded such conventions or agreements and which, therefore, exchange tax information. Let us take, for example, the cases of Panama and Germany. These two countries belong to the category of cooperative countries. Argentina has signed a double taxation agreement with Germany, which has been in force since 25 November 1979[358], giving it access to tax information.[359] In the case of Panama, however, Argentina has no access to tax information as it has not signed any agreement on exchange of tax information with Panama. We also note that various countries which have initiated negotiations have a different status. For example, both Panama and Hong Kong (China) have initiated negotiations but neither of the two exchanges tax information with Argentina as there is no agreement or convention in force to cover such exchange.[360] While Panama has the status of cooperative country, however, Hong Kong (China) is still considered a non-cooperative country.[361]

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[352] Argentina's second written submission, para. 9.

[353] Argentina's first written submission, paras. 188 and 210. See also response to Panel question No. 33.

[354] Argentina's second written submission, para. 46.

[355] Argentina's first written submission, paras. 49-51 (referring to Exhibit ARG-8).

[356] Article 1 of Decree No. 589/2013, (Exhibits PAN-3 / ARG-35).

[357] We note, however, that AFIP Resolution No. 3.576/2013, "adopted in exercise of the powers conferred by Article 2(b) of Decree No. 589" exhibits slight differences in comparison with Decree No. 589/2013. On the one hand, Article 1 of this Resolution establishes three categories of cooperative country: "(a) cooperative countries which have signed a double taxation convention or information exchange agreement, with a positive assessment of effective exchange of information; (b) cooperative countries with which a double taxation convention or information exchange agreement has been signed but it has not been possible to assess effective exchange; and (c) cooperative countries with which the process of negotiating or ratifying a double taxation convention or information exchange agreement has been initiated". We also note that the third category refers to initiation of the negotiation or ratification process, whereas Decree No. 589/2013 refers only to negotiation. See AFIP Resolution No. 3.576/2013, (Exhibits PAN-3 / ARG-37).

[358] Amending Protocol in force since 30 June 2011. See Argentina's response to Panel question No. 13.

[359] Germany signed the OECD Convention on Mutual Administrative Assistance in Tax Matters, to which Argentina is a party, on 3 November 2011, although it has not yet entered into force. See Argentina's response to Panel question No. 13.

[360] Argentina's first written submission, paras. 131 and 132; and responses to Panel questions Nos. 10(b)(i) and 10(b)(ii). The other countries with which Argentina has initiated negotiations since Decree No. 589/2013 entered into force and which do not appear on the current list of cooperative countries are

7.184. This factual situation makes it extremely difficult for us to make the comparison we need to make for an examination of likeness, especially when considering "other factor(s)" that are relevant. Nor has Argentina indicated to us how such a comparison is to be made taking into account this factual situation. We consider that the current circumstances make it impossible for us to compare relevant services and service suppliers in order to evaluate relevant "other factor(s)" in addition to their origin.

7.185. Accordingly, having concluded that the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is due to origin, we consider that Panama has proved that services and service suppliers of cooperative and non-cooperative countries are like by reason of origin.

7.186. In the light of the foregoing, we find that, for the purposes of the claims made by Panama under Article II:1 of the GATS, the services and service suppliers of cooperative countries are like the services and service suppliers of non-cooperative countries.

7.3.2.2.3.3 Third requirement: Whether the measures at issue do not immediately and unconditionally accord treatment no less favourable to like services and service suppliers

7.187. We continue our analysis with the third requirement of the legal standard under Article II:1 of the GATS, namely, whether Panama has proved that the measures at issue do not "immediately and unconditionally" accord "treatment no less favourable" to like services and service suppliers. We shall start by examining whether the measures at issue accord no less favourable treatment to the like services and service suppliers we have just identified. Next, if there is no less favourable treatment, we shall consider whether such treatment is accorded immediately and unconditionally.

7.188. Before beginning our analysis, however, we think it necessary to clarify a matter raised by Argentina with regard to the terms of comparison to be used in determining the existence of no less favourable treatment: whether the treatment accorded to the complaining Member is that which should be the subject of comparison in a no less favourable treatment determination or whether it should be the treatment accorded to any other Member even when it is not the treatment given to the complaining Member.

(a) Whether the treatment accorded to the complaining Member is that which should be the subject of comparison in a no less favourable treatment determination

7.189. One of Argentina's principal arguments regarding the "treatment no less favourable" element of Article II:1 of the GATS concerns the status of the complainant as a cooperative country. Argentina argues that Panama has not established a *prima facie* case that services and service suppliers of non-cooperative countries receive less favourable treatment since Panama enjoys cooperative country status. According to Argentina, this status as a cooperative country means that Panama receives the most favourable treatment.[362]

7.190. In Argentina's opinion, "the reference to services and service suppliers of any other Member in Articles II and XVII should be understood as a reference to the specific services and service suppliers originating in the complaining Member"[363], which are allegedly those which receive less favourable treatment. The treatment they receive should be compared with the treatment accorded to "the services and service suppliers that are the subject of the complaint", whether domestic (in the case of claims under Article XVII of the GATS) or of another origin (in the case of claims under Article II of the GATS).[364]

Belarus, Cameroon, Côte d'Ivoire, Cyprus, Gabon and Gibraltar. See Argentina's response to Panel question No. 10(b)(i), para. 5.

[361] Argentina claims that the reason why Hong Kong (China) is not on the list of cooperative countries is because the list is updated at the beginning of each fiscal year. We note, however, that the list was not updated at the beginning of the 2015 fiscal year. See Argentina's response to Panel question No. 10(b)(ii).

[362] Argentina's first written submission, paras. 165 and 166.

[363] Argentina's first written submission, para. 154.

[364] Argentina's first written submission, para. 149.

7.191. Panama disagrees with Argentina and contends that "[t]he ordinary meaning of the terms 'any other Member' [in Articles II and XVII of the GATS] and 'that other Member' [in Article XXVIII(f) of the GATS] is clearly not the 'complaining Member'".[365] Panama adds that "the benchmark for determining the existence of trade in services and the mode of supply is the presence/absence of the supplier in the *defending Member*."[366] Panama also indicates that Article 3.8 of the DSU provides that the nullification or impairment presumed once a measure's inconsistency with WTO obligations has been found refers to "*other Members* party to the covered agreement" and not to the complaining Member.[367] Furthermore, it points out that Article XXIII of the GATS provides that a Member may have recourse to the DSU if it "considers that any other Member fails to carry out its obligations or specific commitments" under the GATS, without at all mentioning that the effects of the alleged non-compliance by any other Member must be borne by the complaining Member.[368] In any event, Panama clarifies that it has proved the existence of negative effects on Panamanian suppliers during the period in which Panama was considered a non-cooperative country.[369]

7.192. In our view, determining the existence of less favourable treatment does not necessarily imply comparing the treatment given to services and service suppliers of the complaining Member. Although it is true that in most disputes the complaining Member is the Member affected by the allegedly less favourable treatment accorded by the respondent, we recall that in *EC – Bananas III* the Appellate Body determined that no provision of the DSU contains any requirement on the need for the complainant to have a "legal interest or right", as shown below:

> We agree with the Panel that "neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a 'legal interest' as a prerequisite for requesting a panel". We do not accept that the need for a "legal interest" is implied in the DSU or in any other provision of the *WTO Agreement*. It is true that under Article 4.11 of the DSU, a Member wishing to join in multiple consultations must have "a substantial trade interest", and that under Article 10.2 of the DSU, a third party must have "a substantial interest" in the matter before a panel. But neither of these provisions in the DSU, nor anything else in the *WTO Agreement*, provides a basis for asserting that parties to the dispute have to meet any similar standard.[370]

7.193. The Appellate Body also indicated that Members have broad discretion in deciding whether to bring a case against another Member under the DSU and they have to judge whether such action would be fruitful.[371]

7.194. The Appellate Body's statement in *Canada – Autos* also appears relevant to us in respect of the comparison required under Article II:1 of the GATS. The Appellate Body held that "[t]he text of Article II:1 requires, in essence, that treatment by one Member of 'services and services suppliers' of any other Member be compared with treatment of 'like' services and service suppliers of 'any other country'".[372]

7.195. In the dispute before us, we note that Panama currently has cooperative status. Panama nonetheless indicates that when it requested the establishment of a panel it had the status of a non-cooperative country[373] and it was only after the establishment of this Panel that Argentina

[365] Panama's second written submission, para. 2.59.
[366] Panama's second written submission, para. 2.59. (emphasis original)
[367] Panama's second written submission, para. 2.61. (emphasis original)
[368] Panama's second written submission, paras. 2.61 and 2.62.
[369] Panama's second written submission, para. 2.62.
[370] Appellate Body Report, *EC – Bananas III*, para. 132. (footnote omitted; emphasis original)
[371] Appellate Body Report, *EC – Bananas III*, para. 135.
[372] Appellate Body Report, *Canada – Autos*, para. 171.
[373] The terminology used by Panama in its panel request is "listed countries". By "listed countries", Panama means all those WTO Members listed in Decree No. 1344/98, as amended by Decree No. 1037/00. We recall that the list mentioned by Panama was amended after the entry into force of Decree No. 589/2013, Article 1 of which replaces the seventh unnumbered article incorporated by Decree No. 1037/00 following Article 21 of the Regulations to the LIG, consolidated text of 1997 and amendments thereto, approved by Article 1 of Decree No. 1344/98 and amendments thereto. See Panama's request for the establishment of a panel, and Decree No. 589/2013, (Exhibits PAN-3 / ARG-35).

changed its status to that of a cooperative jurisdiction.[374] Taking into account the Appellate Body's case law in *EC – Bananas III*, we do not consider that that change in Panama's status affects its right to bring a complaint under the DSU. At the same time, we do not consider that we should interfere in the broad discretion enjoyed by Panama to decide whether to bring a complaint against another Member under the DSU and whether such complaint would be fruitful for it.

7.196. Bearing in mind the foregoing, we conclude that the submission of claims under Article II:1 of the GATS does not require that the allegedly less favourable treatment that is the subject of the complaint must refer to the complaining party in this dispute, i.e. Panama.

(b) Whether the measures at issue do not accord treatment no less favourable to like services and service suppliers

7.197. After examining this preliminary issue, we turn to consider whether Panama has proved that the measures at issue do not accord "treatment no less favourable" to like services and service suppliers. We shall start by interpreting the expression "treatment no less favourable" within the meaning of Article II:1 of the GATS. In the light of our interpretation of this expression, we shall then proceed to determine whether the eight measures in relation to which Panama has put forward claims under Article II of the GATS grant treatment no less favourable to services and service suppliers of non-cooperative countries compared to the treatment accorded to like services and service suppliers of cooperative countries.

7.198. We note that Article II:1 of the GATS does not define the concept of "treatment no less favourable". Nor does the scant jurisprudence on this provision provide us with a definition of this concept even though, as we pointed out earlier, the Appellate Body in *Canada – Autos* indicated that Article II:1 of the GATS "requires, in essence, that treatment by one Member of 'services and services suppliers' of any other Member be compared with treatment of 'like' services and service suppliers of 'any other country'".[375]

7.199. The parties have engaged in an intense debate on the interpretation of the phrase "treatment no less favourable" under Article II:1 of the GATS and, in particular, on the possibility of transposing to the GATS context the Appellate Body case law on the relevance of legitimate regulatory distinctions in relation to "treatment no less favourable" under Article 2.1 of the TBT Agreement.

7.200. Argentina's proposal asserts that the conclusions reached by the Appellate Body in *US - Clove Cigarettes* on Article 2.1 of the TBT Agreement are applicable to the interpretation of "treatment no less favourable" in Articles II and XVII of the GATS.[376] Argentina considers, in particular, that a "measure does not accord 'less favourable treatment' if the detrimental impact on imports 'stems exclusively from legitimate regulatory distinctions'".[377] Argentina emphasizes that the interpretation of the expression "treatment no less favourable" in Article 2.1 of the TBT Agreement, as developed by the Appellate Body in *US – Clove Cigarettes,* was made in the light of the object and purpose of the TBT Agreement, which is "to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate'".[378] Argentina considers that this approach is also applicable to interpretation of the expression "treatment no less favourable" in the context of Articles II and XVII of the GATS, inasmuch as the preamble to the GATS itself "expressly recognizes that the object and purpose of the Agreement is to promote the progressive liberalization of trade in services at the same time as confirming Members' right to regulate services in order to meet national policy objectives".[379] Argentina asserts that this balance between liberalization and regulation is to be found in the provisions of the GATS and, by way of example, cites Articles VI and VII.[380] In the light of the foregoing, Argentina states that "the term 'treatment no less favourable' in Articles II and XVII

[374] Panama's second written submission, para. 2.62.
[375] Appellate Body Report, *Canada – Autos*, para. 171.
[376] Argentina's first written submission, paras. 225 and 226.
[377] Argentina's first written submission, paras. 225 and 226 (citing Appellate Body Report, *US – Clove Cigarettes*, para. 175).
[378] Argentina's first written submission, para. 225 (citing Appellate Body Report, *US – Clove Cigarettes*, para. 174).
[379] Argentina's first written submission, para. 226.
[380] Argentina's first written submission, para. 227.

must be interpreted as having the same meaning as the term 'treatment no less favourable' in Article 2.1 of the TBT Agreement".[381]

7.201. Argentina asks us to proceed in the manner indicated by the Appellate Body in *US - Clove Cigarettes*, that is, to "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed", in order to determine whether the detrimental impact on services and service suppliers of non-cooperative countries in the Argentine market stems from a legitimate regulatory distinction.[382] Argentina considers that its measures differentiate on the basis of a legitimate regulatory distinction which is "the ability of the national tax authorities to obtain tax information from other jurisdictions", and are in line with internationally recognized objective criteria, for which reason the treatment they prescribe for services and service suppliers of non-cooperative countries does not constitute less favourable treatment in comparison with that accorded to like services and service suppliers of cooperative countries.[383]

7.202. Panama considers that Argentina's argument is "erroneous" and is not based on the case law cited by Argentina or on the conclusions of the Appellate Body in *EC – Seal Products*.[384] Panama contends that the case law in relation to Article 2.1 of the TBT Agreement cannot simply be extrapolated to the context of the GATT 1994 or the GATS inasmuch as it was developed taking into account the specific context of that provision. Panama also points out that the interpretation of "treatment no less favourable" developed in *US – Clove Cigarettes* also had other relevant aspects, such as the fact that the TBT Agreement has no provision containing general exceptions, similar to Article XX of the GATT 1994.[385]

7.203. Panama considers that its position is borne out by the Appellate Body's statement in *EC – Seal Products* that there is no legal reason why "the legal standards for similar obligations – such as Articles I and III:4 of the GATT 1994, on the one hand, and Article 2.1 of the TBT Agreement, on the other hand – must be given identical meanings".[386] Panama argues that the contextual differences which gave rise to diverse interpretations of the expression "treatment no less favourable" in relation to the TBT Agreement, on the one hand, and the GATT 1994, on the other, also apply as between the TBT Agreement and the GATS. Panama mentions in this connection the existence of Article XIV of the GATS, which contains general exceptions similar to those in Article XX of the GATT 1994 and which, therefore, excludes transposition of the interpretation developed under Article 2.1 of the TBT Agreement to Articles II and XVII of the GATS. Panama concludes that "[i]n the context of Articles II:1 and XVII of the GATS, there is 'less favourable treatment' when the conditions of competition are modified, without it being necessary to examine the existence of a legitimate regulatory distinction".[387]

7.204. From the parties' arguments, we note that, certainly, the expression "treatment no less favourable" in Article II:1 of the GATS is also to be found in Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, as well as in Article XVII of the GATS. We consider that these provisions may constitute a relevant context when interpreting the expression "treatment no less favourable" under Article II:1 of the GATS. Nevertheless, before turning to the context, we recall that Article 31.1 of the 1969 Vienna Convention on the Law of Treaties states that the starting point for an interpretative exercise is the "the ordinary meaning to be given to the terms of the treaty".[388] Article 31.1 of the Vienna Convention adds that the basis of interpretation shall be not only the ordinary meaning of the terms but also "their context and in the light of [the treaty's] object and purpose". This was reiterated by the Appellate Body in *EC – Asbestos* when it observed that the same term[389] present in several provisions "must be interpreted in light of the context,

[381] Argentina's first written submission, para. 228.
[382] Argentina's first written submission, para. 230 (citing Appellate Body Report, *US – Clove Cigarettes*, para. 182).
[383] Argentina's first written submission, paras. 231, 232, 235 and 236.
[384] Panama's second written submission, para. 2.68.
[385] Panama's second written submission, para. 2.69.
[386] Panama's second written submission, para. 2.71 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.123).
[387] Panama's second written submission, para. 2.72. See also second written submission, para. 2.73.
[388] Vienna Convention on the Law of Treaties (Vienna Convention), done at Vienna on 23 May 1969, United Nations document A/CONF.39/27.
[389] The expression to be interpreted in *EC – Asbestos* cited in this quotation was "like products".

and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears."[390] We shall thus start with the ordinary meaning of the terms composing the expression "treatment no less favourable".

7.205. We turn to the dictionary of the *Spanish Royal Academy* for the definition of the ordinary meaning of the Spanish terms "*trato*" (treatment), "*menos*" (less), and "*favorable*" (favourable).[391] "*Trato*" (treatment) is defined as "*acción y efecto de tratar*" (action and effect of treating).[392] "Tratar" (to treat) is to be understood as meaning "[*p]roceder con una persona de determinada manera, de obra o de palabra*" (deal with a person in a certain way, in deed or in word).[393] If we look at the ordinary meaning of the term "*menos*" (less), we find that *"[a]nte adjetivos o adverbios, indica que el grado de la propiedad que expresan es bajo en comparación con otro explícito o sobrentendido*" (before adjectives or adverbs, indicates that the degree of property they express is low in comparison with another explicit or implied degree).[394] Lastly, "*favorable*" (favourable) means "*que favorece*" (which favours).[395] "*Favorecer*" (to favour) has been defined as "[*d]ar o hacer un favor*" (give or do a favour), "*favor*" (favour) being understood to mean "*honra, beneficio, gracia*" (honour, benefit or kindness).[396] From the ordinary meaning of the terms, it can be seen that the expression "treatment no less favourable" refers to the action of not granting a benefit to some in smaller measure than to others. Let us nevertheless place this ordinary meaning within its context and in the light of the object and purpose of the treaty in which the expression is to be found, as provided by Article 31.1 of the Vienna Convention.

7.206. The Panel notes that both parties, in developing their arguments on interpretation of the expression "treatment no less favourable", have stressed the important role played by the context, making special reference to the interpretation of the same concept in Article 2.1 of the TBT Agreement by the Appellate Body in *US – Clove Cigarettes*. In fact, as indicated by Panama, the Appellate Body itself, in *EC – Seal Products,* underlined the importance of the context to the interpretation when it stated that "it is the specific context of Article 2.1 of the TBT Agreement … that supports a reading that Article 2.1 does not operate to prohibit *a priori* any restriction on international trade".[397]

7.207. We agree with the parties on the need to look at the context of the expression "treatment no less favourable" when interpreting it in accordance with Article 31.1 of the Vienna Convention, and we shall now do this. First, we shall address the immediate context of the expression, shaped by the actual terms of Article II, before examining its broader context, comprising other provisions of the GATS, as well as other covered agreements.

7.208. We draw attention to the text of Article II:1, which states:

> With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

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[390] Appellate Body Report, *EC – Asbestos*, para. 88.

[391] We nevertheless recall that, as stated by the Appellate Body, "dictionaries alone are not necessarily capable of resolving complex questions of interpretation" but "are important guides to, but not dispositive of, the meaning of words appearing in treaties". See Appellate Body Report, *China – Publications and Audiovisual Products*, para. 348 (referring to Appellate Body Reports, *US – Gambling*, para. 164; *US – Softwood Lumber IV*, para. 59; *Canada – Aircraft*, para. 153; *EC – Asbestos*, para. 92; and *US – Offset Act (Byrd Amendment)*, para. 248.

[392] *Diccionario de la Lengua Española*, 23rd edition, *Real Academia Española* (Espasa Calpe, 2014), Vol. II, p. 2165.

[393] *Diccionario de la Lengua Española*, 23rd edition, *Real Academia Española* (Espasa Calpe, 2014), Vol. II, p. 2165.

[394] *Diccionario de la Lengua Española*, 23rd edition, *Real Academia Española* (Espasa Calpe, 2014), Vol. II, p. 1446.

[395] *Diccionario de la Lengua Española*, 23rd edition, *Real Academia Española* (Espasa Calpe, 2014), Vol. I, p. 1015.

[396] *Diccionario de la Lengua Española*, 23rd edition, *Real Academia Española* (Espasa Calpe, 2014), Vol. I, p. 1015.

[397] Appellate Body Report, *EC – Seal Products*, para. 5.124 (cited in Panama's second written submission, para. 2.71). (emphasis original; footnote omitted)

7.209. In reading this text, we note two aspects in particular which we consider relevant to the interpretation of "treatment no less favourable". The first is the broad scope of the obligation under Article II of the GATS, which applies "[w]ith respect to any measure covered by this Agreement". The second aspect is the reference to services and service suppliers in the text of the provision. We shall explain below to what extent these two aspects can inform the interpretative exercise we are conducting.

7.210. As regards the first aspect, we observe that the scope of the GATS is very broad inasmuch as it applies to "measures by Members affecting trade in services".[398] Article XXVIII(a) of the GATS defines the term "measure" as "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form". The extent of the scope is amplified by the fact that case law has indicated that the term "affecting" should be interpreted to mean having "'an effect on', which indicates a broad scope of application".[399] The broad scope of the Agreement is also reflected in the fact that in the GATS trade in services is defined as the supply of a service through four modes[400], two of which provide that service suppliers may be located outside the territory of the Member "importing" the service.[401]

7.211. The second relevant aspect mentioned above is the reference not only to services but also to service suppliers. We consider that this mention of services and service suppliers is particularly significant, especially if we draw a comparison with other agreements such as the GATT 1994 or the TBT Agreement, which only refer to products and not to producers. Accordingly, below we shall go into further detail concerning the implications that this reference to service suppliers may have when interpreting the expression "treatment no less favourable".

7.212. As we have just stated, the "treatment no less favourable" obligation in Article II:1 of the GATS concerns both like services and service suppliers. In our view, this reference to service suppliers is linked to the nature of the services and, thus, to the nature of the actual trade in them. Their intangible nature, and the relationship established between the consumer and the supplier of the service and, in turn, between the service and its supplier, give services some very special features which differentiate them from goods and which, in our opinion, have a decisive influence on their production, marketing and use. In our view, this immediate context afforded by the actual text of Article II:1 of the GATS, in the light of the special features of services and the importance given to suppliers of services[402], appears to indicate that the regulatory framework in which service suppliers operate may in certain circumstances be relevant in the context of the GATS since it has a direct impact on the service through the natural or legal person supplying the service. In this respect, it appears to us that the determination of the specific aspects of the regulatory framework to be considered when examining "treatment no less favourable" can only be made on a case-by-case basis.

7.213. This position would appear to be supported by the preamble to the GATS. We note in particular that the fourth recital of the GATS specifically 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 and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right". Moreover, the third recital of the GATS mentions the need to achieve higher levels of liberalization of trade, "while giving due respect to national policy objectives".

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[398] Article I:1 of the GATS. See section 7.3.1 above.

[399] Appellate Body Report, *EC – Bananas III*, para. 220.

[400] Article I:2 of the GATS envisages four modes of supply:

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any other Member;

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

[401] We refer to supply of a service from the territory of one Member into the territory of any other Member (mode 1) and supply in the territory of one Member to the service consumer of any other Member (mode 2).

[402] We note in this connection that the GATS refers to service suppliers in many provisions, for example, Articles IV:2, V:6, VII:1 and VII:3, VIII:5 and IX:1.

7.214. This respect for national policy objectives reflected in the preamble to the GATS seems to have its counterpoint in the preamble itself and, in particular, in the second and fifth recitals of the GATS. These refer to the creation of the GATS "with a view to the expansion of … trade [in services] under conditions of transparency and progressive liberalization and as a means of promoting the economic growth … and the development …" and to the importance of facilitating "the increasing participation of developing countries … and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity". This balance between liberalization of trade in services and respect for national policy objectives is also reflected in Article XIX of the GATS, which provides that "[t]he process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members".

7.215. We do not find in the preamble or in Article XIX of the GATS any definition or enumeration of "national policy objectives" on the basis of which Members may exercise their right to regulate the supply of services in their territory. These objectives could perhaps relate to the situations covered by the general exceptions of Article XIV of the GATS, namely: protection of public morals and public order; protection of human, animal or plant life or health; compliance with laws or regulations which are not inconsistent with the GATS; equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members or cases of double taxation. Nevertheless, these situations, relatively few in themselves[403], are not reflected in the preamble to the GATS. Nor are they reflected in the preamble, the security exceptions in Article XIV *bis* of the GATS or other provisions such as paragraph 2(a) of the Annex on Financial Services, which contains the so-called "prudential exception". In our view, equating the national policy objectives mentioned in the preamble and in Article XIX of the GATS with the situations covered by the few general exceptions would mean that any regulation adopted "in order to meet national policy objectives" would necessarily be a violation of the basic principle of non-discrimination and would require justification under Articles XIV and XIV bis. In our view, if this were the case, the drafters of the GATS would have included it in the wording of the Agreement.

7.216. We therefore consider that, although the right of Members to regulate in accordance with their national policy objectives in the context of the GATS cannot be seen as an unlimited right, it should not be confined to the objectives set out in Articles XIV and XIV bis. As stated in the preamble to the GATS itself, this right recognized in the Agreement finds it counterpoint in the express desire of the signatories to the Agreement to expand trade in services under conditions of transparency and progressive liberalization and as a means of promoting economic growth and development.

7.217. It is our understanding that Members' right to regulate in accordance with their national policy objectives, as enshrined in the preamble to the GATS, confirms the relevance of the regulatory framework established to meet these objectives in the area of trade in services.

7.218. We continue our interpretative exercise by examining the context afforded by another provision of the GATS containing the expression "treatment no less favourable": Article XVII of the GATS on the principle of national treatment. Unlike Article II of the GATS, paragraph 3 of Article XVII defines what is considered treatment less favourable in the context of this provision as follows:

> Formally identical or formally different treatment … [which] modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

7.219. Consequently, "[t]his treatment is to be assessed in terms of the 'conditions of competition' between like services and services suppliers".[404]

7.220. As already mentioned, although the Appellate Body has exercised caution regarding the direct transposition of all interpretations developed under Article XVII to Article II of the GATS[405],

[403] In fact, if we take Article XX of the GATT 1994 as a benchmark, which has often been used in interpreting the Article XIV exceptions because of its similar wording, we see that the list of exceptions in Article XX is much longer.

[404] Panel Report, *China – Publications and Audiovisual Products*, para. 7.978.

we consider the context afforded by this provision to be useful inasmuch as the Appellate Body has transposed interpretations developed under Article XVII to Article II of the GATS.[406] We find no impediment to using the definition of "treatment no less favourable" in Article XVII in the context of Article II of the GATS. As in *EC – Bananas III*, in which the Appellate Body established that Articles II and XVII of the GATS cover both *de jure* and *de facto* discrimination, even though only Article XVII does so explicitly, we consider that in Article II, the concept of "treatment no less favourable" also hinges on the "conditions of competition", even though this is not explicitly stated. The context afforded by the interpretations of "treatment no less favourable" developed by the Appellate Body in connection with the GATT 1994 and the TBT Agreement, in our view, support this affirmation. We therefore turn now to examine them as part of the broader context of Article II of the GATS.

7.221. As regards the context provided by other covered Agreements, the parties urge us to take into account the interpretation of "treatment no less favourable" developed by the Appellate Body in relation to Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement.[407] These provisions read:

Article I

General Most-Favoured-Nation Treatment

> 1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Article III

National Treatment on Internal Taxation and Regulation

> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

Article 2

Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

> 1. Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

[405] See footnote 316 above.
[406] See footnote 317 above.
[407] Panama refers to Articles I and III:4 of the GATT 1994, while Argentina focuses on Article 2.1 of the TBT Agreement. See Panama's first written submission, paras. 4.20 and 4.26; and Argentina's first written submission, paras. 225 and 226.

7.222. As regards Article I:1 of the GATT 1994, Panama considers that it should be taken into account when interpreting Article II of the GATS.[408] According to Panama, "[i]n the light of the context afforded by the provisions on MFN treatment in the GATT, especially Article I:1, it is to be understood that, in respect of services, the expression 'treatment no less favourable' in Article II:1 of the GATS refers to each Member's obligation to accord to the services and service suppliers of any other Member, *any advantage* which creates *more favourable competitive opportunities* for like services and like service suppliers of any other country".[409] In Panama's opinion, this interpretation is supported by the case law developed under Article III of the GATT 1994, which also refers to the conditions of competition.[410]

7.223. We note that Article I:1 of the GATT 1994 does not specifically mention the words "treatment no less favourable". As we see from the wording of the provision, what is granted "immediately and unconditionally" in this case is "any advantage, favour, privilege or immunity". In any event, as Article I of the GATT 1994, like Article II of the GATS, contains the most-favoured-nation treatment obligation, it will be useful to us in the interpretative exercise we are undertaking. In this connection, we point out that previous panels linked the word "advantage" to the existence of "'more favourable competitive opportunities'" or [which] affect the commercial relationship between products of different origins".[411] In our view, this follows the approach we took previously when highlighting the reference to modification of the conditions of competition in Article XVII of the GATS.

7.224. The two other provisions we are examining as context (Article III:4 of the GATT 1994 and Article 2:1 of the TBT Agreement) do include the expression "treatment no less favourable". In Article III:4 of the GATT 1994, no less favourable treatment is mentioned in connection with the national treatment obligation in relation to domestic regulations. Although Article II of the GATS refers to the most-favoured-nation treatment obligation and not the national treatment obligation, we consider that Article III:4 could offer a useful context as it contains the expression to be interpreted.[412] As indicated by Argentina, we also find this expression in Article 2.1 of the TBT Agreement, which deals with national treatment and most-favoured-nation obligations.

7.225. The principal common feature we identify in Article II of the GATS and in these two provisions is the text. The three provisions use the expression "treatment no less favourable".[413] It should be noted, however, that, as we mentioned previously, the fact that the actual wording is the same does not necessarily indicate that identical meaning is to be attributed to this expression[414], so we shall move forward with our analysis noting how the concept of "treatment no less favourable" has been interpreted in Articles III:4 of the GATT 1994 and 2.1 of the TBT Agreement in the light of the context provided by their respective Agreements and to what extent these interpretations can inform our approach under Article II of the GATS.

7.226. With regard to Article III:4 of the GATT 1994, the Appellate Body has determined that there is less favourable treatment if "a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products".[415] In *Thailand - Cigarettes (Philippines)*, the Appellate Body clarified that "there must be in every case a genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products".[416] We also find this idea in *EC – Seal Products*, in which the Appellate Body explained that there is less favourable treatment if, after assessing "the implications of the contested measure for the equality of competitive conditions between imported and like domestic products" the conclusion is "that the measure has a detrimental impact on the conditions of competition for like imported products".[417]

[408] Panama's first written submission, para. 4.20.
[409] Panama's first written submission, para. 4.22. (emphasis original)
[410] Panama's first written submission, para. 4.23.
[411] Panel Reports, *Colombia – Ports of Entry*, para. 7.341; and *US – Poultry (China)*, para. 7.415 (citing Panel Report, *EC – Bananas III (Guatemala / Honduras*), para. 7.239).
[412] Panama's first written submission, para. 4.26.
[413] In the case of Article III:4 of the GATT 1994, the exact wording is "… shall be accorded treatment no less favourable…".
[414] See para. 7.204 above.
[415] Appellate Body Report, *Korea – Various Measures on Beef*, para. 137. (emphasis original)
[416] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134.
[417] Appellate Body Report, *EC – Seal Products*, para. 5.116.

7.227. In connection with Article 2.1 of the TBT Agreement, the Appellate Body stated that, in order to determine whether there is less favourable treatment, it must be determined "whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like domestic products" and whether this detrimental impact stems exclusively from a legitimate regulatory distinction.[418] As stated by the Appellate Body in *US – Clove Cigarettes*:

> [W]here the technical regulation at issue does not *de jure* discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported *vis-à-vis* the group of domestic like products is not dispositive of less favourable treatment … Instead, a panel must further analyse whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In making this determination, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products.[419]

7.228. As we have already seen in relation to Article II of the GATS, one of the aspects which differentiates it from the other covered agreements is the reference to "service suppliers".[420] Whereas the agreements relating to goods refer only to "products" (and not to "producers"), the no less favourable treatment affects both services and suppliers of services. We consider that this difference between the GATS, on the one hand, and the GATT 1994 and the TBT Agreement, on the other, has a decisive influence on the use we can make of the interpretations developed in these Agreements in the GATS context.

7.229. Another important aspect that we consider it necessary to highlight is the existence of a general exceptions clause both in Article XX of the GATT 1994 and in Article XIV of the GATS, although we note that fewer exceptions are listed under Article XIV of the GATS than under Article XX of the GATT 1994. This is not the case for the TBT Agreement, in which there is no similar provision. We recall that this was precisely one of the aspects taken into account by the Appellate Body when interpreting the expression "treatment no less favourable" in Article 2.1 of the TBT Agreement.[421]

7.230. We nevertheless note some similarities between the GATS and the TBT Agreement as far as the importance of the regulatory element in both Agreements is concerned. We find in the preambles to both Agreements recognition of Members' right to regulate with a view to achieving certain objectives. On the one hand, the sixth recital of the TBT Agreement contains an "explicit recognition of Members' right to regulate in order to pursue certain legitimate objectives"[422], a right which, as stated by the Appellate Body, is curtailed by the provision in the fifth recital, which states that "unnecessary obstacles to international trade" must not be created.[423] On the other hand, as already explained, the fourth recital of the GATS explicitly 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 and … the particular need of developing countries to exercise this right". The third recital, in turn, refers to the need to achieve higher levels of liberalization of trade in services "while giving due respect to national policy objectives".

7.231. Having examined the context of the expression "treatment no less favourable" in Article II:1 of the GATS, which comprises provisions of the Agreement itself and interpretations of this expression developed under other covered agreements, we have reached the conclusion that we cannot ignore the reference to "service suppliers" in Article II:1 of the GATS when defining the concept of "treatment no less favourable", since they are also covered by the

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[418] Appellate Body Report, *US – Clove Cigarettes*, paras. 180 and 181. We point out that in that dispute the panel's analysis of treatment no less favourable focused on the national treatment obligation under Article 2.1 of the TBT Agreement. This provision also contains the most-favoured-nation obligation.

[419] Appellate Body Report, *US – Clove Cigarettes*, para. 182.

[420] Service suppliers are also referred to in Article XVII of the GATS.

[421] Appellate Body Report, *US – Clove Cigarettes*, para. 101. See also Appellate Body Report, *US – Clove Cigarettes*, para. 109.

[422] Appellate Body Report, *US – Clove Cigarettes*, para. 94.

[423] Appellate Body Report, *US – Clove Cigarettes*, para. 95.

most-favoured-nation treatment obligation. Accordingly, we do not think that the interpretations developed under Articles III:4 of the GATT 1994 and 2.1 of the TBT Agreement can be transposed directly to Article II:1 of the GATS.

7.232. We realize that the mention of service suppliers might lead the interpreter, in the light of the specific circumstances of each dispute, to take other aspects into account in its interpretation of "treatment no less favourable", for example, the relevant regulatory aspects concerning service suppliers which have an impact on the conditions of competition. Consideration of these regulatory aspects could, depending on the case, mean that certain regulatory distinctions between service suppliers established by a Member do not necessarily constitute "treatment … less favourable" within the meaning of Article II:1 of the GATS.

7.233. It is our understanding that this view appears to be confirmed by the object and purpose of the GATS, as set out in its preamble. It is the preamble to the GATS which refers to a balance between the objective of expanding trade in conditions of transparency and progressive liberalization, on the one hand, and, on the other, the right of Members to regulate the supply of services in their territories and to establish new regulations in this regard in order to meet national policy objectives.[424]

7.234. We consider likewise that the element concerning the conditions of competition should also be taken into account in our interpretation of "treatment no less favourable" under Article II:1 of the GATS, just as it is present in Article XVII of the GATS and in Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement.

7.235. Below, we shall transpose this approach to the circumstances of the case before us in order to determine, measure by measure, whether Argentina accords treatment no less favourable to services and service suppliers of non-cooperative countries compared to the treatment given to services and service suppliers of cooperative countries. To this end, we shall first determine whether Argentina accords different treatment to these two categories of services and service suppliers and then go on to examine whether this treatment is less favourable for like services and service suppliers of non-cooperative countries. In this connection, we consider that, in order to determine whether treatment is less favourable, it must be assessed whether the measure modifies the conditions of competition. We also consider that, in this particular case, such an assessment has to take into account regulatory aspects relating to services and service suppliers that may affect the conditions of competition; in particular, whether Argentina is able to have access to tax information on foreign suppliers. In this connection, applying to this dispute the statement of the Appellate Body in *Thailand – Cigarettes (Philippines)* and *US – COOL,* we consider that the assessment of the design, structure and operation of the measures at issue also forms part of our examination.[425] Otherwise, we would not be fulfilling our duty to scrutinize carefully the particular circumstances of this case.

(i) Whether the measures at issue accord different treatment to services and service suppliers of non-cooperative countries compared to the treatment accorded to like services and service suppliers of cooperative countries

7.236. We shall begin by examining whether the measures at issue treat services and service suppliers of non-cooperative countries differently from like services and service suppliers of cooperative countries. The Panel notes that both Panama and Argentina have recognized that the measures at issue differentiate on the basis of whether the country of origin of the service and service supplier is a cooperative or non-cooperative country.[426] The Panel notes that the actual text of the challenged Argentine provisions occasionally shows the different treatment accorded to

[424] See paras. 7.213 and 7.214 above.

[425] Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 134; and *US – COOL*, para. 269. We note that this statement by the Appellate Body was in relation to the assessment of claims under Article III:4 of the GATT 1994 (in the case of *Thailand – Cigarettes (Philippines)*) and Article 2.1 of the TBT Agreement (in the case of *US – COOL*)).

[426] With the exception of certain requirements that form part of measure 5. We refer in particular to the requirements maintained under point 19 of Annex I to SSN Resolution No. 35.615/2011 and Article 4 of SSN Resolution No. 35.794/2011. See Panama's first written submission, paras. 4.35, 4.113, 4.256, 4.311, 4.340, 4.398, 4.424 and 4.450; second written submission, paras. 2.134, 2.415, 2.517, 2.583, 2.602, 2.698, 2.734, 2.738 and 2.791; and Argentina's first written submission, paras. 102, 109-110, 112, 123, 125, 196, 202-203, 347, 360-362, 364-365, 369, 373-374, 393, and 396-398.

services and service suppliers of cooperative and non-cooperative countries.[427] Below we shall see what constitutes the different treatment envisaged in each of the measures challenged by Panama.

1. Whether Argentina accords different treatment under measure 1

7.237. As explained in section 2.3.2 above, measure 1 consists of a legal presumption that payments made to banks or financial institutions located in non-cooperative countries as consideration for the granting of credits or loans or the placement of funds from abroad represent a net gain of 100% for the suppliers for the purpose of determining the tax base for gains tax. This presumption, which allows no evidence to the contrary, is established in Article 93(c) of the LIG.[428]

7.238. The Panel notes that Article 93(c) of the LIG also covers the treatment accorded when the banking or financial institution supplying the service to the Argentine taxpayer is based in a cooperative country. In such cases, the presumed net gain is no longer 100% but 43%. We point out that the rate applicable to net gains in both cases is the same, namely, 35%.

7.239. Consequently, the different treatment accorded to service suppliers of cooperative countries and like service suppliers of non-cooperative countries arises from the specific terms of Article 93(c) of the LIG.

2. Whether Argentina accords different treatment under measure 2

7.240. As explained in section 2.3.3 above, measure 2 consists of the presumption of unjustified increase in wealth applicable to any entry of funds – for the benefit of Argentine taxpayers – from non-cooperative countries in the context of an ex officio determination of the taxable subject matter by the AFIP for the purpose of gains tax. This presumption may be rebutted provided that "it is conclusively shown that the funds originated from activities actually carried out by the taxpayer or by a third party in those countries or from placements of duly declared funds". Argentina applies this measure pursuant to the unnumbered article added after Article 18 of the LPT.[429]

7.241. As we indicated when examining the factual context of this measure, the legal presumptions in Article 18 of the LPT, which apply to Argentine taxpayers, come into play when the AFIP estimates the tax base ex officio because the taxpayer has not submitted a sworn declaration or the declaration is challengeable.[430] The presumption of unjustified increase in wealth in subparagraph (f) of Article 18 of the LPT does not provide for any distinction according to the source of the funds. The unnumbered article added after Article 18 of the LPT, however, under which the measure at issue is applied, does refer specifically to entries of funds from non-cooperative countries, which automatically generate for Argentine taxpayers receiving them a presumption that they constitute unjustified increases in wealth.[431]

7.242. We thus note that, in principle, the concept of unjustified increase in wealth in Article 18 of the LPT may be applicable to any entry of funds, whether from an Argentine or foreign person and, in the latter case, it does not matter whether the funds come from a cooperative or a non-cooperative country. Article 18 of the LPT also provides for the possibility of rebutting the presumptions it contains. We note, however, that in this dispute, the measure at issue challenged by Panama does not refer to the presumption of unjustified increase in wealth provided for in subparagraph (f) of Article 18 of the LPT, but to the presumption of unjustified increase in wealth provided for in the unnumbered article added after Article 18 of the LPT, which applies automatically to income from non-cooperative countries, "irrespective of its nature or purpose or the type of transaction involved".[432] This provision, therefore, is an exception to the rule of

[427] This is the case for measures 1, 5 and 6.
[428] Gains Tax Law, (Exhibits PAN-4 / ARG-42).
[429] Law on Tax Procedure, (Exhibits PAN-9 / ARG-45).
[430] See section 2.4.2.2 above.
[431] The result of applying this presumption is a higher tax base when paying the tax. In this connection, the second paragraph of the unnumbered article added following Article 18 of the LPT provides that "unjustified increases in wealth … plus ten per cent (10%) as income disposed of or consumed as non-deductible expenditure represent net gains during the financial year in which they occur, for the purpose of determining gains tax …".
[432] Panama's second written submission, para. 2.284.

self-assessment of taxable subject matter by Argentine taxpayers, a rule that will not apply if the funds come from a non-cooperative country.

7.243. We therefore consider that Argentina accords different treatment to like services and service suppliers from cooperative and non-cooperative countries inasmuch as the entry of funds from one or the other country will have different consequences for Argentine taxpayers when determining the tax base for gains tax. Whereas, when funds enter from cooperative countries, the AFIP will apply the general rule of self-assessment of the taxable subject matter, only resorting to ex officio determination if the taxpayer has not submitted a sworn declaration or this is challenged; in the case of funds entering from non-cooperative countries, the AFIP will automatically determine the taxable subject matter ex officio, applying the presumption of unjustified increase in wealth. Likewise, in our view, the fact that this presumption may be rebutted by the taxpayer does not affect the fact that the treatment Argentina accords to like services and service suppliers of cooperative and non-cooperative countries is different.

3. Whether Argentina accords different treatment under measure 3

7.244. As we explained in section 2.3.4 above, measure 3 consists of applying methods for valuing transactions based on transfer pricing in order to determine the tax base for gains tax payable by Argentine taxpayers. Argentina applies this measure pursuant to Article 15.2 of the LIG.[433]

7.245. Previously we indicated that Article 14 of the LIG establishes the rule that transactions between an Argentine taxpayer and a foreign person shall be considered as arm's-length transactions "if their services and conditions are in line with normal arm's-length market practices".[434] If this is not the case, the valuation will be governed by the provision in Article 15 of the LIG, which refers to the use by the AFIP of "averages, indices or coefficients … based on the performance of independent companies engaged in identical or similar activities" in order to determine the taxable net profit.

7.246. The measure at issue provides that transactions between Argentine taxpayers and persons of non-cooperative countries "shall not be considered consistent with normal arm's-length market practices or prices". We observe, therefore, that irrespective of whether the parties to the transaction are related, the fact that one of the parties is domiciled, incorporated or located in a non-cooperative country means that the transaction will be valued on the basis of the rules of Article 15 of the LIG and not on the "normal market price", as is the case for arm's-length transactions.

7.247. In our view, the measure at issue provides different treatment for like services and service suppliers of cooperative and non-cooperative countries inasmuch as the rules of Article 15 of the LIG always apply provided that one of the parties is from a non-cooperative country, whereas these rules will only apply to cooperative countries if their services and conditions are not in line with normal arm's-length market practices. The rule does not thus envisage that transactions between Argentine taxpayers and persons from non-cooperative countries might be in line with normal arm's-length market practices, and presumes in every case that they are related.

7.248. This leads us to conclude that the treatment accorded to services and service suppliers of cooperative countries is different from that accorded to like services and service suppliers of non-cooperative countries.

4. Whether Argentina accords different treatment under measure 4

7.249. As explained in section 2.3.5 above, measure 4 consists of applying the payment received rule when allocating expenditure for transactions between Argentine taxpayers and persons from non-cooperative countries. Argentina applies this measure pursuant to the last paragraph of Article 18 of the LIG.[435]

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[433] As regards the claims under the GATT 1994, Panama indicates that measure 3 is applied pursuant to Article 8.5 of the LIG. See the Gains Tax Law, (Exhibits PAN-4 / ARG-42).

[434] See section 2.4.2.3 above.

[435] Gains Tax Law, (Exhibits PAN-4 / ARG-42).

7.250. In explaining the factual context for measure 4, it was indicated that the *accrual* rule is considered to be the general rule for allocating income and expenditure.[436] The measure at issue, however, provides that when an Argentine taxpayer's expenditure constitutes income from an Argentine source for persons located, incorporated, based or domiciled in non-cooperative countries, it must be allocated to the tax year in which the payment was executed (*payment received* rule). It should be pointed out that this allocation of expenditure does not necessarily occur in the same tax year as that in which the payment obligation accrues.

7.251. Although it is true that the *payment received* rule is not exclusively restricted to the allocation of expenditure constituting income from an Argentine source for persons located, incorporated, based or domiciled in non-cooperative countries[437], we note differences in approach in the Argentine rule. This is because it is not permitted to allocate expenditures which constitute income for persons in non-cooperative countries on the basis of the *accrual* rule, irrespective of whether the Argentine taxpayer and the person receiving the income of Argentine source are related. However, in cases of allocation of expenditures constituting income for persons in cooperative countries, the Argentine taxpayer may apply the *accrual* rule, provided that there is no relationship with the foreign person to which the income accrues.

7.252. We thus consider that the treatment accorded to services and service suppliers of cooperative countries is different to that accorded to like services and service suppliers of non-cooperative countries.

5. Whether Argentina accords different treatment under measure 5

7.253. As explained in section 2.3.6 above, for the purposes of the claims under Article II:1 of the GATS, measure 5 consists of Argentina's imposition on service suppliers of non-cooperative countries of requirements that they must meet in order to be able to gain access to Argentina's reinsurance services market. Argentina maintains this measure pursuant to points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011.[438]

7.254. As can be seen from the actual wording of two of the provisions implementing measure 5 (points 18 and 20(f) of Annex I to Resolution SSN No. 35.615/2011, amended by SSN Resolution No. 38.284/2014), Argentina accords different treatment according to whether or not the suppliers of reinsurance services are incorporated and registered in cooperative countries. For example, if a foreign company does not prove that it[439] or its parent company[440] is incorporated and registered in a cooperative country, it must prove that: (i) the foreign company or its parent company is subject to the control and supervision of a body fulfilling functions similar to those of the SSN; and (ii) that this control and supervisory body to which the foreign company or its parent company is subject has signed a memorandum of understanding on cooperation and exchange of information with the SSN.

7.255. We consider that it is obvious, in the light of the text of points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011, that the treatment accorded to service suppliers of cooperative countries is different to that accorded to like service suppliers of non-cooperative countries.

6. Whether Argentina accords different treatment under measure 6

7.256. As explained in section 2.3.7 above, measure 6 consists of imposing requirements on stock market intermediaries[441] for them to be able to engage in transactions ordered by persons

[436] See section 2.4.2.4 above.

[437] For example, Article 18 of the LIG itself, in its last paragraph, provides that the *payment received* rule shall also apply to cases of "outlays by local companies which result in profits of Argentine source for persons or entities abroad with which these companies are related".

[438] SSN Resolution No. 35.615/2011, (Exhibits PAN-36 / ARG-27).

[439] In the case of cross-border supply (mode 1).

[440] In the case of supply through commercial presence (mode 3).

[441] "Stock market intermediaries" means the persons indicated in Article 1 of the Rules of the National Securities Commission (CNV), and including "bargaining agents, liquidation and compensation agents, distribution and placement agents, and collective investment management agents".

from non-cooperative countries. Argentina maintains this measure pursuant to Title XI, Section III, Article 5 of the Rules of the National Securities Commission (CNV).[442]

7.257. Title XI, Section III, Article 5 of the CNV's Rules allows Argentine stock market intermediaries to engage in transactions conducted or ordered by persons incorporated, domiciled or residing in non-cooperative countries in connection with the public offering of negotiable securities, forward contracts, futures or options of any nature, or other financial instruments or products provided that two requirements are met: (i) the persons incorporated, domiciled or residing in non-cooperative countries that give the order to the stock market intermediary must have the status of intermediaries registered with an entity under the control and supervision of a body fulfilling functions similar to those of the Argentine CNV; and (ii) the body in question must have signed a memorandum of understanding on cooperation and exchange of information with the Argentine CNV.[443] However, Argentine stock market intermediaries are not subject to these requirements when they engage in transactions conducted or ordered by persons from cooperative countries

7.258. In the light of the text of Title XI, Section III, Article 5 of the CNV's Rules, we conclude that the treatment accorded to services and service suppliers of cooperative countries is different from that accorded to like services and service suppliers of non-cooperative countries.

7. Whether Argentina accords different treatment under measure 7

7.259. As explained in section 2.3.8 above, measure 7 consists of the alleged imposition of additional requirements on branches of companies from non-cooperative countries for the purpose of registration in the Public Trade Register of the Autonomous City of Buenos Aires. Argentina maintains this measure pursuant to Article 192 of IGJ Resolution No. 7/2005.[444]

7.260. We note that one of the main points in dispute between the parties in relation to this measure concerns whether, as asserted by Panama, Article 192 of IGJ Resolution No. 7/2005 imposes additional requirements on companies of non-cooperative countries or, on the contrary, as claimed by Argentina, the "additional requirements" of Article 192 are required of all companies, whether of cooperative or non-cooperative countries, in those cases in which the IGJ considers that the documents furnished do not provide evidence that the company is effectively engaged in economically significant business activities.[445] In this connection, Argentina contends that the assessment of the requirements under Article 188 responds to the need to check whether a foreign company (from a cooperative or non-cooperative country) is engaged in such activities.[446]

7.261. Below we shall examine whether, as asserted by Argentina, it does not differentiate between foreign companies wishing to set up in Argentina and it applies both Article 188 and Article 192 of IGJ Resolution No. 7/2005 to all foreign companies, irrespective of whether they are from a cooperative or a non-cooperative country.[447]

7.262. We shall first focus on the title of the two provisions, before going into their wording. Article 188 is entitled "First registration. Requirements" and Article 192 is entitled "Companies from jurisdictions with low or no taxes or not cooperating in the fight against 'money laundering' and transnational crime". At first sight, we note that Article 188 lays down some requirements concerning the first registration of companies, whereas Article 192 focuses on a specific category of foreign companies, namely, those "from jurisdictions with low or no taxes or not collaborating in the fight against 'money laundering' and transnational crime".

7.263. If we now look at the text of Article 188, we see that the requirements indicated in the title concern the "registration covered by Article 118, third paragraph, of Law No. 19.550". Article 118 of Law No. 19.550, as we have already seen, concerns firms incorporated abroad. We thus note that the requirements of Article 188 concern the first registration of foreign firms, irrespective of

[442] CNV Rules, (Exhibits PAN-58 / ARG-50).
[443] See paras. 2.35-2.36 above.
[444] IGJ Resolution No. 7/2005, (Exhibits PAN-62 / ARG-33).
[445] Argentina's first written submission, paras. 608, 624, 630-631, 651 and 656.
[446] Argentina's first written submission, paras. 618 and 628.
[447] Argentina's first written submission, paras. 626 and 631.

whether they are from cooperative or non-cooperative countries. This means that the exemption from the requirements set out of Article 188 according to which the IGJ may "where warranted, grant exemption from certain formalities when it is well-known and public knowledge that the company is effectively engaged in economically significant business activities abroad and that its management is also located there" applies to companies from both cooperative and non-cooperative countries.

7.264. We now examine Article 192 of IGJ Resolution No. 7/2005, a provision which, according to Argentina, applies to all foreign firms. First of all, as we have already noted, Argentina's position appears questionable to us in the light of the title of this provision, which only refers to "companies from jurisdictions with low or no taxes or not collaborating in the fight against 'money laundering' and transnational crime". We fail to see on what basis a provision bearing this title could apply to any type of company other than those mentioned in its title.

7.265. We note that Article 192 of IGJ Resolution No. 7/2005 requires the IGJ to consider compliance with a series of requirements "restrictively" when the type of company indicated in its title is being registered. These requirements are set out in section 3, subsections (b) and (c) of Article 188 of IGJ Resolution No. 7/2005, namely: documents proving (i) that it has one or more agencies, branches or representative offices operating outside the Republic and/or non-current (fixed) assets or operating rights in such assets belonging to third parties and/or holdings in other companies not subject to public offering and/or habitually conducts investment transactions on the stock markets or securities markets indicated in its corporate purpose (subsection (b)); and (ii) particulars of the persons who are partners at the time of the decision to request registration (subsection (c)).[448] As provided in Article 192 of IGJ Resolution No. 7/2005, this restrictive assessment entails the submission of additional documents.

7.266. In the light of the foregoing, we do not consider that, as asserted by Argentina, Article 192 of IGJ Resolution No. 7/2005 applies to foreign firms of cooperative countries. As can be seen from the title and wording of Articles 188 and 192 of IGJ Resolution No. 7/2005, Article 188 applies to any foreign company, whereas Article 192 applies only to foreign companies "from jurisdictions with low or no taxes and not collaborating in the fight against 'money laundering' and transnational crime".

7.267. Consequently, we conclude that companies from non-cooperative countries receive different treatment as regards registration in the Public Trade Register of the Autonomous City of Buenos Aires compared to the treatment accorded to companies from cooperative countries, inasmuch as the Argentine law only provides for restrictive assessment of the requirements contained in Article 188.3(c) and 188.3(f) of IGJ Resolution No. 7/2005 in the case of companies from non-cooperative countries.[449]

8. Whether Argentina accords different treatment under measure 8

7.268. As explained in section 2.3.9 above, measure 8 consists of imposing on service suppliers of non-cooperative countries the requirement to obtain prior authorization from the BCRA in order to be able to repatriate their direct investments. Argentina maintains this measure pursuant to Communication "A" 4940, Section I, of the BCRA.[450]

7.269. The first difference we note between the parties concerns the scope of the requirement on prior authorization from the BCRA. While Panama contends that this requirement applies only to service suppliers of non-cooperative countries, Argentina asserts that it also applies to service suppliers of cooperative countries if they do not meet certain conditions.

7.270. In the descriptive part of this Report we indicated that Section I of Communication "A" 4940 establishes the prior authorization requirement for repatriating investment "when the beneficiary abroad is a natural or legal person residing, incorporated or domiciled in" a non-cooperative country. This requirement is an exception to the rule of not requiring prior

[448] Article 188.3 of IGJ Resolution No. 7/2005, (Exhibits PAN-62 / ARG-33).

[449] We note that the restrictive assessment of the requirements mentioned above could apply to foreign companies established, registered or incorporated in cooperative countries if these countries are not considered to be collaborating in the fight against money laundering and transnational crime.

[450] Communication "A" No. 4940, (Exhibits PAN-71 / ARG-31).

authorization for such repatriation set out in point 1.13 of Communication "A" 4662, as amended by Communication "A" 4692. We also noted, however, that there are other instances of repatriation of investment which require prior authorization from the BCRA. These are the situations covered by point 4 of Communication "A" 5237, which provides that "transactions for the repatriation of direct investment which are subject to the established requirements but cannot be shown to be compliant therewith at the date of access to the local foreign exchange market must have prior authorization from the Central Bank". One of the established requirements is contained in point 1 of the same Communication.[451] Point 4 of Communication "A" 4662 lays down other requirements to be met by entities authorized to deal in foreign exchange before they can engage in transactions exempt from prior authorization.[452]

7.271. Consequently, from a reading of points 1 and 4 of Communication "A" 5237 in conjunction with point 4 of Communication "A" 4662, it is clear that the requirement of prior authorization from the BCRA is not limited to repatriation of foreign direct investment in the non-financial private sector on the part of service suppliers of non-cooperative countries but may also apply to cases involving service suppliers of cooperative countries.

7.272. We note that when a natural or legal person residing, incorporated or domiciled in a non-cooperative country wishes to repatriate direct investment of the type indicated in point 1.13 of Communication "A" 4662, it will have to obtain prior authorization from the BCRA, irrespective of compliance with the relevant requirements in Argentine legislation. This is not the case for repatriation of direct investment by natural or legal persons residing, incorporated or domiciled in a cooperative country, which, in principle, do not have to obtain prior authorization, unless they do not comply with any of the requirements laid down in the law.

7.273. The Panel, therefore, finds that the treatment accorded to service suppliers of cooperative countries is different to that accorded to like service suppliers of non-cooperative countries.

(ii) Whether the measures at issue do not accord treatment no less favourable to services and service suppliers of non-cooperative countries in comparison with the treatment accorded to like services and service suppliers of cooperative countries

7.274. As mentioned above, once we have determined whether the treatment Argentina accords to services and service suppliers of non-cooperative countries is different from that accorded to like services and service suppliers of cooperative countries, we shall go on to examine whether this different treatment constitutes treatment no less favourable within the meaning of Article II:1 of the GATS.

7.275. We recall that the mere formal difference of treatment between relevant services and service suppliers is "neither necessary, nor sufficient" to prove the existence of less favourable treatment.[453]

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[451] The requirement laid down in point 1 of Communication "A" 5237 consists of "proof of the entry of funds through the local foreign exchange market for all new investment derived from new contributions or purchases of shares in local companies and real estate, effected in foreign currency as of this date [28 October 2011] by the foreign investor". See Exhibit ARG-75.

[452] The following are the requirements established in point 4 of Communication "A" No. 4662: (a) Verification of the purpose declared for access to the foreign exchange market; (b) Possession of documents proving that the resident debtor has had access to the foreign exchange market for the purpose and amount paid to the non-resident of the country (in cases of payment in the country, for imports, services, income and other current transfers from abroad and commercial and financial debts abroad); (c) Sworn declaration by the customer or his/her representative in the country stating that there has been no previous transfer for the same transaction; (d) Assurance that the funds received have not been used for other investment in the country from the date they were paid in the country for the purpose declared until the date of access to the local foreign exchange market; (e) Certificate of prior settlement of such payments on the foreign exchange market in cases where, as a result of sale of the investment or payment of the credit, part or all of the payments have been made in foreign currency; (f) Possession (on the part of the authority authorized to conduct foreign exchange dealings) of all elements needed to certify the reasonableness and authenticity of the transaction and the documents required under foreign exchange regulations; and (g) Verification of compliance with the other applicable foreign exchange regulations. See Exhibits PAN-67 / ARG-69.

[453] Appellate Body Report, *EC – Seal Products*, para. 5.101 (citing Appellate Body Report *US – Clove Cigarettes*, para. 177 (referring in turn to Appellate Body Reports, *Korea – Various Measures on Beef*,

7.276. We shall therefore examine whether the measures modify the conditions of competition to the detriment of services and service suppliers of non-cooperative countries. We recall that, for the purposes of this analysis, we have considered that, in this dispute, there is an additional element that must be taken into account in our analysis: the possibility for Argentina to access tax information on foreign suppliers.

7.277. Our analysis will therefore also examine the effects on the conditions of competition caused by the design and operation of the measures at issue.

1. Whether Argentina accords treatment no less favourable under measure 1

7.278. As we saw when examining whether or not there is different treatment[454], measure 1 consists of a legal presumption that payments made to banks or financial institutions located in non-cooperative countries as consideration for the granting of foreign credits or loans or the placement of funds from abroad represent a net gain of 100% for the suppliers for the purpose of determining the tax base for gains tax.[455] This presumption allows no evidence to the contrary.

7.279. Panama considers that this measure creates a tax disadvantage for service suppliers of non-cooperative countries inasmuch as the tax burden on them is heavier than that on like service suppliers of cooperative countries.[456] According to Panama, this distinction for purposes of establishing the tax base, all other conditions being equal, results in less favourable treatment of service suppliers from non-cooperative countries, whose tax base is higher as a result of the application of the measure. For Panama, the measure modifies the conditions of competition to the detriment of service suppliers from non-cooperative countries because it has a negative impact on their profitability.[457]

7.280. Argentina considers that the treatment accorded to Panamanian services and service suppliers is not less favourable as Panama appears on the list of cooperative countries.[458]

7.281. We note that, in regard to the payment of an identical sum as consideration for the granting of credits or loans or the placement of funds from abroad, application of the measure at issue results in an increase in the tax base for gains tax if the payment goes to service suppliers of non-cooperative countries.

7.282. We therefore consider that, as a result of measure 1, service suppliers of non-cooperative countries bear a heavier tax burden that has a negative impact on their profitability in the Argentine market and, consequently, modifies the conditions of competition between suppliers of cooperative countries and suppliers of non-cooperative countries on the Argentine market, to the detriment of the latter.

7.283. We note, however, one other factor that cannot be ignored when analysing no less favourable treatment under Article II:1 of the GATS in the case before us and which directly affects the supply of services on the Argentine market, and may modify the conditions of competition on that market. This factor concerns the possibility for Argentina to have access to tax information on foreign suppliers providing services in Argentina.

7.284. In this dispute, Argentina contends that the establishment of differential treatment between service suppliers of cooperative jurisdictions and service suppliers of non-cooperative jurisdictions is the direct consequence of access or lack of access to tax information.[459] We note that the obligation to exchange tax information applies only to parties which have concluded an agreement on exchange of tax information or a convention on the avoidance of international

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para. 137) and *Thailand – Cigarettes (Philippines)*, para. 128 (referring in turn to Appellate Body Report, *EC – Asbestos*, para. 100))).

[454] See para. 7.237 above.

[455] Argentina maintains this measure pursuant to Article 93(c) of the LIG, (Exhibits PAN-4 / ARG-42).

[456] Panama's first written submission, para. 4.37; and second written submission, para. 2.139.

[457] Panama's first written submission, para. 4.38; and second written submission, para. 2.134.

[458] Argentina's first written submission, paras. 165 and 166.

[459] Argentina's second written submission, para. 76. See also responses to Panel questions Nos. 49 and 71.

double taxation with a broad exchange of information clause and it has entered into force. According to Argentina, access to tax information is key in this dispute because measure 1, like the other measures challenged by Panama, is a defensive measure to combat risks to Argentina's fiscal and tax system arising from harmful tax competition generated by service suppliers from jurisdictions with which there is no exchange of information for tax transparency purposes.[460]

7.285. We have already seen that Decree No. 589/2013, which we consider to be inherent in each and every one of the measures at issue because it is the key piece of legislation defining their design and operation, establishes the conditions for a country to be considered cooperative, namely: (i) to have signed an agreement with Argentina on exchange of tax information or a convention on avoidance of international double taxation with a broad information exchange clause, provided that there is effective exchange of information; or (ii) to have initiated with Argentina the negotiations necessary for concluding such an agreement and/or convention. In the latter case, the AFIP will be the body responsible for determining whether the necessary conditions for initiating negotiations have been met.[461]

7.286. We note that, as regards the criterion for initiating the process of negotiating a double taxation convention or an information exchange agreement, there is no formal mechanism allowing effective exchange of information between Argentina and the country with which it is negotiating. Argentina, nonetheless, grants cooperative status to countries in the negotiating process with respect to which it has no access to tax information because no agreement or convention exists. Leaving aside the dispute between the parties as to whether Panama complied with this requirement and did, in fact, initiate negotiations[462], this would be the case of Panama, for example, which is considered by Argentina to be a cooperative country but has not signed any of the agreements provided for in Decree No. 589/2013. This means that the jurisdictions with which Argentina is in the process of negotiating agreements on exchange of tax information should be considered cooperative, despite the fact that Argentina continues to have no access to tax information, the exchange of which is the *raison d'être* of its defensive measures.

7.287. Argentina states that the reason why it grants cooperative country status to countries with which it is negotiating a double taxation convention or information exchange agreement is "to promote this type of cooperation" in view of "the tax authorities' expectation that they will be able to have access to tax information on the transactions conducted with natural or legal persons domiciled, established or located in cooperative countries".[463]

7.288. We also note that countries which are in a similar situation as regards access to tax information by Argentina are treated differently. For example, according to Argentina, negotiations have begun on a double taxation convention or information exchange agreement with Panama and Hong Kong (China).[464] As no agreement has been signed with those two jurisdictions, there is, in principle, no exchange of tax information between them and Argentina. Panama, however, has cooperative country status, whereas Hong Kong (China) does not.[465]

7.289. Looking at the list of cooperative countries, we also see that countries in different situations as regards the exchange of tax information are treated in the same way by Argentina. Let us take the cases of Panama and Germany by way of example. Both belong to the category of cooperative countries. Argentina signed a double taxation agreement with Germany that has been

[460] Argentina's first written submission, paras. 1, 16 and 31.
[461] Article 1 of Decree No. 589/2013, (Exhibits PAN-3 / ARG-35).
[462] We recall that Panama contends that it never initiated negotiations with Argentina, whereas Argentina asserts that such negotiations were initiated in November 2013. See Argentina's first written submission, paras. 131 and 132; Panama's response to Panel question No. 7(a); and Argentina's response to Panel question No. 10(c).
[463] Argentina's response to Panel question No. 9(a).
[464] Argentina's first written submission, paras. 131 and 132; and responses to Panel questions Nos. 10(b)(i) and 10(b)(ii). Other countries with which Argentina has initiated negotiations since Decree No. 589/2013 entered into force and which do not appear on the current list of cooperative countries are Belarus, Cameroon, Côte d'Ivoire, Cyprus, Gabon and Gibraltar. See Argentina's response to Panel question No. 10(b)(i), para. 5.
[465] Argentina claims that the reason why Hong Kong (China) is not on the list of cooperative countries is because the list is updated at the beginning of each fiscal year. We note, however, that the list was not updated at the beginning of the 2015 fiscal year. See Argentina's response to Panel question No. 10(b)(ii).

in force since 25 November 1979[466], giving it access to tax information.[467] In the case of Panama, however, Argentina has no access to tax information since it has not signed any agreement on exchange of tax information with Panama.

7.290. In the light of the examples we have just given, it is obvious that the way in which Argentina classifies countries as cooperative or non-cooperative is not consistent with the possibility for Argentina to have access to tax information. We believe that this lack of consistency is directly attributable to the design of Decree No. 589/2013, which establishes the mechanism for classifying the two categories of countries. The examples mentioned above show that: (i) Argentina treats countries with which it has signed tax information exchange agreements in the same way as countries with which it has not signed such agreements; and (ii) Argentina accords different treatment to countries with which it has initiated negotiations on signing such agreements.

7.291. To the above must be added the question of the updating of the list of cooperative countries. The current list, as indicated in the descriptive part of this report, is the one published on the AFIP's website on 1 January 2014 pursuant to AFIP Resolution No. 3.576/2013.[468] This list has not been updated at the time of distribution of this Report to the parties, despite Argentina's assertion that the list is updated at the beginning of each fiscal year.[469] This system of annual updating may also cause distortion in the treatment accorded to certain countries compared to others in the same situation. This is the case, for example, for countries such as Belarus, Cameroon, Côte d'Ivoire, Cyprus, Gabon, Gibraltar and Hong Kong (China) which, despite allegedly being in the same situation as Panama, as they are negotiating a tax information exchange agreement with Argentina, are not considered to be cooperative jurisdictions because the negotiations were initiated after Decree No. 589/2013 had entered into force.[470] Panama, however, is still on the list of cooperative countries despite having denied that it initiated negotiations with Argentina on the signing of a tax information exchange agreement or an international double taxation convention with a broad information exchange clause.[471] Panama's denial that negotiations have been initiated suggests that there has still not been any such exchange of information.[472]

7.292. In view of the foregoing, we consider that the design of measure 1, pursuant to Decree No. 589/2013, establishes different treatment according to whether the services and service suppliers are from cooperative or non-cooperative countries. This difference in treatment is not based, as Argentina argues, on whether or not Argentina has access to tax information. This can be seen from the fact that countries that are in the process of negotiating an agreement on exchange of tax information have cooperative status even though the agreement has not been concluded and there is thus no formal mechanism for exchanging information. To this must be added the operation of the list of cooperative countries drawn up by Argentina, which results in unequal treatment of jurisdictions in the process of negotiating an agreement, since some are on the list whilst others continue to await the updating of the list.

7.293. We therefore find that the design and operation of measure 1, pursuant to Decree No. 589/2013, create distortions which modify the conditions of competition to the detriment of

[466] Amending Protocol in force since 30 June 2011. See Argentina's response to Panel question No. 13.

[467] On 3 November 2011, Germany signed the OECD Convention on Mutual Administrative Assistance in Tax Matters, to which Argentina is a party, although it has not yet entered into force. See Argentina's response to Panel question No. 13.

[468] AFIP Resolution No. 3.576/2013, (Exhibits PAN-3 / ARG-37).

[469] Article 2 of Decree No. 589/2013 provides that the AFIP shall update the list of cooperative countries, without specifying the periodicity for such updating. Argentina has explained that it is updated at the beginning of each fiscal year. This is in line with the provision in Article 3 of AFIP Resolution No. 3.576/2013, which refers to the "list published by [AFIP] in effect at the beginning of each fiscal year", (Exhibits PAN-3 / ARG-37). See Argentina's responses to Panel questions No. 9(b), para. 14, and No. 10(b)(ii), and opening statement at the second meeting of the Panel, para. 41. At the second meeting of the Panel, Argentina stated that "in view of Panama's current position of not negotiating an agreement with Argentina, the AFIP is reviewing whether to maintain this country's [Panama's] status as a cooperative country for tax transparency purposes. This review is part of the ongoing adjustment to include and remove countries from the list of cooperative countries in this year's update, in accordance with the criteria laid down in the legislation". See Argentina's opening statement at the second meeting of the Panel, paras. 42 and 43.

[470] Argentina's response to Panel question No. 10(b)(i), para. 5.

[471] Panama's response to Panel question No. 7(a).

[472] Panama's response to Panel question No. 7(a).

services and service suppliers of non-cooperative countries and, thus, accord them less favourable treatment than that accorded to like services and service suppliers of cooperative countries.

2. Whether Argentina accords treatment no less favourable under measure 2

7.294. As we have already stated, measure 2 consists of the presumption of unjustified increase in wealth applicable to any entry of funds from non-cooperative countries received by an Argentine taxpayer.[473]

7.295. Panama contends that the very existence of this presumption of unjustified increase in wealth applicable to entries of funds from non-cooperative countries constitutes less favourable treatment for services and service suppliers of non-cooperative countries because it implies an additional requirement for Argentine taxpayers (that of having to rebut the presumption) that would not apply if the taxpayer had contracted services (which give rise to the entry of funds) from a service supplier of a cooperative country.[474]

7.296. As in the case of the previous measure, Argentina argues that the treatment accorded to Panamanian services and service suppliers is not less favourable as Panama appears on the list of cooperative countries.[475]

7.297. The Panel notes that the unnumbered article added after Article 18 of the LPT determines (i) the type of funds covered by that provision; (ii) the nature of the legal presumption provided therein; and (iii) the treatment given to unjustified increases in wealth. In the first place, as regards the funds falling within the scope of the unnumbered article added after Article 18 of the LPT, the Panel highlights the broad scope of the provision, inasmuch as it refers to entries of funds from non-cooperative countries "irrespective of their nature or purpose or the type of transaction involved". In other words, the rule applies to any transaction which generates an entry of funds from those countries. This means that the transmittal of funds earned from the supply of a service to an Argentine taxpayer by a supplier from a non-cooperative country would fall within the scope of this provision.[476] Secondly, as regards the nature of the presumption established by this provision, the Panel points out that the presumption may be rebutted if "the interested party conclusively proves that [the entries of funds] originated from activities actually carried out by the taxpayer or by a third party in those countries or from placements of funds duly declared funds". In that case, the increase in wealth will be considered justified. Lastly, with regard to the treatment accorded to increases in wealth deemed to be unjustified, the unnumbered article added after Article 18 of the LPT provides that such increases plus 10% "under the heading of income disposed of or consumed as non-deductible expenditure" shall be considered net gains for the purposes of determining gains tax and "where applicable [represent] the basis for estimating the taxable transactions omitted from the respective marketing year in terms of value added and internal taxes". Classifying an entry of funds as an unjustified increase in wealth automatically involves an increase in the tax base for gains tax.

7.298. We agree with Panama that this legal presumption involves an additional requirement for taxpayers who contract for services with suppliers of non-cooperative countries and who seek to justify the entry of funds obtained through such services. We note that the additional requirement of having to rebut the legal presumption stipulated in the unnumbered article added after Article 18 of the LPT may deter Argentine taxpayers from entering into contracts with suppliers of non-cooperative countries, since they know that such contracts automatically trigger the legal presumption of unjustified increase in wealth. We consider that this disincentive entails a competitive advantage for service suppliers of cooperative countries, whose services are not affected by this legal presumption. We also consider that, quite apart from the difficulty implicit in

[473] See section 2.3.3 above.
[474] Panama's first written submission, para. 4.126; and second written submission, para. 2.281.
[475] Argentina's first written submission, paras. 165 and 166.
[476] According to Panama, such entries of funds could, for example, originate from: (i) loans granted by suppliers of financial services established in a non-cooperative country for tax transparency purposes; (ii) compensation for damage under an insurance, reinsurance or retrocession contract taken out by an Argentine resident with an insurance company situated in a non-cooperative country for tax transparency purposes; or (iii) compensation for damage under a maritime or air transport insurance contract taken out by an Argentine resident with an insurance company situated in a non-cooperative country for tax transparency purposes. See Panama's first written submission, paras. 4.57 and 4.58.

rebutting the presumption and the greater or lesser success of such a rebuttal by the Argentine taxpayer, the mere existence of this presumption places service suppliers from non-cooperative countries in a less favourable position than like service suppliers of cooperative countries, as the Argentine taxpayer is asked to take an additional step (to prove conclusively "that [the entries of funds] originated from activities actually carried out by the taxpayer or by a third party in those countries or from placements of duly declared funds").

7.299. We believe that our position is supported in the GATT 1994 case law which, even though it cannot be considered directly applicable within the GATS framework, can provide valuable guidance for our analysis. For example, in *Thailand – Cigarettes (Philippines)*, in which the Appellate Body stated that "the mere fact that the additional administrative requirements are imposed on imported cigarettes, and not on like domestic cigarettes, provides, in itself, a significant indication that the conditions of competition are adversely modified to the detriment of imported cigarettes".[477] We find that, in the case of measure 2, there is an "additional requirement" that affects only certain services provided by service suppliers of non-cooperative countries.

7.300. On a preliminary basis, therefore, we conclude that there is less favourable treatment for service suppliers of non-cooperative countries, and this imposes on Argentine taxpayers the additional burden of rebutting the presumption. Nevertheless, as in the case of measure 1, our analysis must take account of the regulatory framework resulting from the signature or non-signature of tax information exchange agreements, that is, the possibility for Argentina to access tax information on foreign service suppliers providing services in Argentina through one of the four modes of supply provided for in the GATS.

7.301. As in the case of measure 1, however, the design and operation of measure 2, pursuant to Decree No. 589/2013, create distortions with regard to (i) granting cooperative status to jurisdictions which have not signed an agreement and which, therefore, are not subject to the exchange of tax information with Argentina; and (ii) the updating of the list of cooperative countries. Indeed, the design of measure 2 establishes differential treatment according to whether the services and service suppliers are from cooperative or non-cooperative countries. This differential treatment, pursuant to Decree No. 589/2013, is not based, as Argentina argues, on whether or not Argentina has access to tax information. This can be seen from the fact that countries which are in the process of negotiating a tax information exchange agreement have cooperative status even though the agreement has not been signed and there is thus no formal mechanism for exchanging information. To this must be added the operation of the list of cooperative countries drawn up by Argentina, which results in unequal treatment of jurisdictions in the process of negotiating an agreement, since some are on the list while others continue to await the updating of the list.[478]

7.302. We therefore find that the design and operation of measure 2, pursuant to Decree No. 589/2013, create distortions which modify the conditions of competition to the detriment of services and service suppliers of non-cooperative countries and, thus, accord them less favourable treatment than that accorded to like services and service suppliers of cooperative countries.

3. Whether Argentina accords treatment no less favourable under measure 3

7.303. Measure 3 contested by Panama concerns the application of the transfer pricing regime in valuing transactions between Argentine taxpayers and persons in non-cooperative countries.[479]

7.304. Panama argues that the use of the transfer pricing regime "implies administrative requirements, economic charges and tax contingencies"[480] which alter the conditions of competition to the detriment of services and service suppliers of non-cooperative countries.[481]

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[477] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 138.
[478] See paras. 7.284-7.291 above.
[479] See section 2.3.4 above.
[480] Panama's first written submission, para. 4.247. See second written submission, paras. 2.425 and 2.426.
[481] Panama's first written submission, para. 4.248; and second written submission, para. 2.428.

7.305. Argentina, as was the case for the previous measures, argues that the treatment accorded to Panamanian services and service suppliers is not less favourable, since Panama is included in the list of cooperative countries.[482]

7.306. When an Argentine taxpayer conducts a transaction with a person in a cooperative country, the valuation of the transaction is based on the value agreed between the parties, unless the parties are related, in which case the transfer pricing regime applies.[483] On the other hand, transactions between Argentine taxpayers and persons domiciled, established or located in non-cooperative countries are not considered to be "in line with normal arm's-length market practices or prices".[484] In such cases, Argentine law requires that the transfer pricing regime apply as if it were a transaction between related parties, irrespective of whether the relationship actually exists. Consequently, transactions between Argentine taxpayers and service suppliers of non-cooperative countries are automatically valued using the transfer pricing regime.[485]

7.307. We thus note that the Argentine taxpayer has no option but to follow this regime when valuing transactions with service suppliers of non-cooperative countries. This is specified in Article 15 of the LIG, which stipulates that, where stable institutions domiciled or located in Argentina or certain companies and trust funds conduct transactions "with natural or legal persons domiciled, established or located in countries with low or no taxes …, [such transactions] shall not be considered to be in line with normal arm's-length market practices or prices". It should also be noted that both Panama and Argentina consider that the transfer price valuation regime is a more burdensome method of valuation for the taxpayer as it "requires more work" than other methods.[486]

7.308. Consequently, the fact that this valuation regime involves higher costs for Argentine taxpayers enables us to conclude on a preliminary basis that this measure alters the conditions of competition to the detriment of service suppliers of non-cooperative countries as it deters Argentine taxpayers from entering into contracts with them.

7.309. As was the case for measures 1 and 2, however, the design and operation of measure 3, pursuant to Decree No. 589/2013, create distortions with regard to (i) granting cooperative status to jurisdictions which have not signed an agreement and which, therefore, are not subject to the exchange of tax information with Argentina; and (ii) the updating of the list of cooperative countries. Indeed, the design of measure 3 establishes differential treatment according to whether the services and service suppliers are from cooperative or non-cooperative countries. This differential treatment, pursuant to Decree No. 589/2013, is not based, as Argentina argues, on whether or not Argentina has access to tax information. This can be seen from the fact that countries which are in the process of negotiating a tax information exchange agreement have cooperative status even though the agreement has not been signed and there is thus no formal mechanism for exchanging information. To this must be added the operation of the list of cooperative countries drawn up by Argentina, which results in unequal treatment of jurisdictions in the process of negotiating an agreement, as some are on the list, while others continue to await the updating of the list.[487]

7.310. We therefore find that the design and operation of measure 3, pursuant to Decree No. 589/2013, create distortions which modify the conditions of competition to the detriment of services and service suppliers of non-cooperative countries and, thus, accord them less favourable treatment than that accorded to like services and service suppliers of cooperative countries.

[482] Argentina's first written submission, paras. 165 and 166

[483] See section 2.4.2.3 above.

[484] Article 15.2 of the LIG, (Exhibits PAN-4 / ARG-42).

[485] A similar rule is determined in Article 8 of the LIG in connection with "earnings from the export of goods produced, manufactured, treated or purchased in the country". See exhibits PAN-4 / ARG-42.

[486] Argentina's first written submission, para. 104. See also Panama's first written submission, paras. 4.218 and 4.238.

[487] See paras. 7.284-7.291 above.

4. Whether Argentina accords treatment no less favourable under measure 4

7.311. Pursuant to measure 4, Argentine companies which enter into a contract with a service supplier of a non-cooperative country may only deduct expenditure incurred by the transaction from their tax base for gains tax when the expenditure is carried out, i.e., when the payment arising from the transaction is executed.[488]

7.312. Panama argues that the application of this rule means that Argentine taxpayers that contract with service suppliers of non-cooperative countries bear a heavier tax burden because their tax base will be higher as a result of not being able to deduct expenditure at the time at which the contractual obligation is generated.

7.313. Argentina argues that the treatment accorded to Panamanian services and service suppliers is not less favourable as Panama is included in the list of cooperative countries.[489]

7.314. First of all, the Panel observes that the measure at issue does not prevent deduction of expenditure by the Argentine taxpayer. In the case of both the accrual rule and the payment received rule, the expenses incurred by the Argentine taxpayer may be deducted from the latter's tax base. In our view, what changes from one rule to the other is the time at which the expenses are allocated, that is, whether the expenses are allocated to the fiscal year in which the obligation accrues or the fiscal year in which the outlay or payment occurs, and the accrual and payment of the obligation may or may not take place in the same fiscal year. Consequently, we agree with Argentina that the rule applied to transactions with service suppliers of non-cooperative countries does not prevent deduction of expenditure by Argentine companies.[490]

7.315. In view of the foregoing, the Panel's analysis will focus on determining whether this possible time difference in allocating expenses constitutes less favourable treatment for service suppliers of non-cooperative countries compared to the treatment arising from the rule applicable to transactions with service suppliers of cooperative countries.

7.316. In this connection, we note that the amount to be allocated in the fiscal year of accrual or the fiscal year of payment will be the same, given that the expenditure effected by the company when contracting services from suppliers in non-cooperative countries in order to obtain revenue does not vary. We consider, however, that the real value of this amount diminishes with the passage of time, since money depreciates over time through the effect of inflation.

7.317. We also agree with Panama that the application of this measure may create an additional burden for companies as it may oblige them to make adjustments in their accounts to reflect the two rules for allocating expenses. We have already referred in this connection to the GATT 1994 case law and, in particular, to the *Thailand – Cigarettes (Philippines)* dispute, in which the Appellate Body considered that the existence of additional requirements for certain products and not others may constitute a "significant indication" that the conditions of competition have been modified to the detriment of the group of products affected by the additional requirement.[491]

7.318. We consider that the effects of the measure at issue in terms of the reduced value of the expenses deducted and the possible additional costs linked to modifying accounting procedures as a result of applying two cost allocation rules (one for transactions with service suppliers of cooperative countries – the accrual rule – and the other for transactions with service suppliers of non-cooperative countries – the payment received rule) may serve to deter Argentine companies from contracting services with suppliers in non-cooperative countries. This would lead us to conclude, on a preliminary basis, that the treatment accorded to services and service suppliers of non-cooperative countries is less favourable than that accorded to like services and service suppliers of cooperative countries.

7.319. As in the case of measures 1, 2 and 3, however, the design and operation of measure 4, pursuant to Decree No. 589/2013, create distortions with regard to (i) granting cooperative status

[488] See section 2.3.5 above.
[489] Argentina's first written submission, paras. 165 and 166.
[490] Argentina's first written submission, Explanatory Annex No. 1, para. 127.
[491] See para. 7.299 above.

to jurisdictions which have not signed an agreement and which, therefore, are not subject to the exchange of tax information with Argentina; and (ii) the updating of the list of cooperative countries. Indeed, the design of measure 4 establishes differential treatment according to whether the services and service suppliers are from cooperative or non-cooperative countries. This differential treatment, pursuant to Decree No. 589/2013 is not based, as Argentina argues, on whether or not Argentina has access to tax information. This can be seen from the fact that countries which are in the process of negotiating a tax information exchange agreement have cooperative status even though the agreement has not been signed and there is thus no formal mechanism for exchanging information. To this must be added the operation of the list of cooperative countries drawn up by Argentina, which results in unequal treatment of jurisdictions in the process of negotiating an agreement, since some are included in the list while others continue to await the updating of the list.[492]

7.320. We therefore find that the design and operation of measure 4, pursuant to Decree No. 589/2013, create distortions which modify the conditions of competition to the detriment of services and service suppliers of non-cooperative countries and, thus, accord them less favourable treatment than that accorded to like services and service suppliers of cooperative countries.

5. Whether Argentina accords treatment no less favourable under measure 5

7.321. As regards the claims under Article II:1 of the GATS, measure 5 consists in the enforcement of compliance with certain requirements by branches of companies from non-cooperative countries which supply their services through commercial presence (mode 3) and by companies in non-cooperative countries which supply reinsurance services through cross-border supply (mode 1) in order to be able to gain access to the Argentine reinsurance services market.

7.322. Points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011, following the March 2014 amendment, provide that foreign suppliers of reinsurance services may be authorized to accept reinsurance from their country of origin (point 20(f)) or from a branch in Argentina (point 18) provided that they comply with two requirements which, according to Argentina[493], are cumulative:

> (1) Prove that they have been incorporated and registered in countries "cooperating for tax transparency purposes" in accordance with the provisions of Decree No. 589/2013 and supplementary regulations (in the case of branches, such proof relates to the parent company)[494];
>
> (2) Prove that they have been incorporated and registered in countries that collaborate in the global fight against the money laundering and terrorist financing offences in accordance with the criteria defined in the public documents issued by the FATF (in the case of branches, such proof relates to the parent company).[495]

7.323. Measure 5 itself provides that, if suppliers of services via mode 1 or mode 3 do not prove that they have been incorporated and registered in a country cooperating for tax transparency purposes, they must show that they are subject to the control and supervision of a body (i) which fulfils functions similar to those of the SSN, and (ii) with which a memorandum of understanding on cooperation and exchange of information has been signed.[496] Measure 5 also provides that, if suppliers of services via mode 1 or mode 3 do not prove that they have been incorporated and registered in a country collaborating in the global fight against money laundering and terrorist financing offences in accordance with the criteria defined by the FATF, the assessment of the request for authorization shall be subject to enhanced due diligence, proportionate to the risks, and the counter-measures indicated in Recommendation 19 of the FATF and the Interpretive Note thereto may be applied.[497]

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[492] See paras. 7.284-7.291 above.
[493] Argentina's response to Panel question No. 63.
[494] Points 18(a) and 20(f)(I) of Annex I to SSN Resolution No. 35.615/2011, (Exhibit ARG-27).
[495] Points 18(b) and 20(f)(II) of Annex I to SSN Resolution No. 35.615/2011, (Exhibit ARG-27).
[496] Points 18(a) and 20(f)(I) of Annex I to SSN Resolution No. 35.615/2011, (Exhibit ARG-27).
[497] Points 18(b) and 20(f)(II) of Annex I to SSN Resolution No. 35.615/2011, (Exhibit ARG-27).

7.324. Panama, which only challenges the requirements on cooperation for tax transparency purposes[498], argues that compliance with these conditions laid down in paragraphs (a) and (I) of points 18 and 20(f) of SSN Resolution No. 35.615/2011 is the only way available to suppliers of reinsurance services from non-cooperative countries to gain access to the Argentine market for such services through cross-border supply (mode 1) or commercial presence (mode 3).[499] In its opinion, the imposition of these conditions causes uncertainty for suppliers of reinsurance services from non-cooperative countries, which face a change in the conditions of competition in the Argentine market.[500]

7.325. Argentina, as was the case for the other measures at issue, argues that the treatment accorded to Panamanian services and service suppliers is not less favourable, since Panama is included in the list of cooperating countries.[501]

7.326. According to the provisions of points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011 with regard to cooperation for tax transparency purposes, we note that the following are the situations which may be faced by foreign suppliers of reinsurance services seeking to enter the Argentine reinsurance market:

a. Suppliers of reinsurance services from cooperative countries

In this case, no requirements would apply to access to the Argentine reinsurance services market through cross-border supply (mode 1) or commercial presence (mode 3).

b. Suppliers of reinsurance services from non-cooperative countries

In this case, access to the Argentine reinsurance market through mode 1 and mode 3 for these suppliers is conditional upon compliance with the two requirements mentioned above: (i) that the supplier (or its parent company) is subject to the control and supervision of a body which fulfils functions similar to those of the SSN, and (ii) that the body in question has signed a memorandum of understanding on cooperation and exchange of information with the SSN.

7.327. On the basis of this classification, we note that the measure does not require that suppliers from cooperative countries should be subject to the control and supervision of a body which fulfils functions similar to those of the SSN or that the body in question has signed a memorandum of understanding on cooperation and exchange of information in order to have access to the Argentine reinsurance market. This does not mean, however, that they are not subject to other conditions derived from their cooperative (or non-cooperative) status for the purposes of the fight against money laundering and financing of terrorism in the FATF framework, a question which Panama does not address in its submissions.[502]

7.328. As a preliminary matter, we consider that the imposition of market access conditions on suppliers of non-cooperative countries modifies the conditions of competition to the detriment of those suppliers in comparison with like service suppliers of cooperative countries, which may have access to the Argentine reinsurance services market via mode 1 and mode 3 without having to comply with these two requirements.

7.329. As in the case of measures 1, 2, 3 and 4, however, the design and operation of measure 5, pursuant to Decree No. 589/2013, create distortions with regard to (i) granting cooperative status to jurisdictions which have not signed an agreement and which, therefore, are not subject to the

[498] Panama's first written submission, paras. 4.341 and 4.342; and second written submission, paras. 2.610 and 2.611.
[499] Panama's second written submission, para. 2.610.
[500] Panama's second written submission, para. 2.612.
[501] Argentina's first written submission, paras. 165 and 166.
[502] As we have indicated, the assessment of requests for authorization of suppliers from countries cooperating for tax transparency purposes but not in the fight against money laundering and financing of terrorism shall be subject to "enhanced due diligence, proportionate to the risks", and the counter-measures indicated in Recommendation 19 of the FATF and the Interpretive Note thereto may be applied. See para. 7.323 above.

exchange of tax information with Argentina; and (ii) the updating of the list of cooperative countries. Indeed, the design of measure 5 establishes differential treatment according to whether the services and service suppliers are from cooperative or non-cooperative countries. This differential treatment, pursuant to Decree No. 589/2013 is not based, as Argentina argues, on whether or not Argentina has access to tax information. This can be seen from the fact that countries which are in the process of negotiating a tax information exchange agreement have cooperative status even though the agreement has not been signed and, there is thus no formal mechanism for exchanging information. To this must be added the operation of the list of cooperative countries drawn up by Argentina, which results in unequal treatment of jurisdictions in the process of negotiating an agreement, since some are included in the list while others continue to await the updating of the list.[503]

7.330. We therefore find that the design and operation of measure 5, pursuant to Decree No. 589/2013, create distortions which modify the conditions of competition to the detriment of services and service suppliers of non-cooperative countries and, thus, accord them less favourable treatment than that accorded to like services and service suppliers of cooperative countries.

6. Whether Argentina accords treatment no less favourable under measure 6

7.331. As we have already mentioned, measure 6 consists of imposing requirements on Argentine stock market intermediaries for them to be able to engage in transactions conducted or ordered by persons from non-cooperative countries.[504]

7.332. Panama argues that the imposition of these market access conditions deters Argentine consumers from contracting services (such as investment portfolio management services) provided by suppliers subject to these conditions, i.e., service suppliers of non-cooperative countries, as they do not have access to all financial centres, including the Argentine market. According to Panama, this means that the Argentine customer incurs additional costs because it has to contract with another investment portfolio manager who does have access to the Argentine market through Argentine stock market intermediaries.[505]

7.333. Argentina, as was the case for the other measures at issue, argues that the treatment accorded to Panamanian services and service suppliers is not less favourable, since Panama is included in the list of cooperative countries.[506] In any event, Argentina adds that the measure does not constitute an absolute prohibition, as asserted by Panama, but allows transactions conducted or ordered by persons incorporated, domiciled or residing in non-cooperative countries to proceed provided that they meet the two conditions specified in Article 5 of the Consolidated Text of the CNV.[507]

7.334. We wish first of all to address the question of the services affected by this measure. Panama claims that, although the measure at issue, as contained in Title XI, Section III, Article 5 of the Rules of the CNV, does not explicitly refer to portfolio management services, the measure affects the cross-border supply of such services as it imposes obligations on authorized intermediaries "whose service is essential for portfolio managers". In Panama's view, "the stock market intermediation service is an essential auxiliary service for the effective delivery of portfolio management services".[508] The measure at issue therefore affects the supply "of portfolio management services to Argentine customers through mode 1".[509] Argentina did not object to this statement by Panama. In fact, Argentina identified portfolio management services in its first written submission when summarizing the services and modes of supply which Argentina considers to be affected by the measures challenged by Panama.[510]

[503] See paras. 7.284-7.291 above.
[504] See section 2.3.7 above.
[505] Panama's second written submission, para. 2.706.
[506] Argentina's first written submission, paras. 165 and 166.
[507] Argentina's first written submission, para. 491.
[508] Panama's first written submission, para. 4.387.
[509] Panama's first written submission, para. 4.394.
[510] Argentina's first written submission, para. 142.

7.335. We note that both parties agree that suppliers of portfolio management services from non-cooperative countries only have access to the Argentine capital market if they comply with the two conditions specified in Title XI, Section III, Article 5 of the CNV's Rules. We also note that such access to the Argentine capital market is necessarily effected through stock market intermediaries[511], which are the ones that proceed with transactions in relation to the public offering of negotiable securities, forward contracts, futures or options of any kind and other financial instruments or products. We see no need to determine whether stock market intermediation services really are auxiliary services for portfolio management services, as asserted by Panama, in order to conclude that the measure at issue has an impact on the cross-border supply of portfolio management services to Argentine consumers by service suppliers of non-cooperative countries. We therefore consider that the services at issue under measure 6 are portfolio management services.

7.336. Having addressed the question of the service affected by the measure at issue, we shall focus on whether the treatment accorded by measure 6 is less favourable to service suppliers of non-cooperative countries. In this connection, we have noted that imposition of conditions on access to the Argentine capital market through stock market intermediaries only affects service suppliers of non-cooperative countries. We consider that the mere imposition of these requirements modifies the conditions of competition to the detriment of service suppliers from non-cooperative countries as, in the eyes of the consumer, they do not have the same ease of access to the Argentine capital market.

7.337. Like Panama, we also believe that the imposition of these conditions on Argentine stock market intermediaries may discourage the contracting of services provided by suppliers of non-cooperative countries, since the latter do not have access to the Argentine market (whereas service suppliers of cooperative countries do have such access) and thus may make it necessary to contract the services of some other supplier which does have access to the Argentine market, generating additional costs for Argentine consumers.

7.338. This leads us to the preliminary conclusion that the treatment accorded to services and service suppliers of non-cooperative countries is less favourable than that accorded to like services and service suppliers of cooperative countries.

7.339. As in the case of measures 1, 2, 3, 4 and 5, however, the design and operation of measure 6, pursuant to Decree No. 589/2013, create distortions with regard to (i) granting cooperative status to jurisdictions which have not signed an agreement and which, therefore, are not subject to the exchange of tax information with Argentina; and (ii) the updating of the list of cooperative countries. Indeed, the design of measure 6 establishes differential treatment according to whether the services and service suppliers are from cooperative or non-cooperative countries. This differential treatment, pursuant to Decree No. 589/2013 is not based, as Argentina argues, on whether or not Argentina has access to tax information. This can be seen from the fact that countries which are in the process of negotiating a tax information exchange agreement have cooperative status even though the agreement has not been signed and there is thus no formal mechanism for exchanging information. To this must be added the operation of the list of cooperative countries drawn up by Argentina, which results in unequal treatment of jurisdictions in the process of negotiating an agreement, since some are included in the list while continue to await the updating of the list.[512]

7.340. We therefore find that the design and operation of measure 6, pursuant to Decree No. 589/2013, create distortions which modify the conditions of competition to the detriment of services and service suppliers of non-cooperative countries and, thus, accord them less favourable treatment than that accorded to like services and service suppliers of cooperative countries.

[511] We recall that "stock market intermediaries" means the persons indicated in Article 1 of the CNV's Rules, including "bargaining agents, liquidation and compensation agents, distribution and placement agents, and collective investment management agents". See footnote 53 above.

[512] See paras. 7.284-7.291 above.

7. Whether Argentina accords treatment no less favourable under measure 7

7.341. Measure 7, as we explained above, relates to the registration requirements applicable to companies from non-cooperative countries wishing to register in the Autonomous City of Buenos Aires.[513]

7.342. Panama contends that the imposition of additional requirements makes the business model consisting of simultaneous establishment in several countries more problematic because at the outset it deters service suppliers of non-cooperative countries from setting up in Argentina.[514]

7.343. Argentina, once again, argues that the treatment accorded to Panamanian services and service suppliers is not less favourable as Panama is included in the list of cooperative countries.[515] In response to Panama's argument that the IGJ exercises discretionary authority in assessing compliance with the requirements, Argentina states that this discretionary authority is inherent in the exercise of its administrative functions.[516]

7.344. We have already seen that Argentina imposes different treatment on companies from non-cooperative countries, since it applies to them Article 192 of IGJ Resolution No. 7/2005, which, as indicated in its title, is not applicable to companies from cooperative countries.

7.345. We understand that the IGJ may evaluate more or less restrictively compliance with the requirements stipulated in Article 188 on the part of a company from a cooperative country in the light of the particular circumstances of each case, being able to request additional documents similar to those provided for in Article 192 if considered necessary. We do not consider, however, that our analysis of the measure at issue requires us to examine the more or less strict assessment by the IGJ of compliance with the requirements laid down in Article 188.

7.346. Nor do we consider that the fact that the exemption from furnishing the documents provided for in Article 188 may apply to non-cooperative countries alters the fact that the legal mandate given to the IGJ in Article 192 to "appraise restrictively compliance with the requirements of Article 188, section 3, subsections (b) and (c)" refers exclusively to companies from countries not cooperating for the purposes of tax transparency and the fight against money laundering and transnational crime.

7.347. We do not consider, as claimed by Panama, that the requirement to prove that the company is effectively engaged in economically significant business activities applies only to companies from non-cooperative countries.[517] In this connection, we note that the exemption provided for in Article 188, which applies to any foreign company, may apply "in cases where it is well-known and public knowledge that the company is effectively engaged in economically significant business activities abroad and that its management is also located there" This concords with Argentina's statement that the assessment of whether the documents submitted by the foreign company in accordance with Article 188 are sufficient is conducted in relation to two aspects: whether the company is effectively engaged in economically significant business activities and its place of central management.[518] We therefore consider that, in assessing compliance with the requirements of Article 188, the IGJ also seeks to determine whether the company is effectively engaged in economically significant business activities, as asserted by Argentina.[519]

7.348. Even though the details that the documentation requested is intended to ascertain are the same in both Article 192 and subsections (b) and (c) of Article 188.3, we cannot ignore the IGJ's mandate under Article 192 to assess compliance with the said requirements restrictively in the case of companies from countries not cooperating for the purposes of tax transparency and the fight against money laundering and transnational crime.

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[513] See section 2.3.8 above.
[514] Panama's second written submission, paras. 2.742 and 2.743.
[515] Argentina's first written submission, paras. 165 and 166.
[516] Argentina's first written submission, para. 620.
[517] Panama's first written submission, paras. 4.425 and 4.431; and second written submission, para. 2.738.
[518] Argentina's first written submission, para. 627.
[519] Argentina's first written submission, para. 630.

7.349. In our view, the fact that the IGJ assesses compliance with these requirements restrictively modifies the conditions of competition to the detriment of companies from non-cooperative countries compared to those from cooperative countries as it may create disincentives to the registration of companies from non-cooperative countries, which face exposure to closer scrutiny on the part of the IGJ, and it may mean that a larger number of documents are required. The fact that most companies register successfully[520] does not eliminate the disincentives caused by the treatment stipulated in Article 192 of IGJ Resolution No. 7/2005.

7.350. Having regard to the foregoing, we reach the preliminary conclusion that the restrictive assessment by the IGJ of certain requirements needed for the registration of companies from non-cooperative countries modifies the conditions of competition to the detriment of the latter, placing them in a less favourable position than like service suppliers from cooperative countries.

7.351. As was the case for measures 1, 2, 3, 4, 5 and 6, however, the design and operation of measure 7, pursuant to Decree No. 589/2013, create distortions with regard to (i) granting cooperative status to jurisdictions which have not signed an agreement and which, therefore, are not subject to the exchange of tax information with Argentina; and (ii) the updating of the list of cooperative countries. Indeed, the design of measure 7 establishes differential treatment according to whether the services and service suppliers are from cooperative or non-cooperative countries. This differential treatment, pursuant to Decree No. 589/2013 is not based, as Argentina argues, on whether or not Argentina has access to tax information. This can be seen from the fact that countries which are in the process of negotiating a tax information exchange agreement have cooperative status even though the agreement has not been signed and there is therefore no formal mechanism for exchanging information. To this must be added the operation of the list of cooperative countries drawn up by Argentina, which results in unequal treatment of jurisdictions in the process of negotiating an agreement, since some are included in the list while others continue to await the updating of the list.[521]

7.352. We therefore find that the design and operation of measure 7, pursuant to Decree No. 589/2013, create distortions which modify the conditions of competition to the detriment of services and service suppliers of non-cooperative countries and, thus, accord them less favourable treatment than that accorded to like services and service suppliers of cooperative countries.

8. Whether Argentina accords treatment no less favourable under measure 8

7.353. As we have already seen, measure 8 consists of the requirement imposed on natural or legal persons from non-cooperative countries to obtain prior authorization from the BCRA in order to repatriate direct investments from Argentina.[522]

7.354. Panama argues that the requirement to obtain prior authorization from the BCRA to allow service suppliers to repatriate their direct investments, which "only applies" to service suppliers of non-cooperative countries[523] creates uncertainty, deterring service suppliers of non-cooperative countries from setting up in Argentina.[524] Panama considers that this requirement imposes an additional administrative burden and, in turn, leads to a risk that the authorization will be refused or given too late.[525] In this connection, Panama highlights the discretionary authority surrounding approval of the application by the BCRA and the waiting times which a supplier has to face before repatriation takes place.[526]

7.355. Argentina, for its part, argues that the treatment accorded to Panamanian services and service suppliers is not less favourable, since Panama is included in the list of cooperative countries.[527] Argentina adds that it does not consider that the repatriation of investment is covered

[520] Argentina's first written submission, para. 648.
[521] See paras. 7.284-7.291 above.
[522] See section 2.3.9 above.
[523] Panama's first written submission, para. 4.438. See also first written submission, paras. 4.449, 4.450 and 4.453; and second written submission, para. 2.793.
[524] Panama's second written submission, paras. 2.794 and 2.795.
[525] Panama's second written submission, para. 2.795.
[526] Panama's second written submission, para. 2.793.
[527] Argentina's first written submission, paras. 165 and 166.

by the GATS and that it does not affect the supply of any service inasmuch as it is a "prior verification requirement" for access to the Argentine foreign exchange market.[528] Nevertheless, Argentina contends that the requirement of prior authorization from the BCRA in order to repatriate foreign direct investment in the non-financial private sector applies to suppliers of both cooperative and non-cooperative countries whenever certain conditions are not met.[529] Argentina adds that the applications for prior authorization submitted so far have not been rejected[530] and the time-frame for granting authorization is a reasonable one in accordance with the transparency requirements of the GATS, the complexity of the transactions and the requirements of the competent authorities.[531] Lastly, Argentina denies that repatriation of investment is subject to the discretionary authority of the BCRA as it will be authorized when the prescribed conditions are met.[532]

7.356. First of all, we note that, pursuant to Section I of Communication "A" 4940, the prior authorization requirement automatically applies to the repatriation of direct investment in the non-financial sector when the beneficiary of the repatriation is a natural or legal person from a non-cooperative country, irrespective of whether the other requirements laid down in Argentina's legislation for this type of transaction have been met. This automaticity appears to us at the outset to place persons from non-cooperative countries in a less favourable position than those from cooperative countries, as the rule in point 1.13 of Communication "A" 4940, on exemption from this requirement can in no event be applied to them.

7.357. To the above must be added the fact that, as stated by Panama, the prior authorization application in itself implies an additional administrative burden to be borne in any event by persons from non-cooperative countries wishing to repatriate their direct investment in the non-financial sector. We recognize that any application not only entails a certain cost in terms of the time required[533] but also a risk that it may ultimately be rejected, which may generate disincentive to establishment for suppliers from non-cooperative countries.

7.358. We understand that any business decision involving investment abroad is based on a survey of the market receiving the investment, which covers not only the terms of entry for the investment but also its treatment post-establishment, including its withdrawal from the country. This includes consideration of not only the formalities for applying for authorization, but also the risks which rejection of the application entails and the time that elapses between the application and the final decision by the BCRA. The fact that no application has so far been rejected, as asserted by Argentina, may give foreign investors an indication of the BCRA's customary practice, but does not prevent us from considering, in the light of the foregoing, that the measure challenged by Panama may have the potential effect of discouraging certain investments by service suppliers of non-cooperative countries, which find themselves automatically made subject to a requirement that does not apply automatically to like service suppliers of cooperative countries.

7.359. We therefore consider, on a preliminary basis, that the requirement of prior authorization from the BCRA imposed in respect of repatriation of direct investment in the non-financial sector when the beneficiary is a person from a non-cooperative country modifies the conditions of competition to the detriment of the latter, placing them in a less favourable position than like service suppliers from cooperative countries.

7.360. As was the case for measures 1, 2, 3, 4, 5, 6 and 7, however, the design and operation of measure 8, pursuant to Decree No. 589/2013, create distortions with regard to (i) granting cooperative status to jurisdictions which have not signed an agreement and which, therefore, are not subject to the exchange of tax information with Argentina; and (ii) the updating of the list of cooperative countries. Indeed, the design of measure 8 establishes differential treatment according to whether the services and service suppliers are from cooperative or non-cooperative countries. This differential treatment, pursuant to Decree No. 589/2013, is not based, as Argentina

[528] Argentina's first written submission, para. 124 and Explanatory Annex No. 2, paras. 27-29 and 41.
[529] Argentina's first written submission, Explanatory Annex No. 2, paras. 38 and 42.
[530] Argentina's first written submission, para. 124 and Explanatory Annex No. 2, paras. 39 and 41.
[531] Argentina's first written submission, Explanatory Annex No. 2, para. 41.
[532] Argentina's first written submission, Explanatory Annex No. 2, para. 43.
[533] This cost in temporal terms covers the time needed to prepare the application for prior authorization and, in particular, the time that elapses between submission of the application and its acceptance or rejection.

argues, on whether or not Argentina has access to tax information. This can be seen from the fact that countries which are in the process of negotiating a tax information exchange agreement have cooperative status even through the agreement has not been signed and there is thus no formal mechanism for exchanging information. To this must be added the operation of the list of cooperative countries drawn up by Argentina, which results in unequal treatment of jurisdictions in the process of negotiating an agreement, since some are included in the list while others continue to await the updating of the list.[534]

7.361. We therefore find that the design and operation of measure 8, pursuant to Decree No. 589/2013, create distortions which modify the conditions of competition to the detriment of services and service suppliers of non-cooperative countries and, thus, accord them less favourable treatment than that accorded to like services and service suppliers of cooperative countries.

(iii) Conclusion

7.362. In the light of the foregoing, we find that Panama has demonstrated that the eight measures at issue do not accord "treatment no less favourable" to services and service suppliers of non-cooperative countries compared to the treatment accorded to like services and service suppliers of cooperative countries.

(c) Whether the treatment no less favourable is accorded immediately and unconditionally to like services and service suppliers

7.363. Having concluded that the eight measures at issue do not accord treatment no less favourable to like services and service suppliers of cooperative and non-cooperative countries, we do not believe it necessary to pursue our analysis by addressing the question of whether non-existent "treatment no less favourable" is accorded immediately and unconditionally to like services and service suppliers.

7.3.2.2.4 Conclusion

7.364. Firstly, we have concluded that Panama has demonstrated that the eight measures at issue in this dispute are covered by the GATS.

7.365. Next, we have concluded that Panama has demonstrated that, in the context of the eight measures at issue, services and service suppliers of cooperative and non-cooperative countries are like by reason of origin. In this respect, we also conclude that Argentina has not persuaded us that the exchange of tax information is an "other factor" that is reflected in the competitive relationship between services and service suppliers of cooperative and non-cooperative countries.

7.366. We have also concluded that Panama has demonstrated that the eight measures at issue do not accord "treatment no less favourable" to services and service suppliers of non-cooperative countries in comparison with the treatment accorded to like services and service suppliers of cooperative countries, which is why we have not considered it necessary to pursue our analysis by addressing the question of whether non-existent "treatment no less favourable" is accorded immediately and unconditionally to like services and service suppliers.

7.367. In the light of the foregoing, the Panel finds that measure 1 (withholding tax on payments of interest or remuneration), measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices), measure 4 (payment received rule for the allocation of expenditure), measure 5 (requirements relating to reinsurance services), measure 6 (requirements for access to the Argentine capital market), measure 7 (requirements for the registration of branches) and measure 8 (foreign exchange authorization requirement) are inconsistent with Article II:1 of the GATS because they do not immediately and unconditionally accord to services and service suppliers from non-cooperative countries treatment no less favourable than that accorded to like services and service suppliers from cooperative countries.

[534] See paras. 7.284-7.291 above.

7.3.3 Panama's claims under Articles XVI:1 and XVI:2 of the GATS

7.3.3.1 Main arguments of the parties

7.3.3.1.1 Panama

7.368. Panama claims that measure 5 is inconsistent with Articles XVI:1 and XVI:2(a) of the GATS because Argentina restricts the number of foreign service suppliers and accords them treatment less favourable than that specified in its Schedule of Commitments.[535] Because of the changes made to this measure, which are explained in sections 2.3.6 and 7.1.3 above, Panama has indicated that it withdraws its claims under Articles XVI:1 and XVI:2(a) of the GATS in respect of the supply of reinsurance services by suppliers from non-cooperative countries via mode 3 (point 18 of Annex I to SSN Resolution No. 35.615/2011) and mode 1 (point 20(f) of Annex I to SSN Resolution No. 35.615/2011). Panama has also emphasized that it maintains its claims "under Article XVI of the GATS in relation to point 19 of Annex I to SSN Resolution 35.615/2011".[536] In this section we include a summary of all Panama's arguments in relation to its claims under Articles XVI:1 and XVI:2 of the GATS.

7.369. In Panama's opinion, Argentina undertook commitments on market access under modes 1 (cross-border supply) and 3 (commercial presence) in relation to the reinsurance and retrocession sector.[537] As regards the cross-border supply mode (mode 1), Panama claims that, by inscribing "None" in the market access column under mode 1, Argentina made a full commitment for this mode.[538] Concerning supply through commercial presence (mode 3), Panama states that the limitation entered ("Authorization of the establishment of new entities is suspended") concerns Argentina's capacity to authorize the establishment of new entities. Panama claims that the ordinary meaning of this entry only covers temporary suspension of authorizations for the establishment of new entities in Argentina for the purpose of providing reinsurance services, a suspension that was in force on 15 April 1994, the date on which the Schedule was adopted. Given that SSN Resolution No. 13.828/1977, which was in force on 15 April 1994, was repealed in 1998 by SSN Resolution No. 25.804/1998, Panama considers that the limitation in Argentina's Schedule ceased to have effect from the moment the granting of authorizations for the establishment of new entities was reinstated, i.e. from 1 October 1998 onwards.[539] Accordingly, Panama concludes that the total ban imposed by Argentina on the supply of reinsurance services through commercial presence on the part of service suppliers from non-cooperative countries – pursuant to point 18 of Annex I to SSN Resolution No. 35.615/2011 – is inconsistent with Argentina's commitments in this sector and mode of supply because it corresponds to a zero quota, falling within the scope of Article XVI:2(a) of the GATS.[540]

7.370. With regard to mode 1, Panama points out that, pursuant to point 20(f) of Annex I to SSN Resolution No. 35.615/2011, service suppliers of non-cooperative countries are prohibited from supplying reinsurance services in the cross-border mode. According to Panama, this prohibition, for reasons of nationality, on supplying a service for which a specific commitment has been made is equivalent to a zero quota falling within the scope of Article XVI:2(a) of the GATS.[541]

7.371. Panama also indicates that, although suppliers from cooperative countries are not subject to this ban on the cross-border supply of reinsurance services, they are subject to certain limitations. More specifically, Panama explains that foreign suppliers of reinsurance services from cooperative countries operating solely from their head office may only provide their services to consumers located in the Argentine market in two situations: (i) pursuant to point 19 of Annex I to SSN Resolution No. 35.615/2011, "when the magnitude or particular characteristics of the ceded risks make it impossible for [the] reinsurance operations to be covered on the Argentine

[535] Panama's second written submission, para. 3.1.e(ii).
[536] See Panama's response to Panel question No. 60.
[537] The Panel recalls that, in section 7.1.4 above, it reached the conclusion that retrocession services are not included in measure 5 contested by Panama. We will therefore refer only to "reinsurance services" in the remainder of this section.
[538] Panama's first written submission, paras. 4.367 and 4.368 (citing Panel Report, *US – Gambling*, para. 6.279).
[539] Panama's first written submission, paras. 4.369-4.374.
[540] Panama's first written submission, paras. 4.380 and 4.381 (citing Appellate Body Report, *US – Gambling*, para. 237).
[541] Panama's first written submission, para. 4.376.

reinsurance market", and (ii) pursuant to Article 4 of SSN Resolution No. 35.794/2011, in cases where the individual risks exceed US$50,000,000 and "for that portion which exceeds the aforementioned amount". According to Panama, this measure amounts to a "limitation on the number of service suppliers … in the form of … the requirements of an economic needs test ", within the meaning of Article XVI:2(a) of the GATS.[542]

7.372. Panama contends that these measures are inconsistent with Article XVI:1 of the GATS as well because they accord suppliers from non-cooperative countries treatment less favourable than that provided in Argentina's Schedule of Commitments.[543]

7.373. In its second written submission, Panama notes that Argentina amended SSN Resolution No. 35.615/2011 by means of SSN Resolution No. 38.284/2014, on the same day that Panama presented its first written submission, namely, 25 March 2014. This SSN Resolution No. 38.284/2014 amends two points in SSN Resolution No. 35.615/2011 on which Panama had submitted claims, namely, points 18 and 20(f) of Annex I to the Resolution, and maintains differential treatment for reinsurance service suppliers according to their origin, both for mode 1 and for mode 3. Panama argues that, given that it had identified SSN Resolution No. 35.615/2011 in its panel request as the instrument whereby Argentina maintained its measures on reinsurance services inconsistent with the GATS and had indicated that "the scope of [this] request … covers … any possible amendments, extensions or additions where applicable"[544], Argentina's amendment forms part of this Panel's terms of reference.[545]

7.374. Panama claims that point 19 of Annex I to SSN Resolution No. 35.615/2011 and Article 4 of SSN Resolution No. 35.794/2011 are still in force and observes that Argentina itself admits that it does not allow full access to its reinsurance market, but only "partial" access. Panama asserts that Argentina's legislation does not allow the cross-border supply of reinsurance services unless there is an economic need therefor, which constitutes a limitation "on the number of service suppliers … in the form of … the requirements of an economic needs test", within the meaning of Article XVI:2(a) of the GATS. Panama claims that the WTO Secretariat Note on economic needs tests, to which the Appellate Body has referred on occasion, gives as an example of limitation by means of an economic needs test measures that allow insurance takers "to seek insurance cover from foreign-based suppliers to the extent that coverage is not available domestically". In Panama's opinion, this example almost identically reflects what is provided in point 19 of Annex I to SSN Resolution No. 35.615/2011. Panama argues that the Secretariat Note indicates that the quantitative nature of measures in the form of economic needs tests means that these are measures "based on criteria the fulfilment of which is beyond the control of the affected service supplier". According to Panama, by allowing the cross-border supply of reinsurance services solely for that portion of the individual risks exceeding US$50 million, Article 4 of SSN Resolution No. 35.794/2011 establishes a criterion the fulfilment of which is clearly "beyond the control" of the foreign reinsurer.[546]

7.375. Panama claims that Argentina took advantage of Panel question No. 76 in order to set out for the first time its response to Panama's claim relating to point 19 of Annex I to SSN Resolution No. 35.615/2011. Panama considers that Argentina's response clearly exceeds the scope of the Panel's question. Panama stresses that Argentina had not previously mentioned, for example, the economic needs tests on which Panama developed detailed arguments in its two written submissions. According to Panama, Argentina's response cannot be accepted because it would run counter to what has been stated by the Appellate Body regarding the division of panel proceedings

[542] Panama's first written submission, paras. 4.376-4.379 (referring to point 19 of Annex I to SSN Resolution No. 35.615/2011), (Exhibits PAN-36 / ARG-27); Article 4 of SSN Resolution No. 35.794/2011, (Exhibits PAN-40 / ARG-48); and the 1993 Scheduling Guidelines, which include as an example of a limitation on the number of service suppliers a "[l]icense for a new restaurant based on an economic needs test". See "Scheduling of Initial Commitments in Trade in Services: Explanatory Note" (1993 Guidelines), MTN.GNS/W/164 of 3 September 1993, (Exhibits PAN-46 / ARG-79), para. 6(a), point 1).

[543] Panama's first written submission, paras. 4.376 and 4.379; and second written submission, para. 2.631.

[544] Panama's second written submission, para. 2.576 (referring to its request for the establishment of a panel, p. 7).

[545] Panama's second written submission, paras. 2.575-2.583.

[546] Panama's second written submission, paras. 2.628-2.630 (referring to the Note by the Secretariat, *Economic Needs Tests*, S/CSS/W/118 of 30 November 2001, (Exhibit PAN-47); and Appellate Body Report, *US – Gambling*, footnote 269).

into phases and the purpose of rule 8 of this Panel's Working Procedures. Panama contends that it would affect its right of defence inasmuch as within the seven-day period it did not have a proper opportunity for weighing up, rebuttal and defence of its position. Panama insists that it was not able to discuss these arguments with Argentina and the Panel at any meeting, in accordance with the principles of due process, procedural immediacy and oral presentation. Panama claims that accepting these belated arguments of Argentina would also affect the rights of third parties, which have not been able to examine or comment on Argentina's position in relation to Panama's claim under Article XVI of the GATS. Panama contends that, in the light of Article 11 of the DSU, the Panel should take due precautions to prevent either of the parties from taking advantage of the opportunity afforded by the Panel to clarify arguments in order to present its case for the first time. In Panama's view, Argentina has not proved that there are any intervening facts or grounds justifying the presentation of arguments and new evidence at this stage of the proceedings.[547]

7.3.3.1.2 Argentina

7.376. In its first written submission, Argentina claims that Panama's description of the Argentine measure does not correspond to the true situation because Argentina's regulatory framework for reinsurance has been modified.[548]

7.377. As regards the supply of reinsurance services through commercial presence (mode 3), Argentina claims that point 18 of Annex I to SSN Resolution No. 35.615/2011, as amended by SSN Resolution No. 38.284/2014, does not prohibit service suppliers of non-cooperative countries from providing reinsurance services in Argentina through commercial presence, but allows them to do so provided that they are subject to the regulatory supervision of a body similar to the SSN, with which there is exchange of information.[549]

7.378. According to Argentina, to this must be added the fact that the limitation recorded under mode 3 in the reinsurance services sector is still in force as Argentina has not amended its Schedule of Commitments in accordance with Article XXI of the GATS. Argentina argues that, because of this limitation, authorization to establish new entities has been suspended, which means that the establishment of new entities will only be possible insofar as the SSN evaluates the merits of exemption from suspension in each particular case. Argentina does not consider that, as claimed by Panama, the term "is suspended" can be read in such a way as to suggest that the suspension of authorization to establish new reinsurers in Argentina is limited temporarily. Argentina considers that, irrespective of any amendment to its domestic legislation, the limitation recorded under mode 3 remains in force, thus giving Argentina the right to suspend authorization for the establishment of new reinsurers.[550]

7.379. With reference to the cross-border supply of reinsurance services (mode 1), Argentina claims that, pursuant to point 20(f) of Annex I to SSN Resolution No. 35.615/2011, as amended by SSN Resolution No. 38.284/2014, service suppliers of non-cooperative countries are not prohibited from supplying cross-border reinsurance services. Argentina explains that the new wording of point 20(f), pursuant to SSN Resolution No. 38.284/2014, provides that entities located in non-cooperative jurisdictions may be authorized to supply cross-border reinsurance or retrocession services in Argentina provided that it is certified that they are subject to the regulatory supervision of an entity similar to the SSN, with which there is exchange of information.[551] Furthermore, Argentina argues that it is also not the case that point 19 of Annex I to SSN Resolution No. 35.615/2011 prohibits the cross-border supply of reinsurance services from central offices (mode 1), but makes it subject to certain conditions. Argentina explains in particular that point 19 of Annex I to SSN Resolution No. 35.615/2011 (elaborated by Article 4 of SSN Resolution No. 35.794/2011) provides for the participation of foreign firms in the supply of reinsurance services through mode 1 partially and for the amount in excess of what is considered to be a threshold for certain types of insured risk, normally defined as "major risks". Argentina justifies this partial limitation on the grounds of strengthening the domestic reinsurance market

[547] Panama's comments on Argentina's response to Panel question No. 76 (citing Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79).
[548] Argentina's first written submission, para. 407.
[549] Argentina's first written submission, para. 431.
[550] Argentina's first written submission, paras. 476-479; and second written submission, paras. 56-58.
[551] Argentina's first written submission, paras. 435 and 436; and second written submission, paras. 54 and 55.

and increasing control so as to avoid fraudulent practices.[552] Argentina claims that the large number of foreign reinsurance firms currently providing reinsurance and retrocession services in Argentina corroborates the absence of any "limitations on the number of service suppliers" within the meaning of Article XVI:2(a) of the GATS.[553]

7.380. Moreover, Argentina points out that the retrocession regime is governed by SSN Resolution No. 35.794/2011, which was not challenged by Panama in this dispute. According to Argentina, not only are retrocession services not limited by any regulatory provision but, in practice, are mostly supplied by foreign firms.[554]

7.381. At the second substantive meeting of the parties with the Panel, Argentina claimed that the measure contested is not inconsistent with Articles XVI:1 and XVI:2(a) of the GATS because it is not covered by those obligations. According to Argentina, Article XVI:2(a) refers exclusively to limitations on the number of service "suppliers". The measure challenged by Panama, however, is not aimed at limiting the number of reinsurance service "suppliers" but at regulating reinsurance "operations". Argentina contends that, if a measure does not limit the number of service suppliers *per se*, it falls outside the scope of Article XVI:2(a) of the GATS. Argentina claims that, in the unlikely event that the Panel were to consider that measure 5 relates to service "suppliers", Argentina has already explained that it is a qualitative measure and thus also falls outside the scope of Article XVI:2(a) of the GATS, which covers measures of a quantitative nature.[555]

7.3.3.2 Assessment by the Panel

7.3.3.2.1 Introduction

7.382. The issue before the Panel is whether measure 5 is inconsistent with Articles XVI:1 and XVI:2(a) of the GATS because, as claimed by Panama, it limits the number of foreign service suppliers by requiring an economic needs test and, consequently, accords them treatment less favourable than that specified in Argentina's Schedule of Commitments.[556] Argentina, for its part, responds that measure 5 does not apply to service "suppliers" and is therefore not covered by Article XVI:2(a) of the GATS. It contends that, in the event that the Panel were to consider that the measure is covered by Article XVI:2(a), Argentina considers that it is a qualitative measure.[557]

7.383. As explained in section 2.3.6 above, measure 5 has been the subject of elaboration and amendments occurring before and after the establishment of this Panel. We recall our decision to rule on measure 5 as elaborated by SSN Resolution No. 35.794/2011 and in accordance with the amendment introduced by SSN Resolution No. 38.284/2014.[558]

7.384. The changes to measure 5 led Panama to reduce the scope of its claims under Articles XVI:1 and XVI:2(a) of the GATS.[559] In particular, in view of the amendment of points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011 by SSN Resolution No. 38.284/2014 and the resulting disappearance of the absolute prohibition initially provided for by those points, Panama confirmed to the Panel that it was withdrawing its claims under Articles XVI:1 and XVI:2(a) of the GATS with regard to the supply of reinsurance services through modes 1 and 3 by suppliers from non-cooperative countries.[560] Panama pointed out, however, that the economic

[552] Argentina's first written submission, paras. 456-458.
[553] Argentina's second written submission, para. 55.
[554] Argentina's first written submission, paras. 443 and 449.
[555] Argentina's opening statement at the second meeting of the Panel, para. 21.
[556] Panama's second written submission, para. 3.1.e(ii)
[557] See footnote 555 above.
[558] See section 7.1.3 above.
[559] In its first written submission, Panama put forward claims under Articles XVI:1 and XVI:2(a) of the GATS in relation to points 18, 19 (developed by Article 4 of SSN Resolution No. 35.794/2011) and 20(f) of SSN Resolution No. 35.615/2011. Points 18 and 20(f) established prohibitions on the supply of reinsurance services through mode 3 and mode 1, respectively. Point 19, developed by Article 4 of SSN Resolution No. 35.794/2011, limits the supply of reinsurance services through mode 1 to situations in which the individual risks exceed US$50 million, but only for the portion that exceeds this amount. See Panama's first written submission, section 4.5.3.
[560] Panama confirmed that it maintains the claims under Article II:1 of the GATS in relation to points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011. The Panel examined these claims in section 7.3.2.2 above. See Panama's second written submission, para. 2.587.

needs test requirement, which applied to all foreign suppliers pursuant to point 19 of Annex I to SSN Resolution No. 35.615/2011 (as elaborated by Article 4 of SSN Resolution No. 35.794/2011) had not been amended and Panama therefore maintained its claims under Articles XVI:1 and XVI:2(a) of the GATS. In this connection, Panama asserts that Argentina limits cross-border access (mode 1) to the Argentine reinsurance market to situations in which the individual risks exceed US$50 million, and only for the portion that exceeds this amount.[561]

7.385. In the light of the foregoing, the Panel will confine its analysis solely to Panama's claims under Articles XVI:1 and XVI:2(a) of the GATS with respect to point 19 of Annex I to SSN Resolution No. 35.615/2011, as developed by Article 4 of SSN Resolution No. 35.794/2011. Consequently, when we allude to measure 5 in this section on Panama's claims under Articles XVI:1 and XVI:2(a), we shall be referring only to point 19 of Annex I to SSN Resolution No. 35.615/2011, as developed by Article 4 of SSN Resolution No. 35.794/2011.

7.386. We shall begin by examining the wording of Articles XVI:1 and XVI:2(a) of the GATS.

7.3.3.2.2 The relevant legal provisions

7.387. Article XVI of the GATS, entitled "Market Access", provides in relevant part:

> 1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[8]
>
> 2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
>
> (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
>
> ———————————
>
> [8] If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory.

7.388. In *US – Gambling*, the Appellate Body explained that Article XVI of the GATS "sets out specific obligations for Members that apply insofar as a Member has undertaken 'specific market access commitments' in its Schedule".[562] The Appellate Body also clarified the function of the paragraphs of this provision cited by Panama:

> The first paragraph of Article XVI obliges Members to accord services and service suppliers of other Members "no less favourable treatment than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." The second paragraph of Article XVI defines, in six sub-paragraphs, measures that a Member, having undertaken a specific commitment, is not to adopt or maintain, "unless otherwise specified in its Schedule".[563]

7.389. Panama's claims under Articles XVI:1 and XVI:2(a) raise the question of the relationship between the two paragraphs of Article XVI with a view to deciding the order the Panel should follow in its analysis. For example, in *China – Publications and Audiovisual Products*, the panel

[561] Panama's response to Panel question No. 60.
[562] Appellate Body Report, *US – Gambling*, para. 214.
[563] Appellate Body Report, *US – Gambling*, para. 214.

decided to begin by examining whether the respondent's Schedule contained a relevant specific commitment in accordance with the specific subparagraph of Article XVI:2 concerned, before examining the measure's consistency with Article XVI:1 of the GATS.[564] The panel's reasoning was as follows:

> Paragraph 1 of Article XVI sets out the general principle that a Member must accord to services and service suppliers of other Members treatment no less favourable than that specified under the "terms, limitations and conditions" contained in its schedule. Paragraph 2 is more specific. It defines, in six sub-paragraphs, the measures that a Member, having inscribed a specific sectoral commitment, must not adopt or maintain "unless otherwise specified in its Schedule". … Under Article XVI, a Member undertakes a minimum standard of treatment, and is thus free to maintain a market access regime less restrictive than set out in its schedule, as confirmed in paragraph 1 which refers to a standard of "no less favourable" treatment. …
>
> The wording of Article XVI indicates that we must next examine the precise terms of China's Schedule to determine whether, with respect to the services at issue, there is a market access commitment and, if so, what are the "terms, limitations and conditions" entered with respect to those commitments.[565]

7.390. In *China – Electronic Payment Services*, the panel followed the same approach.[566] We see no reason to depart from the approach adopted by previous panels and will, therefore, commence our analysis with Panama's claim under Article XVI:2(a) of the GATS.

7.3.3.2.3 The question of whether measure 5 is inconsistent with Article XVI:2(a) of the GATS

7.3.3.2.3.1 The legal standard under Article XVI:2(a) of the GATS

7.391. In *US – Gambling*, the Appellate Body defined the legal standard to be followed under Article XVI:2 of the GATS. In examining Article XVI:2, in particular its subparagraphs (a) and (c), the Appellate Body explained:

> This text suggests that Antigua was required to make its *prima facie* case by first alleging that the United States had undertaken a market access commitment in its GATS Schedule; and, secondly, by identifying, with supporting evidence, how the challenged laws constitute impermissible "limitations" falling within Article XVI:2(a) or XVI:2(c).[567]

7.392. Applying this reasoning to the present dispute, in order to establish a *prima facie* case of violation of Article XVI:2(a) of the GATS, Panama will be required (i) first, to prove that Argentina undertook relevant market access commitments in its Schedule annexed to the GATS; and (ii) second, to specify, with supporting evidence, how measure 5 constitutes an "impermissible limitation" within the meaning of Article XVI:2(a) of the GATS.

7.393. We turn to examine separately whether Panama has complied with these two requirements.

(a) First requirement: Whether Argentina undertook specific commitments under mode 1 in relation to the "reinsurance services" subsector

7.394. We start by recalling that it is for Panama to prove that Argentina undertook market access commitments in relation to reinsurance services. In this connection, we note that Panama

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[564] Panel Report, *China – Publications and Audiovisual Products*, para. 7.1353.
[565] Panel Report, *China – Publications and Audiovisual Products*, paras. 7.1353 and 7.1354.
[566] See Panel Report, *China – Electronic Payment Services*, para. 7.511.
[567] Appellate Body Report, *US – Gambling*, para. 143. Subsequently, the panels in *China – Publications and Audiovisual Products* and *China – Electronic Payment Services* followed the same approach. See Panel Reports, *China – Publications and Audiovisual* Products, para. 7.1354 and *China – Electronic Payment Services,* para. 7.511.

has identified the commitments undertaken by Argentina in the sectors and modes of supply set out below[568]:

Sector or subsector	Limitations on market access	Limitations on national treatment
(c) Reinsurance and retrocession services (CPC 81299*)	*(1) None* (2) None (3) Authorization of the establishment of new entities is suspended (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section

(emphasis added)

7.395. According to Article XX:3 of the GATS, Members' Schedules of Specific Commitments are an integral part of the GATS and their meaning therefore has to be determined in accordance with the rules of interpretation of the Vienna Convention.[569]

7.396. As we see in the extract from its Schedule of Commitments reproduced above, Argentina inscribed "None" in the "Limitations on market access" column with regard to mode 1 (cross-border supply).

7.397. Panama claims that, having inscribed "None" in this column, Argentina must maintain "full market access" within the meaning of the GATS, i.e., it must not apply any of the six limitations and measures set out in Article XVI:2, including subparagraph (a), which is relevant for the purposes of this dispute. According to Panama, this inscription means that Argentina has made a full market access commitment for the supply of reinsurance services in cross-border mode.[570]

7.398. Argentina appears to agree as it acknowledges that its Schedule of Specific Commitments includes a full commitment under mode 1 for the supply of reinsurance services.[571]

7.399. The Panel notes that the GATS does not contain any specific definition of the word "None". In *US – Gambling*, the Appellate Body explained that the word "None" in the market access column means that the Member concerned "has undertaken to provide full market access, within the meaning of Article XVI, in respect of the services included within the scope of" its commitment in the subsector concerned.[572] The Appellate Body concluded that "[i]n so doing, [the United States] has committed not to maintain any of the types of measures listed in the six sub-paragraphs of Article XVI:2".[573]

7.400. In the light of the foregoing, the Panel concludes that, having inscribed "None" in the "Limitations on market access" column, Argentina has made a full specific commitment under mode 1 for "reinsurance services". This means that Argentina has undertaken not to maintain any

[568] Argentina's Schedule of Specific Commitments, document GATS/SC/4, (Exhibit PAN-19), p. 12.

[569] In *US – Gambling*, the Appellate Body stated:

> In the context of the GATS, Article XX:3 explicitly provides that Members' Schedules are an "integral part" of that agreement. Here, too, the task of identifying the meaning of a concession in a GATS Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members. Like the Panel—and, indeed, both the participants—we consider that the meaning of the United States' GATS Schedule must be determined according to the rules codified in Article 31 and, to the extent appropriate, Article 32 of the *Vienna Convention*.

Appellate Body Report, *US – Gambling*, para. 160 (footnotes omitted, emphasis original).

[570] Panama's first written submission, paras. 4.367 and 4.368.

[571] Argentina's second written submission, para. 54 ("With regard to mode 1, in which Argentina has undertaken full market access commitments for reinsurance and retrocession services …").

[572] Appellate Body Report, *US – Gambling*, para. 215. In a footnote, the Appellate Body emphasized that "the opposite of the notation [is] 'Unbound', which means that a Member undertakes no specific commitment". See Appellate Body Report, *US – Gambling*, footnote 257. (emphasis original)

[573] Appellate Body Report, *US – Gambling*, para. 215.

of the six measures covered by any of the subparagraphs of Article XVI:2, including, therefore, subparagraph (a), for this mode and this sector.

(b) Second requirement: Whether measure 5 constitutes an impermissible limitation on the cross-border supply of reinsurance services within the meaning of Article XVI:2(a) of the GATS

7.401. We continue by examining the second requirement, namely, whether, as claimed by Panama, point 19 of Annex I to SSN Resolution No. 35.615/2011, as elaborated by Article 4 of SSN Resolution No. 35.794/2011, constitutes an impermissible limitation on the cross-border supply (mode 1) of reinsurance services within the meaning of Article XVI:2(a) of the GATS.

7.402. Argentina maintains in this connection that Article XVI:2(a) of the GATS is not applicable to measure 5 because that provision refers solely to limitations on the number of service "suppliers", whereas the rule challenged by Panama governs reinsurance "operations".[574] In any event, if the Panel were to consider that measure 5 applies to service "suppliers", Argentina maintains that the measure imposes qualitative requirements and thus falls outside the scope of Article XVI:2(a) of the GATS.[575]

7.403. The Panels notes that the parties' arguments raise two distinct questions with regard to the scope of Article XVI:2(a) of the GATS: (i) whether measure 5 governs service "suppliers" within the meaning of Article XVI:2(a); and (ii) assuming that this is the case, whether the measure constitutes a limitation on the "number of suppliers" of services within the meaning of Article XVI:2(a) of the GATS.

7.404. Before examining these two questions, we should like to deal with a procedural issue raised by Panama in relation to part of Argentina's argument rebutting Panama's claim under Article XVI:2(a) of the GATS.

(i) Procedural issue raised by Panama

7.405. Panama claims that Argentina's counter-arguments concerning point 19 of Annex I to SSN Resolution No. 35.615/2011 cannot be accepted by this Panel because they arrived too late. Panama contends that, by accepting them, we would be affecting its right of defence inasmuch as within the seven-day period it did not have a proper opportunity to weigh and rebut the arguments put forward by Argentina or to fully defend its position. Panama also considers that it did not have the opportunity to discuss these arguments with Argentina and the Panel at any meeting, in accordance with the principles of due process, procedural immediacy and oral presentation.[576]

7.406. We note that Argentina succinctly addressed Panama's claims concerning the inconsistency of measure 5 with Article XVI:2(a) of the GATS in its first written submission. It then put forward an additional argument at the Panel's second substantive meeting, and subsequently developed its argument in response to question No. 76 from the Panel at the second substantive meeting.[577]

7.407. We also note that Panama had the opportunity to comment on Argentina's response to Panel question No. 76 at the second substantive meeting and also within the seven-day period provided in the Panel's timetable. However, Panama opted only to request the Panel to ignore Argentina's response for reasons of due process. Nor did Panama ask the Panel for additional time to respond to the argument put forward by Argentina in its response to our question.

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[574] Argentina's opening statement at the second meeting of the Panel, para. 21 and response to Panel question No. 76..

[575] Argentina's opening statement at the second meeting of the Panel, para. 21 and response to Panel question No. 76.

[576] Panama's comments on Argentina's response to Panel question No. 76 (citing Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79).

[577] Argentina's response to Panel question No. 76.

7.408. We agree that due process is an essential feature of the WTO's dispute settlement mechanism.[578] This does not mean, however, that Panama's right to due process would be infringed if we accept Argentina's arguments in response to one of our questions. Although it would have been preferable for Argentina to submit its arguments relating to the application of Article XVI:2(a) of the GATS to measure 5 at an earlier stage of the proceedings, Panama had an opportunity to respond to Argentina's legal arguments concerning the measure in question. Panama could have commented on those arguments at the second substantive meeting and/or in its comments on Argentina's responses to the Panel's questions after the Panel's second meeting. Panama could also have requested more time in which to comment on these arguments if it had considered that more time was needed.

7.409. As to the case law and the provisions invoked by Panama – rule 8 of the Working Procedures for these proceedings and Article 11 of the DSU -, we note that these refer to the submission of evidence, not legal arguments. Nor do we share Panama's view that "the parties' arguments should be presented in their written submissions", since such a procedure would reduce to irrelevance the holding of substantive meetings with the parties, which are an essential part of panels' working procedures and precisely embody the principles of procedural immediacy and oral presentation mentioned by Panama.

7.410. In the light of the foregoing, the Panel refuses Panama's request that it should reject Argentina's arguments in response to Panel question No. 76.

(ii) Whether measure 5 applies to service "suppliers" within the meaning of Article XVI:2(a) of the GATS

7.411. We continue our analysis by examining whether measure 5 applies to service "suppliers" within the meaning of Article XVI:2(a) of the GATS. For this purpose, we shall focus on determining what is the scope of the concept of service "suppliers" covered by Article XVI:2(a) in order to be able to decide whether measure 5 is covered by this legal provision.

7.412. We start by looking at the wording of Article XVI:2(a) of the GATS, which provides:

> (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test.

7.413. This provision thus refers to limitations on the number of service suppliers. In order to understand the scope of this provision, we deem it useful to refer to its context and, in particular, the other subparagraphs of Article XVI:2 of the GATS.

7.414. In addition to subparagraph (a), Article XVI:2 has five other subparagraphs which provide as follows:

> (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
>
> (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
>
> (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
>
> (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

[578] In fact, "[d]ue process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute." See Appellate Body Report, *US – Continued Suspension*, para. 433.

> (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

7.415. The chapeau of Article XVI:2 states that the purpose of subparagraphs (a) to (f) is to define "sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt …". As indicated by the Appellate Body in *US – Gambling*:

> The chapeau thus contemplates circumstances in which a Member's Schedule *includes* a commitment to allow market access, and points out that the function of the sub-paragraphs in Article XVI:2 is to define certain limitations that are prohibited unless specifically entered in the Member's Schedule.[579]

7.416. If we look at the wording of the first four subparagraphs ((a)-(d)), we see that they share similar language in that all refer to types of quantitative limitations on market access. Certainly, only the subject of the limitation changes. In this regard, subparagraph (a), which is the one with which we are concerned, refers to ""the number of service suppliers", subparagraph (b) to "the total value of service transactions or assets", subparagraph (c) to "the total number of service operations or … the total quantity of service output" and subparagraph (d) to "the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service".

7.417. The fifth subparagraph, (e), "covers measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service"; and the sixth subparagraph, (f), refers to limitations on the participation of foreign capital.[580]

7.418. We agree with previous panels that the six types of measure form a closed or exhaustive list, as indicated in the chapeau of Article XVI:2, by providing that the six measures listed below "are defined as".[581] The word "*definir*" (to define) means "[*f*]*ijar con claridad, exactitud y precisión el significado de una palabra o la naturaleza de una persona o cosa*"[582] (to establish clearly, exactly and precisely the meaning of a word or the nature of a person or thing). In our view, the list of measures in the six subparagraphs of Article XVI:2 is not only exhaustive but also fulfils the function of establishing clearly, exactly and precisely the types of limitation on market access that are prohibited and hence may not be maintained or adopted in those sectors where a Member had adopted specific commitments, unless it has specifically mentioned this possibility in its Schedule.[583] This function is key because it enables Members wishing to undertake specific commitments on market access, as well as all the other Members, to understand precisely the scope of such commitments. Bearing in mind that, in sectors where they make specific commitments, Members have the right to maintain one (or more) of these six limitations provided that they are inscribed in their Schedules, the function of the list of measures, "to establish clearly, exactly and precisely", compels Members to define and identify clearly and exactly the scope of such limitations – and hence the scope of the specific commitment they have made.

7.419. Turning our focus to subparagraphs (a) to (d), which refer to the quantitative limitations on market access, we note that they explicitly identify the elements to be regulated, namely, "the number of service suppliers", "the total value of service transactions or assets", "the total number of service operations or … the total quantity of service output" and "the total number of natural persons" that may be employed in a service sector or by a service supplier. On its face, the text of

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[579] Appellate Body Report, *US – Gambling*, para. 233. (emphasis original)

[580] Appellate Body Report, *US – Gambling*, para. 214. In that Report, the Appellate Body drew a distinction between the first four subparagraphs and the last two subparagraphs ("The first four sub-paragraphs concern quantitative limitations on market access; the fifth sub-paragraph covers measures that restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and the sixth sub-paragraph identifies limitations on the participation of foreign capital.").

[581] Panel Reports, *China – Publications and Audiovisual Products*, para. 7.1353, *China – Electronic Payment Services*, para. 7.629. See also Panel Report, *US – Gambling*, para. 6.298.

[582] *Diccionario de la Lengua Española*, 23rd edition, *Real Academia Española* (Espasa Calpe, 2014), Vol. I, p. 716.

[583] Regarding the scope of Article XVI:2, see also Panel Report, *China – Electronic Payment* Services, para. 7.652 ("Unlike Article XVII, however, the scope of the market access obligation does not extend generally to 'all measures affecting the supply of services'. Instead, it applies to six carefully defined categories of measures of a mainly quantitative nature.").

the subparagraphs in question leads us to conclude that subparagraphs (a) to (d) of Article XVI only cover those elements which are explicitly mentioned in them. Indeed, even if it were conceivable that there might be some other element distinct from the four identified in subparagraphs (a) to (d), whose market access could hypothetically be limited quantitatively, such an element would not form part of the limitations regulated by Article XVI:2 because it was not identified by the drafters. In this regard, we consider that an interpretation of Article XVI:2 which made it applicable to measures that do not, on their face, regulate any of the four elements covered by subparagraphs (a) to (d) would unduly broaden the scope of Article XVI of the GATS and thus the scope of Members' specific commitments.

7.420. One other important element to be borne in mind is that any interpretation of Article XVI:2 of the GATS must give effect to each of the six subparagraphs of the provision. We do not exclude the possibility that, in practice, a measure which regulates, for example, the number of service operations, within the meaning of subparagraph (c), may have the indirect effect of limiting the number of service suppliers. Similarly, measures aimed at limiting the total value of transactions or assets (subparagraph (b)) or the total number of natural persons that may be employed in a particular service sector (subparagraph (d)) could also have the effect of indirectly limiting the number of service suppliers. In this regard, it could be argued that the limitations covered by subparagraphs (b), (c) and (d) of Article XVI:2 could in practice result in an indirect limitation on the number of suppliers even if these measures, on their face, specifically regulate the total value of assets, the number of operations or the total number of natural persons that may be employed in a particular sector, respectively. Consequently, broadening the scope of subparagraph (a) of Article XVI:2 to cover measures which, by quantitatively limiting any of the elements regulated by subparagraphs (b), (c) or (d), indirectly give rise to a quantitative limitation on service suppliers, would deprive subparagraphs (b, (c) and (d) of an "effet utile". Ultimately, each measure could be reduced to a limitation on the number of suppliers. We consider that such an interpretation would run counter to an effective interpretation of the GATS.

7.421. In the light of foregoing, we consider that subparagraphs (a) to (d) of Article XVI:2 cover measures intended specifically to limit the number or value of "service suppliers" (subparagraph (a)), "service transactions or assets (subparagraph (b)), "service operations or … the total quantity of service output (subparagraph (c)) or "natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service" (subparagraph (d)). Any measure which only has the indirect effect of limiting any of the elements covered by subparagraphs (a) to (d) would not therefore be covered by that subparagraph.[584]

7.422. Our interpretation of Article XVI:2 is consistent with the object and purpose of the GATS, as reflected in its preamble, which confirms Members' intention to liberalize trade in services "under conditions of transparency and progressive liberalization".[585] At the same time, it underlines "the right of Members to regulate, and to introduce new regulations, on the supply of services … in order to meet national policy objectives …".[586]

7.423. The preamble confirms that Members wished to liberalize trade in services transparently and progressively. In those sectors where they have made specific commitments, Members are authorized to maintain the limitations listed in subparagraphs (a) to (d) of Article XVI:2, provided that they have recorded them in their Schedules specifically and transparently. In addition, the right to regulate is an essential pillar of the progressive liberalization of trade in services which, according to Article XIX of the GATS "shall take place with due respect for national policy objectives". Members retain the right to regulate in order to meet their national policy objectives, subject to the relevant GATS disciplines, Article VI in particular, including in those sectors where they have made specific commitments under Article XVI of the GATS.

[584] We note that in *US – Gambling*, the Panel considered that measures which referred expressly to service suppliers also regulated services operations because, according to the Panel, they "effectively" prohibited the supply of services (see Panel Report, *US – Gambling*, para. 6.361). For the reasons expressed earlier, this Panel does not agree with the reasoning of the panel in *US – Gambling.*

[585] Second recital of the GATS.

[586] Fourth recital of the GATS.

7.424. On that basis and with a focus on subparagraph (a), the Panel considers that a measure will be covered by Article XVI:2(a) of the GATS if it regulates "service suppliers" as such, that is, when the measure is aimed at persons in their capacity as service suppliers.

7.425. Article XXVIII(g) of the GATS defines the term "service supplier" as "any person that supplies a service".[587] In turn, Article XXVIII(j) of the GATS states that "'person' means either a natural person or a juridical person". Basing ourselves on these definitions, we consider that Article XVI:2(a) covers measures whose purpose is to limit the number of persons, natural or legal, supplying a service.

7.426. We shall now consider whether measure 5 is a measure whose purpose is to limit the number of natural or legal persons supplying a service. We recall in this connection that point 19 of Annex I to SSN Resolution No. 35.615/2011 specifically provides that:

> 19. The NATIONAL INSURANCE SUPERVISORY AUTHORITY, by means of a special reasoned resolution on certain reinsurance transactions duly specified by the requesting insurer, may allow authorized entities to carry out insurance operations in the country, enter into reinsurance contracts with foreign reinsurance entities which conduct their operations from their head office when the magnitude and characteristics of the ceded risks make it impossible to cover such reinsurance operations on the national reinsurance market. The request shall be submitted prior to entering into the contract and shall be accompanied by all the evidence needed to justify the exception.

7.427. This provision was subsequently developed by Article 4 of SSN Resolution No. 35.794/2011, which provides as follows:

> For the purposes of point 19 of Annex I to SSN Resolution No. 35.615, it is stipulated that individual risks exceeding US$50,000,000 (FIFTY MILLION UNITED STATES DOLLARS) may be reinsured with the reinsurance entities mentioned in point 20 of the aforementioned regulations ("approved reinsurers"), for that portion which exceeds the aforementioned amount.

7.428. The Panel notes that the text of point 19 of Annex I to SSN Resolution No. 35.615/2011 refers to "… certain reinsurance operations duly specified by the requesting insurer" and to situations in which it is "… impossible to cover such reinsurance operations on the national reinsurance market". Article 4 of SSN Resolution No. 35.794/2011, which develops point 19 of Annex I to SSN Resolution No. 35.615/2011, regulates "individual risks exceeding US$50,000,000 …". On their face, therefore, both provisions regulate "reinsurance operations" or "individual risks", but do not specifically regulate any natural or legal person supplying reinsurance services (in this case, from their country of origin). In other words, the provisions cited by Panama do not regulate reinsurance service suppliers as such, but rather, in any event, the operations which reinsurers established outside Argentina may conduct with Argentine insurance companies.

7.429. In the light of the foregoing, the Panel finds that measure 5 is not covered by Article XVI:2(a) of the GATS because it does not regulate service suppliers within the meaning of this provision.

(iii) Whether measure 5 constitutes a limitation on the "number of service suppliers" within the meaning of Article XVI:2(a) of the GATS

7.430. Having concluded that Article XVI:2(a) of the GATS is not applicable to measure 5 because it does not regulate service suppliers within the meaning of this provision, the Panel refrains from examining whether measure 5 constitutes a limitation on the number of suppliers within the meaning of Article XVI:2(a) of the GATS.

[587] A footnote to subparagraph (g) of Article XXVIII of the GATS provides that: "Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied."

7.3.3.2.3.2 Conclusion

7.431. In the light of the foregoing, the Panel dismisses Panama's claim under Article XVI:2(a) of the GATS because measure 5 (requirements relating to reinsurance services) is not covered by that provision inasmuch as it does not regulate service suppliers within the meaning of Article XVI:2(a) of the GATS.

7.3.3.2.4 The question of whether measure 5 is inconsistent with Article XVI:1 of the GATS

7.432. We shall now examine Panama's claim under Article XVI:1 of the GATS. We recall in this regard that Panama claims that Argentina accords to foreign suppliers of reinsurance services treatment less favourable than that specified in its Schedule, inconsistently with Article XVI:1 of the GATS inasmuch as the limitation on access to Argentina's reinsurance services market via mode 1, by requiring an economic needs test, is inconsistent with Article XVI:2(a) of the said Agreement.[588] Argentina responds that measure 5 is not inconsistent with Article XVI:1 of the GATS because it is not covered by that provision.[589]

7.433. The Panel notes that Panama only puts forward arguments relating to its claims of violation of Article XVI:2(a), without developing separate and additional arguments in regard to its claim under Article XVI:1 of the GATS. In fact, Panama appears to argue that there is a violation of Article XVI:1 as a consequence of the violation of Article XVI:2 of the GATS.[590]

7.434. In the absence of a separate argument by Panama concerning the inconsistency of measure 5 with Article XVI:1, we consider that Panama has not established a *prima facie* case of inconsistency in respect of its claim under Article XVI:1 of the GATS.

7.3.3.2.4.2 Conclusion

7.435. In the light of the foregoing, the Panel dismisses Panama's claim under Article XVI:1 of the GATS in respect of measure 5 (requirements relating to reinsurance services) because Panama has not established a *prima facie* case of inconsistency in this regard.

7.3.4 Panama's claims under Article XVII of the GATS

7.3.4.1 Main arguments of the parties

7.3.4.1.1 Panama

7.436. Panama claims that measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices) and measure 4 (payment received rule for the allocation of expenditure) are inconsistent with Article XVII of the GATS because they accord services and service suppliers of non-cooperative countries treatment less favourable than that accorded by Argentina to its own like services and like service suppliers.[591]

7.437. As regards Argentina's commitments under measure 2, Panama claims that Argentina undertook full national treatment commitments in the sectors of maritime and air transport insurance, reinsurance and retrocession for the cross-border mode of supply (mode 1). As regards Argentina's commitments in relation to measures 3 and 4, in its first written submission Panama claims that Argentina undertook full national treatment commitments under the cross-border supply mode (mode 1) for all sectors in its Schedule of Commitments, except for a series of financial services.[592] In its second written submission, in connection with measure 3, Panama adds that Argentina has undertaken full national treatment commitments in these sectors, not only for

[588] Panama's second written submission, para. 2.631.
[589] Argentina's opening statement at the second meeting of the Panel, para. 21.
[590] Panama's first written submission, paras. 4.376, 4.379, 4.381 and 4.382; and second written submission, para. 2.631.
[591] Panama's first written submission, paras. 5.1(b)(ii), 5.1(c)(ii) and 5.1(d)(ii); and second written submission, paras. 3.1(b)(ii), 3.1(c)(ii) y 3.1(d)(ii).
[592] Panama's first written submission, paras. 4.152-4.153, 4.254 and 4.315.

cross-border supply (mode 1), but also for Argentine consumers travelling abroad to receive a service (mode 2).[593]

7.438. As to whether the measures affect the relevant modes of supply and service sectors, Panama argues that measure 2 affects the supply and use of these services, since the presumption of unjustified increase in wealth affects the amounts of money that the service supplier (the insurer or reinsurer) pays to the consumer of the service (the insured) in the event of damage or other circumstances covered by the insurance contract.[594] For measure 3, Panama claims that the measure affects the "sale" (within the meaning of Article XXVIII(b) of the GATS) of services by suppliers of non-cooperative countries and, in the light of Article XXVIII(c), the measure affects the "purchase" or "use" of such services by Argentine consumers, both in Argentina (mode 1) and in the territory of the country in question (mode 2).[595] As regards measure 4, Panama contends that the measure affects the supply of services which generate revenue of Argentine source because it has an impact on the perception of the consumer/taxpayer when conducting transactions with suppliers of a particular origin. It therefore affects the "delivery" of such services in the terms of Article XXVIII(b) of the GATS, as well as the "use" of the services in the terms of Article XXVIII(c)(i) of the GATS.[596]

7.439. As regards the existence of less favourable treatment, Panama argues that measures 2, 3 and 4 accord less favourable treatment to services and service suppliers of non-cooperative countries in comparison with the treatment accorded to Argentine like services and service suppliers. In these three cases, the presumption of likeness between national services and/or service suppliers and foreign services and/or service suppliers is confirmed because the sole basis for the differential treatment is the origin of the service and/or service supplier. As regards measure 2, the presumption of likeness is confirmed by the fact that the country of provenance of the funds is the only triggering element for the presumption that the funds in question constitute an unjustified increase in wealth. In the case of measure 3, Panama explains that it derives from a regulatory distinction that depends solely on the place of origin or source of the services. Likewise, measure 4 derives from a regulatory distinction based solely on the place in which the person receiving the payments, i.e. the service supplier, is located, domiciled and/or incorporated.[597] Panama contends that there is no other criterion differentiating between services and service suppliers under measures 2, 3 and 4. Accordingly, and in line with previous case law, the likeness of service suppliers from non-cooperative countries and domestic service suppliers is confirmed. Panama claims that there are, or may be, service suppliers of non-cooperative countries which are the same as Argentine service suppliers in every respect except origin.[598]

7.440. As regards measure 2, Panama claims that there is treatment less favourable because the measure imposes a heavier tax burden on consumers of the service, which entails a disincentive to contract with service suppliers from non-cooperative countries, thereby modifying the conditions of competition to the detriment of the latter. According to Panama, the fact that the purchase of maritime or air transport insurance services and reinsurance or retrocession services offered by suppliers from non-cooperative countries legally imposes a tax contingency associated with the presumption of an unjustified increase in wealth, places these services at a disadvantage *vis-à-vis* potential Argentine consumers. Given the disparity of treatment between one and the other type of service, the consumer's decision will be prejudiced against contracting services offered by service suppliers from non-cooperative countries. According to Panama, one option for the consumer would be to contract the services offered by suppliers located in Argentina, which would avoid the presumption of unjustified increase in wealth and, hence, the potential evidentiary and tax burdens. Panama asserts that the decision taken by the consumer has a direct impact on the service supplier's opportunities to compete. In such circumstances, Panama considers that the challenged measure clearly modifies the conditions of competition to the detriment of services and service suppliers of non-cooperative countries.[599] In Panama's view, the mere risk that the

[593] Panama's second written submission, para. 2.433. Panama points out that the following were the only sectors on which Argentina did not undertake national treatment commitments under mode 2: life, accident and health insurance services; non-life insurance services and new financial services. See Argentina's Schedule of Specific Commitments, (Exhibit PAN-19).

[594] Panama's first written submission, para. 4.154; and second written submission, para. 2.304.

[595] Panama's second written submission, para. 2.434.

[596] Panama's second written submission, para. 2.539.

[597] Panama's first written submission, paras. 4.157, 4.256 and 4.317.

[598] Panama's second written submission, paras. 2.305, 2.435 and 2.540.

[599] Panama's first written submission, paras. 4.160-4.167; and second written submission, para. 2.306.

presumption will be applied, irrespective of whether it can be rebutted or not, alters the conditions of competition to the detriment of like services and service suppliers from non-cooperative countries. Panama adds that the very design and structure of the measure in question modifies the conditions of competition in such a way as to accord less favourable treatment to services and service suppliers of non-cooperative countries.[600]

7.441. With regard to measure 3, Panama contends that this measure accords less favourable treatment to like services and service suppliers of non-cooperative countries in comparison with like services and service suppliers of Argentine origin because it implies administrative requirements, economic burdens and significant tax contingencies, whereas purchasing the same services from a supplier located in Argentina does not involve the same requirements, economic burdens and tax contingencies. This implies modification of the conditions of competition between like services and service suppliers of non-cooperative countries and those of national origin.[601]

7.442. Concerning measure 4, Panama claims that the measure accords services and service suppliers of non-cooperative countries treatment less favourable than that accorded to like services and service suppliers of national origin. Panama asserts that, for Argentine taxpayers, in the context of admissible deductions from gains tax, the purchase of services from persons in non-cooperative countries involves a problem in managing their accounts and tax matters. The measure in question imposes the rule for allocation of expenses based on the time at which the payment of obligations under the service contract is made, instead of the basic principle of accrual which governs the general accounting of commercial companies in Argentina. This special rule undermines opportunities for these services to compete in comparison with like services supplied by domestic service suppliers, whose payments may continue to be allocated on the basis of the accrual rule. Panama explains that measure 4 may alter the net taxable profit of Argentine taxpayers, thereby creating a disincentive for Argentine companies in their relations with service suppliers situated in non-cooperative countries. In Panama's opinion, this impairs the ability of service suppliers from non-cooperative countries to compete on equal terms with like services and service suppliers of national origin.[602]

7.443. Panama alleges that Argentina has submitted its arguments under Articles II:1 and XVII of the GATS collectively and for all the measures at issue at the same time. According to Panama, this creates confusion because Panama submitted claims under Article II:1 of the GATS with regard to the eight measures at issue, but only submitted claims under Article XVII of the GATS in relation to three specific measures, namely, the presumption of unjustified increase in wealth (measure 2), the requirement of transaction valuation based on transfer prices (measure 3) and the payment received rule for the allocation of expenditure to the time of payment (measure 4).[603]

7.3.4.1.2 Argentina

7.444. Argentina has not presented specific arguments in relation to Article XVII of the GATS. As regards the questions of "likeness" and "treatment no less favourable", Argentina put forward the same arguments for Articles II and XVII of the GATS.[604] Accordingly, we refer back to Argentina's arguments presented in section 7.3.2.1.2 above.

7.3.4.2 Assessment by the Panel

7.3.4.2.1 Introduction

7.445. The question before the Panel is whether measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices) and measure 4 (payment

[600] Panama's first written submission, paras. 4.168 and 4.169 (referring to Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 130; and *US – Section 211 Appropriations Act*, para. 268); and second written submission, para. 2.307.

[601] Panama's first written submission, paras. 4.257 and 4.258; and second written submission, para. 2.436.

[602] Panama's first written submission, para. 4.318; and second written submission, para. 2.541 (referring to its response to Panel question No. 42).

[603] Panama's second written submission, para. 2.290.

[604] Argentina's first written submission, paras. 147-236; second written submission, paras. 16-51; and opening statement at the second meeting of the Panel, paras. 2-20.

received rule for the allocation of expenditure) are inconsistent with Article XVII of the GATS. In response to Panama's claims, Argentina states that its measures are not inconsistent with Article XVII of the GATS because Panama has not established a *prima facie* case that the GATS is applicable to these measures, that the services and service suppliers are like, or that there is treatment less favourable.[605]

7.446. We shall start by examining the wording of Article XVII of the GATS in order to establish the applicable legal standard. From this perspective, we shall then determine whether measures 2, 3 and 4 violate this provision.

7.3.4.2.2 The relevant legal provision

7.447. Article XVII, entitled "National Treatment", provides as follows:

> 1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[10]
>
> 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
>
> 3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.
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> ———————————
>
> [10] Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

7.3.4.2.3 The legal standard under Article XVII of the GATS

7.448. The Panel recalls that previous panels applied a legal standard consisting of three requirements in order to determine whether a Member's measure is inconsistent with Article XVII of the GATS. Those panels considered that, in order to substantiate a claim that a measure is inconsistent with Article XVII of the GATS, a complainant must establish a *prima facie* case with respect to the following three requirements: (i) that the respondent has assumed a national treatment commitment in the relevant sector(s) or mode(s) of supply, taking into account any conditions and qualifications, or limitations set out in its Schedule of Commitments; (ii) that the measure in question "affect[s] the supply of services" in the relevant sector(s) and mode(s); and (iii) that the measure does not accord to the services and service suppliers of any other Member treatment no less favourable than that accorded by Argentina to its own like services and service suppliers.[606]

7.449. Following the approach taken by those panels, we shall commence by examining whether Panama has demonstrated that Argentina undertook specific commitments on the services and modes cited by Panama in respect of measures 2, 3 and 4. Next, we shall determine whether Panama has demonstrated that measures 2, 3 and 4 "affect [...] trade in services" in the sectors and modes concerned. Lastly, we shall examine whether Panama has demonstrated that measures 2, 3 and 4 accord services and service suppliers of non-cooperative countries treatment less favourable than that accorded by Argentina to its own like services and service suppliers.

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[605] Argentina's first written submission, Sections III, III.A and III.B.

[606] Panel Reports, *China – Electronic Payment Services*, para. 7.641; *China – Publications and Audiovisual Products*, para. 7.944; and *EC – Bananas III*, para. 7.314.

7.3.4.2.3.1 First requirement: whether Argentina has assumed specific commitments in the sectors and modes cited by Panama in respect of measures 2, 3 and 4

7.450. We start by examining whether Panama has proved that Argentina made commitments on national treatment in the relevant sectors and modes in respect of measures 2, 3 and 4, taking into account any limitations included in its Schedule. We first examine whether Panama has complied with this first requirement in respect of measure 2.

(a) Whether Argentina has assumed specific commitments in the sectors and modes indicated by Panama in respect of measure 2

7.451. Panama claims that Argentina has assumed specific commitments in respect of measure 2 in relation to (i) maritime and air transport insurance services; and (ii) reinsurance and retrocession services.[607] The relevant mode of supply in both cases is mode 1. Panama considers that Argentina made a full national treatment commitment for both sectors because it inscribed the word "None" in the national treatment column under mode 1.[608] Like Panama, we understand that Argentina has not denied that it made full specific national treatment commitments in these two sectors under mode 1.[609]

7.452. We note that the relevant part of Argentina's Schedule of Commitments[610] lists the following commitments:

Sector or subsector	Limitations on national treatment
- Maritime and air transport insurance services (CPC 81293)	*(1) None* (2) None (3) None (4) Unbound, except as indicated in the horizontal section
(c) Reinsurance and retrocession services (CPC 81299*)	*(1) None* (2) None (3) None (4) Unbound, except as indicated in the horizontal section

(emphasis added)

7.453. We note that, as indicated by Panama, Argentina has inscribed "None" in its Schedule of Specific Commitments in the "Limitations on national treatment" column in respect of mode 1 (cross-border supply). We also note that Argentina has inscribed no limitation under mode 1 in the horizontal section (the so-called "horizontal commitments") of its Schedule of Commitments.

7.454. In section 7.3.3.2.3 above, we indicated that the GATS does not contain a specific definition of the term "None". Basing ourselves on previous case law, we conclude that, by inscribing the word "None" in the "Limitations on market access" column, Argentina undertook a full specific commitment under mode 1 on "Reinsurance services". We thus conclude that Argentina has undertaken not to maintain any of the six measures included in any of the subparagraphs of Article XVI:2 and, hence, subparagraph (a) for this mode and this sector. In our view, when it is inscribed in the national treatment column, the word "None" has the same implications with regard to the national treatment obligation established in Article XVII of the GATS. That is to say, the word "None" indicates that Argentina has set out no limitations on national treatment in this mode.[611] As far as the supply of services through mode 1 in the "Maritime and air transport insurance services" and "Reinsurance and retrocession services" sectors is concerned, therefore, the notation "None" in the national treatment column indicates that Argentina has undertaken to accord full national treatment. Such national treatment extends

[607] Panama's first written submission, para. 4.152; and second written submission, paras. 2.302 and 2.303.

[608] Panama's first written submission, para. 4.153.

[609] Panama's second written submission, para. 2.303.

[610] Argentina's Schedule of Specific Commitments, GATS/SC/4, 15 April 1994, (Exhibit PAN-19), p. 12, and Appendix 1 to this Report.

[611] The panel in *China – Publications and Audiovisual Products* came to the same conclusion regarding the meaning of the word "None" in the national treatment column. See Panel Report, *China – Publications and Audiovisual Products*, paras. 7.951 and 7.1056.

to "all measures affecting the supply of services", which is the scope of Article XVII as defined in that provision.[612]

(b) Whether Argentina has assumed specific commitments in the sectors and modes indicated by Panama in respect of measure 3

7.455. We next examine whether, as Panama claims, Argentina made specific commitments in respect of measure 3. We note in this connection that, initially, Panama asserted that the relevant mode of supply affected is "predominantly cross-border trade" (mode 1)[613] in relation to all sectors in its Schedule of Commitments, except for a series of financial services.[614] Later, in response to a question from the Panel, Panama clarified that measure 3 "covers and affects" the supply of cross-border services (mode 1) and the supply of services through consumption in the territory of other Members (mode 2).[615]

7.456. Like Panama, we understand that Argentina has not denied that it made specific commitments in the sectors and modes cited by Panama.[616] In fact, in its first written submission, Argentina confines itself to indicating that "from [the first] written submission [of Panama] it can be inferred that Panama considers relevant, at least, the following services and modes of supply", and refers to modes 1 and 2 in respect of measure 3.[617]

7.457. We turn to determining whether Argentina has assumed specific commitments in respect of measure 3 in the modes and sectors claimed by Panama.

7.458. We note in this connection that, in its panel request, in relation to measure 3, Panama referred to "services or … suppliers domiciled, incorporated or located in the listed countries …"), i.e. to services supplied from, and suppliers located in, the territory of another Member. Panama's panel request therefore potentially covers both mode 1 and mode 2, inasmuch as the common feature of both these modes is that the service supplier "is not present in the territory of the Member" which "imports" the service.[618] Consequently, we conclude that modes 1 and 2 are the relevant modes of supply in respect of measure 3 for the purposes of our examination.

7.459. We next consider whether Panama has identified the sectors in which, in its opinion, Argentina undertook specific commitments in its Schedule. We note that, in its first written submission, Panama claims that "except as regards certain specific services in the financial services sector", Argentina undertook full national treatment commitments" in all the sectors in its Schedule".[619] Then, referring to Argentina's Schedule of Commitments, in a footnote, Panama lists those sectors for which Argentina did *not* assume national treatment commitments in mode 1 instead of listing those for which Argentina did make commitments. The following are the sectors listed by Panama:

> [L]ife, accident and health insurance services; non-life insurance services; acceptance of deposits and other repayable funds from the public; lending of all types including consumer credit, mortgage credit, factoring and financing of commercial transactions; financial leasing services with a purchase option; payment and money transmission services; guarantees and commitments; trading on own account or for clients in money market instruments (cheques, bills, certificates of deposit, etc.), foreign exchange, derivative products, including, but not limited to, futures and options, exchange rate and interest rate instruments, such as swaps, forward interest-rate agreements, etc., transferable securities and other negotiable instruments and financial assets, including bullion; participation in issues of all kinds of securities, including under-writing and placement as agent (whether publicly or privately) and

[612] See in this connection Panel Report, *China – Electronic Payment Services*, para. 7.651.
[613] Panama's first written submission, para. 4.254; see also first written submission, para. 4.315.
[614] Panama's first written submission, para. 4.254 and footnote 252; and second written submission, para. 2.433 and footnote 420.
[615] See Panama's response to Panel question No. 21; and second written submission, para. 2.433.
[616] Panama's second written submission, para. 2.433.
[617] Argentina's first written submission, para. 142.
[618] See the 1993 Guidelines, (Exhibits PAN-46 / ARG-79), para. 18; and Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), adopted by the Council for Trade in Services on 23 March 2001 (2001 Guidelines), S/L/92, (Exhibits PAN-45 / ARG-39), para. 26.
[619] Panama's first written submission, para. 4.254.

> provision of services related to such issues; money broking; asset management; settlement and clearing services for financial assets; new financial services.[620]

7.460. In its second written submission, with regard to measure 3, Panama claims that Argentina has made full commitments on national treatment for "all sectors in its Schedule in modes 1 and 2". In a footnote, in addition to once again listing the services for which Argentina did not undertake specific commitments under mode 1, it adds with regard to mode 2 that "the only sectors in which Argentina did not make national treatment commitments are the following: life, accident and health insurance services; non-life insurance services; and new financial services".[621]

7.461. One question that arises is whether the way in which Panama refers to the sectors in which it claims that Argentina has undertaken commitments suffices to comply with the requirement to prove that Argentina has assumed specific commitments within the meaning of Article XVII of the GATS. Panama did not specify the sectors for which Argentina made national treatment commitments under modes 1 and 2. Panama opted for a negative enumeration, i.e. a list of the sectors in which Argentina did *not* make such commitments. Although in our opinion it would have been advisable for Panama to identify precisely those sectors for which Argentina did make specific commitments, we consider that the information provided by Panama is sufficient for Argentina to understand which sectors are concerned and, therefore, the scope of Panama's claims under Article XVII of the GATS. To this must be added the fact that Argentina has not made any comment in this regard. We therefore accept Panama's negative list for the purposes of identifying the sectors covered by Argentina's specific commitments on national treatment under modes 1 and 2.

7.462. Another point to be clarified is whether Panama's claims under Article XVII of the GATS also cover the commitments on telecommunications which Argentina undertook when ratifying the fourth Protocol contained in Supplement 1 to Argentina's Schedule. This document "supplements the section on Telecommunications Services on pages 9 to 11 of document GATS/SC/4".[622] We note that Panama did not refer to these commitments or to Supplement 1 to Argentina's Schedule, either in its panel request or in its various submissions. We also note that Argentina makes no comment in this regard. In addition, this Supplement is not on the record on this case. This leads us to conclude that Panama's claims under Article XVII of the GATS do not extend to the telecommunications commitments contained in this Supplement.

7.463. In the light of the foregoing, with regard to mode 1, we conclude that the relevant services for which Argentina made a full national treatment commitment include all the services for which Argentina inscribed the word "None" in that mode. These services include all the sectors listed in Argentina's Schedule of Commitments[623], except for the telecommunications services included in Supplement 1 to that Schedule[624] and the following sectors:

> [L]ife, accident and health insurance services; non-life insurance services; acceptance of deposits and other repayable funds from the public; lending of all types including consumer credit, mortgage credit, factoring and financing of commercial transactions; financial leasing services with a purchase option; payment and money transmission services; guarantees and commitments; trading on own account or for clients in money market instruments (cheques, bills, certificates of deposit, etc.), foreign exchange, derivative products, including, but not limited to, futures and options, exchange rate and interest rate instruments, such as swaps, forward interest-rate agreements, etc., transferable securities and other negotiable instruments and financial assets, including bullion; participation in issues of all kinds of securities, including under-writing and placement as agent (whether publicly or privately) and provision of services related to such issues; money broking; asset management; settlement and clearing services for financial assets; new financial services.[625]

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[620] Panama's first written submission, para. 4.254, footnote 252.
[621] Panama's second written submission, para. 2.433, footnote 420.
[622] Argentina's Schedule of Specific Commitments, Supplement 1, GATS/SC/4/Suppl.1, 11 April 1997.
[623] See Appendix 1 to this Report.
[624] See footnote 622 above.
[625] Panama's first written submission, footnote 252; and second written submission, footnote 420.

7.464. As regards mode 2, the relevant services for which Argentina made a full national treatment commitment include all the services for which Argentina has inscribed the word "None" in that mode. These include all the services inscribed in Argentina's Schedule of Commitments[626], except for the telecommunications services included in Supplement 1 to that Schedule[627] and the following sectors: "Life, accident and health insurance services; non-life insurance services; and new financial services".[628]

(c) Whether Argentina has assumed specific commitments in the sectors and modes indicated by Panama in respect of measure 4

7.465. Panama also claims that Argentina assumed specific commitments in respect of measure 4. In this connection, Panama asserts that Argentina made full national treatment commitments under the cross-border mode of supply (mode 1) for the vast majority of service sectors included in its Schedule.[629] This also appears to be Argentina's assessment.[630]

7.466. We proceed to determine whether Argentina assumed specific commitments in respect of measure 4 in the mode and sectors claimed by Panama.

7.467. As regards the mode of supply, we note that Panama refers to full commitments ("None") on national treatment under mode 1 which Argentina has inscribed "in the vast majority of service sectors included in its Schedule of Commitments".[631] Like Panama, we note that Argentina has not denied the existence of such commitments.[632]

7.468. We shall now consider whether Panama has identified the sectors for which, in its opinion, Argentina made a full commitment ("None") under mode 1 in the "Limitations on national treatment" column of its Schedule. We note that, as is the case for measure 3, Panama initially refers to all sectors except for certain financial services. In its second written submission, referring to Argentina's Schedule of Commitments, in a footnote[633] Panama lists those sectors for which Argentina did *not* assume full national treatment commitments in mode 1 instead of listing those for which Argentina did make commitments. This list of sectors is identical to the sectors not covered by measure 3. As was the case for measure 3, we accept Panama's negative list for the purposes of identifying the sectors covered by Argentina's specific commitments on national treatment under mode 1. For the same reasons that we explained in relation to measure 3, we also consider that Panama's claims under Article XVII of the GATS do not extend to the telecommunications commitments contained in Supplement 1 to Argentina's Schedule.

7.469. In the light of the foregoing, with regard to mode 1, we conclude that the relevant services for which Argentina made a full national treatment commitment include all the services for which Argentina inscribed the word "None" for that mode. These include all the service sectors inscribed in Argentina's Schedule of Commitments in document GATS/SC/4[634], except for the telecommunications services included in Supplement 1 to that Schedule[635] and the following sectors:

> [L]ife, accident and health insurance services; non-life insurance services; acceptance of deposits and other repayable funds from the public; lending of all types including consumer credit, mortgage credit, factoring and financing of commercial transactions; financial leasing services with a purchase option; payment and money transmission services; guarantees and commitments; trading on own account or for clients in money market instruments (cheques, bills, certificates of deposit, etc.), foreign exchange, derivative products, including, but not limited to, futures and options, exchange rate and interest rate instruments, such as swaps, forward interest-rate agreements, etc., transferable securities and other negotiable instruments and

[626] See Appendix 1 to this Report.
[627] See footnote 622 above.
[628] Panama's second written submission, footnote 420.
[629] Panama's first written submission, para. 4.315.
[630] Argentina's first written submission, para. 142.
[631] Panama's second written submission, para. 2.538.
[632] Panama's second written submission, para. 2.538.
[633] Panama's first written submission, para. 4.315 and footnote 305.
[634] See Appendix 1 to this Report.
[635] See footnote 622 above.

financial assets, including bullion; participation in issues of all kinds of securities, including under-writing and placement as agent (whether publicly or privately) and provision of services related to such issues; money broking; asset management; settlement and clearing services for financial assets; new financial services.[636]

(d) Conclusion

7.470. In the light of the foregoing, the Panel concludes that Panama has proved that Argentina made specific commitments in the services and modes cited by Panama in respect of measures 2, 3 and 4.

7.471. We continue our analysis with an examination of whether Panama has complied with the second requirement under the legal standard for Article XVII of the GATS, i.e., whether Panama has proved that measures 2, 3 and 4 "affect trade in services" in the sectors and modes concerned.

7.3.4.2.3.2 Second requirement: Whether measures 2, 3 and 4 "affect […] the supply of services" in the sectors and modes concerned

7.472. Panama claims that measures 2, 3 and 4 affect the supply of services under mode 1. Panama also argues that measure 3 affects the supply of services under mode 2 as well.[637] As we explained earlier, Argentina did not submit separate additional arguments under Article XVII of the GATS with respect to whether measures 2, 3 and 4 "affect" the supply of services within the meaning of that provision. We recall, however, that Argentina has contended that Panama has failed to make a *prima facie* case to show that the GATS applies to the eight measures at issue within the meaning of Article I:1 of the GATS.[638]

7.473. We must therefore determine whether, as claimed by Panama, measures 2, 3 and 4 "affect the supply of services" in the sectors and modes concerned. To resolve this issue, we consider it relevant to refer to our findings on the application of the GATS to the eight measures at issue. In this connection, we recall that in section 7.3.1.2 of our Report, we found that Panama had proved that there is "trade in services" and that the eight measures at issue in this dispute "affect" trade in services within the meaning of Article I:1 of the GATS.

7.474. Although under Article I:1 of the GATS we examined whether the eight measures at issue (and thus measures 2, 3 and 4) affect "trade" in services, whereas our analysis under Article XVII of the GATS focuses on whether measures 2, 3 and 4 affect the "supply" of services, we consider these findings to be relevant because the concepts of "trade in services" and "supply of services" are closely linked. Indeed, Article I of the GATS entitled "Scope and Definition" in its paragraph 2 defines the concept of "trade in services" as the "supply of a service" through one of the four modes of supply identified in that provision. If we have found that measures 2, 3 and 4 "affect trade in services", therefore, the logical conclusion is that they also affect the "supply of services" in the sectors and modes concerned.

7.475. This is also the position expressed by the parties, which agree that the concept of measures "affect[ing] the supply of services" within the meaning of Article XVII of the GATS refers to the trade in services defined in Article I:1 of the GATS.[639]

7.476. Consequently, having found in section 7.3.1.2 above that Panama has proved that the eight measures at issue "affect[…] trade in services" within the meaning of Article I:1 of the GATS, we conclude that Panama has proved that measures 2, 3 and 4 "affect[…] the supply of services" within the meaning of Article XVII of the GATS.

7.477. We continue our analysis by examining whether Panama has complied with the third requirement under the legal standard of Article XVII of the GATS, i.e., whether Panama has proved that measures 2, 3 and 4 do not accord to services or service suppliers of non-cooperative

[636] Panama's first written submission, footnote 252; and second written submission, footnote 420.
[637] Panama's first written submission, paras. 4.154, 4.255 and 4.316; and second written submission, paras. 2.304, 2,434 and 2.539.
[638] Argentina's first written submission, paras. 139-146; and second written submission, para. 14.
[639] Responses of the parties to Panel question No. 40.

countries treatment no less favourable than that which Argentina accords to its own like services and like service suppliers.

7.3.4.2.3.3 Third requirement: Whether measures 2, 3 and 4 do not accord to services and service suppliers of non-cooperative countries treatment no less favourable than that which Argentina accords to its own like services and service suppliers

7.478. Panama claims that measures 2, 3 and 4 accord less favourable treatment to services and service suppliers of non-cooperative countries in comparison with the treatment accorded to Argentine like services and service suppliers. According to Panama, in the three cases the presumption of likeness between Argentine services and/or service suppliers and foreign services and/or service suppliers has been confirmed because the only basis for differential treatment is the origin of the service and/or service supplier. Panama contends that measure 2 places a heavier tax burden on consumers of the service, which entails a disincentive to contracting with service suppliers from non-cooperative countries, thus modifying the conditions of competition to the detriment of services and service suppliers of non-cooperative countries. Panama also considers that measure 3 implies administrative requirements, economic burdens and significant tax contingencies which alter the conditions of competition to the detriment of services and service suppliers of non-cooperative countries.[640] Lastly, Panama argues that measure 4 creates additional accounting problems for Argentine taxpayers, depriving services and service suppliers of non-cooperative countries of opportunities to compete and, impairing equality of opportunities to compete between them and domestic services and service suppliers.[641]

7.479. We recall that Argentina put forward its arguments on the "likeness" of services and service suppliers and "treatment no less favourable" collectively in relation to Articles II and XVII of the GATS. We shall therefore refer to section 7.3.2.1.2 above, in which Argentina's arguments concerning Article II:1 of the GATS are set out.

7.480. In order to examine this third requirement, we must determine whether, as is claimed by Panama, measures 2, 3 and 4 do not accord services or service suppliers of non-cooperative countries "treatment no less favourable" than that accorded to Argentine "like services and service suppliers. We shall start with the question of "likeness" given that, if they are not like, there will be no need to examine whether Argentina accords services and service suppliers of non-cooperative countries "treatment no less favourable" than that accorded to Argentine like services and service suppliers.

(a) Whether the services and service suppliers of non-cooperative countries are like Argentine services and service suppliers

7.481. We note that both Panama and Argentina consider that their arguments on likeness developed under Article II are also applicable under Article XVII of the GATS. For example, Panama maintains that domestic services and service suppliers are like those of non-cooperative countries because the only basis for differential treatment is the origin of the service and/or service supplier.[642] Argentina, for its part, argues that the regulatory differences between the service suppliers being compared are relevant for determining their likeness to the extent that they affect the way suppliers operate in the market.[643]

7.482. We recall that we considered the question of the likeness of services and service suppliers when we examined Panama's claims under Article II:1 of the GATS.[644] On that occasion, we concluded that the services and service suppliers of cooperative countries were like the services and service suppliers of non-cooperative countries.[645]

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[640] Panama's first written submission, paras. 4-160-4.169, 4.257 and 4.258; and second written submission, paras. 2.306 and 2.436.

[641] Panama's first written submission, paras. 4.317 and 4.318; and second written submission, para. 2.541 (referring to its response to Panel question No. 42).

[642] Panama's first written submission, paras. 4.157, 4.256 and 4.317; and second written submission, paras. 2.305, 2.435 and 2.540.

[643] Argentina's response to Panel question No. 31.

[644] See section 7.3.2.2.3.3 above.

[645] See paras. 7.185-7.186 above.

7.483. Unlike our examination under Article II:1 of the GATS, in which the services and service suppliers being compared were those of cooperative and non-cooperative countries, in the case of Article XVII of the GATS, the appropriate comparison for determining likeness must be made between Argentine services and service suppliers, on the one hand, and services and service suppliers of non-cooperative countries on the other. Panama asks us to confine our comparison to services and service suppliers of non-cooperative countries and Argentine like services and like service suppliers.[646] As we indicate below, Argentina, for its part, does not appear to object to this comparison.

7.484. We note that Article XVII of the GATS obliges Members, in this case, Argentina, to accord treatment no less favourable to the services and service suppliers "of any other Member". This comparison does not therefore require a comparison of Argentine services and service suppliers with the universe of services and service suppliers of all other WTO Members.

7.485. We also note that, for the purposes of this dispute, there are two relevant groups of Members as a result of applying Decree No. 589/2013, namely, cooperative and non-cooperative countries. Panama's claims focus on the allegedly less favourable treatment which Argentina accords solely to services and service suppliers of non-cooperative countries.

7.486. We likewise note that the treatment provided for in the relevant Argentine legislation is the same for transactions by Argentine taxpayers with Argentine service suppliers and with service suppliers of cooperative countries. This is because, in both cases, Argentina is able to access tax information on the service suppliers concerned. Consequently, the rules described in sections 2.4.2.2 and 2.4.2.4 as applying to cooperative countries in respect of presumption of unjustified increase in wealth and the allocation of expenditure are those applicable to Argentine taxpayers with regard to Argentine services and service suppliers. As to the valuation of transactions, there is no difference in treatment for transactions between Argentine taxpayers and Argentine service suppliers or those from cooperative countries, provided that they are consistent with normal arm's-length market practices. In that case, they would not be subject to the special price determination requirements provided for in Article 15 of the LIG. In this connection, we note that the treatment provided for in Argentina's legislation with regard to the valuation of transactions is the same for transactions by Argentine taxpayers with Argentine service suppliers and with service suppliers of cooperative countries.

7.487. We thus consider that, for the purposes of comparison under Article XVII of the GATS, Argentine services and service suppliers are subject to the same treatment accorded by Argentine legislation to services and service suppliers from cooperative countries. We understand that Argentina also agrees that its services and service suppliers would be comparable to services and service suppliers of cooperative countries as it relates its arguments under Article XVII of the GATS to its arguments under Article II:1, where we saw that the comparison was between services and service suppliers of cooperative countries and those of non-cooperative countries.[647] In connection with Panama's claims under Article XVII, Argentina also refers to an argument developed under Article XIV(c) of the GATS. Argentina refers in particular to the difference between Argentine domestic services and service suppliers and services and service suppliers of non-cooperative countries as regards access to information and the exercise of control and supervision by the tax authorities in enforcing Argentina's tax laws and regulations. The resulting difference in regulatory treatment finds expression in a similar manner to the difference in treatment governing services and service suppliers of cooperative and non-cooperative countries for the same purposes.[648]

7.488. In the light of the foregoing, having found that services and service suppliers of cooperative countries are like those of non-cooperative countries, we consider that our likeness finding under Article II:1 of the GATS can be transposed to the scope of Article XVII of the GATS.

[646] Panama's first written submission, paras. 5.1(b)(ii), 5.1(c)(ii) y 5.1(d)(ii); and second written submission, paras. 3.1(b)(ii), 3.1(c)(ii) y 3.1(d)(ii).

[647] For Argentina, "[t]he categories of services and service suppliers are those that originate in jurisdictions which adhere to the international standards of transparency and effective exchange of tax information, and those that do not". See Argentina's first written submission, p. 69.

[648] Argentina's first written submission, paras. 345-351.

7.489. We thus conclude that Argentine services and service suppliers are like the services and service suppliers of non-cooperative countries for the purposes of our analysis of Article XVII of the GATS.

(b) Whether the treatment accorded to services and service suppliers of non-cooperative countries is "treatment no less favourable" than that accorded to Argentine like services and service suppliers

7.490. Having made a finding of likeness between the relevant services and service suppliers, we must now examine whether measures 2, 3 and 4 accord to services and service suppliers of non-cooperative countries "treatment no less favourable" than that accorded to Argentine like services and service suppliers.

7.491. We recall that Article XVII:3 of the GATS provides that:

> Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

7.492. Accordingly, "[t]his treatment is to be assessed in terms of the 'conditions of competition' between like services and services suppliers".[649]

7.493. We note that, like Article II of the GATS, Article XVII of the GATS refers not only to "like services" but also to "like service suppliers". For the reasons explained above in connection with our analysis of "treatment no less favourable" under Article II of the GATS[650], we understand that the reference to service suppliers may also lead the interpreter, depending on the specific circumstances of each dispute, to take other aspects into account when interpreting "treatment no less favourable" in the context of Article XVII, for example, the relevant regulatory aspects concerning service suppliers which have an impact on the conditions of competition. Consideration of these regulatory aspects could, depending on the case, mean that certain regulatory distinctions between service suppliers established by a Member do not necessarily constitute "treatment less favourable" within the meaning of Article XVII of the GATS.

7.494. On the basis of the provisions of Article XVII:3 of the GATS and in the light of our interpretation of the concept "treatment no less favourable" developed under Article II of the GATS[651], we shall now determine whether measures 2, 3 and 4 stipulate different treatment for services and service suppliers of non-cooperative countries compared to that accorded to Argentine like services and service suppliers. Subsequently, we shall examine whether this treatment is less favourable for like services and service suppliers of non-cooperative countries. In this connection, it is our understanding that, in order to determine whether treatment is less favourable, it must be assessed whether the measure modifies the conditions of competition in favour of Argentine services or service suppliers in comparison with like services or like service suppliers of non-cooperative countries. Moreover, we consider that, in the present case, such an assessment has to take into account regulatory aspects concerning the services and service suppliers that might affect the conditions of competition. We refer, in particular, to the possibility for Argentina to access tax information on the relevant service suppliers.

(i) Whether the treatment accorded to services and service suppliers of non-cooperative countries is different to that accorded to Argentine like services and service suppliers

7.495. As regards whether measures 2, 3 and 4 accord different treatment to services and service suppliers from non-cooperative countries in comparison with that accorded to Argentine like

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[649] Panel Report, *China – Publications and Audiovisual Products*, para. 7.978. See also Panel Report, *China – Electronic Payment Services*, para. 7.687.

[650] See section 7.3.2.2.3.4 above.

[651] We recall that the Appellate Body exercised caution concerning the direct transposition to Article II of the GATS of all interpretations developed under Article XVII. Nevertheless, we consider the context provided by Article II:1 to be useful as the Appellate Body has transposed interpretations developed under Article XVII to Article II of the GATS. See Appellate Body Report, *EC – Bananas* III, para. 231.

services and service suppliers, we consider that our findings of different treatment under Article II:1 of the GATS also apply under Article XVII of the GATS. As we have already indicated, the reason for this is that the treatment accorded by Argentina to Argentine services and service suppliers is the same as that accorded to services and service suppliers of cooperative countries. We recall our conclusions in this regard below.

7.496. As regards measure 2, in section 7.3.2.2.3.4 above[652], we concluded that Argentina accords different treatment to like services and service suppliers of cooperative and non-cooperative countries inasmuch as the entry of funds from one or the other country will have different consequences for Argentine taxpayers when determining the tax base for gains tax. Whereas when funds enter from cooperative countries, the AFIP will apply the general rule of self-assessment of the taxable subject matter, only resorting to ex officio determination when the taxpayer has not submitted a sworn declaration or when this is challengeable; in the case of funds entering from non-cooperative countries, the AFIP will automatically determine the taxable subject matter ex officio, applying the presumption of unjustified increase in wealth. Likewise, we concluded that the fact that this presumption may be rebutted by the taxpayer does not affect the fact that the treatment Argentina accords to like services and service suppliers of cooperative and non-cooperative countries is different. In the case before us, when an Argentine taxpayer receives funds from an Argentine service supplier, the AFIP will apply the general rule of self-assessment of the taxable subject matter (as in the case of the entry of funds from cooperative countries), resorting to ex officio assessment only if the taxpayer has not presented a sworn declaration or this is challengeable.

7.497. With regard to measure 3, in section 7.3.2.2.3.4 above[653], we concluded that Argentina accords different treatment to like services and service suppliers of cooperative and non-cooperative countries inasmuch as the rules in Article 15 of the LIG are always applied, provided that one of the parties is from a non-cooperative country, whereas these rules will only be applied to transactions with service suppliers from cooperative countries if the terms and conditions of such transactions are not in line with normal arm's-length market practices. The rule does not thus envisage that transactions between Argentine taxpayers and persons from non-cooperative countries might be in line with normal arm's-length market practices, and presumes in every case that they are related. On the other hand, in transactions between Argentine taxpayers and Argentine service suppliers, it will be considered that these are consistent with normal arm's-length market practices.

7.498. As far as measure 4 is concerned, in section 7.3.2.2.3.4 above[654], we concluded that Argentina accords different treatment to like services and service suppliers from cooperative and non-cooperative countries because, although it is true that the *payment received* rule is not exclusively restricted to the allocation of expenses by the Argentine taxpayer, which constitute income from an Argentine source for persons located, incorporated, based or domiciled in non-cooperative countries[655], we note differences of criterion in the Argentine rule. This is because Argentine taxpayers are not permitted to allocate expenses which constitute income for persons in non-cooperative countries on the basis of the *accrual* rule, irrespective of whether the Argentine taxpayer and the person receiving the income of Argentine source are related. However, in cases of allocation of expenses constituting income for persons in cooperative countries, the Argentine taxpayer may apply the *accrual* rule, provided that there is no relationship between the taxpayer and the foreign person to which the income accrues. Likewise, when an Argentine taxpayer allocates expenses which constitute income for Argentine persons (service suppliers), the taxpayer may apply the *accrual* rule, provided that there is no relationship between the taxpayer and the person receiving the income.

7.499. We therefore conclude that measures 2, 3 and 4 establish different treatment for services and service suppliers of non-cooperative countries in comparison with that accorded to Argentine like services and service suppliers.

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[652] See paras. 7.240-7.243 above.
[653] See paras. 7.244-7.248 above.
[654] See paras. 7.249-7.252 above.
[655] For example, Article 18 of the LIG itself, in its last paragraph, provides that the *payment made* rule shall also apply to cases of "outlays by local companies which result in profits of Argentine source for foreign persons or entities with which these companies are related". See the Gains Tax Law, (Exhibits PAN-4 / ARG-42).

(ii) Whether the treatment accorded to services and service suppliers of non-cooperative countries is "treatment no less favourable" than that accorded to Argentine like services and service suppliers

7.500. Concerning whether the treatment accorded to services and service suppliers of non-cooperative countries is "treatment no less favourable" than that accorded to Argentine like services and service suppliers, we also consider that there are aspects of the analysis we developed under Article II:1 which are applicable under Article XVII of the GATS. As we indicated when addressing the question of different treatment, the reason is that Argentina accords the same treatment to Argentine services and service suppliers as that accorded to those from cooperative countries. We recall in this connection that the treatment in question "is to be assessed in terms of the 'conditions of competition' between like services and service suppliers".[656]

7.501. In this connection, it is useful to recall that, in the case of measure 2, our preliminary conclusion of treatment less favourable under Article II:1 results from the fact that Argentine taxpayers who contract services with suppliers of non-cooperative countries and who wish to justify the entry of funds earned from obtaining such services have to bear an additional burden, namely to rebut the presumption of unjustified increase in wealth.[657] This burden is not imposed automatically when the transaction is conducted between Argentine taxpayers, i.e., when an Argentine taxpayer receives funds from an Argentine service supplier.[658]

7.502. In the case of measure 3, we consider that application of the transfer pricing regime for the valuation of transactions, irrespective of whether or not there is a relationship between the parties to the transaction, implies higher costs for those Argentine taxpayers that engage in transactions with service suppliers of non-cooperative countries. Such costs do not have to be incurred if the transaction is between an Argentine taxpayer and an Argentine service supplier.[659]

7.503. In the case of measure 4, we consider that the time difference in the deduction of expenditure, which has an effect in terms of reduced value of the expenditure deducted, as well as the possible additional costs caused by more complex accounting as a result of simultaneously applying two rules for the allocation of expenditure, would lead us to the preliminary conclusion that the treatment accorded to services and service suppliers of non-cooperative countries is less favourable than that accorded to Argentine like services and service suppliers, inasmuch as, in the latter case, Argentine taxpayers do not have to incur those additional costs when obtaining services from Argentine service suppliers.[660]

7.504. Referring back to our findings in connection with Article II:1 of the GATS, therefore, we consider on a preliminary basis that measures 2, 3 and 4 do not accord treatment no less favourable to services and service suppliers of non-cooperative countries in comparison with that accorded to Argentine like services and service suppliers.

7.505. As in our analysis under Article II:1 of the GATS, we also consider that there is one important factor that cannot be ignored in any analysis of no less favourable treatment under Article XVII of the GATS and which has a direct impact on the supply of services in the Argentine market and may modify the conditions of competition in that market. This factor is the regulatory framework which allows the Argentine authorities access to tax information on foreign service

[656] Panel Report, *China – Publications and Audiovisual Products*, para. 7.978. See also Panel Report, *China – Electronic Payment Services*, para. 7.687.

[657] See para. 7.300 above.

[658] We recall that there is a presumption concerning unjustified increases in wealth which the AFIP may apply in order to estimate the taxable subject matter ex officio in cases of transactions between Argentine taxpayers or between an Argentine taxpayer and a service supplier from a cooperative country. This presumption is provided for in Article 18(f) of the LPT. See section 2.4.2.2 above.

[659] We point out that Article 33 of the LPT on verification and supervision empowers the AFIP to require taxpayers to keep supporting documents needed for verification of the taxpayer's tax situation, such as accounts ledgers or special registers, vouchers and any other documents concerning the taxpayers' operations, etc. This Article also provides that all accounting entries must be backed up by the corresponding proof. See the Law on Tax Procedure, (Exhibits PAN-9 / ARG-45).

[660] See para. 7.318 above. We point out that, although the *accrual* rule is the general rule for allocating income and expenditure and applies to expenditure under transactions between Argentine taxpayers or between an Argentine taxpayer and a person from a cooperative country, Article 18 of the LIG provides that, in certain cases, expenditure is not allocated to the fiscal year in which it was accrued.

suppliers. Unlike our analysis under Article II:1, which, by its nature, called for a comparison of MFN treatment, there is an important aspect to be examined in relation to measures 2, 3 and 4 (and the other measures challenged by Panama) under Article II:1 but which we do not consider applies to examination of "treatment no less favourable" under Article XVII. We refer to the distortions caused by the design and operation of measures 2, 3 and 4 pursuant to Decree No. 589/2013 with regard to the granting of cooperative status to jurisdictions which have not signed a tax information exchange agreement and the discretionary authority governing the updating of the list of cooperative countries.

7.506. We recall in this connection that Argentina considers that according service suppliers different treatment is a direct result of access or no access to tax information.[661] What we observed in our analysis under Article II:1 of the GATS is that countries in a similar situation as regards Argentina's access to tax information on their service suppliers do not fall into the same category. For example, Panama and Hong Kong (China) have not signed a tax information exchange agreement with Argentina, and yet Panama is considered cooperative and Hong Kong (China) is considered non-cooperative. We also observed that countries classified in the same category find themselves in different situations as far as Argentina's access to tax information is concerned. By way of example, we mentioned the case of Panama and Germany. Both countries appear on the list of cooperative countries, although Germany has signed a tax information exchange agreement with Argentina and Panama has not.

7.507. We do not see that Decree No. 589/2013 creates such distortions when comparing service suppliers from cooperative countries and Argentine service suppliers. In this case, Argentina has access to tax information on its taxpayers, which include its service suppliers, whereas it has no access to tax information on suppliers from non-cooperative countries.

7.508. In any event, after concluding that the distortions in the design and operation of measures 2, 3 and 4 noted under Article II:1 of the GATS are not relevant in the context of Article XVII of the GATS, we consider it appropriate to pursue our analysis in order to ascertain whether our preliminary conclusions on less favourable treatment are confirmed after examining the impact on competitive conditions of the possibility for Argentina to access tax information on service suppliers.

7.509. The first point to be highlighted in this respect is that both Panama and Argentina acknowledge that lack of tax transparency (caused by failure to exchange tax information) has an impact on the conditions of competition in which Argentine service suppliers and service suppliers of non-cooperative countries operate in the Argentine market. Indeed, in its commitment to accepting the principles of "Transparency" and "Effective exchange of tax information", Panama states that "it considers essential that implementation of the initiative proposed by the OECD guarantee fairness and non-discrimination among all countries and jurisdictions … with which the Republic of Panama competes substantially on international markets in supplying international services, especially financial and business services".[662] Argentina, for its part, refers in particular to the fact that measures 2, 3 and 4, like the other measures at issue, are "essential tools for equalizing the conditions of competition on the international market for financial and other services".[663] This idea of equalizing the conditions of competition is also mentioned by Panama in a letter to the Secretary-General of the OECD, which states that "the principles of transparency and the exchange of effective information … should be developed within parameters of fairness and non-discrimination; in other words, a 'level playing field'".[664] We find support for Argentina's statement concerning the importance of access to tax information in order to equalize the conditions of competition in many documents of the G-20 and the OECD. For example, in 2000, we

[661] See para. 7.140 above. Although Argentina puts this argument forward in relation to the comparison between service suppliers from cooperative and non-cooperative countries, we consider that the reason given to justify the different treatment (access to tax information) is equally valid for the comparison between Argentine service suppliers and those from non-cooperative countries. See Argentina's second written submission, para. 76. See also first written submission, para. 125 and responses to Panel questions Nos. 49 and 71.

[662] Note from Panama's Minister of the Economy and Finance to the Secretary-General of the OECD, 15 April 2002, (Exhibit ARG-8), para. 4.

[663] Argentina's first written submission, para. 10.

[664] Note from Panama's Minister of the Economy and Finance to the Secretary-General of the OECD, 15 April 2002, (Exhibit ARG-8), last paragraph.

see that the OECD emphasized the role of defensive measures in neutralizing the competitive advantages derived from the lack of transparency in certain non-cooperative jurisdictions.[665]

7.510. In this connection, in a 2004 report, the Global Forum explained that the objective of the global level playing field was to achieve high standards of transparency and exchange of information so as to allow fair and equitable competition among all countries:

> In developing proposals, the members of the Sub-Group [delegated to make recommendations to the Global Forum on the occasion of the Berlin Global Forum in June 2004] were guided by the objective of the global level playing field: to achieve high standards of transparency and information exchange in a way that is fair, equitable and permits fair competition between all countries, large and small, OECD and non-OECD.[666]

7.511. According to the OECD, in its 2009 document entitled "*Towards a level playing field*", all countries should comply with these standards so that competition among them takes place on the basis of legitimate commercial considerations rather than on the basis of lack of transparency or effective exchange of information:

> All countries, regardless of their tax systems, should meet such standards so that competition takes place on the basis of legitimate commercial considerations rather than on the basis of lack of transparency or the lack of effective exchange of information. A decade on since the Global Forum's establishment, the goal of a level playing field is both closer and more relevant than ever.[667]

7.512. Another more recent example can be found in a 2013 report on erosion of the tax base and the transfer of company profits, in which the OECD explains that:

> Every jurisdiction is free to set up its corporate tax system as it chooses. States have the sovereignty to implement tax measures that raise revenues to pay for the expenditures they deem necessary. An important challenge relates to the need to ensure that tax does not produce unintended and distortive effects on cross-border trade and investment nor that it distorts competition and investment within each country by disadvantaging domestic players. In a globalised world where economies are increasingly integrated, domestic tax systems designed in isolation are often not aligned with each other, thus creating room for mismatches. As already mentioned, these mismatches may result in double taxation and may also result in double non-taxation. In other words, these mismatches may in effect make income disappear for tax purposes. This leads to a reduction of the overall tax paid by all parties involved as a whole. Although it is often difficult to determine which of the countries involved has lost tax revenue, it is clear that collectively the countries concerned lose tax revenue. Further, this *undermines competition*, as some businesses, such as those which operate cross-border and have access to sophisticated tax expertise, may profit from these opportunities and have *unintended competitive advantages* compared with other business, such as small and medium-sized enterprises, that operate mostly at the domestic level.[668] (emphasis added)

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[665] Argentina's first written submission, paras. 40 and 41 (referring to the OECD Report, *Towards Global Tax Co-operation - Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, OECD 2000,* (Exhibit ARG-6), pp. 5 and 6, available at http://www.oecd.org/tax/transparency/44430257.pdf (exhibit provided in English; Spanish text available at http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx).

[666] International Trade and Investment Organization (ITIO), *Leveling the playing field, OECD Global Tax Forum, Melbourne, 15-16 November 2005* (referring to para. 3 of the Report, which was adopted at the Berlin Global Forum in June 2004), (Exhibit ARG-94), p. 4.

[667] OECD, *Tax Cooperation 2009 – Towards a level playing field, 2009, (*Exhibit ARG-41), p. 9 (exhibit provided in English; Spanish translation by the WTO Secretariat).

[668] OECD, *Addressing base erosion and profit* shifting, (Exhibit ARG-22), p. 39, available at http://www.oecd.org/tax/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm (exhibit provided in English; Spanish text available at: http://www.oecd-ilibrary.org/taxation/abordando-la-erosion-de-la-base-imponible-y-la-deslocalizacion-de-beneficios_9789264201224-es).

7.513. Another key concept linking the regulatory element we are examining under "treatment no less favourable" to the conditions of competition is the expression "harmful *tax competition*". In our view, the use of this expression in the competent international fora (in the OECD it has been in use since the mid-1990s[669]) highlights the obvious link between access to tax information (tax transparency) and the conditions of competition.

7.514. Thus, a central issue in this dispute is whether the exchange of tax information between Argentina and non-cooperative jurisdictions constitutes a regulatory aspect that modifies the conditions of competition on the Argentine market in such a way that it converts different and, in principle, less favourable treatment into "treatment no less favourable". In other words, whether the exchange of tax information means that measures 2, 3 and 4 do not modify the conditions of competition *in favour* of Argentine services and service suppliers in comparison with like services and like service suppliers of non-cooperative countries.

7.515. It is our understanding that measures 2, 3 and 4 are intended to "level a playing field" which, as confirmed by the OECD and the G-20, is "not level" because of the lack of tax transparency caused by the absence of exchange of tax information. From the pronouncements of the competent international fora, we understand that what measures 2, 3 and 4 do, rather than giving Argentine services and service suppliers an advantage, is to neutralize an "unintended competitive advantage"[670] enjoyed by non-cooperative jurisdictions owing to the lack of exchange of tax information with Argentina on their suppliers. This advantage is not available to Argentine service suppliers, whose tax information can be obtained by the Argentine authorities.

7.516. In connection with the idea of "competitive advantage" expressed in the preceding paragraph, we note that the text of Article XVII:3 of the GATS states that, in order for "treatment no less favourable" to exist, the measure must not modify the conditions of competition *in favour* of the services or service suppliers of the Member (in this case, Argentina). Previously, when interpreting the expression "treatment no less favourable" under Article II:1 of the GATS, we examined the ordinary meaning of the word "*favorable*" (favourable) and found that *"favorable"* means "*que favorece*" (which favours)[671], and that "*favorecer"* has been defined as "[*d*]*ar o hacer un favor*" (give or do a favour), *"favour"* (favour) being understood to mean "*honra, beneficio, gracia*" [honour, benefit or kindness].[672] We therefore understand that Article XVII:3 of the GATS refers to any modification of the conditions of competition which "favours" Argentine services or service suppliers or which consists of any type of "favour" for such services and service suppliers. In our view, taking into account the implications for the conditions of competition resulting from the absence of tax transparency referred to in numerous statements and reports by the OECD and the G-20, we do not consider that measures 2, 3 and 4 "favour" or grant any type of "favour" to Argentine services and service suppliers in comparison with like services and like service suppliers of non-cooperative countries, as explained below.

7.517. As we explained above, measure 2 consists of the presumption of unjustified increase in wealth applicable to any entry of funds – for the benefit of Argentine taxpayers – from non-cooperative countries in the context of an ex officio determination of the taxable subject matter by the AFIP for the purpose of gains tax.[673] This presumption may be rebutted provided that "it is conclusively proved that [the entries of funds] originated from activities actually carried out by the taxpayer or by a third party in those countries or from placements of duly declared funds". We do not see how a presumption that can be rebutted by proving that the transaction effectively took place can modify the conditions of competition in favour of Argentine services and service suppliers because Argentine taxpayers are able to free themselves of this burden. We also recall that, in Article 18(f) of the LPT, there is a presumption of unjustified increase in wealth

[669] OECD, *Harmful Tax Competition – An Emerging Global Issue*, 1998, (Exhibit ARG-5).

[670] Term used by the OECD in its Report entitled *Addressing base erosion and profit* shifting, (Exhibit ARG-22), p. 39, available at http://www.oecd.org/tax/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm (exhibit provided in English; Spanish text available at: http://www.oecd-ilibrary.org/taxation/abordando-la-erosion-de-la-base-imponible-y-la-deslocalizacion-de-beneficios_9789264201224-es)

[671] *Diccionario de la Lengua Española*, 23rd edition, *Real Academia Española* (Espasa Calpe, 2014), Vol. I, p. 1015.

[672] *Diccionario de la Lengua Española*, 23rd edition, *Real Academia Española* (Espasa Calpe, 2014), Vol. I, p. 1015.

[673] Argentina applies this measure pursuant to the unnumbered article added after Article 18 of the LPT, (Exhibits PAN-9 / ARG-45).

which applies to Argentine taxpayers working with Argentine suppliers. Accordingly, the concept of unjustified increase in wealth is not a tool used exclusively by the Argentine authorities in respect of non-cooperative jurisdictions, but is in the form of an instrument used to respond to the existence of certain situations which the Argentine authorities perceive to be a risk for the tax collection system, with the lack of tax transparency being the trigger in the case of transactions between Argentine taxpayers and service suppliers of non-cooperative countries. It does not appear to us to be a measure that gives domestic service suppliers a competitive advantage.

7.518. In the case of measure 3 we do not think either that the application of a different method for valuing transactions (based on transfer prices) modifies the conditions of competition *in favour* of Argentine services and service suppliers.[674] First of all, because the objective of applying the transfer pricing regime to the valuation of transactions is to determine the market value of the transaction and not to distort it artificially to the benefit or detriment of one of the parties to the transaction. To this must be added the fact that there are other situations in which the Argentine authorities perceive a risk to the tax collection system and prescribe application of this method to transactions involving Argentine suppliers and those from cooperative countries. In this connection, as a general rule, the first paragraph of Article 15 of the LIG provides that "[w]hen the type of operations or the organizational procedures of the companies make it impossible to determine exactly the income of Argentine source, the FEDERAL PUBLIC REVENUE ADMINISTRATION, an autonomous body within the MINISTRY OF THE ECONOMY AND PUBLIC WORKS AND SERVICES may determine the net taxable income by using averages, indices or coefficients established for this purpose on the basis of the performance of independent companies engaged in the same or similar activities".[675] We thus see a response to a risk and not the granting of an advantage to domestic suppliers.

7.519. As regards measure 4, consisting of application of the payment received rule when allocating expenditure for transactions between Argentine taxpayers and persons of non-cooperative countries[676], we have already indicated that in every case the Argentine taxpayer may deduct expenses, the main difference being the time at which the deduction is made. We do not therefore think that the measure results in modification of the conditions of competition *in favour* of Argentine services and service suppliers in comparison with those of non-cooperative countries since in both cases the deduction is made. The difference in treatment reflects the risk perceived by Argentina to its tax collection system as a result of the lack of tax transparency.

7.520. We find the context afforded by Article III of the GATT 1994 to be particularly relevant; it contains the same obligation provided for in Article XVII (national treatment). In *Japan – Alcoholic Beverages II*, the Appellate Body explained that "Article III protects expectations … of the equal competitive relationship between imported and domestic products".[677] In *Canada – Publications*, the Appellate Body reiterated that "[t]he fundamental purpose of Article III of the GATT 1994 is to ensure equality of competitive conditions between imported and like domestic products".[678] We consider that, as is the case for Article III of the GATT 1994, the objective of Article XVII of the GATS is to ensure equal conditions of competition between Argentine services and service suppliers and those of non-cooperative countries.

7.521. In our view, measures 2, 3 and 4 are designed precisely to guarantee that the competitive relationship between Argentine services and service suppliers and those of any other Member (in this case, non-cooperative countries) is on an equal footing. We agree with the opinion expressed in other international fora such as the OECD and the G-20 on the effect of harmful tax practices on the conditions of competition. It is precisely these effects on the conditions of competition caused by the lack of tax transparency which prompted these fora to envisage the adoption of defensive measures whose objective is not to place domestic services and service suppliers in a more advantageous position but rather to address risks caused by the lack of tax transparency in their respective markets. Consequently, we do not consider that measures 2, 3 and 4 modify the conditions of competition *in favour* of Argentine like services and service suppliers.

[674] Argentina applies this measure pursuant to Article 15.2 of the LIG, (Exhibits PAN-4 / ARG-42).
[675] Gains Tax Law, (Exhibits PAN-4 / ARG-42).
[676] Argentina applies this measure pursuant to the last paragraph of Article 18 of the LIG, (Exhibits PAN-4 / ARG-42).
[677] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 15.
[678] Appellate Body Report, *Canada – Periodicals*, p. 17.

(c) Conclusion

7.522. In the light of the foregoing, the Panel concludes that Panama has not proved that measures 2, 3 and 4 do not accord "treatment no less favourable" to services and service suppliers of non-cooperative countries in comparison with that accorded to Argentine like services and service suppliers.

7.3.4.2.4 Conclusion

7.523. Having concluded, in the first place, that Panama has proved that Argentina made specific commitments on the services and modes cited by Panama in respect of measures 2, 3 and 4, we went on to conclude that Panama has proved that measures 2, 3 and 4 "affect[..] the supply of services" within the meaning of Article XVII of the GATS.

7.524. We have also concluded that Panama has proved that Argentine services and service suppliers are like services and service suppliers of non-cooperative countries for the purposes of our analysis of Article XVII of the GATS. Lastly, we have concluded that Panama has not proved that measures 2, 3 and 4 do not accord services and service suppliers of non-cooperative countries "treatment no less favourable" than that accorded to Argentine "like services and service suppliers".

7.525. In the light of the foregoing, we find that measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices) and measure 4 (payment received rule for the allocation of expenditure) are not inconsistent with Article XVII of the GATS because they accord to services and service suppliers of non-cooperative countries treatment no less favourable than the treatment accorded to Argentine like services or like service suppliers, in respect of the relevant services and modes on which Argentina undertook specific commitments.

7.3.5 Argentina's defence under Article XIV(c) of the GATS

7.3.5.1 Main arguments of the parties

7.3.5.1.1 Argentina

7.526. In the event that the Panel finds that six of the eight measures (measures 1 to 4, 7 and 8) are inconsistent with the GATS provisions cited by Panama, Argentina invokes the exception in Article XIV(c) of the GATS.

7.527. Specifically, Argentina contends that its defensive tax measures are "necessary to secure compliance" with Argentina's tax laws and regulations within the meaning of Article XIV(c) of the GATS, including the "prevention of deceptive and fraudulent practices" (subparagraph (i)) commonly associated with transactions with non-cooperative tax jurisdictions. Argentina maintains that it has followed the recommendations of the OECD's Global Forum in establishing a comprehensive regulatory framework to address the risks posed by harmful tax competition to the integrity and stability of its tax system. Argentina argues that measures such as the withholding tax on payments of interest or remuneration (measure 1), the presumption of unjustified increase in wealth (measure 2), transaction valuation based on transfer prices (measure 3), the payment received rule for the allocation of expenditure (measure 4) and the requirements for the registration of branches (measure 7) are widely accepted in the Global Forum's initiative as appropriate regulatory responses to address the harmful effects of tax jurisdictions which do not cooperate in the collection of taxes and compliance with the tax laws of third parties.[679]

7.528. In response to Panama's second written submission, Argentina argues that it is not obliged to prove that the measures in question refer to "the prevention of deceptive and fraudulent practices" under Article XIV(c)(i) of the GATS because the list of measures in subparagraphs (i) to (iii) of Article XIV(c) is illustrative. Accordingly, in its opinion, any measure intended to secure

[679] Argentina's first written submission, paras. 244-248 (referring to OECD, *Harmful Tax Competition – An Emerging Global Issue*, OECD, 1998, (Exhibit ARG-5), and OECD, *OECD's Project on Harmful Tax Practices, The 2004 Progress Report*, (Exhibit ARG-9), available at http://www.oecd.org/tax/harmful/30901115.pdf (exhibit provided in English; Spanish text available at http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx).

compliance with laws and regulations consistent with the GATS may be justified pursuant to Article XIV(c), irrespective of whether or not it is covered by subparagraphs (i)-(iii).[680]

7.529. Argentina claims that in transactions with non-cooperative jurisdictions it is not possible for Argentina's authorities to determine who are the real beneficiaries of the profits of entities located in those jurisdictions. Nor is it possible for the Argentine authorities to determine the real value of the transaction and independently to obtain access to any other information relevant to establishing whether a particular transaction involving the participation of such jurisdictions has been conducted for a legitimate purpose or whether it is fraudulent or deceptive in the sense that its only purpose is to evade taxes in Argentina. According to Argentina, similar risks do not arise in respect of transactions involving jurisdictions that have concluded information exchange agreements with Argentina's tax authorities because, in such cases, the AFIP has independent access to information on the beneficial owner of the legal persons located in the cooperative jurisdiction, as well as information enabling it to determine the transaction value of operations with such jurisdictions.[681]

7.530. Argentina claims that all models for tax agreements, whether those of the United Nations or the OECD, include a provision enabling the tax authorities to exchange information. In Argentina's opinion, this is recognition that a country's ability to enforce its own tax laws is greater when there is effective exchange of information.[682] Argentina contends that a financial centre which decides not to adopt high standards of transparency and effective exchange of information should not be permitted to benefit from that decision.[683]

7.531. Argentina claims that its defensive tax measures (measures 1, 2, 3, 4 and 7) were adopted in order to secure compliance with laws and regulations which are in themselves consistent with the GATS and are similar to the tax measures widely adopted by WTO Members. Argentina's legislation on the determination and imposition of income tax secures compliance with the Gains Tax Law (LIG). The additional information requirements for setting up branches of foreign companies in Buenos Aires secure compliance with Article 118.3 of the Law on Commercial Companies (LSC) and Article 188 of IGJ Resolution No. 7/2005.[684] The requirement of authorization for the repatriation of investment (measure 8) is designed to secure compliance with Articles 20, 20 *bis* and 21 of Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin in Argentina.[685]

7.532. At the second meeting of the Panel, Argentina reiterated that measures 1, 2, 3 and 4 are designed to secure compliance with the LIG in the case of income which Argentina has determined to be taxable. Argentina argues that Articles 1, 2, 5, 17, 80, 91, 92, 127, 129 and 130 of the LIG establish rules which determine the earnings subject to taxation in Argentina, and Argentina's defensive tax measures are intended to secure compliance with these. Measures 1, 2, 3 and 4 are therefore designed to secure compliance with the aforementioned articles of the LIG, which operate in a regulatory framework that includes this Law and the regulations thereto, the administration and implementation of which are necessarily linked to the body of rules which also includes the LPT (Articles 33, 38, 39, 45 and 46 in particular) and the Criminal Tax Law (Articles 1, 2 and 6 in particular) and is based on the constitutional principles enshrined in Articles 4, 16, 17 and 75.2 of the National Constitution of the Argentine Republic. Argentina reiterates that measure 7 is designed to secure compliance with Article 118.3 of the LSC and Article 188 of IGJ

[680] Argentina's opening statement at the second meeting of the Panel, para. 29.
[681] Argentina's first written submission, paras. 249-253.
[682] Argentina's first written submission, para. 254 (citing OECD, *OECD's Project on Harmful Tax Practices, The 2001 Progress Report*, (Exhibit ARG-7), available at http://www/oecd.org/ctp/harmful/2664450.pdf (exhibit provided in English; Spanish text available at http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx)).
[683] Argentina's first written submission, para. 255 (citing OECD, *OECD's Project on Harmful Tax Practices, The 2001 Progress Report*, (Exhibit ARG-7), available at http://www/oecd.org/ctp/harmful/2664450.pdf (exhibit provided in English; Spanish text available at http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx)).
[684] Argentina's first written submission, paras. 264-267.
[685] Argentina's first written submission, paras. 334-338.

Resolution No. 7/2005, and measure 8 to secure compliance with Articles 20, 20 *bis* and 21 of Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin in Argentina.[686]

7.533. Argentina claims that it has explained the "circumstances and problems" which led to the adoption of the measures at issue, and has submitted substantial evidence on the types of transaction between Argentine taxpayers and non-cooperative jurisdictions which result in the artificial erosion of the tax base in Argentina.[687]

7.534. Argentina argues that its defensive tax measures are "necessary" to secure compliance with its tax laws and regulations. According to Argentina, the defensive tax measures 1, 2, 3, 4 and 7 considerably lessen the risks of tax evasion, tax avoidance and fraud as they eliminate the possible tax benefits which Argentine taxpayers would gain from the simulation of transactions with related companies based in non-cooperative countries, conducted exclusively for the purpose of avoiding the payment of tax in Argentina. Such tax measures constitute a "global strategy" to address the risks posed by the harmful tax practices of non-cooperative countries. Argentina argues that the defensive tax measures at issue adequately serve to make an important contribution to securing compliance with Argentina's tax laws and rules, and are designed individually or in an overall policy context to address the risks posed by harmful tax practices.[688] Measure 8 is needed to secure compliance with the laws and regulations preventing concealment and laundering of money of criminal origin and makes an important contribution to the objective of securing compliance with these laws and regulations as it is in line with international standards on the prevention of money laundering adopted within the FATF framework.[689]

7.535. Argentina argues that the objective of protecting its tax collection system against the risks posed by the harmful tax practices of non-cooperative countries is an interest of the utmost importance. Argentina claims that, in the past, both panels and the Appellate Body have recognized the importance of the fight against tax evasion and of guaranteeing the proper implementation of tax laws and regulations.[690] Argentina argues that the degree of importance of protecting the collection of tax revenue and application of Argentina's tax system against the risks caused by the harmful tax practices of non-cooperative countries has been confirmed by the Global Forum's work. According to Argentina, Panama recognized the importance of the fight against the effects of harmful tax practices when it acceded to the OECD's Global Forum on tax matters and made a commitment to the principles of transparency and effective exchange of tax information.[691] Argentina also claims that the objective of prevention against the risks posed by the laundering of money of criminal origin is an interest of the utmost importance.[692]

7.536. Argentina claims that its defensive tax measures are not excessively restrictive on trade in financial services by service suppliers from non-cooperative countries inasmuch as they do not prohibit these suppliers from providing services in Argentina. Rather, the defensive tax measures at issue generally reflect the application of presumptions in order to determine the tax base for transactions with entities located in non-cooperative countries. In most cases, the Argentine taxpayer can rebut these presumptions by furnishing the necessary information.[693] Argentina claims that measure 8 is the least trade-restrictive measure for the purposes of securing compliance with the obligations imposed by Argentine law to combat the risks posed by the

[686] Argentina's second written submission, paras. 71 and 72; and opening statement at the second meeting of the Panel, paras. 26 and 27.

[687] Argentina's opening statement at the second meeting of the Panel, para. 28 (referring to Federal Administration of Public Revenue, Offshore Companies – Fraudulent Manoeuvres and Harmful Tax Planning, 2013, Exhibit ARG-44).

[688] Argentina's first written submission, paras. 276, 287 and 288; second written submission, para. 73; and opening statement at the second meeting of the Panel, paras. 31 and 32.

[689] Argentina's first written submission, paras. 328, 334-338.

[690] Argentina's first written submission, paras. 289-292 (citing Appellate Body Report, *Dominican Republic – Import and Sale of* Cigarettes, para. 7.215; and Panel Report, *Argentina – Hides and Leather*, para. 11.307).

[691] Argentina's first written submission, paras. 293 and 294 (citing the OECD Report, *Towards Global Tax Co-operation*, *Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, OECD 2000,* (Exhibit ARG-6), available at http://www.oecd.org/tax/transparency/44430257.pdf (exhibit provided in English; Spanish text available at http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx); and Note from Panama's Minister of the Economy and Finance to the Secretary-General of the OECD, 15 April 2002, (Exhibit ARG-8).

[692] Argentina's first written submission, para. 339.

[693] Argentina's first written submission, paras. 297 and 298.

laundering of money of criminal origin. Argentina argues that measure 8 neither prevents nor discourages the establishment of branches of companies incorporated in non-cooperative countries but makes repatriation of their direct investments subject to verification of the "transparency of the operation". According to Argentina, the measure does not impede the supply of services which a company may provide.[694]

7.537. Argentina argues that it is Panama's responsibility to present WTO-consistent measures that are "reasonably available" alternatives to the defensive tax measures challenged in this dispute. According to Argentina, any alternative to the defensive tax measures in question must not be prohibitively expensive as the Argentine authorities have limited resources with which to secure compliance with tax legislation.[695] Likewise, any alternative measure proposed by Panama must ensure at least the same level of protection against the risks posed by fraudulent tax practices as that afforded by the defensive tax measures being challenged. According to Argentina, the conclusion of agreements on mutual exchange of information is the internationally established means of addressing this type of situation and is reasonably available to the counterpart. Argentina considers that measures of a corrective nature do not, *a priori*, ensure that level of protection.[696] Argentina claims that Panama has not even suggested an alternative measure and, when it attempts to do so, the alternative suggested consists of withdrawing the measure challenged.[697]

7.538. Argentina argues that its defensive tax measures are applied in accordance with the chapeau of Article XIV(c) of the GATS. Argentina asserts that the distinction made by Argentina's defensive tax measures between service suppliers of cooperative and non-cooperative countries cannot be seen as "arbitrary" or unjustifiable" since these two categories of supplier pose different levels of risk for compliance with Argentina's tax legislation. In addition, Argentina contends that the differences between cooperative and non-cooperative countries reflected in Argentina's defensive tax measures are based on internationally recognized rules of the Global Forum and the OECD, to which Panama has made a commitment, and they can therefore hardly be considered "arbitrary or unjustifiable". Argentina claims that, when Panama joined the Global Forum, Panama asked its fellow members in the Forum to apply a coordinated scheme of defensive tax measures to all jurisdictions which do not adhere to the standards on transparency and effective exchange of tax information. Argentina contends that that is precisely what it is doing through the measures at issue in this dispute.[698]

7.539. Argentina also claims that the reason for the distinction between cooperative and non-cooperative countries in Decree No. 589/2013 concerns Argentina's ability to access the information needed to secure compliance with its laws and regulations. Accordingly, if a country has concluded an agreement on effective exchange of tax information with Argentina or has started negotiations for this purpose, Argentina considers that there is little risk that it will not be able to have access to the information needed to determine whether the transaction in question reflects legitimate commercial purposes. According to Argentina, in most cases, the possibility of initiating negotiations acts as a sufficient incentive to encourage the conclusion of this type of agreement. Consequently, from the point of view of the risk that the Argentine authorities will not have access to the information needed to secure compliance with Argentina's laws and regulations, these two categories of country are undoubtedly not in a similar situation.[699] Argentina thus considers that its capacity to designate as cooperative those countries that have participated in good faith in negotiations aimed at signing an agreement on exchange of tax information reflecting the standards of the Global Forum is not equivalent to an arbitrary or unjustifiable distinction, since it neither impairs nor is contrary to Argentina's objective of securing compliance with its legislation.[700]

7.540. Argentina argues that, if this Panel finds that Panama has established a violation of Article XVII of the GATS, Argentina's defensive tax measures challenged by Panama as regards national treatment under Article XVII of the GATS (measures 2, 3 and 4) are "necessary to secure

[694] Argentina's first written submission, paras. 342 and 343.
[695] Argentina's first written submission, paras. 308-312 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 171; and Panel Report, *Argentina – Hides and Leather*, para. [11.305]).
[696] Argentina's first written submission, paras. 313 and 314; and second written submission, para. 74.
[697] Argentina's opening statement at the second meeting of the Panel, para. 35.
[698] Argentina's first written submission, paras. 315-326.
[699] Argentina's second written submission, paras. 75-77; and response to Panel question No. 49.
[700] Argentina's opening statement at the second meeting of the Panel, para. 36.

compliance" with Argentina's tax laws and regulations within the meaning of Article XIV(c) of the GATS, including the "prevention of deceptive and fraudulent practices" commonly associated with transactions with non-cooperative tax jurisdictions. Argentina considers that it has shown that its defensive measures (measures 1, 2, 3, 4, 7 and 8) are justified under Article XIV(c) of the GATS and are applied consistently with its chapeau. Argentina argues that this proof and the reasons set forth also pertain to Panama's claims on national treatment. This is because the difference that exists between Argentine services and service suppliers and the services and service suppliers of non-cooperative countries as regards access to information and exercise of control and supervision by the tax authorities in order to secure compliance with Argentina's tax laws and regulations (and the resulting difference in regulatory treatment) manifests itself in a way similar to the difference between services and service suppliers of cooperative and non-cooperative countries for the same purposes.[701]

7.541. According to Argentina, nothing in the text of Article XIV(c) of the GATS requires a defending Member to invoke this defence separately for each claim of violation made by the complaining Member, and in *China – Auto Parts* the panel suggested nothing to the contrary. Argentina contends that Panama's reference to the *China – Auto Parts* dispute is out of place because in that dispute the panel, in substance, considered whether China had proved that its measures were needed to secure compliance with laws and regulations within the meaning of that provision, despite having criticized China's collective presentation of arguments.[702]

7.3.5.1.2 Panama

7.542. Panama argues that Argentina put forward a common defence in relation to a series of measures, without justifying each of them individually. Panama contends, in particular, that Argentina submitted a single defence based on Article XIV(c)(i) of the GATS in respect of measures 1 to 4 and considers that, in its collective defence, Argentina has combined arguments concerning the violation of Article II:1 and Article XVII of the GATS on some of the four measures taken together. Panama claims that in *China – Auto Parts*, the presentation of a combined defence relating to different violations of WTO law led the panel to question the defence's validity. In the present case, Panama considers that this lack of clarity not only affects its ability to understand Argentina's defence clearly, but also the Panel's assessment, and even the effective participation of third parties.[703]

7.543. According to Panama, Argentina is not seeking compliance with its domestic law but rather an international policy objective, namely, the conclusion of a maximum number of information exchange agreements so as to expand the AFIP's prerogatives. In Panama's opinion, Argentina is using its domestic law as a means of exerting pressure on non-cooperative countries. Panama contends that by attacking the so-called "harmful tax practices" of non-cooperative countries, Argentina is trying to make these countries align themselves with standards applied by Argentina in its international relations with other countries. According to Panama, the requirement of this type of "compliance" is not covered by Article XIV(c)(i) of the GATS.[704]

7.544. Panama claims that, even if the purpose of the measures were to secure compliance with the rules of domestic law, Argentina does not identify the specific obligation(s) with which these measures allegedly seek to secure compliance and also fails to explain how the various measures in question have been designed as compliance mechanisms. According to Panama, Argentina does not specify which situations of non-compliance led to the introduction of the measures and does not describe what type of unlawful practices or conduct violating domestic law it is sought to combat with each of the measures in question. Panama claims that Argentina does not explain how less favourable treatment in tax and administrative matters can lead to effective compliance with its legislation.[705]

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[701] Argentina's first written submission, paras. 345-351.

[702] Argentina's second written submission, paras. 66-70 (citing Panel Report, *China – Auto Parts*, para. 7.285).

[703] Panama's opening statement at the first meeting of the Panel, para. 48 (citing Panel Report, *China – Auto Parts*, para. 7.287); and second written submission, paras. 2.169-2.171 and 2.310-2.311.

[704] Panama's opening statement at the first meeting of the Panel, para. 49.

[705] Panama's opening statement at the first meeting of the Panel, paras. 50 and 51.

7.545. Panama considers that there are alternative mechanisms that can be used to secure compliance with Argentine law in a less trade-restrictive manner without entailing the discrimination and inconsistency of the measures in question. According to Panama, there is no reason why the instances of fraud involving Argentine taxpayers differ depending on the counterpart's location. Panama claims that the so-called information exchange agreements could be effective in adopting corrective measures *ex post* but in no way prevent fraud *ex ante*. In Panama's opinion, trying to justify measures which seek the disclosure of registers and individual accounts of a confidential nature is contrary to the spirit of Article XIV(c)(ii) of the GATS, which precisely seeks to protect such confidential information.[706]

7.546. Panama argues that Argentina's explanation of how the measures in question secure compliance with laws and regulations which in themselves are not inconsistent with the GATS is insufficient and flawed.[707]

7.547. As regards the identification of laws or regulations that are not inconsistent with the GATS, Panama argues that, in its first written submission, Argentina made only a general reference to the LIG without citing any specific provision. According to Panama, this means that any regulatory instrument other than the LIG lies outside the Panel's remit and Argentina cannot present new evidence regarding this matter.[708] Panama claims that Argentina has not proved that the LIG is a law "relating to the prevention of deceptive and fraudulent practices" within the meaning of Article XIV(c)(i) of the GATS. Panama asserts that the LIG establishes the gains tax and all the components needed to apply it, so it is not a law "relating to the prevention of deceptive and fraudulent practices". According to Panama, Argentina is pursuing diverse tax or economic policy objectives or is attempting to follow recommendations or considerations suggested in an international standard; according to Panama, this is not in keeping with the purpose protected by Article XIV(c)(i) of the GATS.[709]

7.548. Panama contends that a mere reference to a law or regulation is not sufficient. According to Panama, Argentina should have identified specific provisions or obligations of the LIG on the prevention of deceptive or fraudulent practices. Panama argues that there is no LIG provision linked to the prevention of practices which might in any way resemble practices that are the subject of Argentina's concern (the so-called self-loans, the transmittal and entry of funds from non-cooperative countries, transaction valuation based on transfer prices, or the allocation of expenditure to the time of payment).[710] Panama also argues that the relevant provision of the law or regulation with which it is sought to achieve compliance through the measure cannot be the same rule which gives purpose to the measure in question, as this would result in a circular justification.[711]

7.549. With regard to measures 1 to 4, Panama has stated its opposition to Argentina's attempt during the second meeting of the Panel to rectify its inappropriate invocation of Article XIV(c)(i) of the GATS. According to Panama, the inclusion of numerous provisions, not only from the LIG but also from other Argentine regulations and even its National Constitution, broadens the scope of its defence and affects Panama's procedural rights. Panama considers that Argentina has not even explained how the measures in question are intended to secure compliance with each and every one of the new provisions invoked.[712]

7.550. As regards measure 7, Panama argues that Argentina's mere assertions regarding the laws or regulations with which Article 192 of IGJ Resolution No. 7/2005 seeks to secure compliance do not equate to proof.[713] Concerning measure 8, Panama argues that the domestic rules and regulations which form part of the defending Member's national legal order cannot be international rules. Consequently, Argentina's argument that its measure is necessary in order to secure

[706] Panama's opening statement at the first meeting of the Panel, para. 52.
[707] Panama's second written submission, para. 2.178.
[708] Panama's second written submission, paras. 2.179 and 2.180.
[709] Panama's second written submission, paras. 2.181-2.184, 2.319-2.322, 2.326, 2.445-2.446, 2.449, 2.549, 2.552, 2.753, 2.800 and 2.802.
[710] Panama's second written submission, paras. 2.186-2.192, 2.323-2.324, 2.447, 2.550, 2.552 and 2.801.
[711] Panama's second written submission, para. 2.551.
[712] Panama's closing statement at the second meeting of the Panel, para. 5.
[713] Panama's second written submission, paras. 2.751 and 2.752.

compliance with international standards of transparency is without foundation under Article XIV(c)(i) of the GATS.[714]

7.551. Panama argues that Argentina has not proved that the LIG is consistent with the GATS. It considers that the LIG is in itself inconsistent with the GATS, particularly with Articles II and XVII, as can be seen from Panama's numerous claims.[715] According to Panama, Argentina has also failed to explain how Articles 118 of Law No. 19.550 on Commercial Companies and 188 of IGJ Resolution No. 7/2005 are consistent with the GATS.[716] In the case of measure 8, Argentina has not explained why Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin should be considered consistent with the GATS.[717]

7.552. Panama argues that Argentina has not shown how measures 1 to 4 secure compliance with the LIG. Panama alleges that, without having determined the specific LIG provision with which the measure in question seeks to secure compliance, it is not possible to assess to what degree the measure is intended to achieve this purpose.[718] According to Panama, Argentina does not satisfactorily explain the circumstances which led to introduction of the measure.[719] Panama alleges that Argentina's concern focuses on a very special situation in the case of measures 1 to 4 and that the scope of each of these four measures goes beyond the concern in question.[720] As regards measures 7 and 8, Panama claims that Argentina did not present any argument to show that these measures are intended to secure compliance with the laws and regulations cited by Argentina.[721]

7.553. Regarding measures 1 to 4, Panama argues that the level of contribution of each measure should be determined according to the objective it is sought to achieve, namely, compliance with the LIG. As it has not been shown that the practices mentioned violate any specific provision of the LIG, and thus no specific objective has been established for achieving compliance with measures 1 to 4, it is not possible to assess whether these measures make a contribution with regard to a compliance objective not identified by Argentina. Panama concludes, therefore, that Argentina has not been able validly to establish that measures 1 to 4 make a material contribution to an objective of compliance with the LIG.[722]

7.554. Concerning measure 7, Panama recalls that Argentina argues that discrimination in the registration of branches makes an important contribution to compliance with Argentina's tax legislation, but does not explain how requesting additional information only from companies of non-cooperative countries helps to secure compliance with Articles 118 of the LSC and 188 of IGJ Resolution No. 7/2005, which apply to all companies, irrespective of their origin. Nor does Argentina indicate how the measure contributes to ensuring that branches of companies from cooperative countries "have a legitimate commercial purpose" and are not "mere vehicles for simulated transactions".[723] As to measure 8, Panama claims that Argentina only cites three provisions of Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin and does not explain how imposing the requirement of prior authorization from the BCRA for repatriation to non-cooperative countries helps to secure compliance.[724]

7.555. With regard to measures 1 to 4 and 7, Panama clarifies that it does not contest the value placed by Argentina on protecting its tax collection system against the risks posed by harmful tax practices on the part of non-cooperative jurisdictions. However, Panama considers that there are other interests of prime importance such as that of observing the rule of law in tax matters. Panama argues that, whereas Argentina's interest in collecting taxes is of the utmost importance, it has to be interpreted in conjunction with the interest of the Argentine citizen, resident or economic operator who trusts that tax measures will fall within the parameters of strict compliance

[714] Panama's second written submission, para. 2.800.
[715] Panama's second written submission, paras. 2.197-2.198, 2.329, 2.451 and 2.554.
[716] Panama's second written submission, para. 2.754.
[717] Panama's second written submission, para. 2.802.
[718] Panama's second written submission, paras. 2.200-2.201, 2.330, 2.224, 2.452 and 2.555.
[719] Panama's second written submission, para. 2.330.
[720] Panama's second written submission para. 2.204. Panama put forward the same argument with regard to measure 2 (para. 2.332), measure 3 (para. 2.453) and measure 4 (para. 2.556).
[721] Panama's second written submission, paras. 2.755 and 2.802.
[722] Panama's second written submission, paras. 2.211, 2.337, 2.456 and 2.559.
[723] Panama's second written submission, para. 2.759.
[724] Panama's second written submission, para. 2.803.

with the law and tax equality. According to Panama, protecting Argentine citizens and taxpayers is of the utmost importance, especially in view of the issues of a criminal nature related to the AFIP's utilization of private information.[725] In the case of measure 8, Panama claims that Argentina has not identified the interest protected.[726]

7.556. Panama argues that measures 1 to 4 have an impact on transactions that are not the subject of Argentina's concern and these measures, therefore, go beyond what is necessary to meet Argentina's concerns.[727] Panama adds that, as far as measure 1 is concerned, the irrefutable nature of the presumption has no raison d'être when it can be shown that the transaction is not an "insider loan" or was conducted at arm's length.[728] As to measure 7, Panama claims that Argentina confines itself to observing that Article 192 of IGJ Resolution No. 7/2005 "does not prohibit the establishment of branches of companies incorporated in {} non-cooperative jurisdictions in Buenos Aires", as if that alone proved that the measure is not restrictive. In Panama's opinion, the fact that a prohibition is a measure still more restrictive than that contained in Article 192 of IGJ Resolution No. 7/2005 does not lessen the fact that the imposition of additional registration requirements on companies from non-cooperative countries restricts and impedes such companies' capacity to establish a commercial presence in the city of Buenos Aires.[729] As regards measure 8, Panama contends that no type of evidence accompanies Argentina's statements that the foreign exchange measure is the least trade-restrictive measure.[730]

7.557. In connection with measure 1, Panama argues that the discriminatory withholding tax should not apply to transactions where it is certain that the borrower and the lender are not "the same person" according to the "insider loan" criteria clearly established by law. Even in transactions between related persons, there is no reason to apply discriminatory withholding if it can be shown that the transactions genuinely reflect actual conditions in the market. In this respect, in Panama's opinion, there is no reason for the presumption to be irrefutable. Panama considers that, in the case of related persons which have not been able to prove that the transactions reflect actual conditions in the market, Argentina has at its disposal the transfer pricing regime under Article 15 of the LIG (except for its second paragraph) and other relevant provisions of the RIG, which would enable prices similar to market prices to be established.[731]

7.558. As far as measures 2, 3 and 4 are concerned, Panama argues that Argentina could and should have adopted a measure solely intended to assuage Argentina's specific concern and not one which has restrictive effects on perfectly legal transactions that do not fit the scenario that preoccupies Argentina.[732]

7.559. Panama claims that there is an alternative measure less restrictive than measure 7. According to Panama, Argentina itself argues in its first written submission that "companies incorporated in jurisdictions 'not cooperating for tax transparency purposes' are required to provide the same documents as those incorporated in jurisdictions cooperating for tax transparency purposes" and asserts that the requirement in Article 192 of IGJ Resolution No. 7/2005 for companies of non-cooperative countries "is equivalent to the requirements provided for in Article 188" of IGJ Resolution No. 7/2005. Panama contends that, if this is the case, Article 192 of IGJ Resolution No. 7/2005 is totally superfluous. According to Panama, eliminating this discriminatory provision, which targets only companies from non-cooperative countries, would be a less restrictive alternative and would not be prohibitively costly.[733]

7.560. Panama argues that, even allowing that measures 1 to 4, 7 and 8 could be justified provisionally under Article XIV(c) of the GATS, they constitute a means of arbitrary and unjustifiable discrimination between countries that are in similar situations for the purposes of tax transparency and exchange of information. Panama claims that the more favourable treatment

[725] Panama's second written submission, paras. 2.222-2.225, 2.341-2.343, 2.461-2.462, 2.561, 2.760 and 2.761.
[726] Panama's second written submission, para. 2.803.
[727] Panama's second written submission, paras, 2.218, 2.339-2.340, 2.458-2.460 and 2.560.
[728] Panama's second written submission, paras. 2.219 and 2.220.
[729] Panama's second written submission, para. 2.758.
[730] Panama's second written submission, para. 2.803.
[731] Panama's second written submission, paras. 2.226-2.228.
[732] Panama's second written submission, paras. 2.344, 2.463 and 2.562.
[733] Argentina's second written submission, para. 2.762 (referring to Argentina's first written submission, paras. 614 and 616).

accorded by Argentina is based on the list of countries cooperating with Argentina. By exclusion, the less favourable treatment accorded by Argentina concerns all those jurisdictions that are not on this list and that are described as "non-cooperative" for the same purposes. Panama notes that the distinction between countries based on cooperation with Argentina is unilateral, discretionary and political; it disregards criteria developed in international fora, prejudges certain countries, and ignores their individual efforts aimed at greater tax transparency and cooperation in exchanging information.

7.561. In response to Argentina's argument that, in distinguishing between cooperative and non-cooperative countries, Argentina is promoting universal adoption of the Global Forum's standards, Panama states that, in fact, Argentina disregards in part the findings of the Global Forum with respect to the situation of various countries as regards compliance with tax transparency and exchange of information standards. Panama asserts, for example, that Argentina excludes from the "cooperative countries" category jurisdictions such as Bahrain and Hong Kong (China) which, in the opinion of the Global Forum itself, are in the same situation as Argentina with regard to tax transparency and exchange of information. Moreover, Argentina includes in the list of "cooperative countries" jurisdictions which, in the opinion of the Global Forum, do not meet the institution's basic standards in that regard.

7.562. According to Panama, the criterion for being considered a cooperative country, which relates to the initiation of negotiations with Argentina with a view to concluding an agreement on exchange of information, is unrelated to the existence of actual conditions in the other country which facilitate transparency and exchange of information with Argentina. In Panama's view, the desire to negotiate does not imply that the country in question has a legal, administrative, tax, banking confidential information protection framework, which makes cooperation possible.

7.563. Panama stresses what it regards as the arbitrariness of the rule on initiation of negotiations, stating that the opening of such negotiations is subject to Argentina's discretion and there is no established procedure in its regulations enabling non-cooperative countries to initiate negotiations with a view to their inclusion in the list of cooperative countries. Further, Panama points out that the regulations also do not determine the intervals at which the list is to be updated.[734]

7.564. Panama also argues that, even if the restriction were provisionally justified under Article XIV(c)(i) of the GATS, measures 1 to 4 constitute a disguised restriction on trade in services because their scope is broader than that relating to the concern that gave rise to the measure.[735]

7.565. Panama argues additionally that, even if the Panel were to conclude that measure 8 is provisionally justified under Article XIV(c)(i) of the GATS, Argentina has failed to demonstrate that the measure is applied in conformity with the chapeau of that article. Panama wishes to emphasize that, in its first written submission, Argentina did not put forward any argument on the chapeau of Article XIV in relation to the measure concerning repatriation of investment. Panama claims that, in any case, in its view, the Argentine measure on repatriation of investment is applied in a way which "constitute[s] a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail", inconsistently with the chapeau of Article XIV(c)(i) of the GATS.

7.566. Panama shares the concern expressed by the European Union regarding the discretionary authority with which Argentina designates countries as "cooperative for tax transparency purposes" and considers that this raises the question of whether the Argentine measures are really applied in conformity with the chapeau of Article XIV(c)(i) of the GATS. Panama claims that the "effective exchange of information" referred to by Argentina may not occur even when the service suppliers are from cooperative countries, since the mere initiation of negotiations with Argentina does not guarantee the existence of the instruments needed to ensure the effective receipt of information. Panama contends that Argentina itself has recognized that it considers as cooperative 18 countries with which it has initiated negotiations and with which no agreement on exchange of information is in force.

[734] Panama's second written submission, paras. 2.230-2.236, 2.345, 2.464, 2.563 and 2.764.
[735] Panama's second written submission, paras. 2.237, 2.346, 2.465 and 2.564.

7.567. According to Panama, measure 8 imposes the requirement of prior authorization from the BCRA on companies from non-cooperative countries (for example, Egypt and Oman), with which the effective exchange of information is just as absent as with countries deemed cooperative with which Argentina has not yet signed any agreement guaranteeing such exchange (for example, El Salvador, Honduras and the Philippines). Panama points out that Argentina is not consistent in drawing up its list, since countries which have not initiated negotiations with Argentina are included in the list of cooperative countries (this being the case for Panama), while countries which have allegedly initiated negotiations with Argentina will continue to be regarded as non-cooperative while waiting for Argentina to update its list (for example, Cyprus or Hong Kong (China)).[736]

7.3.5.2 Assessment by the Panel

7.3.5.2.1 Introduction

7.568. The issue placed before the Panel is whether, as Argentina claims, measure 1 (withholding tax on payments of interest or remuneration), measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices), measure 4 (payment received rule for the allocation of expenditure), measure 7 (requirements for the registration of branches) and measure 8 (foreign exchange authorization requirement) are covered by the exception in Article XIV(c) of the GATS, "including its subparagraph (i)".[737] In response, Panama not only calls into question this coverage, but also the validity of the alleged "collective" or "combined" presentation of Argentina's defence under Article XIV(c) of the GATS with regard to the six measures.

7.569. We start by examining the two preliminary questions relating to the defence put forward by Argentina under Article XIV(c) of the GATS.

7.3.5.2.2 Preliminary questions relating to the defence put forward by Argentina

7.3.5.2.2.1 The question of whether the way in which Argentina presents its defence under Article XIV(c) of the GATS is admissible

7.570. Panama asks us to reject Argentina's defence under Article XIV(c) of the GATS in relation to the six measures concerned because it was presented as a "combined" or "collective" defence "without trying to justify each of them individually".[738] Panama claims that, faced with a similar situation in which the respondent had presented a general defence with respect to various violations of WTO law, the panel in *China – Auto Parts* indicated that "[i]t is not for the Panel to advance or presume specific arguments or analysis for a claim made by a party to the dispute". Panama urges us to follow the same reasoning as the panel in *China – Auto Parts* and asserts that, because of its general nature and lack of precision, we should dismiss Argentina's defence under Article XIV(c) of the GATS. According to Panama, an objective assessment of the matter under Article 11 of the DSU implies in this case refraining from "presum[ing] specific arguments or analysis" which Argentina did not present. Panama argues that, given the uncertainty of its collective arguments and bearing in mind that Argentina has the burden of proving the merits of the justification it claims, we have no option but to find that the measures in question cannot be justified under Article XIV(c) of the GATS.[739]

7.571. Argentina responds that Panama's reference to *China – Auto Parts* is out of place because, despite criticism of the way in which China presented its arguments, the panel in that dispute assessed, in substance, whether China had shown that its measures met the requirements of Article XX(d) of the GATT 1994. Moreover, Argentina explains, the criticism of China by the panel in that dispute was exclusively concerned with the fact that the underlying measures with which China allegedly secured compliance were different, depending on whether the Panel found a

[736] Panama's second written submission, paras. 2.805-2.808.
[737] Argentina's first written submission, paras. 244 and 328; and opening statement at the second meeting of the Panel, para. 29.
[738] Panama's opening statement at the first meeting of the Panel, para. 48.
[739] Panama's opening statement at the first meeting of the Panel, para. 48; and second written submission, paras. 2.170-2.171, 2.311-2.312, 2.439, 2.544, and 2.749 (citing Panel Report, *China – Auto Parts*, para. 7.287).

violation of Article II or Article III of the GATT 1994. Argentina argues that in the present dispute, on the contrary, the measures with which compliance with its laws and regulations is secured are the same, irrespective of whether the Panel finds a violation of Article II:1 or Article XVII of the GATS. Argentina contends that nothing in the text of Article XIV(c) requires a defending Member to invoke its defence separately for each claim of violation put forward by a complaining Member and in *China – Auto Parts* the panel did not suggest the contrary. For Argentina, this means that Panama's argument lacks merit and it urges us to reject Panama's objection.[740]

7.572. Argentina also maintains that Panama's criticism refers exclusively to the way in which Argentina decided to frame its arguments and that, therefore, Panama is mistaken in affirming that Argentina invoked a collective defence for the measures justified under Article XIV(c) of the GATS. Argentina explains that, in order to avoid unnecessary repetition and in the interests of the Panel's efficiency and of Secretariat resources, Argentina refrained from repeating the arguments for each of the elements of the "weighing and balancing" test when they were common to all the measures. According to Argentina, this is also true for the element relating to the importance of the interests or for the analysis in the context of the chapeau of Article XIV, for example. Argentina contends that, whenever the arguments were different, Argentina established the relevant elements of the test separately and individually for each measure.[741]

7.573. Consequently, as a preliminary matter, we must focus on whether, as proposed by Panama, we should dismiss Argentina's defence under Article XIV(c) of the GATS because of the way in which it was presented. We begin precisely by examining the way in which Argentina presented its defence.

7.574. We note that, in its first written submission, Argentina structures its arguments by dividing them into two groups: on the one hand, it develops arguments for five of the six measures defended under Article XIV(c) of the GATS (measures 1, 2, 3, 4 and 7) and, on the other, it develops its arguments for measure 8 separately. As regards measures 1, 2, 3, 4 and 7, although Argentina discusses certain elements together, it also develops separate arguments for each measure. For example, in its first written submission, Argentina discusses separately each measure's contribution to its legitimate objectives[742], as well as the trade-restrictive aspects.[743] Argentina also makes a distinction in the light of the provision invoked by Panama, that is, the arguments developed under Article XIV(c) of the GATS appear initially only to concern the claims under Article II:1 of the GATS. Then, in a later part of its written submission, Argentina extends all the arguments developed previously in relation to Article XIV(c) of the GATS to the claims relating to Article XVII of the GATS, which only concern measures 2, 3 and 4. In its second written submission, Argentina deals with measures 1, 2, 3, 4, 7 and 8 together, except as regards Argentina's arguments with respect to the laws or regulations which it is sought to enforce, where Argentina provides a separate explanation for each measure. Argentina also explains that the measures it uses to secure compliance with its laws and regulations are the same, irrespective of whether the Panel finds a violation of Article II:1 or Article XVII of the GATS.

7.575. We do not therefore agree with Panama that Argentina has presented a "collective" or "combined" defence for measures 1, 2, 3, 4, 7 and 8 "without trying to justify each of them individually". Perhaps Argentina could have presented its arguments under Article XIV(c) of the GATS differently, but this does not mean that it is obliged to follow the approach chosen by Panama. We recall that Panama organized its arguments in its written submissions measure by measure, i.e. an analysis of all the relevant claims and defences under the GATS (and the GATT 1994) presented in relation to a single measure at issue. As we have already indicated[744], this way of organizing its arguments causes Panama to repeat the same arguments over and over again in different parts of its second written submission. This is so precisely because, as Argentina contends, there are numerous elements common to several of the measures.

[740] Argentina's second written submission, paras. 66-70 (citing Panel Report, *China – Auto* Parts, para. 7.285).

[741] Argentina's response to Panel question No. 79, paras. 1 and 2. Argentina refers in particular to paras. 278-286 and 297-304 of its first written submission where it explains for each measure its contribution to the objective pursued and its degree of trade restrictiveness.

[742] Argentina's first written submission, paras. 278-286.

[743] Argentina's first written submission, paras. 297-304.

[744] See para. 7.66 above.

7.576. In any event, even though Argentina's defence may be qualified as "combined" or "collective", we note that both in *China – Auto Parts*[745] and in *Colombia – Ports of Entry*[746], two disputes in which the respondents put forward their defence of various measures collectively, the panels assessed that defence despite their criticism and reservations in this respect. Accordingly, assuming that Argentina has presented a "collective" defence, *quod non*, the Panel considers that, contrary to Panama's contention, this would not be sufficient reason to dismiss Argentina's defence out of hand.

7.577. In the light of the foregoing, we shall examine Argentina's defence under Article XIV(c) of the GATS with regard to measures 1, 2, 3, 4, 7 and 8. Where there are elements common to the measures at issue concerned, we shall examine these elements collectively.

7.3.5.2.2.2 The question of whether Argentina's defence is limited to the laws and regulations indicated in subparagraph (i) of Article XIV(c) of the GATS

7.578. The second preliminary question we must address is whether the defence presented by Argentina is limited to the types of laws and regulations covered by subparagraph (i) of Article XIV(c) of the GATS.

7.579. Panama raises a general objection relating to Argentina's invocation of subparagraph (i) of Article XIV(c) of the GATS. Panama contends in this regard that Argentina should be consistent with this option and refer only to securing compliance with laws and regulations on the prevention of deceptive and fraudulent practices or ways of dealing with the effects of a default on services contracts.[747]

7.580. Argentina disagrees with Panama and argues that it is not obliged to prove separately that the measures concerned refer to "the prevention of deceptive and fraudulent practices" under subparagraph (i) of Article XIV(c) of the GATS. According to Argentina, this is because the list of measures in subparagraphs (i) to (iii) of Article XIV(c) is illustrative and not exhaustive. Consequently, any measure intended to secure compliance with laws and regulations consistent with the GATS may be justified pursuant to Article XIV(c), irrespective of whether or not it is covered by subparagraphs (i) to (iii). Argentina argues that Article XIV does not contain any limitation *a priori* with regard to the types of GATS-consistent "laws and regulations" with which it is sought to secure compliance.[748]

7.581. The Panel notes that Argentina does not appear to argue that the relevant laws and regulations are exclusively concerned with "the prevention of deceptive and fraudulent practices…". In its first written submission, for example, Argentina explains that its defensive tax measures "have been implemented to 'secure compliance' with its own laws and regulations by imposing taxes, *including* the prevention of 'deceptive and fraudulent practices'".[749] Likewise, in its

[745] In *China – Auto Parts*, the panel noted that, initially, in its justification of the measures under Article XX(d), China did not distinguish whether the justification referred to a possible finding of inconsistency with Article III or Article II of the GATT 1994. After the second substantive meeting, in response to a question from the panel, China changed its position and clarified that the Article XX(d) analysis should be different depending on whether a violation was found under Article III or Article II of the GATT 1994. The panel, noting that China had not distinguished its Article XX(d) arguments on the possible violation of Article III from those concerning Article II until specifically asked to do so by the panel, questioned "from the outset the validity of China's defence under Article XX(d)". The panel nevertheless considered that it was not for the panel "to advance or presume specific arguments or analysis for a claim made by a party to the dispute" and therefore went on to examine China's defence. See Panel Report, *China – Auto Parts*, paras. 7.283-7.287.

[746] In *Colombia – Ports of Entry*, the panel noted that the respondent had presented a "general defence" under Article XX(d) of the GATT 1994, in the sense that Colombia referred collectively to various requirements of the measure concerning ports of entry which constituted the basis of Panama's claims under several provisions of the GATT 1994. The panel noted that Colombia had not presented evidence to demonstrate how each of the requirements at issue "as the object of a separate claim, [was] individually necessary to secure compliance". Bearing in mind the approach decided by Colombia for presenting its defence, the panel decided to "address Colombia's global defence that the ports of entry measure is justified as necessary to secure compliance with the relevant laws or regulations by considering the requirements under the ports of entry measure collectively, without attempting to evaluate the individual contribution of each requirement in the ports of entry measure". See Panel Report, *Colombia – Ports of Entry*, paras. 7.502-7.508.

[747] Panama's second written submission, paras. 2.153, 2.180, 2.320-2.322, 2.445, 2.549 and 2.753.

[748] Argentina's opening statement at the second meeting of the Panel, para. 29.

[749] Argentina's first written submission, para. 262. (emphasis added)

subsequent submissions to the Panel, Argentina did not refer again to subparagraph (i) but rather focused its arguments on subparagraph (c) of Article XIV in general.[750]

7.582. In any event, we agree with the panel in *US – Gambling* that Article XIV(c) contains an illustrative list of laws or regulations "which are not inconsistent with the provisions" of the GATS. On this premise, the panel considered that laws and regulations other than those in subparagraphs (i) to (iii) may be relied upon in justifying a GATS-inconsistent measure under subparagraph (c) provided that those other laws and regulations are consistent with the provisions of the GATS.[751] It should be noted that the Appellate Body reached a similar conclusion regarding the list in Article XX(d) of the GATT 1994.[752]

7.583. The Panel therefore agrees with Argentina that Article XIV(c) "does not contain any limitation *a priori* with regard to the types of 'laws and regulations' consistent with the GATS with which a Member may seek to secure compliance".[753] Accordingly, the Panel will not assess whether Argentina has proved that the relevant "laws or regulations" are related to "the prevention of deceptive and fraudulent practices", provided that it considers that Argentina has proved that the relevant measures secure compliance with laws and regulations that are not inconsistent with the provisions of the GATS.

7.3.5.2.3 The relevant legal provision

7.584. Article XIV(c) of the GATS provides in relevant part:

> Article XIV
>
> General Exceptions
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> [...]
>
> (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
>
> (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
>
> (ii) ...
>
> [...]

7.585. In *US – Gambling*, the Appellate Body elaborated on the analogy between Article XIV of the GATS and Article XX of the GATT 1994, explaining that the former stipulated general exceptions under the GATS in a similar way to the latter under the GATT 1994. The Appellate Body concluded that its previous decisions under Article XX of the GATT 1994 were relevant to the analysis of Article XIV of the GATS:

> Article XIV of the GATS sets out the general exceptions from obligations under that Agreement in the same manner as does Article XX of the GATT 1994. Both of these provisions affirm the right of Members to pursue objectives identified in the paragraphs of these provisions even if, in doing so, Members act inconsistently with

[750] Argentina's opening statement at the first meeting of the Panel, para. 41; second written submission, paras. 66-78; and opening statement at the second meeting of the Panel, paras. 24-36.
[751] Panel Report, *US – Gambling*, para. 6.540.
[752] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 70.
[753] Argentina's opening statement at the second meeting of the Panel, para. 29.

> obligations set out in other provisions of the respective agreements, provided that all of the conditions set out therein are satisfied. Similar language is used in both provisions, notably the term "necessary" and the requirements set out in their respective chapeaux. Accordingly, like the Panel, we find previous decisions under Article XX of the GATT 1994 relevant for our analysis under Article XIV of the GATS.[754]

7.586. The analogy between the two provisions led the Appellate Body in *US – Gambling* to use in its examination of Article XIV of the GATS the same "two-tier analysis" already used in relation to Article XX of the GATT 1994. Thus, Article XIV of the GATS provides for an analysis in two stages: (i) first, the Panel must determine whether the measure falls within the scope of one of the subparagraphs of Article XIV of the GATS; and (ii) after having found that the measure at issue is justified under one of the subparagraphs of Article XIV of the GATS, the Panel must examine whether this measure satisfies the requirements laid down in the introductory clause or chapeau of Article XIV of the GATS.[755]

7.587. We shall therefore first examine whether measures 1, 2, 3, 4, 7 and 8 are provisionally justified under subparagraph (c) of Article XIV, that is, whether they are "necessary to secure compliance with laws or regulations" of Argentina "which are not inconsistent with the provisions of [the GATS]". Only if we find that measures 1, 2, 3, 4, 7 and 8 are provisionally justified under Article XIV(c), shall we proceed to examine whether those measures satisfy the requirements of the chapeau of Article XIV, that is, whether they "are [not] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services".

7.588. In conducting this examination, we take into account the Appellate Body's observations in *EC – Seal Products* according to which the general exceptions (in that case, Article XX of the GATT 1994) apply to "measures" that are to be analysed under the subparagraphs and the chapeau, not to any inconsistency with the GATT 1994 that might arise from such measures. With reference to its report in *Thailand – Cigarettes (Philippines)*, the Appellate Body pointed out that the analysis of the Article XX(d) defence in that case should focus on the "differences in the regulation of imports and of like domestic products" giving rise to the finding of less favourable treatment under Article III:4 of the GATT 1994. The Appellate Body concluded that the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994.[756] The same conclusion could be applied to our analysis under Article XIV(c) of the GATS. Our analysis of measures 1, 2 3, 4, 7 and 8 under Article XIV(c) of the GATS will therefore focus on the aspects of the measures that have given rise to the findings of inconsistency with Article II:1 of the GATS, particularly those aspects concerning the design and operation of measures 1, 2, 3, 4, 7 and 8 pursuant to Decree No. 589/2013.

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[754] Appellate Body Report, *US – Gambling*, para. 291. (footnotes omitted)

[755] Appellate Body Report, *US – Gambling*, para. 292 (referring to its Reports in *US – Shrimp*, para. 147 and *US – Gasoline*, pp. 20-21 and 25).

[756] The Appellate Body reasoned as follows:

> We begin by noting that the general exceptions of Article XX apply to "measures" that are to be analysed under the subparagraphs and chapeau, not to any inconsistency with the GATT 1994 that might arise from such measures. In *US – Gasoline*, the Appellate Body clarified that it is not a panel's legal conclusions of GATT-inconsistency that must be justified under Article XX, but rather the provisions of a measure that are infringing the GATT 1994.
>
> See Appellate Body Report, *EC – Seal Products*, para. 5.185 (referring to Appellate Body Report, *US – Gasoline*, pp. 12 and 13).

In *Thailand – Cigarettes (Philippines)*, the Appellate Body indicated that the analysis of the Article XX(d) defence in that case should focus on the "differences in the regulation of imports and of like domestic products" giving rise to the finding of less favourable treatment under Article III:4. The aspects of the measure that have to be justified under the subparagraphs of Article XX are thus those giving rise to the finding of inconsistency under GATT 1994. See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177.

7.3.5.2.4 The question of whether measures 1, 2, 3, 4, 7 and 8 fall under Article XIV(c) of the GATS

7.3.5.2.4.1 The legal standard under Article XIV(c) of the GATS

7.589. We note that one part of the wording of Article XIV(c) of the GATS ("necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement") is very similar to that of Article XX(d) of the GATT 1994, which provides as follows:

> Article XX
>
> General Exceptions
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> [...]
>
> (*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices.

7.590. In view of the similar wording of Article XIV(c) of the GATS and Article XX(d) of the GATT 1994, and bearing in mind the conclusions of the Appellate Body in *US – Gambling* to the effect that previous decisions under Article XX of the GATT 1994 are relevant to the analysis of Article XIV of the GATS[757], we shall be guided by these decisions where relevant for our analysis.

7.591. In this connection, we note that in *Korea – Various Measures on Beef*, the Appellate Body set forth the legal standard to be followed under Article XX(d) of the GATT 1994:

> For a measure … to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed[758] to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be "necessary" to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met.[759]

7.592. We agree with the panel in *US - Gambling*[760] that the legal standard set forth by the Appellate Body in *Korea – Various Measures on Beef* is relevant to our analysis of Argentina's defence under Article XIV(c) of the GATS.

7.593. In order to justify its measures successfully under subparagraph (c) of Article XIV, therefore, Argentina should first demonstrate that measures 1, 2, 3, 4, 7 and 8 are designed to secure compliance with the relevant Argentine laws and regulations that are not in themselves inconsistent with the GATS; and secondly, that these measures are "necessary" to secure such compliance.

7.594. We start by examining the first element of the legal standard.

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[757] Appellate Body Report, *US – Gambling*, para. 291. (footnotes omitted)

[758] The Panel points out that the original text of the Appellate Body Report in English uses the term "designed to secure compliance". In our view, the words "*diseñada para*" are closer to the original English than the terms "*destinada a*" used in the official translation We note that the parties use both terms indifferently "*diseñada para*" and "*destinada a*" in Spanish).

[759] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157. See also Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177.

[760] Appellate Body Report, *US – Gambling*, paras. 6.536 and 6.537 and footnote 990.

(a) First element: Whether the measures are designed to secure compliance with laws and regulations that are not in themselves inconsistent with the GATS

7.595. In examining whether a measure is designed to secure compliance with laws and regulations within the meaning of Article XX(d) of the GATT 1994, previous panels considered that the Member invoking such a defence must (i) identify the laws and regulations with which the challenged measure is intended to secure compliance, and prove that (ii) those laws and regulations are not in themselves inconsistent with WTO law; and (iii) that the measure challenged is designed to secure compliance with those laws or regulations.[761]

7.596. We will follow the previous panels' approach, adapting it where necessary to the text of Article XIV(c) of the GATS. We begin by examining whether Argentina has duly identified the relevant laws and regulations for the purposes of its defence under Article XIV(c) of the GATS.

(i) Whether Argentina has identified the laws or regulations with which the challenged measures are intended to secure compliance within the meaning of subparagraph (c) of Article XIV

7.597. In its first written submission, Argentina explained that measures 1, 2 3 and 4 are designed to secure compliance with the LIG "pursuant to which taxable income in Argentina is determined".[762] At the second substantive meeting with the Panel, Argentina specified that measures 1 to 4 are designed to secure compliance with Articles 1, 2, 5, 17, 80, 91, 92, 127, 129 and 130 of the LIG, which "operate in a regulatory framework that includes this Law and the regulations thereto, the administration and implementation of which are necessarily linked to the body of rules which also includes the LPT (Articles 33, 38, 39, 45 and 46 in particular) and the Criminal Tax Law (Articles 1, 2 and 6 in particular) and is based on the constitutional principles enshrined in Articles 4, 16, 17 and 75 (second paragraph) of the National Constitution of the Argentine Republic.[763] Argentina also maintains that measure 7 secures compliance with Article 118.3 of Law No. 19.550 on Commercial Companies (LSC) and Article 188 of IGJ Resolution No. 7/2005.[764] As regards measure 8, Argentina states that it secures compliance with Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin in Argentina, and Articles 20, 20 *bis* and 21 thereof in particular.[765]

7.598. Panama objects to the way in which Argentina has sought to identify the relevant laws and regulations for the purposes of its defence under Article XIV(c) of the GATS. Initially, Panama argued that a mere reference to a law or regulation, or even a chapter of such a law or regulation, is not sufficient, and this should lead a panel to conclude that the respondent erred in putting forward its defence. According to Panama, Argentina should have identified specific provisions or obligations in the LIG on the prevention of deceptive or fraudulent practices.[766] As regards measure 7, Panama argues that Argentina's mere affirmations regarding the laws or regulations with which Article 192 of IGJ Resolution No. 7/2005 seeks to secure compliance do not equate to proof.[767] Concerning measure 8, Panama argues that the domestic rules and regulations which form part of the defending Member's national legal order cannot be international rules. Therefore, the argument that the measure is necessary to secure compliance with international standards on transparency is without foundation under Article XIV(c) of the GATS.[768]

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[761] Panel Reports, *Colombia – Ports of Entry*, para. 7.514; and *US – Shrimp (Thailand)*, para. 7.174. See also Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

[762] Argentina's first written submission, para. 264. See also first written submission, para. 265; and second written submission, para. 71.

[763] Argentina's opening statement at the second meeting of the Panel, para. 26.

[764] Argentina's first written submission, para. 266; second written submission, para. 72; and opening statement at the second meeting of the Panel, para. 27.

[765] Argentina's first written submission, paras. 334-337; second written submission, para. 72; and opening statement at the second meeting of the Panel, para. 27.

[766] Panama's opening statement at the first meeting of the Panel, para. 50; second written submission, paras. 2.186 and 2.187. Panama refers to the Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 179 and footnote 271. Panama puts forward the same argument with regard to measure 2 (para. 2.323), measure 3 (para. 2.447), measure 4 (para. 2.550) and measure 8 (para. 2.801).

[767] Panama's second written submission, para. 2.752.

[768] Panama's second written submission, para. 2.800.

7.599. Panama also objects to the inclusion of several provisions, not only from the LIG but also from other Argentine regulations, and even its National Constitution, at the Panel's second meeting because, in its opinion, it broadens the scope of Argentina's defence and affects Panama's procedural rights. Panama also argues that Argentina has not explained how the measures in question are intended to secure compliance with each and every one of the new provisions invoked in Argentina's opening statement at the second meeting of the Panel.[769]

7.600. Before turning to consider whether Argentina identified the relevant laws and regulations for the purpose of its defence under Article XIV(c) of the GATS, we shall respond to Panama's objection to Argentina's late identification of the specific provisions in the instruments referred to previously and the inclusion of new instruments, and to what extent this affects its procedural rights.

7.601. As we have already emphasized, due process is an essential feature of the WTO dispute settlement system.[770] In our view, the fact that Argentina referred to new instruments and specific provisions of the instruments identified as relevant "laws or regulations" at the second meeting is not extemporaneous, although it would have been desirable for Argentina to have done so earlier in the proceedings. We consider that a complaining party cannot expect the defending party invoking an exception to present its entire defence in its first written submission. Although the defending party should endeavour to present its defence in the most comprehensive manner possible, it should also have the opportunity to react to the rebuttal presented by the complaining party in its second written submission and at the second meeting. Bearing in mind that in WTO panel procedures, the parties present their second written submissions simultaneously, the panel's second meeting with the parties represents the first opportunity the defending party has to challenge the rebuttal submission of the complaining party.

7.602. To this must be added the opportunity to respond to Argentina's arguments and to its responses to Panel questions. Indeed, in its opening statement at the first substantive meeting with the Panel, Panama argued that Argentina "does not identify the specific obligation or obligations with which the measures in question allegedly seek to secure compliance". Panama develops this argument in its second written submission, criticizing Argentina, *inter alia*, for having made a mere reference to the LIG without specifying the relevant provisions.[771] Panama also argues that Argentina only refers to the LIG and does not mention any other law or regulation under Argentine legislation.[772]

7.603. The Panel therefore considers that by specifying the provisions of the LIG and citing other instruments at the second meeting, Argentina was responding to Panama's arguments. One of the purposes of the second meeting is precisely to respond to the arguments contained in the other party's second written submission. The Panel also considers that Panama had the opportunity to defend its position and to respond to Argentina's arguments relating to the LIG, the LPT, the Criminal Tax Law and the National Constitution. Panama could have made known its arguments at the second meeting. Panama did not, however, make any statement in this regard at the second meeting, except to present a complaint in its closing statement with regard to the broadening of the scope of Argentina's defence.[773] Nor did Panama request more time in which to comment on the arguments presented by Argentina at the second meeting. We also note that in its comments on Argentina's response to a question from the Panel at the second substantive meeting, Panama

[769] Panama's closing statement at the second meeting of the Panel, para. 5. See also Panama's comments on Argentina's response to Panel question No. 82. In those comments, Panama claims that Argentina's arguments in its response to Panel question No. 82 are "extemporaneous". According to Panama, "the references to other regulations under Argentine law [i.e. other than the LIG] at this stage of the proceedings deprive Panama and third parties of the opportunity to defend their position properly". Panama also argues that the inadmissibility of Argentina's request is made even more obvious by the fact that Argentina has produced no evidence on the text of the various rules which it is invoking at this stage.

[770] In fact "[d]ue process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute". See Appellate Body Report, *US – Continued Suspension*, para. 433.

[771] Panama's opening statement at the first meeting of the Panel, para. 50; second written submission, paras. 2.180, 2.323, 2.447 and 2.550.

[772] Panama's second written submission, para. 2.179.

[773] Panama's closing statement at the second meeting of the Panel, para. 5. The Panel recalls that in *US – Gambling*, the respondent only presented its defence for the first time in its second written submission and the Appellate Body considered that the complaining party had had the opportunity to rebut the respondent's arguments. See Appellate Body Report, *US – Gambling*, paras. 274-276.

essentially put forward procedural arguments, but it could have taken the opportunity to respond to the substantive arguments presented by Argentina in its response as well.[774]

7.604. Although we consider that the reference to specific provisions of instruments previously indicated and the reference to new instruments at the second substantive meeting did not affect Panama's procedural rights, this does not mean that we shall not consider carefully whether Argentina has "identified" laws and regulations within the meaning of subparagraph (c) of Article XIV of the GATS.

7.605. The Panel notes that the instruments with which Argentina seeks to secure compliance are the same for measures 1, 2, 3 and 4, namely, the LIG, the LPT, the Criminal Tax Law and the National Constitution. With regard to measures 7 and 8, Argentina refers to different instruments. We start by examining whether Argentina has duly identified the relevant laws and regulations for the purposes of its defence under Article XIV(c) of the GATS in relation to measures 1 to 4 and will then examine whether it has done the same in relation to measures 7 and 8.

1. Whether Argentina has "identified" laws and regulations within the meaning of subparagraph (c) of Article XIV in respect of measures 1 to 4

7.606. The Panel observes that in its first and second written submissions Argentina only refers to the LIG as a "law or regulation" with which measures 1 to 4 seek to secure compliance. At the second meeting, Argentina mentioned three additional instruments, namely: the LPT, the Criminal Tax Law and the National Constitution. At that meeting, Argentina also identified various provisions in those four instruments.[775]

7.607. The concept of "laws and regulations" was examined by the Appellate Body in *Mexico – Taxes on Soft Drinks*, which concluded that those terms "cover rules that form part of the domestic legal system of a WTO Member".[776] All the instruments mentioned by Argentina form part of Argentina's domestic legal system.

7.608. We point out that Argentina has provided the text of the LIG, as well as that of the LPT.[777] As regards the Criminal Tax Law (Law No. 24.769), Argentina only cites the wording of Article 1 in its response to a Panel question.[778] As far as the National Constitution is concerned, Argentina has not provided the text. We note, however, that in its second written submission Panama refers to various constitutional principles and provides an exhibit citing various provisions of Argentina's National Constitution.[779]

7.609. In our view, when "identifying" laws or regulations with which the measures at issue seek to secure compliance within the meaning of Article XIV(c) of the GATS, it is not enough to refer to them or to their provisions; the respondent must provide their texts, either by way of an exhibit or by citing their wording in its submissions. It does not appear reasonable to us, however, to require a party to present an exhibit that is already in our record. Accordingly, even though Argentina has not provided them, we shall take into account the provisions of the National Constitution cited by Argentina, provided that they are contained in the Panel's record[780], in order to examine Argentina's defence. This is not the case for the Criminal Tax Law whose text has not been provided by Argentina and is not in our record, with the exception of Article 1, the wording of which is provided by Argentina in its response to Panel question No. 82.

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[774] Panama's comments on Argentina's response to Panel question No. 82.

[775] Argentina's opening statement at the second meeting of the Panel, para. 26. See also Argentina's response to Panel question No. 82.

[776] The Appellate Body added that "laws and regulations" also include "rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system". See Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79.

[777] Gains Tax Law, (Exhibits PAN-4 / ARG-42); Law on Tax Procedure (Exhibits PAN-9 / ARG-45).

[778] Argentina's response to Panel question No. 82.

[779] Panama's second written submission, paras. 2.223 and 2.342 (referring to Exhibit PAN-83, "Constitutional principles on tax matters").

[780] The following are the provisions of Argentina's National Constitution contained in full or in part in Exhibit PAN-83: Articles 4, 16, 17, 19, 52 and 75.

7.610. In the light of the foregoing, and as far as measures 1 to 4 are concerned, we consider that Argentina has identified the following laws and regulations within the meaning of Article XIV(c): the LIG, the LPT, Article 1 of the Criminal Tax Law and those provisions of the National Constitution contained in our record.

7.611. We turn to examine whether Argentina has duly "identified" the relevant "laws and regulations" in the case of measures 7 and 8.

2. Whether Argentina has "identified" the laws and regulations within the meaning of subparagraph (c) of Article XIV in respect of measures 7 and 8

7.612. We note that since its first written submission Argentina has referred to Article 118.3 of Law No. 19.550 on Commercial Companies (LSC) and Article 188 of IGJ Resolution No. 7/2005 as the "laws and regulations" with which measure 7[781] seeks to secure compliance.

7.613. According to Argentina, measure 8 seeks to secure compliance with Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin, particularly Articles 20, 20 *bis* and 21 thereof.[782] Argentina did not identify additional instruments at a subsequent stage of the proceedings as "laws or regulations" relevant to measures 7 and 8. We also note that, contrary to what Panama appears to assert[783], Argentina does not contend that measure 8 is justified in order to secure compliance with international standards.

7.614. As is the case of the instruments identified in relation to measures 1 to 4, the instruments to which Argentina refers in relation to measures 7 and 8, namely, the LSC, IGJ Resolution No. 7/2005 and Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin, form part of Argentina's legal system and are therefore "laws and regulations" within the meaning of Article XIV(c) of the GATS.

7.615. As we explained earlier, in order to determine whether these laws and regulations have been "identified" within the meaning of Article XIV(c) of the GATS it is not enough to refer to them or to their provisions; the respondent must provide their texts, either by means of an exhibit or by setting out their wording in its submissions. We note that Argentina has provided us with the text of Article 118.3 of the LSC and Article 188 of IGJ Resolution No. 7/2005 in relation to measure 7[784], as well as Articles 20, 20 *bis* and 21 of Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin in relation to measure 8.[785]

3. Conclusion

7.616. In the light of the foregoing, the Panel considers that Argentina has identified the laws and regulations with which it seeks to secure compliance by means of measures 1, 2, 3, 4, 7 and 8 within the meaning of Article XIV(c) of the GATS.

(ii) Whether the laws or regulations identified are not in themselves inconsistent with the provisions of the GATS[786]

7.617. We continue our analysis by examining whether the laws and regulations identified by Argentina, namely, Articles 1, 2, 5, 17, 80, 91, 92, 127, 129 and 130 of the LIG, Articles 33, 38, 39, 45 and 46 of the LPT, Article 1 of the Criminal Tax Law, the provisions of the National Constitution contained in our record, Article 118.3 of the LSC, Article 188 of IGJ Resolution

[781] Argentina's first written submission, para. 266; second written submission, para. 72; and opening statement at the second meeting of the Panel, para. 27.
[782] Argentina's first written submission, paras. 334 and 337; second written submission, para. 72; and opening statement at the second meeting of the Panel, para. 27.
[783] Panama's second written submission, para. 2.800.
[784] Law on Commercial Companies, (Exhibits PAN-34 / ARG-43); and IGJ Resolution No. 7/2005, (Exhibits PAN-62 / ARG-33).
[785] Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin, (Exhibit ARG-32).
[786] We note that the text of Article XIV(c) of the GATS refers to the provisions "of this Agreement", so it is our understanding that inconsistency must be examined in relation to the GATS.

No. 7/2005 and Articles 20, 20 *bis* and 21 of Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin are not in themselves inconsistent with the provisions of the GATS.

7.618. Argentina argues that its defensive tax measures, similar to those adopted by other WTO Members, have been devised to secure compliance with laws and regulations which are in themselves consistent with the GATS. According to Argentina, measures 1 to 4 and measure 7 are fully consistent with the GATS.[787] Argentina also claims that measure 8 is designed "to secure compliance" with laws and regulations established in accordance with the international recommendations on preventing the concealment and laundering of money of criminal origin.[788]

7.619. Panama responds that Argentina has not shown that the LIG is consistent with the GATS and asserts that it is in itself inconsistent with the GATS, especially Articles II:1 and XVII, as can be seen from Panama's numerous claims.[789] Panama also claims that Argentina has also failed to explain why Articles 118 of the LSC and 188 of IGJ Resolution No. 7/2005 and Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin should be considered consistent with the GATS.[790]

7.620. The Panel agrees with Panama that it is Argentina's responsibility to prove that its measures meet the conditions necessary for the defence invoked. In this connection, we recall that on several occasions the Appellate Body has emphasized that the legislation of a defending Member shall be considered WTO-consistent until proven otherwise.[791]

7.621. Beginning our examination with the LIG and the LPT, we note that Panama has made claims of inconsistency with regard to certain measures that are applied pursuant to specific provisions found in these two instruments. Panama challenges in particular measure 1 (withholding tax on payments of interest or remuneration, maintained pursuant to Article 93(c) of the LIG); measure 2 (presumption of unjustified increase in wealth, maintained by virtue of the unnumbered article added after Article 18 of the LPT); measure 3 (transaction valuation based on transfer prices, maintained pursuant to Article 15.2 of the LIG); and measure 4 (payment received rule for the allocation of expenditure, maintained pursuant to Article 18 of the LIG). Panama has not therefore challenged these two instruments as a whole. We also note that Panama has not challenged any provision of the Criminal Tax Law or Argentina's National Constitution.

7.622. We recall that in sections 7.3.2.2.4 and 7.3.4.2.4 above we concluded that measures 1, 2, 3 and 4 are inconsistent with Article II:1 of the GATS. This does not mean that the GATS inconsistency of certain provisions of the LIG and the LPT results in the GATS inconsistency of the other provisions of these two instruments.

7.623. As regards the laws and regulations cited in relation to measure 7, the Panel notes that Panama has not challenged any provision of the LSC. Panama challenges the requirements for the registration of branches, maintained pursuant to Article 192 of IGJ Resolution No. 7/2005, and Argentina refers to Article 188 of the same Resolution as a relevant "law or regulation". The Panel has found that the measure challenged by Panama and maintained by virtue of Article 192 of IGJ Resolution No. 7/2005 is inconsistent with Article II:1 of the GATS. Panama has not, however, put forward any claims of inconsistency in relation to other provisions of IGJ Resolution No. 7/2005 and the inconsistency of one provision of IGJ Resolution No. 7/2005 does not mean that the other provisions of this instrument are also GATS-inconsistent.

7.624. Lastly, we recall that we have concluded that the foreign exchange authorization requirement (measure 8), maintained by virtue of Section I of Communication "A" 4940 is inconsistent with Article II:1 of the GATS. Panama has not, however, challenged Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin, which Argentina cites as a "law or regulation" with which measure 8 seeks to secure compliance.

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[787] Argentina's first written submission, para. 267.

[788] Argentina's first written submission, para. 328.

[789] Panama's second written submission, paras. 2.197 and 2.198. See also second written submission, paras. 2.329, 2.451 and 2.554.

[790] Panama's second written submission, paras. 2.754 and 2.802.

[791] Appellate Body Report, *US – Carbon Steel*, para. 157. See also Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 111, and *US – Gambling*, para. 138.

7.625. The Panel recalls that a Member's legislation shall be presumed WTO-consistent until proven otherwise. In our view, the findings of inconsistency of certain provisions of the LIG, the LPT and IGJ Resolution No. 7/2005 do not mean that the other provisions of these instruments are also inconsistent with the GATS.[792] The Panel therefore considers that it is not necessary to undertake a detailed examination of the instruments and/or provisions invoked by Argentina in order to establish whether they are consistent with the GATS.

7.626. In the light of the foregoing, the Panel concludes that, for the purposes of its analysis of Argentina's defence under subparagraph (c) of Article XIV of the GATS, Argentina has identified laws and regulations which "are not inconsistent with the provisions of [the GATS]".

(iii) Whether the measures in question are designed to secure compliance with the laws or regulations identified by Argentina that are not in themselves inconsistent with the GATS

7.627. We continue our examination of whether measures 1, 2, 3, 4, 7 and 8 are designed to secure compliance with the laws and regulations identified by Argentina.

7.628. In *Mexico – Taxes on Soft Drinks*, the Appellate Body explained that the words "to secure compliance" refer to two types of measure which a Member may justify under subparagraph (d) of Article XX of the GATT 1994. According to the Appellate Body, these words "relate to the design[793] of the measures sought to be justified".[794] The Appellate Body considered that "a measure can be said to be designed 'to secure compliance' even if the measure cannot be guaranteed to achieve its result with absolute certainty".[795] Applying this conclusion of the Appellate Body to the similar language used in Article XIV(c) of the GATS, we proceed to determine whether measures 1, 2, 3, 4, 7 and 8 are "designed to" secure compliance with the laws and regulations identified by Argentina, even if it is not possible to guarantee that they will achieve that result with absolute certainty.[796] We start with measures 1 to 4.

1. Whether measures 1 to 4 are "designed to secure compliance" with the laws and regulations identified

7.629. We note that Argentina argues that measures 1 to 4 are designed to secure compliance with the LIG, under which the tax base for Argentine taxpayers' gains tax is determined. Argentina asserts that these defensive tax measures were devised to lessen the risk of artificial erosion of the tax base through deceptive and fraudulent transactions between Argentine taxpayers and entities located in non-cooperative jurisdictions. Argentina also maintains that measure 3 in particular, which increases the information requirements for transactions with non-cooperative jurisdictions, ensures compliance with the LIG, which establishes the general transfer pricing regime. This regime's overall objective is to determine the accuracy of the value of transactions between related parties, thereby preventing fraudulent and simulated transactions which have as their sole purpose to evade taxes and/or transfer profits to non-cooperative jurisdictions where there is a lack of tax transparency.[797]

7.630. Panama responds that Argentina does not explain how such measures secure compliance with the LIG. In its opinion, the failure to specify the particular LIG provision with which it is sought to secure compliance means that it is not possible to assess properly to what extent the measure is designed to achieve that compliance objective.[798] Panama contends that, for each of

[792] The Panel points out that in *Colombia – Ports of Entry* the panel reached the same conclusion in a similar situation. See Panel Report, *Colombia – Ports of Entry*, para. 7.530.

[793] As we indicated earlier, in the English text of the Appellate Body Report, the word "design" is used, which should be translated into Spanish as "*diseño*". Likewise, the Appellate Body refers to "measures designed to secure compliance". In the Spanish version of our analysis, therefore, we shall use the words "*diseño*" and "*diseñado para*" because we consider that they are closer to the original English text of the Appellate Body Report. See footnote 758 above.

[794] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 72.

[795] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 74.

[796] The Panel also recalls that it now has to assess whether the measures in question are designed to secure compliance with the relevant laws and regulations. The Panel is not now assessing to what extent the measures in question contribute to compliance with the relevant laws and regulations.

[797] Argentina's first written submission, paras. 264 and 265; second written submission, para. 71.

[798] Panama's second written submission, paras. 2.199, 2.330, 2.452 and 2.555.

the measures 1 to 4, Argentina's concern focuses on a very specific situation (for example, insider loans) and that the measure's scope goes beyond that concern.[799] Panama claims that Argentina has not shown how the practices referred to by Argentina allegedly violate the LIG and, therefore, Panama concludes that the measure is not "designed" to secure the compliance in question.[800] Panama contends that it is important to draw a distinction between tax evasion and avoidance, because although evasion is illegal, avoidance is legal.[801] Panama also argues that Argentina's real concern focuses on the possibility of tax evasion and not so much on avoidance. Panama argues that Argentina only invoked the LIG, which does not regulate the offence of tax evasion as such. According to Panama, Argentina's failure to refer to the rules governing tax evasion issues is an irremediable error.[802]

7.631. Panama also argues that Argentina does not adequately explain the circumstances or problems which led to the introduction of measure 1 (withholding tax on payments of interest or remuneration) and measure 2 (presumption of unjustified increase in wealth).[803]

7.632. We turn now to examine the content of the laws and regulations identified by Argentina. We begin with the provisions of the LIG identified by Argentina. The LIG establishes the general framework governing the collection of gains tax. Its first two articles define the subjects (Article 1)[804] and the object of the tax, i.e. the taxable "gains" (Article 2).[805] Article 5 of the LIG enshrines the principle of source or territoriality as the criterion for attribution of the taxable subject matter, according to which any sums originating in activities conducted within Argentine territory, by either Argentine or foreign service suppliers, are deemed to be gains of Argentine source.[806] Article 17 of the LIG defines the net gains subject to the tax and Article 80 the deductions permitted.[807] Article 91 of the LIG provides that the net profits earned by foreign suppliers are subject to a tax of 35%, which must be withheld and paid to the AFIP by the

[799] Panama's second written submission, paras. 2.204, 2.331-2.333, 2.453, 2.556 and 2.557.
[800] Panama's second written submission, paras. 2.207 and 2.334.
[801] Panama's second written submission, para. 2.193.
[802] Panama's comments on Argentina's response to Panel question No. 82.
[803] Panama's second written submission, paras 2.202 and 2.330.
[804] Article 1 of the LIG provides as follows:
All gains (*ganancias*) earned by natural or legal persons are subject to the emergency levy established by this Law.
The persons referred to in the preceding paragraph who are resident in the country shall pay tax on all their gains earned in the country or abroad, and may credit against the tax governed by this Law the sums actually paid under analogous levies on their activities abroad, up to an amount not exceeding the increased tax obligation resulting from inclusion of the gains earned abroad.
Non-residents shall pay tax only on their gains from Argentine sources, in accordance with the provisions of Title V.
Undivided estates are taxpayers in accordance with the provisions of Article 33.
See the Gains Tax Law, (Exhibit PAN-4). See also Exhibit ARG-42.
[805] Article 2 of the LIG provides as follows:
For the purposes of this Law, without prejudice to the special provisions in each category, and, even when not specified therein, gains are:
(1) yields, income or enrichments subject to a periodicity that implies the permanence of the source producing them and their authorization;
(2) yields, income, profits or enrichments, whether or not complying with the conditions of the previous paragraph, which are earned by the responsible persons referred to in Article 69 and all those derived from other companies, enterprises or single-person businesses, unless, though not in the case of the taxpayers covered by in Article 69, they carry out activities indicated in subparagraphs (f) and (g) of Article 79 and they are not supplemented by a commercial operation, in which case the provisions of the previous paragraph shall be applicable;
(3) the profits earned from the disposal of depreciable movables, regardless of the person who earns them.
See the Gains Tax Law, (Exhibit PAN-4). See also Exhibit ARG-42.
[806] Article 5 of the LIG provides as follows:
In general and without prejudice to the special provisions of the following articles, gains of Argentine source are those derived from assets situated, placed or used economically in the Republic, from the performance in the territory of the Nation of any act or activity susceptible of producing profits, or of actions occurring within the limits of the same regardless of the nationality, domicile or residence of the holder or of the parties intervening in the operations, or the place where the contracts are concluded.
See the Gains Tax Law, (Exhibits PAN-4 / ARG-42).
[807] Gains Tax Law, (Exhibits PAN-4 / ARG-42).

Argentine taxpayer.[808] The 35% rate is applied to the presumed net gain (Article 92). Articles 127, 129 and 130 of the LIG define the "gains of foreign source" taxable in Argentina. These three articles are a necessary complement to Articles 1 and 2 of the LIG, which establish the obligation for Argentine residents to pay tax on all the gains earned in Argentina or abroad.[809]

7.633. The LPT[810] lays down the methods for collecting taxes in Argentina, including procedures to ensure verification (Article 33), violations and applicable sanctions (Articles 38 and 39). Article 38 defines the procedures and sanctions applicable in cases of non-compliance with the obligation to submit sworn declarations (including those on gains subject to the LIG), which constitute the initial basis for determining the taxes payable by the Argentine taxpayer. Article 39 establishes sanctions for non-compliance with formal obligations by the taxpayer, for example, keeping documentary evidence of transactions or furnishing data required by the AFIP in order to control international operations. The LPT also provides for sanctions for omission and tax fraud (Articles 45 and 46). Article 45 establishes sanctions for cases where the sworn declaration is either not submitted or is inaccurate, while Article 46 establishes sanctions for any person engaging in tax fraud through misleading declarations or wilful concealment.[811]

7.634. Article 1 of the Criminal Tax Law, the only provision identified by Argentina, provides that "any obligor who, by means of misleading declarations, wilful concealment or any other scheme or deception, by action or omission evades all or some of the taxes payable to the national treasury, the provincial treasury or the Autonomous City of Buenos Aires, shall be punished by a term of imprisonment of two (2) to six (6) years provided that the amount evaded exceeds the sum of four hundred thousand pesos ($400,000) for each tax and for each financial year, even in the case of spot taxes or a fiscal period of less than one (1) year".

7.635. The provisions of its National Constitution identified by Argentina[812] refer to various tax principles.[813] According to Article 16 of the Argentine National Constitution "[a]ll its inhabitants are equal before the law … Equality is the basis of taxation".[814] In the commentary in the second column entitled "Synthesis", it is explained that the principle of equality of taxation means that the law "shall ensure the same treatment for persons in analogous situations"[815] Accordingly, equality refers to each taxpayer's capacity to pay: taxpayers with equal capacity to pay must pay the same tax. Moreover, Articles 4 and 75.2 determine that taxes are fixed by congressional law and are an essential source of financing for the State.[816] Likewise, Article 17, declaring the inviolability of private property, confirms that only Congress may levy the taxes mentioned in Article 4 of the Constitution.

7.636. From our examination of the laws and regulations identified by Argentina, we may conclude that the LIG, the LPT, the relevant section of the Criminal Tax Law and the National Constitution form the backbone of the regulatory framework for collecting taxes in Argentina. The

[808] Article 91 of the LIG, in part, provides as follows:
When net profits of any category are paid to companies, enterprises or any other beneficiary abroad, with the exception of dividends and profits of the persons to which items 1, 2, 3, 6 and 7 of subparagraph (a) of Article 69 refer, as well as the profits of the establishments included in subparagraph (b) of the same Article, whoever pays them must withhold and transfer to the Federal Public Revenue Administration, an autonomous body within the Ministry of the Economy and Public Works and Services, as sole and final payment, thirty five % (35%) of such profits.
See the Gains Tax Law, (Exhibit PAN-4). See also Exhibit ARG-42.

[809] See the Gains Tax Law, (Exhibits PAN-4 / ARG-42).

[810] Law on Tax Procedure, (Exhibits PAN-9 / ARG-45).

[811] Article 46 of the LPT provides the following: "Anyone who, by means of misleading declarations or wilful concealment, by action or omission defrauds the Treasury, shall be punishable by a fine of TWO (2) up to TEN (10) times the amount of the tax evaded". See the Law on Tax Procedure, (Exhibits PAN-9 / ARG-45).

[812] We recall that we are only considering the provisions of the National Constitution found in Exhibit PAN-83 ("Constitutional Principles on Tax Matters").

[813] Panama's second written submission paras. 2.223 and 2.342 (referring to Exhibit PAN-83, "Constitutional Principles on Tax Matters"). This document cites relevant constitutional provisions on tax matters and comments on each of them.

[814] Constitutional Principles on Tax Matters, (Exhibit PAN-83), p. 3.

[815] Constitutional Principles on Tax Matters, (Exhibit PAN-83), p. 3.

[816] Pursuant to Article 75.2 of the Argentine National Constitution, Congress is empowered "[t]o levy indirect taxes as a power concurrent with the provinces. To levy direct taxes for a specified term and proportionally equal throughout the national territory, provided that the defence, common security and general welfare of the State so require it." See Constitutional Principles on Tax Matters, (Exhibit PAN-83), p. 3. (emphasis original)

National Constitution in particular obliges the Argentine National Congress and the Government to levy taxes equitably, according to each taxpayer's capacity to pay. The relevant parts of the LIG and the LPT develop the tax principles established in the Argentine National Constitution. They thus oblige the competent authorities to levy tax on the earnings of natural and legal persons resident in Argentina according to their capacity to pay, ensuring that taxpayers with equal capacity pay the same amount of tax.

7.637. In our view, measures 1 to 4 are designed to secure compliance with the overall objective of the LIG, which is to collect the gains tax owed by Argentine taxpayers. They are also designed to secure compliance with certain key provisions of the LIG. As Argentina explains, measures 1 to 4 were established to prevent fraudulent and simulated transactions whose ultimate objective is to evade taxes and/or transfer profits to jurisdictions where there is a lack of tax transparency. In other words, these measures enable the Argentine authorities to determine whether transactions with non-cooperative jurisdictions have a legitimate commercial purpose or are simply aimed at evading the payment of taxes in Argentina. Thus, by making transactions with a high risk of evasion subject to additional information requirements (measures 2, 3 and 4) or higher tax (measure 1), these measures discourage harmful tax practices and enable the authorities to ensure that Argentine residents are taxed "on all their gains earned in the country or abroad", as provided in Article 1 of the LIG. By reducing the opportunities for conducting fraudulent transactions, measures 1 to 4 are also designed to secure compliance with Article 5 of the LIG, which considers earnings from activities performed in Argentine territory, by either Argentine or foreign service suppliers, to be gains of Argentine source (and thus subject to taxation in Argentina).

7.638. Measures 1 to 4 are also designed to secure compliance with the LPT. For example, the measures enable Argentina's tax authorities to prevent the use of transactions with service suppliers from non-cooperative countries to defraud the treasury by means of misleading declarations or wilful concealment, which is precisely the goal pursued by Article 46 of the LPT. This would also be the case for the offence defined in Article 1 of the Criminal Tax Law.

7.639. Their design also makes it easier to secure compliance with the relevant provisions of Argentina's National Constitution, especially Article 16 promoting tax equality, which provides that taxpayers with the same contributive capacity must pay the same tax. Consequently, by mitigating the risks of tax evasion, measures 1 to 4 contribute to ensuring that, given equal contributive capacity, honest taxpayers do not pay higher taxes than dishonest taxpayers.[817]

7.640. With regard to Panama's argument that a distinction has to be made between tax evasion and tax avoidance, we consider that such a distinction is not relevant for the purposes of Argentina's defence under Article XIV(c) of the GATS. Indeed, it is sufficient for Argentina to demonstrate that measures 1 to 4 are designed to secure compliance with its regulations and laws, including those established to prevent tax avoidance.[818]

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[817] The prejudicial effect of harmful tax practices on taxpayers has been recognized in the relevant international fora. See, for example OECD, *OECD's Project on Harmful Tax Practices, The 2001 Progress Report*, (Exhibit ARG-7), para. 2 ("[u]ltimately, taxpayer confidence in the integrity and fairness of the tax system, and in government in general, declines as honest taxpayers feel that they shoulder a greater share of the tax burden and that government cannot effectively enforce its own tax laws", available at http://www/oecd.org/ctp/harmful/2664450.pdf (exhibit provided in English; Spanish text available at http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx); *G-20 Statement on Transparency and Exchange of Information for Tax* Purposes, 21 November 2004, (Exhibit ARG-85), p. 1, ("[l]ack of access to information in the tax field has significant adverse effects. It allows some to escape tax that is legally due and is unfair to citizens that comply with the tax laws (exhibit provided in English; Spanish translation by the WTO Secretariat); and OECD *Addressing base erosion and profit* shifting, (Exhibit ARG-22), p. 50, available at http://www.oecd.org/tax/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm (exhibit provided in English; Spanish text available at: http://www.oecd-ilibrary.org/taxation/abordando-la-erosion-de-la-base-imponible-y-la-deslocalizacion-de-beneficios_9789264201224-es) ("if other taxpayers (including ordinary individuals) think that multinational corporations can legally avoid paying income tax it will undermine voluntary compliance by all taxpayers – upon which modern tax administration depends.").

[818] We note in this regard that the evidence provided by Argentina indicates that in the relevant international fora both tax evasion and tax avoidance are considered to be problematic practices that should be combated and eliminated. For example, in 2013, the G-20 stated: "Cross-border tax evasion and avoidance undermine our public finances and our people's trust in the fairness of the tax system. Today, we endorsed plans to address these problems and committed to take steps to change our rules to tackle tax avoidance,

7.641. We therefore disagree with Panama's claim that measures 1 to 4 are not designed to secure compliance with the LIG because the LIG "does not regulate the offence of tax evasion".[819] We consider that, despite not "defining" tax offences, the LIG is relevant as a law or regulation with which the measures at issue seek to secure compliance. If we were to follow Panama's argument that only "laws or regulations" that "define offences" can be relevant for the purposes of applying Article XIV(c) of the GATS, we would considerably diminish the scope of the "laws or regulations" that may be relevant under this provision. Panama's approach could have as a consequence that only criminal laws or regulations could be considered relevant "laws or regulations" for the purposes of applying Article XIV(c) of the GATS. The Panel considers, on the contrary, that the concept of "laws or regulations" within the meaning of Article XIV(c) also covers laws and regulations that establish obligations to be met in the jurisdiction of the Member invoking the provision. More specifically, laws or regulations that define offences are only relevant to the extent that there is a prior obligation that must be met.

7.642. In the light of the foregoing, the Panel considers that Argentina has demonstrated that measures 1, 2, 3 and 4 are designed to secure compliance with the relevant provisions of the LIG, the LPT, the Criminal Tax Law and the National Constitution of Argentina.

7.643. We now examine whether measures 7 and 8 are designed to secure compliance with the laws and regulations identified by Argentina.

2. Whether measures 7 and 8 are "designed to secure compliance" with the laws and regulations identified

7.644. With regard to measure 7, Argentina claims that it ensures compliance with Articles 118.3 of Law No. 19.550 on Commercial Companies (LSC) and 188 of IGJ Resolution No. 7/2005, which require proof of the legitimacy of commercial activities from the parent company in the home jurisdiction for the purpose of establishing branches in the City of Buenos Aires.[820] In the case of measure 8, Argentina maintains that it is a measure necessary for securing compliance with Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin in the area of prevention of money laundering. According to Argentina, the request for prior authorization in order to sell foreign currency to non-residents for the repatriation of direct investment enables the banking entity to place on record that it has verified the documentation submitted by the customer in order to approve the type of investment declared, and that the funds used for the purchase of the foreign currency transfer come from the sale within the country of the assets realized, as well as the reasonableness and authenticity of the transaction.[821]

7.645. In connection with measure 7, Panama responds that Argentina did not put forward any argument to show that this measure is designed to secure compliance with Articles 118 of the LSC and 188 of IGJ Resolution No. 7/2005, and that it effectively does so. According to Panama, Argentina neither identified nor submitted evidence regarding the fraudulent or deceptive practices that are explicitly contrary to Articles 118 of the LSC and 188 of IGJ Resolution No. 7/2005 and which it is sought to prevent or mitigate through Article 192 of IGJ Resolution No. 7/2005.[822] Panama argues that Argentina has also provided no explanation of how measure 8 is intended to secure compliance with Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin.[823]

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harmful practices, and aggressive tax planning." See the G-20 Declaration, Saint Petersburg Summit, 5-6 September 2013, (Exhibit ARG-87), p. 4 (exhibit provided in English; Spanish translation by the WTO Secretariat). We also note that the multilateral Council of Europe/OECD Convention on Mutual Assistance in Tax Matters condemns both tax evasion and tax avoidance: "The Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters was developed jointly by the Council of Europe and the OECD to provide for all possible forms of administrative co-operation between states in the collection and assessment of taxes, in particular with a view to combating tax avoidance and evasion." See the OECD Report, *Tax Co-operation 2009: Towards a Level Playing Field*, (Exhibit ARG-41), p. 346 (exhibit provided in English; Spanish translation by the WTO Secretariat).

[819] Panama's comments on Argentina's response to Panel question No. 82.

[820] Argentina's first written submission, para. 266; and second written submission, para. 72.

[821] Argentina's first written submission, paras. 328 and 329 and Explanatory Annex No. 2, para. 52; and second written submission, para. 72.

[822] Panama's second written submission, paras. 2.755 and 2.756.

[823] Panama's second written submission, para, 2.802.

7.646. As regards measure 7, we note that Section XV of the LSC[824], which includes Article 118, concerns companies incorporated abroad. Article 118.3 of the LSC establishes various requirements which a company incorporated abroad must meet when setting up in Argentina, such as proving that the company complies with the laws of its country, establishing domicile in Argentina or showing good cause for the decision to create the representative office, and designating the person to be responsible for running it. In turn, IGJ Resolution No. 7/2005 establishes various requirements for the registration of companies incorporated abroad. Article 188 of this Resolution specifies the requirements to be met for registering a foreign company under Article 118.3 of the LSC. This provision describes the documentation and type of information required for the purpose of registering a foreign company in Argentina (notably, the particulars of the partners, the amount of the assets etc.).[825] Consequently, the additional information required of companies located in non-cooperative jurisdictions intending to set up branches in the City of Buenos Aires, pursuant to Article 192 of IGJ Resolution No. 7/2005 under which measure 7 is maintained, enables the Argentine authorities to obtain the relevant information for the purpose of applying Article 118.3 of the LSC and Article 188 of IGJ Resolution No. 7/2005.

7.647. As regards measure 8, Argentina has argued that it is designed to secure compliance with Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin[826], which establishes rules to combat money laundering. Articles 20, 20 *bis* and 21, cited by Argentina, refer to the duty to inform the Financial Intelligence Unit (UIF). In particular, the various persons required to report to the UIF are identified (Article 20), the content of the reporting duty is defined (Article 20 *bis*) and other related obligations are established (for example, the obligation for the persons concerned to collect relevant information from their clients). The BCRA is expressly identified as a person subject to the duty to report to the UIF. In our view, by requiring the BCRA to conduct closer scrutiny of transfers to non-cooperative jurisdictions in order to ensure that the operations concerned, are of genuine origin, Communication "A" 4.940, Section I, under which measure 8 is maintained, is designed to secure compliance with Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin. These additional information requirements enable the Argentine authority, for example, to verify the identity of the person obliged to report to the UIF in situations where the requested authority fails to provide this information, as in the case of the authorities of a country which does not exchange information with Argentina. Measure 8, therefore, makes it possible to verify that the repatriation of capital does not cover up a money laundering operation.

7.648. Taking the above into account, the Panel considers that Argentina has demonstrated that measure 7 is designed to secure compliance with the relevant provisions of Law No. 19.550 on Commercial Companies (LSC) and IGJ Resolution No. 7/2005, and that measure 8 is designed to secure compliance with the relevant provisions of Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin.

3. Relevance of the prevailing circumstances at the time of implementing measures 1, 2, 3, 4, 7 and 8

7.649. We recall that previous panels have taken into account the prevailing circumstances at the time of implementing measures when assessing whether these were designed to secure compliance with laws and regulations under Article XX(d) of the GATT 1994.[827] We consider that such analysis is also relevant to our analysis under Article XIV(c) of the GATS.

7.650. We note that Argentina has presented evidence of the existence of fraudulent tax practices between Argentine taxpayers and non-cooperative jurisdictions. These practices involve "offshore" companies based in non-cooperative jurisdictions, including Panama. The fraudulent manoeuvres documented by the AFIP include the use of such companies as owners of intangible assets of an economic group, to which royalties or usage fees are payable; the supply of intra-group services; intermediation in buying and selling transactions and the simulation of financial loans. The AFIP found that Argentine residents participate in "offshore" companies located in Panama without informing the Argentine tax authorities and use those companies to evade tax. The AFIP also

[824] Law on Commercial Companies, (Exhibits PAN-34 / ARG-43).
[825] IGJ Resolution No. 7/2005 (Exhibits PAN-62 / ARG-33).
[826] Law on Concealment and Laundering of Money of Criminal Origin, (Exhibit ARG-32).
[827] Panel Reports, *Korea – Various Measures on Beef*, paras. 655-658; *China – Auto Parts*, paras. 7.309-7.312; and *Colombia – Ports of Entry*, paras. 7.542 and 7.543.

described the effects that harmful tax planning can have, including the possibility of laundering money through non-externalized operations and lowering the tax base. The AFIP indicates, *inter alia,* that investigative work led to the detection of 2,699 Argentine taxpayers with companies abroad, of which 27.26% were companies resident in Panama. The Argentine authorities identified 1,542 Argentine taxpayers who did not externalize their participation in "offshore" companies. The document also indicates that "the AFIP filed requests with the Republic of Panama for exchange of information through diplomatic channels, none of which received a response" from Panama.[828] The Panel therefore considers that the evidence submitted by Argentina demonstrates that transactions with entities located in non-cooperative jurisdictions make tax evasion possible because the lack of transparency characterizing such jurisdictions facilitates manoeuvres intended to evade taxes in Argentina.

7.651. We also note that the efficacy of defensive tax measures, such as the measures at issue in the present case, in preserving the integrity of national tax systems has been recognized in the relevant international fora, in particular the OECD and the G-20. Argentina has provided ample evidence of the recognition by these fora of the important role of defensive tax measures as a means of protecting public revenue.

7.652. For example, mention should be made of a 1998 OECD report which identifies the ways in which harmful tax practices affect the economy and the tax systems of other countries, proposes criteria for determining whether a particular jurisdiction may be considered a "tax haven", and identifies defensive measures that countries may take to deal with harmful tax competition.[829] Likewise, another OECD report of 2000 makes the following recommendation:

> The Committee [on Fiscal Affairs] recommends a general framework within which Member countries can implement a common approach to restraining harmful tax competition. This framework will facilitate the ability of countries to take defensive measures swiftly and effectively against jurisdictions that persist in their harmful tax practices. Defensive measures are important so that the adverse impacts from uncooperative jurisdictions can be addressed and so that these jurisdictions do not gain a competitive advantage over co-operative jurisdictions. In the application of the co-ordinated defensive measures, no distinction shall be made between jurisdictions that are dependencies of OECD countries and those that are not. These defensive measures would be at the discretion of countries and taken under their domestic legislation or under tax treaties. Moreover, each country may choose to enforce the defensive measures in a manner that is proportionate and prioritised according to the degree of harm that a particular jurisdiction has the potential to inflict, and taking into account the effectiveness of its existing defensive measures.[830]

7.653. An OECD report of 2001 acknowledges the benefits of exchanging information between tax authorities in order to halt harmful tax practices and notes that "a framework of coordinated defensive measures is a means by which countries with similar concerns can support each other's efforts to counter the effects of harmful tax practices".[831] Another OECD report of 2004 discusses the importance of guaranteeing a coordinated approach to the application of defensive measures against non-cooperative jurisdictions, indicating that it is not "possible to produce an exhaustive or exclusive list of measures that might be used" and identifies some possible defensive measures.[832]

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[828] AFIP, Offshore companies – Fraudulent manœuvres and harmful tax planning, (Exhibit ARG-44).

[829] Argentina's first written submission, paras. 17-29; and OECD, *1998 Report, Harmful Tax Competition – An Emerging Global Issue*, (Exhibit ARG-5), Chapter 2.

[830] OECD, *Towards Global Tax Co-operation – Report to the 2000 Ministerial Council meeting and Recommendations by the Committee on Fiscal Affairs, OECD,* 2000, (Exhibit ARG-6), para. 33, available at http://www.oecd.org/tax/harmful/2090192.pdf (exhibit provided in English; Spanish text available at: http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx). See also Argentina's first written submission, paras. 40 and 41.

[831] OECD, The *OECD's Project on Harmful Tax Practices*: *The 2001 Progress Report*, (Exhibit ARG-7), para. 47, available at http://www/oecd.org/ctp/harmful/2664450.pdf (exhibit provided in English; Spanish text available at http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx). See also Argentina's first written submission, paras. 44-48.

[832] OECD, The *OECD's Project on Harmful Tax Practices*: *The 2004 Progress Report*, (Exhibit ARG-9), para. 30, available at http://www.oecd.org/tax/harmful/30901115.pdf (exhibit provided in English; Spanish

7.654. We note that, at their meeting held in Pittsburgh in November 2009, the members of the G-20 reiterated their commitment "to maintain the momentum in dealing with tax havens, and agreed that they were "ready to use countermeasures against tax havens from March 2010".[833] Likewise, the lack of transparency in non-cooperative jurisdictions has been identified as a factor that can encourage money laundering and therefore justifies the application of defensive measures. In the same Declaration, the G-20 reaffirmed their commitment "to maintain the momentum in dealing with … money laundering".[834]

(iv) Conclusion

7.655. In the light of the foregoing, the Panel considers that Argentina has proved to its (the Panel's) satisfaction that measures 1, 2, 3 and 4 are designed to secure compliance with the relevant provisions of the LIG, the LPT, the Criminal Tax Law and Argentina's National Constitution. The Panel also considers that Argentina has proved to its (the Panel's) satisfaction that measure 7 is designed to secure compliance with the relevant provisions of Law No. 19.550 on Commercial Companies (LSC) and IGJ Resolution No. 7/2005, and that measure 8 is designed to secure compliance with the relevant provisions of Law No. 25.246 on Concealment and Laundering of Money of Criminal Origin.

7.656. Consequently, the Panel will now examine whether measures 1, 2, 3, 4, 7 and 8 are "necessary" to secure compliance with the aforementioned laws and regulations.

(b) Second element: Whether the measures are "necessary" to secure compliance with the laws and regulations identified by Argentina

(i) The standard of "necessity"

7.657. Having found that measures 1, 2, 3, 4, 7 and 8 are designed to secure compliance with the laws and regulations identified by Argentina, we begin our analysis of the second element of the legal standard set out in Article XIV(c) of the GATS, namely, whether measures 1, 2, 3, 4, 7 and 8 are "necessary" to secure compliance with the said instruments in Argentina's legislation.

7.658. When examining the concept of "necessary" in the context of subparagraph (a) of Article XIV of the GATS, the Appellate Body in *US – Gambling* defined the standard of "necessity" as an "objective" standard and urged panels to assess the "necessity" of the measure before them independently and objectively, taking into account the structure and application of the measures and all the evidence in the record. The Appellate Body noted that:

> [T]he standard of "necessity" provided for in the general exceptions provision is an *objective* standard. To be sure, a Member's characterization of a measure's objectives and of the effectiveness of its regulatory approach – as evidenced, for example, by texts of statutes, legislative history, and pronouncements of government agencies or officials – will be relevant in determining whether the measure is, objectively, "necessary". A panel is not bound by these characterizations, however, and may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. In any event, a panel must, on the basis of the evidence in the record, independently and objectively assess the "necessity" of the measure before it.[835] (emphasis original)

7.659. In *EC – Seal Products*, the Appellate Body summarized its previous decisions on the necessity standard as follows:

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text available at http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx). See also Argentina's first written submission, para. 55.

[833] Argentina's first written submission, para. 72 (referring to the *G-20, Leaders' Statement, The Pittsburgh Summit*, 24-27 September 2009, (Exhibit ARG-15), para. 15). ("We are committed to maintain the momentum in dealing with tax havens, money laundering, proceeds of corruption, terrorist financing, and prudential standards.") (exhibit provided in English; Spanish translation by the WTO Secretariat).

[834] Argentina's first written submission, para. 72 (referring to the *G-20, Leaders' Statement, The Pittsburgh Summit*, 24-27 September 2009, (Exhibit ARG-15), para. 15).

[835] Appellate Body Report, *US – Gambling*, para. 304. (footnote omitted)

> As the Appellate Body has explained, a necessity analysis involves a process of "weighing and balancing" a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure.[836] The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken.[837] [838]

7.660. In *EC – Seal Products*, the Appellate Body also recalled that:

> As the Appellate Body has stated, "[i]t is on the basis of this 'weighing and balancing' and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is 'necessary' or, alternatively, whether another, WTO-consistent measure is 'reasonably available' [to the Member concerned]".[839] Such an analysis, the Appellate Body has observed, involves a "holistic" weighing and balancing exercise "that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement".[840] [841]

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

1. The importance of the objective pursued

7.662. We proceed to assess the importance of the objective pursued by the laws and regulations with which measures 1, 2, 3, 4, 7 and 8 are designed to secure compliance.

7.663. In the Panel's opinion, it can be seen from Argentina's arguments that with respect to measures 1, 2, 3, 4 and 7 the objective pursued is to "protect the tax collection system against the risks posed by the harmful tax practices of non-cooperative jurisdictions for tax transparency purposes".[842] With respect to measure 8, Argentina claims that the objective of preventing the risks posed by laundering money of criminal origin is an interest of the utmost importance.[843]

<u>The objective pursued in the case of measures 1, 2, 3, 4 and 7</u>

7.664. As we have already explained, the objective of measures 1, 2, 3, 4 and 7 is "to protect the tax collection system against the risks posed by the harmful tax practices of jurisdictions that are non-cooperative for tax transparency purposes".[844] We note in this connection that previous panels have acknowledged the importance of protecting the tax revenue system, including the prevention

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[836] (Footnote original) Appellate Body Reports, *Korea – Various Measures on Beef*, para. 164; *US – Gambling*, para. 306; and *Brazil – Retreaded Tyres*, para. 182.

[837] (Footnote original) Appellate Body Report, *US – Gambling*, para. 307 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166). See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 321 (referring to Appellate Body Report, *US – Gambling*, para. 307). In the context of Article 2.2 of the TBT Agreement, the Appellate Body stated that "[i]n most cases, a comparison of the challenged measure and possible alternative measures should be undertaken". (Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.) The Appellate Body then proceeded to identify circumstances in which comparison with possible alternative measures may not be required, for instance, when the challenged measure is not trade restrictive, or when it makes no contribution to the objective. (Ibid., footnote 647 to para. 322).

[838] Appellate Body Report, *EC – Seal Products*, para. 5.169.

[839] (Footnote original) Appellate Body Report, *US – Gambling*, para. 307 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166).

[840] (Footnote original) Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182.

[841] Appellate Body Report, *EC – Seal Products*, para. 5.214.

[842] Argentina's first written submission, para. 289.

[843] Argentina's first written submission, paras. 333 and 339.

[844] Argentina's first written submission, para. 289.

of tax evasion.[845] We agree with those previous panels that protecting the national tax system is a question of primordial importance for any country, and particularly for a developing country.

7.665. We also note that the importance of protecting national tax collection systems, particularly in developing countries and, consequently, the need for measures to facilitate transparency and the exchange of information as a way of combating tax evasion, have been recognized as a priority at the international level for more than 15 years. In a 2000 report, for example, the OECD discussed the harmful effects of tax competition, explaining:

> The goal is to secure the integrity of tax systems by addressing the issues raised by practices with respect to mobile activities that unfairly erode the tax bases of other countries and distort the location of capital and services. Such practices can also cause undesired shifts of part of the tax burden to less mobile tax bases, such as labour, property, and consumption, and increase administrative costs and compliance burdens on tax authorities and taxpayers … the project is about ensuring that the burden of taxation is fairly shared and that tax should not be the dominant factor in making capital allocation decisions. … Tax base erosion as a result of harmful tax practices can be a particularly serious threat to the economies of developing countries. The project will, by promoting a co-operative framework, support the effective fiscal sovereignty of countries over the design of their tax systems.[846]

7.666. In 2004, participants in the Global Forum emphasized the crucial importance of ensuring that countries can obtain from other countries the information necessary to enforce their own tax laws:

> … to facilitate the creation of an environment in which all significant financial centres meet the high standards of transparency and effective exchange of information on both criminal and civil taxation matters. This is vital to ensuring that countries can obtain from other countries the information necessary to enforce their own tax laws, to ensuring that financial centres that meet such standards are not unduly disadvantaged by doing so, and to ensuring that financial centres that meet such high standards are and remain fully integrated into the international financial system and the global community. Any significant financial centre that decides not to adopt high standards of transparency and effective exchange of information must not be permitted to profit from that decision.[847]

7.667. The same year, the Ministers of Finance and Central Bank Governors of G-20 members reaffirmed their commitment to enhancing good governance and fighting illicit use of the financial system in all its forms:

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[845] In *Argentina – Hides and Leather*, the panel recognized the importance of the fight against tax evasion in Argentina:

> We are satisfied that Argentina has adduced argument and evidence sufficient to raise a presumption that the contested measures, in their general design and structure, are "necessary" even on the European Communities' reading of that term. Argentina stresses the fact that tax evasion is common in its territory and that, against this background of low levels of tax compliance, tax authorities cannot expect to improve tax collection primarily through the pursuit of repressive enforcement strategies (e.g. aggressive criminal prosecution of tax offenders). In those circumstances, Argentina maintains, tax authorities must direct their efforts towards preventing tax evasion from occurring in the first place.

See Panel Report, *Argentina – Hides and Leather*, para. 11.305.

Likewise, in *Dominican Republic – Import and Sale of Cigarettes*, the panel considered:

> The Panel finds no reason to question the Dominican Republic's assertions in the sense that the collection of tax revenue (and, conversely, the prevention of tax evasion) is a most important interest for any country and particularly for a developing country such as the Dominican Republic.

See Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.215, upheld by the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes*, para. 71.

[846] OECD, *Towards Global Tax Co-operation - Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, OECD* 2000, (Exhibit ARG-6), p. 5, available at http://www.oecd.org/tax/transparency/44430257.pdf (exhibit provided in English; Spanish translation available at http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx). See Argentina's first written submission, para. 35.

[847] OECD, *A Process for Achieving a Global Level Playing Field*, Global Forum on Taxation, Berlin 3-4 June 2004, (Exhibit ARG-10), para. 28 (exhibit provided in English; Spanish translation by Argentina). See Argentina's first written submission, para. 58; and response to Panel question No. 71, para. 2.

> Consequently, we are committed to transparency and exchange of information for tax purposes. We regard this as vital to enhance fairness and equity in our societies and to promote economic development. … Financial systems must respect commercial confidentiality, but confidentiality should not be allowed to foster illicit activity. Lack of access to information in the tax field has significant adverse effects. It allows some to escape tax that is legally due and is unfair to citizens that comply with the tax laws. It distorts international investment decisions which should be based on legitimate commercial considerations rather than the circumvention of tax laws. The G-20 therefore regards it as a mark of good international citizenship for countries to eliminate practices that restrict or frustrate the ability of another country to enforce its chosen system of taxation. … We call on all countries with financial centres to adopt and implement the high standards articulated by the OECD so that we can move towards an international financial system that is free of distortions created through lack of transparency and lack of effective exchange of information in tax matters. It is important that countries which do meet these standards have confidence that they will not be disadvantaged and that financial centres in countries that choose not to meet these standards will not benefit from that choice.[848]

7.668. In 2009, within the Global Forum framework, 70 jurisdictions and international organizations reiterated "… the need of governments to protect their tax bases from non-compliance with their tax laws …".[849] In the same year, the G-20 "welcome with satisfaction" the expansion of the Global Forum, whose main focus "will be to improve tax transparency and exchange of information so that countries can fully enforce their tax laws to protect their tax base".[850]

7.669. More recently, in 2012, the OECD started work on the tax planning techniques used by multinationals to minimize their tax burden by transferring profits to countries where there is no corporate tax or only low levels of income tax ("BEPS" Action Plan[851]). In a 2013 report, the OECD concluded as follows:

> What is at stake is the integrity of the corporate income tax. A lack of response would further undermine competition, as some businesses, such as those which operate cross-border and have access to sophisticated tax expertise, may profit from BEPS opportunities and therefore have unintended competitive advantages compared with enterprises that operate mostly at the domestic level. … Finally, if other taxpayers (including ordinary individuals) think that multinational corporations can legally avoid paying income tax it will undermine voluntary compliance by all taxpayers – upon which modern tax administration depends.[852]

7.670. In September 2014, the G-20 confirmed the importance of assisting developing countries to protect and increase their tax bases:

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[848] *G-20 Statement on Transparency and Exchange of Information for Tax Purposes*, 21 November 2004, (Exhibit ARG-85) (exhibit provided in English; Spanish translation by the WTO Secretariat).

[849] OECD Global Forum, *Moving Forward on the Global Standards of Transparency and the Exchange of Information for Tax Purposes*, Mexico, 1-2 September 2009, (Exhibit ARG-17), p. 1

[850] Argentina's first written submission, para. 72 (citing the *G-20 Leaders' Statement, The Pittsburgh Summit*, 24-27 September 2009, (Exhibit ARG-15), para. 15).

[851] "BEPS" is the acronym for "Base Erosion and Profit Shifting".

[852] OECD, *Addressing base erosion and profit* shifting, (Exhibit ARG-22), p. 50, available at http://www.oecd.org/tax/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm (exhibit provided in English; Spanish text available at: http://www.oecd-ilibrary.org/taxation/abordando-la-erosion-de-la-base-imponible-y-la-deslocalizacion-de-beneficios_9789264201224-es). See also Argentina's first written submission, paras. 79-82. Argentina also cites the *Action Plan on Base Erosion and Profit Shifting (BEPS*), (Exhibit ARG-21). In the Action Plan, the OECD explains that BEPS "undermines the integrity of the tax system, as the public, the media and some taxpayers deem reported low corporate taxes to be unfair", noting that this is a special concern in developing countries, where "the lack of tax revenue leads to critical under-funding of public investment that could help promote economic growth". See the *Action Plan on Base Erosion and Profit Shifting (BEPS*), (Exhibit ARG-21), p. 8 (exhibit provided in English; Spanish translation available at http://www.oecd-ilibrary.org/taxation/plan-de-accion-contra-la-erosion-de-la-base-imponible-y-el-traslado-de-beneficios_9789264207813-es). See also Argentina's first written submission, para. 82.

> We are strongly committed to a global response to cross-border tax avoidance and evasion so that the tax system supports growth-enhancing fiscal strategies and economic resilience. … We endorse the finalised global Common Reporting Standard for automatic exchange of tax information on a reciprocal basis which will provide a step-change in our ability to tackle and deter cross-border tax evasion. We will begin exchanging information automatically between each other and with other countries by 2017 or end-2018, subject to the completion of necessary legislative procedures. We call on all financial centres to make this commitment by the time of the Global Forum meeting in Berlin, to be reported at the Brisbane Summit, and support efforts to monitor global implementation of the new global standard. … We will continue to take practical steps to assist developing countries preserve and grow their revenue bases and stand ready to help those that wish to participate in automatic information exchange.[853]

7.671. The foregoing statements show us the support at the international level for protection of national tax collection systems against harmful tax practices, including tax evasion. In our view, these statements confirm that the objective, interest or value at stake in this dispute in respect of measures 1, 2, 3, 4 and 7 is of vital importance.

The objective pursued in respect of measure 8

7.672. As regards measure 8, we recall that the objective pursued is prevention of the risks posed by money laundering transactions.[854] As in the previous case, the importance of this objective has been acknowledged by previous panels, for example, in *US – Gambling*, where it was emphasized that protecting society against the threat of money laundering is an interest that is important in the highest degree.[855]

7.673. In our view, the evidence provided by Argentina confirms that combating money laundering is an internationally-established priority shared by many countries, both developed and developing. By way of example, the mandate of the FAFT, whose functioning we described in section 2.4.4 above, is to establish standards and promote the effective implementation of legal, regulatory and operational measures for combating money laundering, the financing of terrorism and the proliferation of weapons of mass destruction, as well as other related threats to the integrity of the financial system. The FAFT's Recommendations set out "essential measures" which its member jurisdictions (including Argentina) should have in place, *inter alia,* to "combat money laundering and terrorist financing …".[856]

7.674. In a 1998 report, the OECD expressed its concern at non-transparent administrative practices because they encourage money laundering:

> Because non-transparent administrative practices as well as an inability or unwillingness to provide information not only allow investors to avoid their taxes but also facilitate illegal activities, such as tax evasion and money laundering, these factors are particularly troublesome. … The most obvious consequence of the failure to provide information is that it facilitates tax evasion and money laundering. Thus, these factors are particularly harmful characteristics of a tax haven and, as discussed later, of a harmful preferential tax regime.[857]

7.675. In a report in 2001, the OECD refers to the FAFT's opinion for the period 1998-1999 on "Money Laundering Typologies", according to which "problems in obtaining information from certain jurisdictions on the beneficial owners of shell companies, international business

[853] *Meeting of G-20 Finance Ministers and Central Bank Governors*, Cairns, 20-21 September 2014, (Exhibit ARG-128), p. 2 (exhibit provided in English; Spanish translation by the WTO Secretariat).

[854] Argentina's first written submission, para. 339.

[855] Panel Report, *US – Gambling*, paras. 6.492 and 6.493.

[856] FATF, FATF Recommendations, (Exhibit ARG-25), p. 7. The FATF Recommendations were revised for the second time in 2003, and "have been endorsed by over 180 countries, and are universally recognized as the international standard for anti-money laundering and countering the financing of terrorism".

[857] OECD, *Harmful Tax Competition – An Emerging Global Issue*, 1998, (Exhibit ARG-5), para. 53 (exhibit provided in English; translation into Spanish by the WTO Secretariat).

corporations (IBCs), and offshore trusts were the primary obstacles in investigating transnational laundering activities".[858]

7.676. The evidence provided by Argentina shows that the need to combat money laundering is also one of the concerns of the G-20.[859]

7.677. Panama does not deny the importance attached by Argentina to protecting its tax collection system against harmful tax practices. Panama claims, however, that other interests of considerable importance also exist, for example, the rule of law and the principle of equality in tax matters. According to Panama, Argentina's interest in collecting taxes has to be interpreted in conjunction with the citizen's interest in tax measures that obey these principles of conformity with statute and equality.[860]

7.678. The Panel considers that the fact that there may be "other interests of considerable importance" does not lessen the importance of the interest or value which Argentina is seeking to achieve. Secondly, we understand that Panama's argument suggests that the rule of law and the principle of equality in tax matters are contrary to, or at least irreconcilable with, Argentina's interest in protecting its tax collection system against harmful tax practices. We do not agree with Panama. In accordance with the rule of conformity with statute enshrined in the National Constitution ("No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit"), no one is obliged to pay a tax that has not been imposed by law.[861] We consider that the corollary of the rule of conformity with statute in tax matters is that taxpayers must pay their taxes in accordance with tax legislation. The principle of tax equality requires that taxpayers with equal capacity to pay should pay the same tax. Accordingly, in our opinion, the principles of conformity with statute and equality in tax matters require a government to act against harmful tax practices. Indeed, as the OECD explains, "[u]ltimately, taxpayer confidence in the integrity and fairness of the tax system, and in government in general, declines as honest taxpayers feel that they shoulder a greater share of the tax burden and that government cannot effectively enforce its own tax laws".[862] In our view, the principles of conformity with statute and tax equality are not "other interests" but form an inherent part of the interest or common value of ensuring the integrity of the national tax collection system and, consequently of protecting it against the risks posed by harmful tax practices of non-cooperative jurisdictions.

7.679. In line with the approach of the panel in *Dominican Republic – Import and Sale of Cigarettes*[863], we consider that we have no reason to question Argentina's assertions to the effect that the "prevention of tax evasion and the proper application of its tax legislation are interests of maximum importance".[864] The Panel also agrees with Argentina that "the objective of preventing the risks posed by operations to launder money of criminal origin is an interest of the utmost importance".[865] The Panel considers that this objective is even more vital for a developing country such as Argentina.

7.680. We recall that, commenting on the relative importance of relevant common interests or values, the Appellate Body noted that "[t]he more vital or important those common interests or

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[858] OECD, *Behind the Corporate Veil – Using Corporate Entities for Illicit Purposes*, 2001, (Exhibit ARG-24), p. 19 (citing the FAFT report, *Money Laundering Typologies*, 1998-1999, p. 19).

[859] See, for example, G-20, *Declaration, Summit on Financial Markets and the World Economy*, 2008, (Exhibit ARG-14), *Action Plan to Implement Principles for Reform*, p.4; *G-20, Leaders' Statement, The Pittsburgh Summit*, 24-27 September 2009, (Exhibit ARG-15), para. 15; *G-20, Cannes Summit Final Declaration: Building our Common Future: Renewed Collective Action for the Benefit of All*, 2011, (Exhibit ARG-19), paras. 35 and 86; *Leaders' Declaration*, Los Cabos, México, 2012, (Exhibit ARG-20), para. 49; *G-20 Toronto Summit Declaration*, 26-27 June 2010, (Exhibit ARG-90), para. 22.

[860] Panama's second written submission, paras. 2.222-2.223, 2.341-2.342, 2.461, 2.561, 2.760 and 2.761.

[861] Constitutional Principles on Tax Matters, (Exhibit PAN-83), p. 2.

[862] OECD, *OECD's Project on Harmful Tax Practices, The 2001 Progress Report*, (Exhibit ARG-7), para. 2, available at http://www/oecd.org/ctp/harmful/2664450.pdf (exhibit provided in English; Spanish text available at http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx).

[863] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.215, upheld by the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes*, para. 71.

[864] Argentina's first written submission, para. 295.

[865] Argentina's first written submission, p. 103.

values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument".[866]

7.681. In fact, the Panel considers that the common interests or values at stake are particularly important. In any country, tax collection is an indispensable source of revenue to ensure the functioning of the State and the various government services to citizens. Protection of the national tax base guarantees the viability of a country's public finances and, by extension, its economy and financial system. The risks posed by harmful tax practices[867] are even more important for developing countries because they deprive their public finances of financial resources vital to promoting their economic development and implementing their domestic policies. Lastly, there can be no doubt that combating money laundering, which fits in with the fight against drug trafficking and terrorism, is a priority for the international community and thus also for Argentina.

7.682. The Panel concludes, therefore, that the protection of its tax collection system and the fight against harmful tax practices and money laundering are objectives, interests or values of the utmost importance for Argentina.

2. The contribution of measures 1, 2, 3, 4, 7 and 8 to achieving the objectives pursued

7.683. We continue our analysis with the contribution made by measures 1, 2, 3, 4, 7 and 8 to achieving the objectives pursued.

7.684. In *Brazil – Retreaded Tyres*, the Appellate Body determined various principles which govern evaluation of a measure's contribution in the context of Article XX of the GATT 1994. The Appellate Body explained in particular:

> A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban. Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it.[868]

7.685. We recall that, in the Appellate Body's opinion, "[t]he greater the contribution, the more easily a measure might be considered to be 'necessary'."[869] The Appellate Body also confirmed that the analysis of the contribution "can be done either in quantitative or qualitative terms".[870] The choice of a methodology for evaluating the contribution of a measure "is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made".[871]

7.686. As regards the importance of the measure's contribution, compared to the other components of the "necessity calculus", in *EC – Seal Products,* the Appellate Body explained that a measure's contribution is "only one component of the necessity calculus":

> A measure's contribution is thus only one component of the necessity calculus under Article XX. This means that whether a measure is "necessary" cannot be determined by the level of contribution alone, but will depend on the manner in which the other factors of the necessity analysis, including a consideration of potential alternative

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[866] Appellate Body Report, *Korea - Various Measures on Beef*, para. 162.
[867] The expression "harmful tax practices" covers tax evasion, avoidance and fraud.
[868] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 210. See also the Appellate Body Report, *EC – Seal Products*, para. 5.210.
[869] Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.
[870] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 146. See also Appellate Body Report, *EC – Seal Products*, para. 5.211.
[871] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145. See also Appellate Body Report, *EC – Seal Products*, para. 5.210.

> measures, inform the analysis. It will also depend on the nature, quantity, and quality of evidence, and whether a panel's analysis is performed in quantitative or qualitative terms. Indeed, the very utility of examining the interaction between the various factors of the necessity analysis, and conducting a comparison with potential alternative measures, is that it provides a means of testing these factors as part of a holistic weighing and balancing exercise, whether quantitative or qualitative in nature. The flexibility of such an exercise does not allow for the setting of pre-determined thresholds in respect of any particular factor. If the level of contribution alone cannot determine whether a measure is necessary or not, we do not see that mandating in advance a pre-determined threshold level of contribution would be instructive or warranted in a necessity analysis. The Appellate Body's approach in *Brazil – Retreaded Tyres* is consonant with an assessment of the contribution of a measure as one element of a holistic necessity analysis under Article XX. It is also consistent with our understanding that the EU Seal Regime, even if it were highly trade-restrictive in nature, could still be found to be "necessary" within the meaning of Article XX(a), subject to the result of a weighing and balancing exercise under the specific circumstances of the case and in the light of the particular nature of the measure at issue.[872]

7.687. It is therefore our understanding that the criterion of the measure's contribution to achieving the goal pursued is no more important than the other factors of the necessity analysis in determining whether a measure is necessary.

7.688. We first examine the design, structure and operation of the measures in question. We shall focus in particular on determining whether there is an ends and means relationship between the objective pursued and the measures in question. Given the nature of the evidence and the arguments of the parties, the Panel considers it more pertinent to conduct a qualitative analysis.

7.689. We recall that the objective of measures 1, 2, 3, 4 and 7 is to protect Argentina's tax collection system in accordance with its relevant laws and regulations. As to measure 8, the objective pursued is to prevent money laundering. We also recall that both the erosion of the Argentine tax collection system caused by harmful tax practices and money laundering are shielded by lack of transparency and the absence of exchange of information between tax authorities. In the case of cooperative jurisdictions, the Argentine authority has access to information on the actual beneficiaries of transactions and is therefore able to determine whether the transaction has a legitimate commercial purpose. In the case of non-cooperative jurisdictions, the Argentine tax authority has no access to information and is thus not able to identify the beneficial owner of a transaction.

Contribution of measure 1 to achieving the objective pursued

7.690. We recall that, as described in section 2.3.2 above, measure 1 consists of a legal presumption that, for the purposes of determining the tax base for the gains tax payable by the service suppliers, payments made to banks or financial entities located in non-cooperative countries as consideration for the granting of credits or loans or the placement of funds from abroad represent a net gain of 100% for such service suppliers. Pursuant to Article 93(c) of the LIG, Argentina's tax authorities presume, against any evidence to the contrary, a net gain in the case of interest or remuneration paid as consideration for credits, loans or placements of funds of any origin or nature from abroad. In order to determine the tax base for gains tax purposes, the rule defines the percentage applicable according to whether the bank or financial entity that has supplied the service to the Argentine consumer is located in a cooperative or non-cooperative country: (i) if it is located in a cooperative country, a net gain of 43% is presumed; (ii) if, on the other hand, it is located in a non-cooperative country, the presumed net gain is 100%. On these bases, Argentina applies a rate of 35% in both cases. This means that for every 100 units (of any currency) transmitted abroad for the purposes mentioned above, the entity granting the loan pays 15.05% tax if it is located in a cooperative jurisdiction and 35% if it is located in a non-cooperative jurisdiction.

7.691. Argentina explains that measure 1 counters a practice commonly used by Argentine taxpayers, namely, the simulation of loans from related offshore financial entities (insider loans).

[872] Appellate Body Report, *EC – Seal Products*, para. 5.215 (footnotes omitted).

In our view, the evidence presented by Argentina shows that the simulation of financial loans is a practice used by Argentine taxpayers to evade tax.[873] By taxing the profits earned from loans, credits or placements of funds from non-cooperative jurisdictions at a higher rate than that on the same services supplied from cooperative jurisdictions, measure 1 contributes to protecting the tax base since it serves to (i) discourage the undeclared outflow of capital; and (ii) discourage false payment of interest (on insider loans) which can then be deducted from gains tax by Argentine taxpayers.

7.692. We therefore consider that measure 1 contributes to safeguarding Argentina's tax collection system inasmuch as it prevents harmful tax practices, in particular the undeclared outflow of capital and so-called insider loans from financial entities related to Argentine taxpayers and located in non-cooperative countries.

Contribution of measure 2 to achieving the objective pursued

7.693. As to measure 2, described in section 2.3.3 above, we recall that it applies to any entry of funds in favour of Argentine taxpayers from non-cooperative countries in connection with an ex officio determination of the taxable subject matter by the AFIP for gains tax purposes. Under this measure, it is presumed that the funds received from entities located in non-cooperative jurisdictions constitute "unjustified increases in wealth" for the purpose of determining the tax base in Argentina. Argentina explains that the purpose of this measure is to prevent undeclared funds or income that should have been subject to tax in Argentina but was transferred to non-cooperative jurisdictions from being repatriated to Argentina through simulated transactions between the same beneficial owners or related parties.[874]

7.694. We note that the presumption may be rebutted, i.e. that a taxpayer who proves that the income subject to tax originated from lawful activities (exports, for example) is released from the presumption of unjustified increase in wealth. This measure therefore allows Argentina's tax authorities to obtain the information necessary to determine the true nature of a transaction with a jurisdiction that does not furnish information on the identity of the service supplier. In our view, the existence of this presumption discourages tax evasion by Argentine taxpayers (ex ante effect), as it makes it more difficult to repatriate any funds surreptitiously transferred by those taxpayers to non-cooperative jurisdictions (for example, to bank accounts in non-cooperative jurisdictions). In this way, the measure also contributes to combating the erosion of Argentina's tax base.

7.695. We therefore consider that measure 2 contributes to safeguarding Argentina's tax collection system inasmuch as it enables the Argentine authority to obtain the information necessary to ensure that a transaction between an Argentine taxpayer and a service supplier located in a non-cooperative jurisdiction has a legitimate purpose, to adjust the taxpayer's tax base and to restore tax equality with taxpayers for which the Argentine authority has all the necessary information.

Contribution of measure 3 to achieving the objective pursued

7.696. Measure 3, as described in section 2.3.4 above, consists of applying methods for valuing transactions based on transfer prices in order to determine the tax base for gains tax payable by Argentine taxpayers. The measure consists in the application, at the option of the Argentine taxpayer, of one of the methods for valuing transactions provided for in the regulations, and this involves additional information requirements and the calculation of transactions for the Argentine taxpayer in the case of transactions with persons in non-cooperative countries. This separate valuation method enables the Argentine authorities to determine the real value of transactions with non-cooperative jurisdictions.[875]

7.697. We therefore consider that measure 3 contributes to safeguarding Argentina's tax collection system inasmuch as it enables the Argentine authorities to obtain the information

[873] AFIP, Offshore Companies – Fraudulent Manoeuvres and Harmful Tax Planning, (Exhibit ARG-44), p. 2.

[874] Argentina's first written submission, para. 280; and opening statement at the second meeting of the Panel, para. 31.

[875] Argentina's first written submission, para. 282; and opening statement at the second meeting of the Panel, para. 31.

necessary to determine, in particular, whether the operation takes place between related parties and its real value. It also contributes to discouraging ex ante harmful tax practices similar to those mentioned in the preceding paragraphs and to protecting Argentina's tax base by correctly identifying the value of transactions and the expenses which are legitimately tax-deductible.

Contribution of measure 4 to achieving the objective pursued

7.698. Measure 4, as described in section 2.3.5 above, relates, like measures 1, 2, 3, to the determination of the tax base for gains tax payable by Argentine taxpayers. In this case, the measure consists of applying the "payment received rule" when allocating expenses for transactions between Argentine taxpayers and persons in non-cooperative countries. Under this measure, outlays by Argentine entities which constitute profits of Argentine source for persons located, incorporated, based or domiciled in non-cooperative countries must be allocated to the fiscal year in which payment for the transaction actually takes place. Argentina explains that, contrary to the general rule of "accrual", the payment received rule enables the tax benefits from simulated transactions to be eliminated.[876] Measure 4 thus enables the Argentine authorities to ensure that there has actually been a payment corresponding to the expenditure deducted by the Argentine taxpayer from its tax base.

7.699. We note that, in both cases, the expenditure effected may be deducted from the taxpayer's tax base; the difference is the time at which it may be deducted, i.e. the time at which the expenditure has been accrued, on the one hand, or the time of payment, on the other. Application of the time of payment as the criterion for determining the expenses deductible from taxable income does not prevent the expenditure from being deducted and can be resolved by submitting a sworn declaration of payment for the expenditure.[877]

7.700. We therefore consider that measure 4 contributes to safeguarding Argentina's tax collection system inasmuch as it prevents simulated transactions with service suppliers in non-cooperative jurisdictions.

Contribution of measure 7 to achieving the objective pursued

7.701. Measure 7, as described in section 2.3.8 above, consists of imposing additional requirements on branches of companies from non-cooperative jurisdictions for purposes of registration in the Public Trade Register of the Autonomous City of Buenos Aires. Apart from the requirements applicable to companies of cooperative countries, branches of companies established, registered or incorporated in non-cooperative countries must show "that the company is effectively engaged in economically significant business activities in the place where it was set up, registered or incorporated and/or in third countries", for which the General Justice Inspectorate (IGJ) may require additional documentation. The IGJ may also request additional documentation in order to verify the records of the company's partners.

7.702. Hence, on its face, this measure enables the Argentine authorities to verify that a company established in a non-cooperative country is effectively engaged in activities in its country of origin and has not been set up in that country simply to facilitate tax evasion in Argentina ("shell company").

7.703. We therefore consider that measure 7 contributes to safeguarding Argentina's tax collection system inasmuch as it seeks to verify that branches of foreign companies setting up in the City of Buenos Aires have a legitimate commercial purpose, have genuine activities, and have not been set up by companies related to Argentine taxpayers solely for the purpose of simulating transactions with Argentine taxpayers through which the latter may generate fictitious costs or tax credits and thereby improperly reduce the base for calculating their obligatory taxes.

Contribution of measure 8 to achieving the objective pursued

7.704. Measure 8, as described in section 2.3.9 above, consists of imposing the requirement to obtain prior authorization from the BCRA in order to be able to repatriate direct investment when

[876] Argentina's first written submission, para. 284; and opening statement at the second meeting of the Panel, para. 31.

[877] Argentina's first written submission, para. 301.

the beneficiary abroad (natural or legal person) is in a non-cooperative country. This measure applies to the repatriation of investments by non-residents to a non-cooperative jurisdiction and enables the BCRA to verify the genuineness of a repatriation of capital. It can thus be verified whether the operation involves an actual repatriation of investment and not disguised outflow of capital or foreign currency.

7.705. We therefore consider that measure 8 contributes to preventing money laundering operations inasmuch as it makes it compulsory to declare, *inter alia*, the origin of the funds to be repatriated for the purpose of preventing such operations.

Conclusion

7.706. In our view, measures 1, 2, 3, 4 and 7 *individually* contribute to protecting Argentina's tax collection system and to ensuring the collection of taxes in accordance with the relevant laws and regulations.

7.707. Measure 1 contributes to safeguarding Argentina's tax collection system inasmuch as it prevents harmful tax practices, especially the undeclared outflow of capital and so-called insider loans from financial entities related to Argentine taxpayers and located in non-cooperative countries.

7.708. Measure 2 contributes to safeguarding Argentina's tax collection system inasmuch as it enables the Argentine authorities to obtain the information necessary to ensure that a transaction between an Argentine taxpayer and a service supplier located in a non-cooperative jurisdiction has a legitimate purpose. This measure also makes it possible to adjust the tax base of the taxpayer in question and to restore tax equality with taxpayers for which the Argentine authority has all the necessary information.

7.709. Measure 3 contributes to safeguarding Argentina's tax collection system inasmuch as it enables the Argentine authorities to obtain the information necessary to determine, in particular, whether the operations is between related parties and its actual value. The measure also helps to discourage ex ante harmful tax practices similar to those mentioned in the preceding paragraphs and to protect Argentina's tax base by correctly identifying the value of transactions and the expenses that are legitimately tax-deductible.

7.710. Measure 4 contributes to safeguarding Argentina's tax collection system inasmuch as it prevents simulated transactions with service suppliers in non-cooperative jurisdictions.

7.711. Measure 7 contributes to safeguarding Argentina's tax collection system inasmuch as it seeks to verify that branches of foreign companies setting up in the City of Buenos Aires have a legitimate commercial purpose, have genuine activities, and have not been set up by companies related to Argentine taxpayers solely for the purpose of simulating transactions with Argentine taxpayers through which the latter may generate fictitious costs or tax credits and thereby improperly reduce the base for calculating their obligatory taxes.

7.712. Measure 8, for its part, contributes to preventing money laundering operations inasmuch as it makes it compulsory to declare, *inter alia*, the origin of funds to be repatriated for the purpose of preventing such operations.

7.713. At the same time, measures 1, 2, 3, 4 and 7 have an ex ante effect by preventing and deterring various harmful tax practices. For example, the mere fact of the existence of such measures, which act as tools for detecting fraudulent manoeuvres, may influence the future behaviour of taxpayers and dissuade them from resorting to such practices. This has a positive effect also for honest Argentine taxpayers because they can see that those that engage in illegal manoeuvres do not benefit from impunity and that the State, through defensive tax measures, ensures tax equality between Argentine taxpayers. We agree with the OECD that the mere existence of such measures helps to "educate" taxpayers.[878] Measure 8 also has an ex ante effect

[878] OECD, *Addressing base erosion and profit shifting*, (Exhibit ARG-22), p. 37, available at http://www.oecd.org/tax/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm (exhibit provided in English; Spanish text available at: http://www.oecd-ilibrary.org/taxation/abordando-la-erosion-de-la-base-imponible-y-la-deslocalizacion-de-bene

by preventing money laundering operations. Measures 1, 2, 3, 4, 7 and 8, therefore, contribute to safeguarding Argentina's tax collection system and preventing money laundering.

7.714. The Panel also considers that it should not disregard the contribution made by measures 1, 2, 3, 4 and 7, operating *in conjunction*, in the context of a comprehensive policy pursued by Argentina to ensure the collection of taxes in accordance with its relevant laws and regulations. The application of a single measure would not make sense in terms of combating harmful tax practices, given that these may utilize various different channels. In our view, this combined effect of the measures concerned corresponds to more than the simple sum of each measure taken separately.

7.715. It also appears significant to us that, in the relevant international fora (especially the OECD and the G-20), the use of defensive measures has been recognized as a legitimate tool which countries may utilize to protect their tax systems and prevent harmful tax practices. In this respect, the evidence presented by Argentina shows that transactions with non-cooperative jurisdictions pose a greater risk of tax evasion. It also shows that it is precisely the lack of transparency prevailing in such jurisdictions (security of anonymity) which attracts taxpayers wishing to evade tax in their countries of residence. We find evidence of recognition at the international level that preventive/defensive measures which foster tax transparency contribute to securing compliance with the tax legislation in force, and thus to protecting the integrity of tax collection systems. It can be seen from the evidence submitted by Argentina that the OECD considers that such measures are "potentially useful to neutralise the deleterious effects of harmful tax practices".[879] In addition, the examples provided by the OECD show that Argentina's measures in this dispute are in line with those envisaged by the OECD.

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ficios_9789264201224-es). ("Such deterrence strategies include, for example, influencing taxpayers through the issuance of public rulings, applying promoter penalties, imposing additional reporting obligations, as well as implementing effective mass communication strategies".)

[879] An OECD report explains:

> As noted above, the possible defensive measures that might be co-ordinated must remain flexible. *It is not, therefore, possible to produce an exhaustive or exclusive list of measures that might be used*. Based on the identification of some measures currently in use in OECD member countries and non-OECD economies, *a number of measures have been identified as being potentially useful to neutralise the deleterious effects of harmful tax practices*. These defensive measures are:
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> - The use of provisions *having the effect of disallowing any deduction, exemption, credit or other allowance in relation to all substantial payments made to persons located in countries or jurisdictions engaged in harmful tax practices except where the taxpayer is able to establish satisfactorily that such payments do not exceed an arm's length amount and correspond to bona fide transactions*.
> - The use of thin capitalisation provisions restricting the deduction of interest payments to persons located in jurisdictions engaged in harmful tax practices.
> - The use of legislative or administrative provisions *having the effect of requiring any resident who makes a substantial payment to a person located in a country or jurisdiction engaged in a harmful tax practice, enters into a transaction with such a person, or owns any interest in such a person to report that payment, transaction or ownership to the tax authorities,* such requirement being supported by substantial penalties for inaccurate reporting or non-reporting of such payments.
> - The use of legislative provisions allowing *the taxation of residents on amounts corresponding to income that benefits from harmful tax practices that is earned by entities established abroad in which these residents have an interest and that would otherwise be subject to substantially lower or deferred taxes*.
> - The denial of the exemption method or modification of the credit method. Where a country levies no or nominal tax on most of the income arising therein because of the existence of harmful tax practices, it may not be appropriate for such income to receive an exemption otherwise intended to relieve double taxation. Member countries that permit foreign tax credits may wish to modify those rules to prevent the pooling of income benefiting from harmful tax practices with other income. In addition, such countries may wish to implement systems to verify the amounts claimed actually constitute creditable taxes.
> - The use of legislative provisions ensuring that withholding taxes at a minimum rate apply to all payments of dividends, interest and royalties made to beneficial owners benefiting from harmful tax practices**.**
> - The use of provisions for special audit and enforcement programs to co-ordinate enforcement activities involving entities and transactions related to countries and jurisdictions engaged in harmful tax practices.
> - Terminating, limiting and not entering into tax treaties. Participating countries could adopt, and make public, a policy of not entering into tax conventions with countries and jurisdictions involved in harmful tax practices. Those that are parties to conventions with such countries and jurisdictions may wish to

7.716. Another OECD report which deals with ways of countering the incentives to evade taxes and explains the usefulness of measures which act *ex ante* to deter taxpayers from evading tax is a 2013 report entitled *Addressing Base Erosion and Profit Shifting*. In this report, the OECD explains that:

> Measures that negate or reduce the tax benefit sought, as well as initiatives aimed at influencing taxpayer's and third parties' behaviours, are of obvious relevance in the area of corporate tax planning. In practice, there are a variety of anti-avoidance strategies that countries use to ensure the fairness and effectiveness of their corporate tax system. These strategies often focus on deterring, detecting and responding to aggressive tax planning. Deterrence strategies generally aim at deterring taxpayers from taking an aggressive position. Such deterrence strategies include, for example, influencing taxpayers through the issuance of public rulings, applying promoter penalties, imposing additional reporting obligations, as well as implementing effective mass communication strategies. Detection strategies aim to ensure the availability of timely, targeted and comprehensive information, which traditional audits alone can no longer deliver. The availability of such information is important to allow governments to identify risk areas in a timely manner and be able to quickly decide whether and how to respond, thus providing increased certainty to taxpayers.
>
> In terms of response strategies, the ultimate objective of anti-avoidance measures is often not only to counter behaviour perceived as inappropriate but also to influence future behaviour. In other words, anti-avoidance measures are fundamental policy prohibitions to engage in certain planning and/or to obtain certain results.[880]

7.717. In the light of the foregoing, the Panel concludes that measures 1, 2, 3, 4, 7 and 8 contribute to achieving the objectives pursued.

3. The degree of trade restrictiveness of measures 1, 2, 3, 4, 7 and 8

7.718. We turn to an examination of the degree of restriction of measures 1, 2, 3, 4, 7 and 8. The Panel notes, firstly, that none of the measures in question, i.e. measures 1, 2, 3, 4, 7 and 8, entails a ban on trade in services in the sectors and modes concerned.

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take appropriate measures to ensure that these conventions are limited or terminated. Alternatively, participating countries could consider that all existing or proposed treaties with a country or jurisdiction engaging in harmful tax practices contain a limitation of benefits clause which would prevent the benefits of the treaty from being claimed by third country residents who had no real connection with the country or jurisdiction. With respect to terminating an existing treaty, it is recognized that such action has important implications which go beyond the revenue impact of the treaty.

See OECD, *The OECD's Project on Harmful Tax Practices, The 2004 Progress Report*, (Exhibit ARG-9), para. 30, available at http://www/oecd.org/ctp/harmful/2664450.pdf (exhibit provided in English; Spanish text available at http://www.ief.es/recursos/publicaciones/libros/informes_OCDE.aspx). (emphasis added)

[880] The OECD mentions various measures to combat tax avoidance which, in its opinion, are "most relevant":

- **General anti-avoidance rules or doctrines**, which limit or deny the availability of undue tax benefits, for example, in situations where transactions lack economic substance or a non-tax business purpose;
- **Controlled foreign company rules (CFC)**, under which certain base eroding or "tainted" income derived by a non-resident controlled entity is attributed to and taxed currently to the domestic shareholders regardless of whether the income has been repatriated to them;
- **Thin capitalisation and other rules limiting interest deductions**, which disallow the deduction of certain interest expenses when, *e.g.* the debt-to-equity ratio of the debtor is considered to be excessive;
- **Anti-hybrid rules**, which link the domestic tax treatment with the tax treatment in that foreign country thus eliminating the possibility for mismatches;
- **Anti-base erosion rules**, which impose higher withholding taxes on, or deny the deductibility of, certain payments (*e.g.* those made to entities located in certain jurisdictions).

See OECD, *Addressing Base Erosion and Profit Shifting*, (Exhibit ARG-22), pp. 37 and 38, available at http://www.oecd.org/tax/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm (exhibit provided in English; Spanish text available at: http://www.oecd-ilibrary.org/taxation/abordando-la-erosion-de-la-base-imponible-y-la-deslocalizacion-de-beneficios_9789264201224-es). (emphasis original)

7.719. We recall that measure 1 results in a higher tax on profits derived from certain services (loans, credits or other services involving the placement of funds in Argentina) provided by suppliers located in non-cooperative jurisdictions. There is an irrefutable presumption of enrichment, in the sense that consumers in Argentina that engage in a transaction with an entity located in a non-cooperative country shall be required to pay a higher tax even when they are in a position to show that the purpose of the operation is not to evade taxes in Argentina (for example, that it is a genuine loan and not an "insider loan"). The effect of measure 1 is that, for hypothetically the same type of service, the supplier from a non-cooperative jurisdiction will pay more gains tax on its transactions in Argentina than a supplier from a cooperative jurisdiction. This is not, therefore, a ban on trade in services but a measure that could potentially deter trade with non-cooperative countries by imposing higher taxes.

7.720. Measure 2 consists of a rebuttable presumption that enables the Argentine authorities to obtain additional information on certain transactions. We understand and accept Argentina's explanation that it has access to relevant tax information from those jurisdictions with which it has signed an agreement on the exchange of tax information. On the other hand, the same information is not automatically available in non-cooperative jurisdictions. We also note that Argentine taxpayers may avoid the tax effects of this measure by providing the additional information required. We do not therefore consider that measure 2 entails a very high level of trade restriction.

7.721. Measures 3 and 4 also enable the Argentine authorities to obtain additional information on certain transactions. These measures do not prevent the conduct of transactions but make them subject to certain requirements. For example, measure 3 results in the imposition of an accounting method which implies a greater burden for Argentine taxpayers in their transactions with suppliers of non-cooperative countries[881] but at no time does it prevent them from carrying out the transaction. The situation is similar with regard to measure 4, where we see that the rule applicable to Argentine taxpayers conducting transactions with service suppliers from non-cooperative countries does not prevent them deducting the value of the transaction from their tax base, but simply defers the deduction to the fiscal year in which payment takes place, instead of the time of accrual. However, we also do not consider that measures 3 and 4 imply a very high level of trade restriction.

7.722. Measure 7 consists of imposing additional requirements on branches of companies from non-cooperative countries for registration in the Public Trade Register of the Autonomous City of Buenos Aires. This measure also enables the Argentine authority to obtain information to which it has no access when dealing with companies related to a non-cooperative jurisdiction.[882] Accordingly, the burden of providing the information required does not appear to us to represent a significant obstacle to international trade in services.

7.723. Measure 8 comes into play when the service supplier withdraws from the Argentine market and repatriates its investment. This measure requires service suppliers from non-cooperative countries established in Argentine territory for a period of 365 days or more to seek prior authorization from the BCRA in order to repatriate their investment. Argentina claims that this measure implies closer scrutiny by the BCRA but this cannot prevent the repatriation of direct investments if they meet the prescribed conditions. Argentina indicates that, to date, all requests have received prior authorization.[883] Panama has not disputed these facts, but claims that Argentina does not provide any type of evidence in support of its statements.[884] The burden of providing the information required by the BCRA when repatriating investment does not appear to us to represent a significant barrier to international trade in services.

7.724. From the foregoing, it can be seen that measure 1 may have a potentially restrictive impact on trade in services inasmuch as it is a presumption that cannot be rebutted by the Argentine taxpayer, not even if the legitimacy of the transaction can be proved. In the case of measure 2, we note that its restrictive impact on international trade in services is less, since Argentine taxpayers can be released from the presumption provided that they can prove that the funds were earned from activities that they actually carried out or that were carried out by a third

[881] See para. 7.307 above.
[882] Argentina's first written submission, paras. 126 and 127.
[883] Argentina's first written submission, Explanatory Annex No. 2, paras. 41 and 43.
[884] Panama's second written submission, para. 2.803.

party, or else that the funds had been duly declared. For measure 3, we consider that the impact on international trade in services is also limited inasmuch as, although it entails a different accounting methodology in order to determine the market value of the transactions, which may attract higher tax, at no time does it prevent such transactions. Likewise, we do not see that measure 4 places significant obstacles in the way of transactions with non-cooperative countries, as its effect is to defer the deduction of expenses arising from such transactions for Argentine taxpayers until the time payment is made, but in no way prevents them from deducting the costs incurred. As regards measure 7, this requires additional information in order to prove the legitimacy of the commercial activities of the parent company in its home jurisdiction for any branch wishing to establish a commercial presence in the City of Buenos Aires. Measure 8 also involves supplying information to the Argentine authorities in order to verify the legitimacy of a transaction; it seems to us important to bear in mind also that this measure reflects the FAFT's recommendations.[885]

7.725. We stress that none of these measures prevents the supply of services by service suppliers from non-cooperative countries if the transactions have legitimate purposes. It seems to us, therefore, that these measures, except for measure 1, have relatively little restrictive impact on international trade in services. Even in the case of measure 1, the effect on international trade in services is not equivalent to a ban.

7.726. Panama argues that measures 1, 2, 3 and 4 affect transactions with non-cooperative jurisdictions which are not a subject of concern for Argentina but which are nevertheless affected by the measures. We understand that Panama is referring to legitimate transactions with non-cooperative jurisdictions. We do not share Panama's opinion in this regard. Indeed, the measures in question have to cover all transactions because they apply *ex ante* and their purpose is to detect fraudulent transactions. If the Argentine authorities could distinguish ex ante between transactions with a legitimate purpose and those which involve fraudulent manoeuvres, the measures in question would not be necessary.

7.727. We recall that the Appellate Body has explained that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects".[886] In the case before us, the design of the measures and the evidence in our record does not permit us to conclude that measures 1, 2, 3, 4, 7 and 8 have a significant distortive effect on international trade in services. The Panel therefore considers that measures 1, 2, 3, 4, 7 and 8 have a limited restrictive effect on international trade in services.

7.728. Having examined factors such as the importance of the objective, the measure's contribution to achieving the objective and the degree of trade restrictiveness of the measure, we now examine whether we can make a comparison between measures 1, 2, 3, 4, 7 and 8 and possible alternative measures.[887] This will enable us to determine whether there are other GATS-consistent measures reasonably available to Argentina.[888]

4. Possible alternative measures to measures 1, 2, 3, 4, 7 and 8

7.729. We start by recalling that, according to the Appellate Body, it is for Panama, as the complaining Member, to identify possible alternatives to Argentina's measures 1, 2, 3, 4, 7 and 8.[889] As we explained above, the Appellate Body has also clarified that an alternative measure must be "reasonably available" to the responding Member and must preserve for the Member the right to achieve the same desired level of protection with respect to the objective pursued:

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[885] The FAFT indicates in relation to "higher-risk countries", that "[f]inancial institutions should be required to apply enhanced due diligence measures to business relationships and transactions with natural and legal persons, and financial institutions, from countries for which this is called for by the FATF. The type of enhanced due diligence measures applied should be effective and proportionate to the risks." See the FATF Recommendations, (Exhibit ARG-25), p. 19. See also Argentina's first written submission, Explanatory Annex No. 2, para. 48.

[886] Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

[887] See Appellate Body Report, *EC – Seal Products*, para. 5.214 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.169)

[888] See Appellate Body Report, *EC – Seal Products*, para. 5.214 (referring to Appellate Body Reports, *US – Gambling*, para. 307; and *Korea – Various Measures on Beef*, para. 166).

[889] Appellate Body Reports, *US – Gambling*, para. 309; and *Brazil – Retreaded Tyres*, para. 156.

> The requirement, under Article XIV(a), that a measure be "necessary"—that is, that there be no "reasonably available", WTO-consistent alternative—reflects the shared understanding of Members that substantive GATS obligations should not be deviated from lightly. An alternative measure may be found not to be "reasonably available", however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a "reasonably available" alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.[890]

7.730. Only if the complaining party identifies alternative measures consistent with GATS provisions and achieving the same level of protection with respect to the objective pursued must the responding party demonstrate why it does not consider the alternative measure proposed by the complainant to be appropriate.[891]

7.731. It is thus for Panama to identify possible alternative measures reasonably available to Argentina that would enable Argentina to ensure the collection of taxes in Argentina, in accordance with its tax legislation, and that they do not involve additional risks of harmful tax practices or money laundering.

7.732. With regard to measures 1, 2 and 3, Panama basically argues that Argentina could take measures that target only the problem Argentina wishes to address, but do not affect all transactions, especially lawful ones.[892] We note, in the first place, that Panama has not specifically described what type of measure reasonably available to Argentina could be applied to transactions that are the subject of Argentina's concern, that is, transactions which cover up harmful tax practices. In fact, by their very nature, transactions which cover up tax evasion manoeuvres are not readily identifiable as such and the tax authorities therefore must have the means to identify them. Consequently, measures which would be applicable solely to transactions that constitute tax evasion could only be *ex post* measures. Nevertheless, in order to identify any unlawful transaction in the first instance, other measures are needed, operating ex ante, to enable the tax authorities to identify those transactions that are lawful and those that are not.

7.733. With regard to measure 1, going beyond the argument we have just expounded, Panama contends that the presumption "need not be irrebuttable".[893] It is our understanding that Panama is suggesting that an alternative measure for Argentina would be to transform the irrebuttable presumption provided for in Article 93(c) of the LIG into a rebuttable presumption. Although we consider that the possibility of rebutting a presumption could result in a lesser degree of trade restriction than in the case of an irrebuttable presumption, it is difficult for us to reconcile this argument of Panama's with its challenge to the rebuttable presumption in measure 2. Panama also argues that for transactions between related persons, Argentina "has available to it the transfer pricing regime under Article 15 of the LIG (except for its second paragraph), and other relevant provisions in the RIG, which would allow prices similar to market prices to be determined".[894] In any event, Panama does not explain how Argentina could achieve the same level of protection against the risk of tax evasion. In particular, Panama does not explain how, based on "Article 15 of the LIG (except for the second paragraph) … and other provisions in the RIG", Argentina could obtain information on a service supplier located in a non-cooperative jurisdiction in order to prevent the risk of tax evasion.

7.734. As regards measures 2 and 3, Panama puts forward no alternative measure, beyond stating, as we have already seen, that Argentina could take measures directed solely at unlawful transactions.

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[890] Appellate Body Report, *US – Gambling*, para. 308. See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156. (footnotes omitted)

[891] Appellate Body Report, *US – Gambling*, para. 311; and *Brazil – Retreaded Tyres*, para. 156. (footnotes omitted)

[892] Panama's second written submission, paras. 2.226 (measure 1); 2.344 (measure 2); and 2.463 (measure 3).

[893] Panama's second written submission, para. 2.227.

[894] Panama's second written submission, para. 2.228.

7.735. With regard to measure 4, we note that Panama does not propose measures which could constitute alternatives reasonably available to Argentina and be less trade-restrictive. In the case of measure 7, Panama proposes as an alternative the elimination of this regulatory provision.[895] In our view, this is equivalent to not proposing any alternative measure.[896] Lastly, Panama does not propose possible alternatives to measure 8 either.

7.736. The Panel therefore concludes that Panama has not identified any specific measure reasonably available to Argentina, that is less trade-restrictive and able to achieve the same level of protection in respect of the objective pursued as measures 1, 2, 3, 4, 7 and 8.

(ii) Conclusion

7.737. The Panel now has to weigh and balance the importance of the common interests or values protected by the laws or regulations in question, the contribution of the measures to securing compliance with these laws or regulations, and the effect of the measures on trade in services. In weighing these three factors, we must also bear in mind that no reasonably available alternative measures have been identified that would permit achievement of the same level of protection as measures 1, 2, 3, 4, 7 and 8.

7.738. The Panel has found that the protection of its tax collection system and the fight against harmful tax practices and money laundering are interests or values of the utmost importance for Argentina. We have also concluded that measures 1, 2, 3, 4, 7 and 8 contribute to achieving the objective pursued. We have also considered that measures 1, 2, 3, 4, 7 and 8 have a limited restrictive effect on international trade in services.

7.739. In addition, we have found that Panama has not identified any measure reasonably available to Argentina and less trade-restrictive that Argentina could take in order to achieve the same objectives, that is, to achieve the same level of tax collection and, as regards measure 8, achieve the same level of protection against money laundering.

7.740. In the light of the foregoing, the Panel concludes on a preliminary basis that measures 1, 2, 3, 4, 7 and 8 are "necessary to secure compliance with laws or regulations which are not inconsistent" with the GATS within the meaning of subparagraph (c) of Article XIV of the GATS. We now proceed to examine whether measures 1, 2, 3, 4, 7 and 8 comply with the requirements of the chapeau of Article XIV of the GATS.

(c) Third element: Whether measures 1, 2, 3, 4, 7 and 8 comply with the requirements of the chapeau of Article XIV of the GATS

7.741. Having found that measures 1, 2, 3, 4, 7 and 8 are provisionally justified under subparagraph (c) of Article XIV of the GATS, we shall now consider whether they comply with the requirements laid down in the chapeau of that provision, which states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures…

7.742. Recently, in *EC – Seal Products*, in connection with the chapeau of Article XX of the GATT 1994, which has very similar wording, the Appellate Body stated that "it imposes additional disciplines on measures that have been found to violate an obligation under the GATT 1994, but that have also been found to be provisionally justified under one of the exceptions set forth in the subparagraphs of Article XX of the GATT 1994".[897] The Appellate Body explained that the chapeau imposes these additional disciplines "by requiring that measures not be 'applied in a manner which

[895] Panama's second written submission, para. 2.762.

[896] In *Colombia – Ports of Entry*, the panel considered that when the alternative measure proposed by the complainant consists of producing the same result as would be obtained if the panel were to uphold any of its claims, it is not considered that the complainant has identified any reasonably available specific measure. See Panel Report, *Colombia – Ports of Entry*, para. 7.611.

[897] Appellate Body Report, *EC – Seal Products*, para. 5.296.

would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'."[898]

7.743. As regards the function of the chapeau, in *EC – Seal Products*, the Appellate Body indicated that:

> The function of the chapeau of Article XX of the GATT 1994 is to prevent the abuse or misuse of a Member's right to invoke the exceptions contained in the subparagraphs of that Article.[899] In that way, the chapeau operates to preserve the balance between a Member's right to invoke the exceptions of Article XX, and the rights of other Members to be protected from conduct proscribed under the GATT 1994.[900] Achieving this equilibrium is called for "so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves".[901] As the Appellate Body stated in *US – Gasoline*, the burden of demonstrating that a measure provisionally justified under one of the exceptions of Article XX does not constitute an abuse of such an exception under the chapeau rests with the party invoking the exception.[902] The Appellate Body explained that this is "a heavier task than that involved in showing that an exception … encompasses the measure at issue."[903][904]

7.744. In *US – Gambling*, the Appellate Body explained that the chapeau of Article XIV of the GATS refers to "the *application* of a measure already found by the Panel to be inconsistent with one of the obligations under the GATS but falling within one of the paragraphs of Article XIV".[905] In *EC – Seal Products*, the Appellate Body clarified that:

> Although this suggests that the focus of the inquiry is on the manner in which the measure is *applied*, the Appellate Body has noted that whether a measure is *applied* in a particular manner "can most often be discerned from the design, the architecture, and the revealing structure of a measure".[906] It is thus relevant to consider the design, architecture, and revealing structure of a measure in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. This involves a consideration of "both substantive and procedural requirements" under the measure at issue.[907] [,908] (emphasis original)

7.745. We note that the chapeau of Article XIV of the GATS describes in terms very similar to those of Article XX of the GATT 1994 the existence of three types of situation relating to the application of measures that may give rise to inconsistency with the said chapeau: (i) arbitrary discrimination between countries where like conditions prevail; (ii) unjustifiable discrimination between countries where like conditions prevail; or (iii) a disguised restriction on trade in services. In disputes under Article XX of the GATT 1994, the first two situations (i.e. arbitrary discrimination

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[898] Appellate Body Report, *EC – Seal Products*, para. 5.296.
[899] (Footnote original) Appellate Body Report, *US – Gasoline*, p. 22.
[900] (Footnote original) Appellate Body Report, *US – Shrimp*, para. 156.
[901] (Footnote original) The Appellate Body, in *US – Shrimp*, stated that:
The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.
Appellate Body Report, *US – Shrimp*, para. 159
[902] (Footnote original) Appellate Body Report, *US – Gasoline*, pp. 22-23.
[903] (Footnote original) Appellate Body Report, *US – Gasoline*, p. 23.
[904] Appellate Body Report, *EC – Seal Products*, para. 5.297.
[905] Appellate Body Report, *US – Gambling*, para. 339 (citing Appellate Body Report, *US – Gasoline*) (emphasis original). We recall that the text of the chapeau of Article XIV of the GATS is drafted in terms virtually identical to the chapeau of Article XX of the GATT 1994. Accordingly, the case law developed under Article XX of the GATT 1994 is relevant for our analysis.
[906] (Footnote original) Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29.
[907] (Footnote original) Appellate Body Report, *US – Shrimp*, para. 160.
[908] Appellate Body Report, *EC – Seal Products*, para. 5.302.

or unjustifiable discrimination) have often been addressed together.[909] The existence of one of these situations suffices to conclude that a measure cannot be justified under Article XX of the GATT 1994.[910]

7.746. Bearing in mind this guidance from the Appellate Body, we shall examine whether the *application* of the measures in question constitutes "a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail". In *US – Shrimp*, the Appellate Body indicated that in order for a measure to be applied in a manner which constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist: (i) the application of the measure must result in discrimination; (ii) the discrimination must be arbitrary or unjustifiable in character; and (iii) this discrimination must occur between countries where the same conditions prevail.[911] As the Appellate Body declared in *Brazil – Retreaded Tyres*, "t]he assessment of these factors … was part of an analysis that was directed at the cause, or the rationale, of the discrimination".[912]

7.747. We shall accordingly examine whether measures 1, 2, 3, 4, 7 and 8 are applied in such a manner as to discriminate between services and service suppliers of non-cooperative countries and like services and service suppliers of cooperative countries (MFN obligation under Article II:1 of the GATS).

7.748. In order to conduct this examination of the measure's application, we shall be guided by the Appellate Body's statement in *EC – Seal Products*. As already indicated, in that dispute the Appellate Body determined that "whether a measure is *applied* in a particular manner 'can most often be discerned from the design, the architecture, and the revealing structure of a measure'".[913] Consequently, below we shall examine "the design, the architecture, and the revealing structure" of measures 1, 2, 3, 4, 7 and 8 "in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".[914]

7.749. We have found that measures 1, 2, 3, 4, 7 and 8 distinguish between services and service suppliers of cooperative and non-cooperative countries. This distinction is made pursuant to Decree No. 589/2013, which we consider inherent in each and every one of the measures at issue as it is the key piece of legislation which defines their design and operation.

7.750. Article 1 of Decree No. 589/2013 establishes that cooperative countries are countries which (i) have signed with Argentina an agreement on the exchange of tax information or a convention to avoid international double taxation with a broad exchange of information clause, provided that information is effectively exchanged; or (ii) have initiated negotiations with Argentina for the purpose of signing such an agreement or convention. In the latter case, the AFIP shall be the body responsible for determining whether the conditions necessary for the initiation of negotiations have been met.[915]

7.751. We note that the text of Decree No. 589/2013 provides that a country may be considered "cooperative" not only when it has signed a tax information exchange agreement with Argentina and relevant information is effectively being exchanged, but also when it has *initiated negotiations* with Argentina. However, we observe that Argentina has no access to tax information from countries with which it is negotiating. Argentina itself appears to acknowledge this when it states that the objective of granting cooperative status to those countries with which it is negotiating is to encourage the conclusion of such agreements.[916] We fail to see, therefore, how Argentina can

[909] See, for example, Appellate Body Reports, *US – Gasoline*, *US – Shrimp (Article 21.5 – Malaysia)*, *US – Gambling*, and *Brazil – Retreaded* Tyres; and Panel Reports, *US – Gambling*, *EC – Tariff Preferences*, *EC – Asbestos* and *Brazil – Retreaded Tyres*.

[910] Appellate Body Report, *US – Shrimp*, para. 184.

[911] Appellate Body Report, *US – Shrimp*, para. 150.

[912] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225. (footnote omitted)

[913] Appellate Body Report, *EC – Seal Products*, para. 5.302 (citing Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29). (emphasis original)

[914] Appellate Body Report, *EC – Seal Products*, para. 5.302. We point out that Article XIV of the GATS refers to "like conditions", whereas the GATT 1994 refers to "the same conditions".

[915] Decree No. 589/2013, (Exhibits PAN-3 / ARG–35).

[916] Argentina's second written submission, para. 76. See also Argentina's response to Panel question No. 12(b) and opening statement at the second meeting of the Panel, para. 36.

systematically have access to the information necessary to prevent harmful tax practices or money laundering without the existence of an information exchange agreement.

7.752. In our view, it is not simply a question of Argentina not having access to the tax information of countries with which it is negotiating. Indeed, to this must be added the fact that, during the negotiations, the negotiating countries are not subject to the requirements laid down in measures 1, 2, 3, 4, 7 and 8. This means that the Argentine authorities are not able to ensure the legitimacy of transactions with suppliers from these countries, even though the lack of access to information means that these countries represent a risk for Argentina's tax system. The mere fact of initiating and conducting negotiations does not enable Argentina to meet its objectives of ensuring tax collection and combating harmful tax practices or money laundering. In fact, it could be argued that this situation is counterproductive with regard to the achievement of these objectives. We therefore agree with Panama that the mere initiation of negotiations – without the certainty of concluding an agreement – does not constitute a sufficient mechanism to ensure the effective exchange of information and compliance with Argentine legislation.[917]

7.753. We are not convinced that, as contended by Argentina, the fact of designating as cooperative countries those with which negotiations have been initiated in good faith with a view to signing an information exchange agreement promotes the objectives of such agreements and encourages the rapid conclusion of an agreement.[918] It appears to us, on the contrary, that a country which has the status of cooperative country despite failing to transmit the information sought by the Argentine authorities does not really have any incentive rapidly to conclude an agreement obliging it to exchange the relevant tax information.

7.754. The relations between Panama and Argentina illustrate this problem. As explained by Argentina, Panama was included "as of 1 January 2014 as 'a cooperative country for tax transparency purposes' in the context of Decree No. 589/2013 and the RG AFIP [3576]/2013, after having initiated negotiations on signing an agreement on the exchange of information for tax purposes in November 2013 …".[919] In other words, up to 31 December 2013, Argentina considered Panama to be a "country with low or no taxes"[920] and, accordingly, applied defensive tax measures to it. From 1 January 2014 onwards, Argentina ceased to apply these defensive tax measures to Panama as it had initiated negotiations with Panama in November 2013.[921] Nevertheless, it would appear there was no change as regards Argentina's access to tax information from Panama, despite Panama's new status: Argentina still has no access to such information.[922]

7.755. Consequently, the Argentine authorities' application of the initiation of negotiations rule for granting cooperative country status creates distortions within the category of cooperative countries itself, since Argentina includes within that category both countries with which it effectively exchanges information (for example, Germany) and countries with which there is no exchange (as is the case for Panama). In turn, these distortions are reflected in the application of measures 1, 2, 3, 4, 7 and 8, as they are imposed on non-cooperative countries in application of Decree No. 589/2013.

7.756. Together with this situation, we also note distortions in relation to the updating of the list. We recall that, pursuant to Article 2 of Decree No. 589/2013, the AFIP is empowered to draw up the list of cooperative countries and to keep it up to date. According to Argentina, this updating takes place annually at the beginning of the fiscal year.[923] At the time of circulating this Report to the parties, the list of countries which Argentina considers to be cooperative continues to be the one published on the AFIP's website on 1 January 2014. Panama, despite have repeatedly stated that "it has not initiated negotiations on concluding an agreement on exchange of tax

[917] Panama's opening statement at the first meeting of the Panel, para. 54.

[918] Argentina's opening statement at the second meeting of the Panel, para. 36. See also response to Panel question No. 9(a).

[919] Argentina's response to Panel question No. 10(c) and (d).

[920] Decree No. 589/2013 replaced this term by "country not considered 'cooperative for tax transparency purposes'".

[921] Argentina's response to Panel question No. 10(c) and (d).

[922] We understand that Panama's refusal to acknowledge that it has initiated negotiations with a view to signing an agreement on the exchange of information appears to indicate that Panama has not exchanged information with Argentina. See Panama's response to Panel question No. 7.

[923] Argentina's opening statement at the second meeting of the Panel, paras. 41-43.

information"[924], remains on the list of cooperative countries. However, other countries with which Argentina initiated negotiations in 2014 (namely, Belarus, Cameroon, Côte d'Ivoire, Cyprus, Gabon, Gibraltar and Hong Kong (China))[925] still do not have cooperative country status and are therefore subject to Argentina's defensive tax measures.

7.757. We also note that the European Union has expressed doubts about the "apparent discretion" with which Argentina designates cooperative jurisdictions for the purpose of applying the chapeau of Article XIV of the GATS. The European Union claims that "the discretion of Argentina's authorities does not seem to be curtailed by established criteria provided in law nor do the distinctions drawn by Argentina appear to be linked to the regulatory objective. Rather, from Argentina's own description of how Panama was first considered to be a non-cooperating country … and is designated as a cooperating jurisdiction as of 1 January 2014, it appears that Argentina is not necessarily making distinctions on the basis of international standards or effective tax cooperation on a bilateral basis".[926]

7.758. In this context, Panama criticizes Argentina for excluding from the "cooperative countries" category jurisdictions such as Bahrain and Hong Kong (China) which, in the opinion of the Global Forum itself, are in the same situation as Argentina as regards compliance with the tax transparency and information exchange standards of that organization. Moreover, Argentina includes in the list of "cooperative countries" jurisdictions which, in the opinion of the Global Forum, do not yet meet its basic standards (for example, Luxembourg and the British Virgin Islands).[927] Panama's argument does not appear to us to be relevant. Argentina's objective is to exchange tax information. The key factor in enabling Argentina to exchange tax information is signature of an agreement on the exchange of tax information with a jurisdiction, not the Global Forum's classification or categorization of the jurisdiction. Thus, the fact that a country is "in the same situation" as Argentina according to the Forum's criteria (that is, at the same "peer review" stage) does not necessarily mean that the country is exchanging information with Argentina.[928] Likewise, the fact that a country does not comply with the Global Forum's basic standards does not mean that it does not exchange tax information with Argentina if it has signed an information exchange agreement with Argentina.[929] Again, the distortion has its origin in the discretionary authority which governs the updating of the list, which is expressed in practice in the imposition of measures 1, 2, 3, 4, 7 and 8, which apply to non-cooperative countries pursuant to Decree No. 589/2013.

7.759. We also find it difficult to reconcile the application of these measures, pursuant to Decree No. 589/2013, with the transparency and information exchange standards established by the Global Forum itself. The "Terms of Reference" for the Global Forum's Peer Review Process which represent, in particular, "the standards and key elements against which jurisdictions' legal and administrative framework and actual implementation of the standards will be assessed" explain that:

> Exchange of information for tax purposes is effective when reliable information, foreseeably relevant to the tax requirements of a requesting jurisdiction is available, or can be made available, in a timely manner and there are legal mechanisms that enable the information to be obtained and exchanged. It is helpful, therefore, to conceptualize transparency and exchange of information as embracing three basic components:

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[924] Panama's response to Panel question No. 7.

[925] Argentina's response to Panel question No. 10(b)(ii).

[926] European Union's third-party submission, para. 121 (Spanish translation by the WTO Secretariat).

[927] Panama's response to Panel question No. 1 (referring to Exhibits PAN-3 and ARG-2).

[928] It can be seen from the actual terms of reference of the Global Forum that the exchange of information essentially has a legal basis: "The legal authority to exchange information may be derived from bilateral or multilateral mechanisms (*e.g.* double tax conventions, tax information exchange agreements, the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters) or arise from domestic law." See Global Forum, *Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information for Tax Purposes (Terms of Reference)*, OECD, 2010, (Exhibit ARG-40), para. 14 (exhibit provided in English; Spanish translation by the WTO Secretariat). Paragraph C.2 of this document provides: "The jurisdictions' network of information exchange mechanisms should cover all relevant partners".

[929] In fact, countries which do not yet comply with the Forum's standards have an interest in signing agreements, since this is one of the criteria taken into account by the Forum when evaluating its Members' level of compliance with the Forum's standards.

- availability of information
- appropriate access to the information, and
- the existence of exchange of information mechanisms.

In other words, the information must be **available**, the tax authorities must have **access** to the information, and there must be a basis for **exchange**. If any of these elements are missing, information exchange will not be effective.[930]

7.760. As regards the "essential elements" of exchange of information, the Global Forum explains that exchange of information mechanisms should "provide for effective exchange of information and should be in force; where agreements have been signed, jurisdictions must take all steps necessary to bring them into force expeditiously".[931] Accordingly, the Global Forum lays emphasis on the exchange of information having a legal basis which guarantees effective exchange. The mere prospect – whether near or remote – of obtaining such information because negotiations on an information exchange agreement have been initiated (including negotiations initiated in good faith between Argentina and another country) does not appear to be in line with the standard established by the Global Forum.

7.761. From the foregoing, we conclude that, in granting cooperative country status to countries with which it is negotiating a tax information exchange agreement, without having in force an agreement that allows effective exchange of such information, Argentina is applying measures 1, 2, 3, 4, 7 and 8 in a manner that is counterproductive with regard to the objective it has itself declared in order to justify the distinction between cooperative and non-cooperative countries. We recall that this objective is "the ability … to have access to the information necessary to secure compliance with Argentina's laws and regulations".[932] This situation leads us to the statement by the Appellate Body in *Brazil – Retreaded Tyres* in the sense that the absence of a relationship between the measures and the objectives indicates that the measures discriminate in an "arbitrary or unjustifiable" way.[933] For example, jurisdictions in different situations as regards Argentina's access to information are classified in the same category; and jurisdictions in a similar situation as regards Argentina's access to information are placed in different categories. We also consider that the annual updating of the list leads to discriminatory treatment between jurisdictions in the same situation. In both cases, we consider that the distortions caused by the design and application of Decree No. 589/2013 are carried over to the application of measures 1, 2, 3, 4, 7 and 8 because Decree No. 589/2013 is an inherent part of them.

7.762. Consequently, we conclude that the application of measures 1, 2, 3, 4, 7 and 8 constitutes arbitrary and unjustifiable discrimination within the meaning of the chapeau of Article XIV of the GATS.

7.763. Taking into account the above, the Panel concludes that Argentina has not demonstrated that the measures at issue are applied in accordance with the chapeau of Article XIV of the GATS.

7.3.5.2.5 Conclusion

7.764. In the light of the foregoing, we find that measure 1 (withholding tax on interest or remuneration payments), measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices), measure 4 (payment received rule for the allocation of expenditure), measure 7 (requirements for the registration of branches) and measure 8 (foreign exchange authorization requirement) are not covered by the exception in Article XIV(c) of the GATS because their application constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XIV of the GATS.

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[930] Global Forum, *Terms of Reference*, OECD 2010, (Exhibit ARG-40), paras. 8 and 9 (footnotes omitted, emphasis original) (exhibit provided in English; Spanish translation by the WTO Secretariat).

[931] Global Forum, *Terms of Reference*, OECD 2010, (Exhibit ARG-40), para. C.1.8, p. 8 (exhibit provided in English; Spanish translation by the WTO Secretariat).

[932] Argentina's second written submission, para. 76.

[933] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 232.

7.3.6 Argentina's defence under Article XIV(d) of the GATS

7.3.6.1 Main arguments of the parties

7.3.6.1.1 Argentina

7.765. Argentina claims that its defensive tax measures in respect of Panama's national treatment claims under Article XVII of the GATS (measures 2, 3 and 4) are justified, alternatively, under Article XIV(d) of the GATS, as measures which establish "*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*".[934]

7.766. Argentina claims that the defensive tax measures provided for in the LIG and the LPT "impose a difference in treatment that ensures the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members" within the meaning of Article XIV(d) of the GATS, including footnote 6 to subparagraph (d). Argentina contends that, as can be seen from Panama's description, Argentina's defensive tax measures have been established to impose different treatment that ensures the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers from countries not cooperating for tax transparency purposes. Argentina claims that their very objective means that each of measures 2, 3 and 4 apply different treatment to transactions by Argentine taxpayers which involve service suppliers in non-cooperative countries in order to ensure the equitable and/or effective imposition and/or collection of the gains tax on the transactions in which they are involved. This is because these measures are applied in order to ensure imposition or payment of the tax, or for both reasons, in Argentine territory and to prevent tax avoidance or evasion and so protect Argentina's tax base. The different treatment is based on recognition of the difference existing as regards the impossibility of determining the tax base for gains tax when Argentine taxpayers engage in transactions with service suppliers located in non-cooperative countries, as the Argentine tax authorities do not have the necessary tax information.[935]

7.767. Argentina argues that measures 2 and 4 are designed to secure compliance with the LIG, according to which taxable income is determined in Argentina. These defensive tax measures have been created to ensure the imposition and/or collection of gains tax and to protect the tax base, and to mitigate the risk of their artificial erosion and of avoidance and evasion manoeuvres between Argentine taxpayers and related entities located in non-cooperative jurisdictions. In Argentina's opinion, measure 3 accords different treatment to transactions with service suppliers of non-cooperative countries in order to ensure the effective imposition of gains tax in the absence of tax information that would make it possible to verify whether the valuations of transactions reflect actual operations which "determine, allocate or divide income, profits, gains, losses, deductions or credits of resident persons or branches, or between related persons or branches of the same person", safeguarding Argentina's tax base under the general transfer pricing regime in Argentine law. Argentina points out that its defensive tax measures have been created to accord different treatment with the objective of "ensuring the equitable and/or effective imposition and/or collection of gains tax". Argentina claims that these measures are in themselves consistent with the GATS and are similar to the tax measures widely adopted by WTO Members.[936]

7.768. Argentina claims that its defensive tax measures are "necessary" to establish a "difference in treatment [which is] aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members". According to Argentina, each of the defensive tax measures challenged by Panama is capable of contributing notably – and does in fact contribute - to guaranteeing the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members, and also of preventing tax avoidance or evasion and safeguarding Argentina's tax base. Argentina argues that the difference in treatment of domestic transactions with Argentine taxpayers and transactions between Argentine taxpayers and entities located in non-cooperative tax jurisdictions is justified because the latter represent a greater risk of tax evasion, tax avoidance and fraud, since it is not possible for the Argentine authorities to determine whether the transaction has a legitimate commercial purpose or whether it is solely aimed at avoiding payment of tax in Argentina. According to

[934] Argentina's first written submission, para. 355. (emphasis original)
[935] Argentina's first written submission, paras. 356-361.
[936] Argentina's first written submission, paras. 363-365.

Argentina, its defensive tax measures considerably reduce these risks inasmuch as they eliminate the potential tax benefits Argentine taxpayers could derive from simulated transactions carried out solely to avoid paying gains tax in Argentina and the consequent erosion of the tax base. Argentina reiterates that the defensive tax measures in question constitute a "global strategy" against the risks posed by the harmful tax practices of non-cooperative jurisdictions.[937]

7.769. As to the degree of importance of the interests protected by the defensive tax measures, Argentina contends that the objective of securing its tax collection system against the risks posed by the harmful tax practices of non-cooperative jurisdictions is an interest of the utmost importance. Argentina recalls that transactions between taxpayers and entities located in non-cooperative jurisdictions represent a greater risk of tax evasion, tax avoidance and erosion of Argentina's tax base because the Argentine authorities do not have independent access to information on the identity of the beneficial owners of the foreign entities and have no access either to information on the real value of the transactions in question. By reducing the opportunities for the occurrence of this type of deceptive and fraudulent transaction, the defensive tax measures in question reinforce the overriding interest of protecting Argentina's tax system against the risks posed by the harmful tax practices of non-cooperative jurisdictions. Argentina reiterates that the level of importance of protecting tax collection and the application of Argentina's taxation system against the risks posed by the harmful tax practices of non-cooperative tax jurisdictions is corroborated by the work of the Global Forum.[938]

7.770. Argentina argues that the defensive tax measures in question are not excessively restrictive on trade in financial services provided by service suppliers in non-cooperative tax jurisdictions.[939] Regarding this aspect, Argentina refers to the statement in connection with its defence under Article XIV(c) of the GATS.[940]

7.771. Argentina concludes that there is no single factor that works against the conclusion that measures 2, 3 and 4 are covered by subparagraph (d) of Article XIV.[941]

7.772. Argentina argues that measures 2, 3 and 4 are applied in accordance with the chapeau of Article XIV of the GATS. The different treatment of taxpayers established by Argentina's defensive tax measures for gains tax purposes in relation to domestic transactions and transactions involving Argentine taxpayers and service suppliers of non-cooperative jurisdictions can hardly be seen as "arbitrary" or "unjustifiable". From the point of view of the Argentine tax authorities, these two categories of transaction entail different levels of risk in order "to ensure the equitable or effective imposition and collection of direct taxes in Argentina in accordance with its tax legislation". While in the case of suppliers in Argentina, the Argentine tax authorities are able to obtain the information necessary "to ensure the equitable and effective imposition and collection of direct taxes", in the case of suppliers from non-cooperative jurisdictions, the Argentine tax authorities are not able to obtain this information. According to Argentina, this difference has a negative effect on its capacity "to ensure the equitable or effective imposition and collection of direct taxes" and protect the integrity of its tax base.[942]

7.773. Argentina contends that the difference in treatment of taxpayers for the purposes of gains tax in transactions involving service suppliers in Argentina and transactions involving Argentine taxpayers and service suppliers of non-cooperative jurisdictions, as reflected in Argentina's defensive tax measures, is based on the internationally recognized rules of the Global Forum and the OECD, to which, moreover, Panama has committed itself. Argentina concludes that the reason or motive for the different treatment attributed by the rules to service suppliers in Argentina *vis-à-vis* service suppliers of non-cooperative jurisdictions is directly related to the legitimate purpose of "ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members" in the light of the greater risks which transactions with non-cooperative jurisdictions entail in respect of effective collection, the risks of tax evasion

[937] Argentina's first written submission, paras. 367-371.
[938] Argentina's first written submission, paras. 381-384.
[939] Argentina's first written submission, paras. 386 and 387.
[940] See para. 7.536 above.
[941] Argentina's first written submission, para. 389.
[942] Argentina's first written submission, paras. 392-395.

and avoidance, the transfer of profits and the protection of Argentina's tax base in comparison with domestic transactions.[943]

7.3.6.1.2 Panama

7.774. Panama notes that there is no jurisprudence establishing the manner in which this provision should be interpreted and applied in an actual case, but there is no reason not to apply by analogy the same approach as that used for the application of Article XIV(c)(i) of the GATS. Panama recalls that the requirements of the chapeau are the same for a defence under Article XIV(d) of the GATS. According to Panama, the party invoking this provision in an attempt to show cause for a measure violating Article XVII of the GATS has the burden of proving that its measure falls within the scope of this rule. Panama considers that, in order to provisionally justify a measure under subparagraph (d) of Article XIV, the respondent must prove that it is a measure whose purpose is to ensure "the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members". To do so, a respondent must: (i) identify the direct taxes; (ii) establish what it considers to be equitable or effective imposition or collection [of those taxes] in respect of services and service suppliers of other Members; and (iii) demonstrate that the purpose of the measure is to ensure such imposition or collection.[944]

7.775. Panama argues that identification of direct taxes refers to identification of taxes directly imposed on the person subject to the tax obligation. Direct taxes have to be distinguished from indirect taxes or any other form of taxation (including levies and tax contributions). As regards the second element, the respondent must prove that the measure in question relates to equitable or effective imposition or collection in respect of services or service suppliers of other Members, and identify what it considers to be equitable or effective in terms of tax collection or imposition. According to Panama, if a measure does not relate to imposition or collection in respect of services or service suppliers of other Members, it falls outside the scope of Article XIV(d) of the GATS. Panama contends that, in the third place, a respondent must prove that the purpose of the measure is to ensure the equitable or effective collection or imposition in question. In order to do this, it must evaluate the specific purpose of the measure, whether it is contained in a rule, as well as its design, structure and architecture.[945]

7.776. Panama argues that measures 2, 3 and 4 are not intended to ensure the collection of direct taxes in respect of services or service suppliers abroad. According to Panama, measure 2 not only affects the collection of the gains tax – a direct tax – but also VAT and internal taxes, which are indirect taxes.[946] Panama acknowledges that measure 3 is related to the imposition or collection of a direct tax, but argues that it is not related to the collection or imposition of taxes on services or service suppliers of other Members. According to Panama, the purpose of this measure, as Argentina itself has indicated, is to determine the accuracy of the actual value between related parties in order to prevent transactions whose purpose is to evade taxes and/or transfer profits to non-cooperative jurisdictions. Panama claims that the measure may produce effects and a possible increase in the tax collected from the consumer of the services, that is, the Argentine taxpayer, but that it is not related to the imposition or collection of gains tax "in respect of services and service suppliers of other Members". It thus appears that the measure does not relate to tax collection or imposition in respect of service suppliers of other Members. Panama argues that it is also not a measure concerning the collection or imposition of gains tax in respect of services of other Members because the imposition or collection of gains tax in respect of the services that are affected in mode 1 is governed by Articles 9 to 13 and Title V of the LIG. With regard to the services that might be affected in mode 2 – inasmuch as they are activities conducted outside Argentina – Panama notes that they are not taxed under the LIG pursuant to Article 5 of this Law.[947] Panama acknowledges that measure 4 is related to collection of a direct tax.[948]

7.777. Panama argues that measures 2, 3 and 4 are not related to the collection or imposition of tax on services or service suppliers of other Members. These measures may have effects and make

[943] Argentina's first written submission, paras. 396-398.
[944] Panama's second written submission, paras. 2.350-2.353.
[945] Panama's second written submission, paras. 2.354-2.358.
[946] Panama's opening statement at the first meeting of the Panel, para. 55; second written submission, paras. 2.360 and 2.361.
[947] Panama's opening statement at the first meeting of the Panel, para. 56; second written submission, paras. 2.471 and 2.472.
[948] Panama's second written submission, para. 2.570.

possible an increase in the tax collected from the consumer of the services, namely, the Argentine taxpayer. None of these three measures, however, is related to collection or imposition in respect of services or service suppliers of other Members.[949]

7.778. Panama argues that none of the measures 2, 3 and 4 is applied in accordance with the chapeau of Article XIV of the GATS. According to Panama, each of these three measures constitutes a means of arbitrary and unjustifiable discrimination between countries in similar situations for the purposes of tax transparency and exchange of information. Panama contends that Argentina's distinctions based on the list of countries cooperating for purposes of tax transparency and exchange of information do not reflect impartial and neutral treatment of countries in similar situations in this context. Panama also claims that these measures are a disguised restriction on trade in the relevant services from non-cooperative countries between unrelated persons.[950]

7.3.6.2 Assessment by the Panel

7.779. In this dispute, Argentina invokes Article XIV(d) of the GATS as an alternative to its principal defence presented under Article XIV(c) of the GATS in respect of Panama's claims under Article XVII in relation to measures 2, 3 and 4.

7.780. Given that we have found that measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices), and measure 4 (payment received rule for the allocation of expenditure) are not inconsistent with Article XVII of the GATS inasmuch as they accord to services and service suppliers from non-cooperative countries treatment no less favourable than that accorded to Argentine like services and like service suppliers, for the relevant services and modes on which Argentina made specific commitments, the Panel refrains from ruling on whether these measures are covered by the exception provided for in Article XIV(d) of the GATS.

7.3.7 Argentina's defence under paragraph 2(a) of the Annex on Financial Services ("prudential exception")

7.3.7.1 Main arguments of the parties

7.3.7.1.1 Argentina

7.781. Argentina claims that in the event that the Panel were to find measure 5 to be inconsistent with Articles II:1, XVI:1 and XVI:2(a) of the GATS and measure 6 to be inconsistent with Article II:1 of the GATS, its measures would be covered by paragraph 2(a) of the GATS Annex on Financial Services (the prudential exception).[951]

7.782. With regard to the scope of the prudential exception, Argentina argues that paragraph 2(a) provides an exception for GATS-inconsistent measures that are taken for prudential or precautionary purposes.[952] Argentina does not agree with Panama's argument that the prudential exception only applies to "domestic regulation" measures taken under Article VI of the GATS. Argentina sees no textual basis for such a narrow interpretation and, on the contrary, considers that Panama's position is in direct contradiction with the text of paragraph 2(a) of the Annex on Financial Services.[953] Furthermore, Argentina considers that the words "[n]otwithstanding any other provisions of the Agreement" clearly indicate that paragraph 2(a) relates to any violation of the GATS, provided that it affects trade in services. Argentina considers this to be confirmed by the context of the second sentence of paragraph 2(a), which states that "[w]here such measures do not conform with the provisions of the Agreement", thereby indicating that the first sentence applies to measures which are otherwise inconsistent with some provision of the GATS. In

[949] Panama's second written submission, paras. 2.363, 2.471-2.472 and 2.571-2.572.
[950] Panama's second written submission, paras. 2.364-2.365, 2.474-2.475 and 2.573. With regard to the application of the chapeau of Article XIV to measures 2, 3 and 4, Panama also refers to the arguments it presented in relation to Argentina's defence under Article XIV(c). See paras. 7.560-7.565 above.
[951] Argentina's first written submission, para. 551. See also Argentina's response to Panel question No. 85(a).
[952] Argentina's first written submission, para. 553.
[953] Argentina's second written submission, para. 80.

addition, Argentina considers that the reference to "[n]othing in the Agreement" in paragraph 2(b) of the Annex on Financial Services indicates that the prudential exception is broad in its scope and applies to violations of any of the provisions of the GATS.[954]

7.783. With respect to the legal standard to be adopted under the prudential exception, Argentina argues that, in assessing its defence, the Panel should proceed in "three successive steps", namely:[955] (i) establish whether the measure in question is a measure "affecting the supply of financial services" within the meaning of paragraph 1(a) of the GATS Annex on Financial Services; (ii) determine whether the measure has been taken "for prudential reasons" – Argentina considers that "this question requires the existence of a 'rational relationship' between the measure and its prudential objective"[956]; and (iii) determine whether the measure is being "used as a means of avoiding the Member's commitments or obligations under the Agreement". With regard to this latter aspect of the proposed legal standard, Argentina asserts that the second sentence of the prudential exception performs the same function as the preamble to Article XIV of the GATS, i.e. to prevent abuse in the use of the exception.[957] Argentina explains that the second sentence of the prudential exception requires that WTO-inconsistent measures taken for prudential reasons not be, in actual fact, measures whose objective is to avoid the disciplines of the GATS.[958] According to Argentina, this provision is aimed at determining whether the measure is genuinely being applied in a manner consistent with its prudential objective and not for the purpose of avoiding a Member's commitments or obligations under the GATS.[959]

7.784. With respect to the first element of the proposed legal standard, Argentina recognizes that the measures in question are undoubtedly measures "affecting the supply of financial services" within the meaning of paragraph 1(a) of the Annex on Financial Services. In fact, both "reinsurance and retrocession services" and trading "transferable securities" are specifically mentioned in the definitions of financial services in paragraph 5(a) of the Annex on Financial Services.[960]

7.785. With respect to the second element of the proposed legal standard, Argentina believes that a "prudential" measure, or one taken "for prudential reasons" within the meaning of the prudential exception, is a measure intended to prevent an outcome running counter to an objective previously established or envisaged by the corresponding authority which could have adverse or pernicious consequences for the rights protected by that authority.[961] According to Argentina, the first sentence of paragraph 2(a) of the Annex on Financial Services establishes a non-exhaustive list of measures that could serve prudential purposes; it does not contain *a priori* any limitation on the kinds of measures that a WTO Member can adopt for prudential reasons. The scope of the GATS-inconsistent measures that could potentially be subject to the prudential exception is therefore very broad.[962] For Argentina, it includes, at the very least, measures that protect the interests of consumers or the general public with respect to the provision of financial services, as well as measures that seek to ensure the integrity and stability of the financial system, such as measures aimed at preventing a run on the banks or the systemic failure of the financial institutions or at protecting the financial system against moral hazard.[963] According to Argentina, the two measures in question are preventive measures that seek to protect the insured and the consumers of financial services from risks that could undermine public confidence and affect the functioning of Argentina's financial markets.[964]

7.786. For Argentina, another central feature of a prudential measure is its fitness for the purpose of preventing the event, or the effects resulting therefrom, which the measure is intended to avoid. In this respect, measure 5 is directly and specifically related with the need to preserve, as fittingly as possible, the soundness of the Argentine financial system.[965] For Argentina, in both

[954] Argentina's second written submission, para. 81.
[955] Argentina's second written submission, para. 79.
[956] Argentina's second written submission, para. 79.
[957] Argentina's first written submission, para. 556.
[958] Argentina's first written submission, para. 556.
[959] Argentina's second written submission, para. 79.
[960] Argentina's second written submission, para. 85.
[961] Argentina's first written submission, para. 560.
[962] Argentina's first written submission, para. 554.
[963] Argentina's first written submission, para. 555.
[964] Argentina's second written submission, para. 86.
[965] Argentina's second written submission, para. 89.

cases, there is a rational relationship between the measure and its prudential objective, since both measures ensure the achievement of precautionary or prudential objectives established in relation to their respective sectors – reinsurance and the capital market.[966] Where measure 5 is concerned, Argentina points out that the recitals of SSN Resolution No. 35.615/2011 refer to the need to upgrade the control mechanisms designed to ensure the necessary solvency of insurers and reinsurers operating within the national territory and, moreover, the fairness and technical reasonableness of the respective contract conditions. The regulations establish additional requirements which compensate for the lack of direct and effective access to information.[967]

7.787. Argentina considers that measure 5, for example, would normally be targeted at the reinsurance market to preserve the intrinsic nature of the insurance contract, which is based on a relationship of trust and good faith between the insurer and the insured.[968] According to Argentina, in the event of the insolvency or failure of a foreign reinsurer, the policy holder in Argentina would be unable to collect its claim against that reinsurer, and the original insurer in Argentina would continue to be responsible for paying out claims made under the original insurance contract. Therefore, the collapse of the foreign reinsurer implies an additional burden on the financial capacity of the original insurer, which in its turn could lead to the failure of the original insurer and thus produce a "domino effect" in the Argentine insurance market.[969] Argentina argues that if the reinsurer is located in a non-cooperative jurisdiction, the Argentine authorities will not have access to information on, among other things, the effective ownership of the reinsurer, whether it is adequately capitalized, whether its sources of funds are legitimate, or whether there is any risk of the transaction being used to launder money. Accordingly, transactions of this type expose the insurance markets in Argentina to greater systemic risk.[970] Argentina maintains that, for this reason, in imposing measures of a prudential nature that regulate the activity and certain aspects related to its inherent risks, the Argentine authority – SSN – has not only to protect the fiduciary relationship between the reinsurance company and the policy holders but also to preserve the soundness of the system, so as to ensure appropriate conditions for safeguarding insurance contracts and the fiduciary relationship between the companies and the policy holders.

7.788. In relation to measure 5, Argentina also invokes the prudential exception with respect to Panama's claim under Article XVI of the GATS. Argentina considers that the requirement for insurers to pass on certain additional information to the SSN in order to be authorized to effect reinsurance operations with foreign reinsurance entities, from their country of origin, where these operations correspond to individual risks amounting to less than US$50,000,000, establishes a reasonable threshold that contributes to the prudential objective of strengthening the reinsurers operating within the national territory, by generating an active, sound and competitive domestic sector capable of confronting systemic risks and ensuring the necessary solvency of the reinsurers developing there.[971] Argentina points out that measure 5 is a measure taken for the prudential reasons mentioned in paragraph 2(a) of the Annex on Financial Services, namely: (i) to ensure the integrity and stability of the financial system; (ii) the protection of policy holders or persons to whom a fiduciary duty is owed by a financial service supplier; and (iii) the protection of investors and depositors.[972] According to Argentina, a crisis in the insurance and reinsurance sector involving a loss of insurance or reinsurance capacity could quickly erupt and damage financial stability and the real economy.[973]

7.789. Where measure 6 is concerned, Argentina argues that the objective is "the protection of investors … [and] the integrity and smooth functioning of the Argentine capital market".[974] Argentina considers that it is essential for the smooth functioning of financial markets to safeguard the financial health of the securities intermediaries and protect investors from systemic failures involving financial intermediaries.[975] According to Argentina, securities operations with non-cooperative jurisdictions expose the Argentine financial market to greater risk of systemic failure, since in transactions of this type the Argentine regulator is unable to obtain access to information

[966] Argentina's first written submission, para. 567.
[967] Argentina's first written submission, para. 568.
[968] Argentina's first written submission, para. 561.
[969] Argentina's second written submission, para. 87.
[970] Argentina's second written submission, para. 88.
[971] Argentina's response to Panel question No. 85(a).
[972] Argentina's response to Panel question No. 85(a).
[973] Argentina's response to Panel question No. 85(a).
[974] Argentina's first written submission, para. 562.
[975] Argentina's second written submission, para. 91.

concerning the effective ownership of the party ordering the transaction and the legitimacy of the source of its funds, nor is it able to establish whether the foreign entity is subject to adequate supervision in its home jurisdiction. Argentina therefore maintains that securities transactions with entities located in non-cooperative jurisdictions pose risks that may not be present in transactions with entities located in cooperative jurisdictions, including risks of money laundering, tax evasion and non-payment of securities transactions.[976]

7.790. Argentina does not agree with Panama's interpretation that the Spanish term "*cautelar*" suggests the need to prove the existence of a "danger in delay" (*periculum in mora*). According to Argentina, the analogy with the requirements for the granting of precautionary measures by the domestic courts is inappropriate and neither does it follow from the text of the exception. In confirmation of this, Argentina makes reference to the equivalents of the Spanish term "*cautelar*" in English (*prudential*) and in French (*prudentielle*). Argentina considers that the ordinary meaning of the term "*cautelar*" suggests that the measures adopted under paragraph 2(a) of the Annex on Financial Services are preventive in nature and that nothing in the ordinary meaning of the word "*cautelar*" suggests that the risks which justify the adoption of the measure have to be imminent or might arise in the near future. On the contrary, as the financial crisis of 2008 showed, risks to the "integrity and stability of the financial system" are typically latent and extremely difficult to identify beforehand, making it practically impossible to deal with those risks by taking corrective measures. This is precisely why paragraph 2(a) of the Annex on Financial Services authorizes WTO Members to take measures for prudential reasons to deal with risks of a systemic nature *ex ante*.[977]

7.791. With regard to the third element of the proposed legal standard, Argentina argues that its reinsurance and securities regulations are not used as a means of avoiding its commitments or obligations under the GATS. These measures are aimed at countering systemic risks which only arise in connection with transactions involving entities located in non-cooperative jurisdictions and are not applied if there are no such risks. In both cases, the "access to information allows the regulatory authority to exercise effective supervision and control in order to prevent the capital market from becoming a vehicle for money laundering, tax evasion, market manipulation and abuse and other harmful practices and thus ensure the integrity of the financial system by reducing the systemic risk."[978] For example, securities transactions ordered or effected from non-cooperative jurisdictions can be processed provided it can be shown that (i) the intermediary is subject to appropriate regulatory supervision within the jurisdiction of origin, and that (ii) that body has concluded an information exchange agreement with the CNV.[979]

7.792. Finally, in relation to measure 5, Argentina stresses the proportionality of the measure with respect to the objective pursued.[980] In this connection, Argentina points out that in the recitals of SSN Resolution No. 35.615/2011 themselves it is expressly stated "[t]hat, on the basis of the experience accumulated, it has been found necessary to upgrade the control mechanisms designed to ensure the necessary solvency of insurers and reinsurers operating within the national territory and, moreover, the fairness and technical reasonableness of the respective contract conditions". Argentina argues that, as explained in the relevant section, the regulations establish additional requirements that compensate for the lack of direct and effective access to information.[981]

7.3.7.1.2 Panama

7.793. Panama questions whether measures 5 and 6 are covered by the prudential exception, arguing that Argentina has failed to establish that the two measures are justified under that provision.[982] Panama considers that paragraph 2(a) of the Annex on Financial Services "is in the nature of an exception", as is clear from its initial sentence "[n]otwithstanding any other provisions of the Agreement".[983] Panama therefore considers that any WTO Member that seeks to justify the inconsistency of a measure under the prudential exception bears the burden of proof and will

[976] Argentina's second written submission, para. 92.
[977] Argentina's second written submission, para. 82.
[978] Argentina's first written submission, para. 567.
[979] Argentina's second written submission, para. 94.
[980] Argentina's first written submission, para. 568.
[981] Argentina's first written submission, para. 568.
[982] Panama's second written submission, paras. 2.685-2.686 and 2.722.
[983] Panama's second written submission, para. 2.636.

therefore have to show that the measure meets all the requirements of that provision.[984] Panama argues that Argentina has failed to discharge its burden of proof under the prudential exception, has proposed a legal standard that omits relevant aspects and, in general, has disregarded the customary rules of interpretation of public international law.[985]

7.794. With regard to the legal standard to be adopted under the prudential exception, Panama suggests that the following four elements need to be verified: (i) that the measure affects the supply of financial services; (ii) that the measure constitutes a "domestic regulation" and is covered by the prudential exception; (iii) that the measure has been adopted for "prudential reasons"; and (iv) that the measure in question is not being used as a means of avoiding commitments or obligations under the GATS.[986]

7.795. Where the first element of the proposed legal standard is concerned, Panama considers that the respondent bears the burden of proving that the measure it seeks to justify is covered by the Annex on Financial Services. It is therefore for the respondent to prove the Annex's applicability in the light of the definitions established therein.[987]

7.796. With regard to the second element of the legal standard, Panama considers that the respondent must prove that the measure in question qualifies as a "domestic regulation".[988] Panama considers that the heading "Domestic Regulation" of paragraph 2 of the Annex on Financial Services informs the interpretation of the prudential exception and confines it to the type of measures envisaged in Article VI of the GATS, which is also entitled "Domestic Regulation".[989] For Panama, Article VI of the GATS relates to domestic regulations such as the rules and procedures concerning qualifications, licences and technical standards.[990] Panama considers that it must be shown that the measure concerns a supplier's technical standard, qualification or licence, of the kind related, for example, to the quality of the service provided or the ability of the supplier to provide the service.[991] Panama argues that an objective interpretation of the GATS cannot give a divergent meaning to two provisions that explicitly cover the same subject, unless the terms used are expressly intended to have a different meaning.[992] According to Panama, a measure that does not qualify as a domestic regulation might be covered by other exceptions[993], but would never fall within the scope of the prudential exception.[994]

7.797. With respect to the third element of the legal standard, Panama considers that the respondent has to show that the measure satisfies the requirements of the first sentence of the prudential exception, that is, that the domestic regulation measure has been adopted "for prudential reasons".[995] Panama points out that the prudential exception mentions two "prudential reasons": (i) "the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier"; and (ii) "to ensure the integrity and stability of the financial system". Panama recognizes that although the list of reasons is not exhaustive, whatever the reason for its adoption the measure must, in any event, be precautionary or "prudential".[996]

7.798. In analysing what constitutes a "*motivo cautelar*" (prudential reason), Panama points out that the ordinary meaning of the Spanish word "*motivo*" is "*causa o razón que mueve para algo*"[997] (moving cause or reason for something), while the word "*cautelar*" means "*preventivo, precautorio*", "*dicho de una medida o de una regla destinada a prevenir la consecución de*

[984] Panama's second written submission paras. 2.633, 2.636, 2.637 and 2.708.
[985] Panama's second written submission, para. 2.633.
[986] Panama's second written submission, para. 2.637.
[987] Panama's second written submission, para. 2.638.
[988] Panama's second written submission, para. 2.651.
[989] Panama's second written submission, para. 2.643.
[990] Panama's second written submission, para. 2.645.
[991] Panama's second written submission, para. 2.651. (footnote original) Panel Report, *US – Gambling*, para. 6.304.
[992] Panama's second written submission, para. 2.643.
[993] Panama's second written submission, para. 2.651. In this paragraph Panama mentions Article XIV of the GATS, by way of example.
[994] Panama's second written submission, para. 2.651.
[995] Panama's second written submission, para. 2.652.
[996] Panama's second written submission, para. 2.652.
[997] Panama's second written submission, para. 2.653. (footnote original) *Diccionario de la lengua española*, Real Academia Española, 22nd edition, 2001, p. 1545.

determinado fin o precaver lo que pueda dificultarlo"[998] (preventive, precautionary, said of a measure or rule intended to prevent a particular outcome or guard against that which might impede it). In its turn, the ordinary meaning of the Spanish verb "*precaver*" is "*prevenir un riesgo, daño o peligro, para guardarse de él y evitarlo*" (to forestall a risk, injury or danger, to protect oneself from it and avoid it).[999] Panama considers that it follows from these definitions that measures which are "*cautelares*" or taken "*por motivos cautelares*"[1000] "are those adopted for a specific 'cause or reason', namely, 'to forestall a risk, injury or danger' that might materialize, in order thus to avoid it and safeguard legitimate interests".[1001] Panama proposes that the term "*medidas cautelares*" (prudential measures) should be equated with "*medidas provisionales*" (provisional measures) because "within the context of public international law, Spanish-speaking jurists appear to use '*medidas provisionales*' as a synonym of, and interchangeably with, '*medidas cautelares*'".[1002] Panama also makes reference to the French term "*mesures conservatoires*" (protective measures).[1003] In addition, Panama bases itself on Article [41.1] of the Statute of the International Court of Justice (ICJ), which empowers the Court to indicate "any *provisional* measures which ought to be taken to preserve the respective rights of either party".[1004] Panama considers that this article allows the Court to indicate "[*prudential*] measures only when [] considers that circumstances so require".[1005] Panama points out that the ICJ believes that "one of the distinctive characteristics of these measures is their objective of *preserving or protecting* the rights or legal interests at risk".[1006]

7.799. As previously mentioned, Panama argues that jurists specializing in different areas of the law agree that it would be right to adopt prudential measures if at least two requirements that follow from their legal nature are met: *fumus boni iuris* and *periculum in mora*. The first requirement (likelihood of success on the merit of the case) calls for the claim to have a certain degree of plausibility, the actual existence of a risk and the possibility of its materialization. The second requirement (danger in delay) is related to the risk of an imminent legal injury being suffered as a consequence of a delay in the adoption of the measure. It is precisely the risk of imminent injury that generally lends prudential measures their urgent character.[1007] Furthermore, Panama considers that, since the existence of an imminent danger does not correspond to a permanent or structural situation, prudential measures are transitional, provisional or short-term

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[998] Panama's second written submission, para. 2.653. (footnote original) *Diccionario de la lengua española*, Real Academia Española, 22nd edition, 2001, p. 484.

[999] Panama's second written submission, para. 2.653. (footnote original) *Diccionario de la lengua española*, Real Academia Española, 22nd edition, 2001, p. 1817.

[1000] Panama's second written submission, para. 2.653. (footnote original) Like Argentina, Panama believes that "prudential" measures and measures taken for "prudential reasons" mean the same thing. (See Argentina's first written submission, para. 560). In this connection, Panama observes that paragraphs 3 and 4 of the Annex on Financial Services refer to "prudential measures" and "prudential issues", respectively, which would appear to confirm that the key word for the purposes of the Annex on Financial Services is "prudential" rather than "reasons", "measures" or "issues".

[1001] Panama's second written submission, para. 2.653.

[1002] Panama's second written submission, para. 2.654. (footnote original) According to some authors, "[W]e say *prudential measure*, because we are not satisfied with the distinction made by the internationalists between prudential measures and provisional, interim or emergency measures, all of the latter being characteristic of the former" (Augusto Mario Morello and Enrique Véscovi, "*La eficacia de la justicia. Valor supremo del procedimiento, en el área de la cautela*", Revista Uruguaya de Derecho Procesal, No. 4, 1984, p. 543.) See also Soledad Torrecuadrada García-Lozano, "*La indicación de medidas cautelares por la Corte Internacional de Justicia: El asunto Breard (Paraguay contra Estados Unidos de América)*", Agenda Internacional, Instituto de Estudios Internacionales, p. 113.

[1003] Panama's second written submission, para. 2.654.

[1004] Panama's second written submission, para. 2.654. (emphasis original).

[1005] Panama's second written submission, para. 2.654. (emphasis original) (footnote original) Augusto Mario Morello and Enrique Véscovi, "*La eficacia de la justicia. Valor supremo del procedimiento, en el área de la cautela*", Revista Uruguaya de Derecho Procesal, No. 4, 1984, p. 165 (citing and translating into Spanish the Order of the ICJ of 10 May 1984, case of Nicaragua v. United States of America (Request for the indication of provisional measures of 9 April 1984)).

[1006] Panama's second written submission, para. 2.654. (emphasis original) (footnote original) Interhandel case, Order of 24 October 1957 in ICJ *Reports* 1957, pp. 110-112; and Passage through the Great Belt case (Finland v. Denmark), Order of 29 July 1991, in ICJ *Reports* 1991, p. 17.

[1007] Panama's second written submission, para. 2.655. (footnote original) See, for example, Andrés Nogueira Muñoz, "*Dos tipos de medidas provisionales en la jurisprudencia de la Corte Interamericana de Derechos Humanos*", Revista Derechos Humanos (2011), p. 3; Jake W Rylatt, "*Provisional Measures and the Authority of the International Court of Justice: Sovereignty vs. Efficiency*", Leeds Journal of Law & Criminology, Vol. 1 No. 1, p. 66; or Gabriel Hernández Villarreal, "*Medidas cautelares en los procesos arbitrales, ¿Taxatividad o enunciación de las cautelas?*", ISSN 0124-0579 (2007), pp. 189-190.

in nature. Thus, prudential measures can remain in place only for as long as the factual circumstances that justified their adoption continue to exist.[1008]

7.800. With respect to the two prudential reasons envisaged in the first sentence of the prudential exception, Panama considers that the first part, referring to the "protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier" covers the protection of financial services consumers in general. Here, Panama makes a connection with the panel report in *EC – Asbestos*, where it is stated that "the notion of 'protection' [implies] the existence of a risk".[1009] For Panama this "fits in perfectly with the requirement of *periculum in mora* for the adoption of prudential measures", because "for prudential measures to be adopted for the protection of financial services consumers there must be a 'risk' of the supplier failing to fulfil its fiduciary duty and causing pecuniary injury to the consumer".[1010]

7.801. With regard to the second prudential reason, which consists in "ensur[ing] the integrity and stability of the financial system", Panama considers that this objective would cover measures aimed at preventing the imminent disintegration and destabilization of the financial system.[1011] Panama maintains that this prudential reason cannot justify any type of measure relating to financial services which, in one way or another, has some relationship with the financial system. On the contrary, it ought to cover only measures directed at avoiding serious and systemic "risks" that might lead to a crisis affecting the structures of the financial system and a disruption in the smooth functioning of the economy.[1012] As was mentioned earlier, Panama recognizes that the list of prudential reasons in the prudential exception is non-exhaustive. In any event, the reasons for the measure should always be "prudential".[1013] Panama stresses that the *prudential* nature of the measure taken by the respondent, namely, that of prevention of a genuine risk that demands an urgent response, is the element that should be the "subject of closest scrutiny" by a panel. Panama considers that a panel cannot accept any reason offered by the respondent without further examination. Panama observes that neither the GATS nor the Annex on Financial Services provides for special standards of review distinct from those laid down in Article 11 of the DSU.

7.802. Panama concludes its analysis of this element by pointing out that when a panel assesses whether the measure adopted by a Member is "for prudential reasons" within the meaning of paragraph 2(a) of the Annex on Financial Services, it should examine whether there is a real risk of imminent injury if that measure is not adopted or if its adoption is delayed. Thus, for example, in the case of measures to protect consumers, there must be a risk of the financial service supplier failing to fulfil its obligations and causing pecuniary injury to the consumer. At the same time, in the case of measures to ensure the integrity and stability of the financial system, there must be a risk of financial instability that threatens the foundations of the financial system.[1014]

7.803. With respect to the fourth element of the proposed legal standard, Panama argues that the purpose of the second sentence of paragraph 2(a) of the Annex on Financial Services is to limit the possibility of measures being freely taken for allegedly prudential reasons.[1015] For this condition to be satisfied, Panama considers that there must be a relationship of means and ends between the measure taken and the prudential objective pursued.[1016] Panama agrees with Argentina that the academic literature has described the second sentence of the prudential exception as equivalent to

[1008] Panama's second written submission, para. 2.656. See also second written submission, para. 2.655. In making these arguments, Panama bases itself on Articles 74.1, 74.2 and 76.1 of the ICJ Rules of Court.
[1009] Panama's second written submission, para. 2.658 (citing Panel Report, *EC – Asbestos*, para. 8.170 (emphasis original)).
[1010] Panama's second written submission, para. 2.658.
[1011] Panama's second written submission, para. 2.659.
[1012] Panama's second written submission, para. 2.659.
[1013] Panama's second written submission, para. 2.660. Notwithstanding the above, in paragraph 2.654 of its second written submission, Panama acknowledges that the prudential exception, in its English version, "refers to measures taken for prudential reasons. The ordinary meaning of the word 'prudential' is '[p]ertaining or relating to prudence', '[w]hat is not exaggerated or excessive'. Therefore, within the context of the GATS, 'prudential measures' (*medidas cautelares*) have a certain connotation of prudence". See Panama's second written submission, para. 2.654.
[1014] Panama's second written submission, para. 2.661.
[1015] Panama's second written submission, para. 2.662.
[1016] Panama's second written submission, para. 2.708.

a good faith obligation that requires a rational relationship of means and ends between the measure taken and the prudential objective pursued.[1017]

7.804. Panama argues that a prohibited or improper use is an abuse. Therefore, the prohibition on using prudential measures as a means of avoiding commitments and obligations is intended to prevent abuses. Moreover, it ensures that the right of Members to avail themselves of exceptions is exercised reasonably or prudently and in such a way as not to frustrate the rights accorded to other Members by the substantive rules of the GATS.[1018]

7.805. Panama considers that in analysing compliance with the last part of the prudential exception a panel should examine whether the design, structure and architecture of the measure (or its application in practice) correspond with the prudential reasons on which it is allegedly based. In other words, it should examine whether there is a genuine relationship of means and ends between the measure and its stated objectives.[1019] In this connection, Panama considers that if a measure is not suitable, fit or appropriate for achieving its presumed prudential objective, then it should be understood that its utilization is inconsistent (wholly or in part) with the objective pursued. In these circumstances, the use of a measure that does not match the purported prudential reason will not be underpinned by a prudential reason. In the absence of a supporting prudential reason, such use (or part thereof) should be treated as what it is: a means of avoiding commitments or obligations, and therefore prohibited under the second sentence of paragraph 2(a) of the Annex on Financial Services.[1020]

7.806. Panama considers that the analysis of this element should be based on an objective assessment.[1021] In this connection, Panama makes various references to the Appellate Body Report in *Japan – Alcoholic Beverages II* and points out that in previous cases it has repeatedly been concluded that "[t]his is not an issue of intent"[1022] and that the objective of a measure can most often "be discerned from the design, the architecture, and the revealing structure" of the measure.[1023]

7.807. By way of example, Panama notes that "if a measure is not designed to protect financial services consumers and its application does not help to achieve that objective, it must be concluded that the relationship between means and ends required by the second sentence of paragraph 2(a) of the Annex on Financial Services does not exist".[1024] Panama concludes that "consequently, it will be understood that the measure is being used as a means of avoiding commitments or obligations under the GATS and it will not be justified by the prudential exception".[1025]

7.3.7.2 Assessment by the Panel

7.3.7.2.1 Introduction

7.808. The question submitted for consideration by the Panel is whether measure 5 (requirements relating to reinsurance services) and measure 6 (requirements for access to the Argentine capital market) are covered by paragraph 2(a) of the GATS Annex on Financial Services, as Argentina maintains.[1026] In response, Panama considers that Argentina has failed to prove that the two measures are covered by that provision.[1027]

[1017] Panama's second written submission, para. 2.665.
[1018] Panama's second written submission, para. 2.663 (referring to Appellate Body Report, *US – Gambling*, para. 339).
[1019] Panama's second written submission, para. 2.664.
[1020] Panama's second written submission, para. 2.665.
[1021] Panama's second written submission, para. 2.666.
[1022] Panama's second written submission, para. 2.666 (citing Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 27).
[1023] Panama's second written submission, para. 2.666 (citing Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29).
[1024] Panama's second written submission, para. 2.666.
[1025] Panama's second written submission, para. 2.666.
[1026] Argentina's first written submission, para. 551.
[1027] Panama's second written submission, paras. 2.685-2.686 and 2.722.

7.809. It should be stressed that this is the first time that a Member has invoked paragraph 2(a) of the Annex on Financial Services (i.e. the prudential exception) in a WTO dispute. We will commence our analysis by establishing the legal standard which we consider appropriate under the prudential exception, before using it to determine whether measures 5[1028] and 6 are covered by paragraph 2(a) of the GATS Annex on Financial Services.

7.810. The starting point for our analysis is the wording of paragraph 2(a) of the Annex on Financial Services.

7.3.7.2.2 The relevant legal provision

7.811. Paragraph 2(a) of the Annex on Financial Services reads as follows:

> 2. Domestic Regulation
>
> (a) 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.

7.812. As pointed out in the introduction, this provision has not been the subject of interpretation by the Appellate Body or previous panels. It therefore falls to us to undertake the arduous task of interpreting it for the first time. Before proceeding to establish the legal standard which we consider appropriate under this provision, we deem it relevant to determine the nature of the provision with a view to ascertaining which party bears the burden of proof.

7.3.7.2.3 The nature of paragraph 2(a) of the Annex on Financial Services. The burden of proof

7.813. As far as the nature of paragraph 2(a) of the Annex on Financial Services is concerned, both parties appear to regard this provision as an "exception".[1029]

7.814. If we look at the Spanish text of paragraph 2(a) of the Annex on Financial Services, we see that it begins: "[*n*]*o obstante las demás disposiciones del* [*AGCS*]". Moreover, the first part of the second sentence of the paragraph states: "[*c*]*uando esas medidas no sean conformes a las disposiciones del Acuerdo*". In view of this wording, we agree with the parties that paragraph 2(a) constitutes a justification for measures that are inconsistent with the GATS and is therefore in the nature of an "exception". The English[1030] and French[1031] versions of the provision confirm our view.

7.815. Our conclusion is consistent with the categorization of this provision in the revised version of the Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), adopted by the Council for Trade in Services on 23 March 2001. In that

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[1028] The Panel recalls that, in the case of measure 5, it has found that the aspects of this measure maintained by virtue of point 19 of Annex I to SSN Resolution No. 35.615/2011 and Article 4 of SSN Resolution No. 35.794/2011 are not inconsistent with Articles XVI:1 and XVI:2(a) of the GATS. Accordingly, it will not examine these aspects of measure 5 in the light of paragraph 2(a) of the Annex on Financial Services. It will focus exclusively on the aspects of measure 5 maintained by virtue of points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011 (as amended by SSN Resolution No. 38.284/2014), which it has found to be inconsistent with Article II:1 of the GATS. See sections 7.3.3.2.3.2, 7.3.3.2.4.2 and 7.3.2.2.4 above.

[1029] Argentina's first written submission, para. 553, and Panama's second written submission, para. 2.636. We note that this also appears to be the opinion of several third parties. See European Union's third-party submission, para. 128; United States' third-party submission, para. 21; and United States' and Brazil's responses to Panel question No. 13.

[1030] In the English version, the first and second sentences of paragraph 2(a) of the Annex on Financial Services begin as follows: "*Notwithstanding any other provisions of the Agreement*" … "*[w]here such measures do not conform with the provisions of the Agreement*".

[1031] In the French version the first and second sentences of paragraph 2(a) of the Annex on Financial Services begin as follows: "*Nonobstant toute autre disposition de l'Accord*" … "*[d]ans les cas où de telles mesures ne seront pas conformes aux dispositions de l'Accord*".

document, in a section describing the "Exceptions" under the GATS, it is explained that "any prudential measure taken in accordance with paragraph 2(a) of the Annex on Financial Services constitutes an exception to the Agreement".[1032] This is the same language as that used in a previous Explanatory Note by the Secretariat entitled "Scheduling of Initial Commitments in Trade in Services" in which, in the course of explaining what should be recorded in a Schedule of Specific Commitments under the GATS, it is stated that "any prudential measure justifiable under paragraph 2.1 of the Annex on Financial Services constitutes an exception to the Agreement".[1033]

7.816. Given that paragraph 2(a) of the Annex on Financial Services is in the nature of an exception, the burden of proof lies with Argentina, which must therefore demonstrate that its measures 5 and 6 are covered by that provision.[1034]

7.817. We continue our work of interpretation by examining what should be the requirements that constitute the legal standard under paragraph 2(a) of the Annex on Financial Services and which Argentina must demonstrate in order to shield its measures 5 and 6 under that provision.

7.3.7.2.4 The legal standard under paragraph 2(a) of the Annex on Financial Services

7.818. We note that paragraph 2(a) of the Annex on Financial Services consists of two sentences. The first sentence reads:

> 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.

7.819. Thus, the first sentence permits the adoption of measures "for prudential reasons" and includes a list of prudential reasons. The use of the term "including" (in Spanish "*entre ellos*", in French "*y compris*") shows that this is an indicative list.

7.820. The second sentence of paragraph 2(a) of the Annex on Financial Services stipulates that:

> 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.

7.821. Thus, it can be inferred from the wording of paragraph 2(a) of the Annex on Financial Services that Argentina must demonstrate that two requirements have been met in order to avail itself of the exception, namely: (i) that the measure in question was taken for prudential reasons and (ii) that the measure is not being used as a means of avoiding its commitments or obligations under the GATS. In this connection, we note that both the parties and various third parties agree with this interpretation.[1035]

7.822. Nevertheless, in addition to these two requirements, both parties and one of the third parties identify a preliminary requirement which must be demonstrated by the party invoking paragraph 2(a) of the Annex on Financial Services and which they derive from paragraph 1(a) of the Annex on Financial Services. This paragraph states that "[t]his Annex applies to measures affecting the supply of financial services". In their view, the party invoking the prudential

[1032] See the 2001 Guidelines, (Exhibits PAN-45 / ARG-39), para. 20.

[1033] See the 1993 Guidelines, (Exhibits PAN-46 / ARG-79), para. 13. We recall that in *US – Gambling* the Appellate Body considered that this Explanatory Note constituted a supplementary means of interpretation under Article 32 of the Vienna Convention. See Appellate Body Report, *US – Gambling*, para. 197.

[1034] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[1035] Argentina's second written submission, para. 79; Panama's second written submission, para. 2.637; European Union's third-party submission, paras. 131 and 133, and response to Panel question No. 13, paras. 32 and 33; and United States' response to Panel question No. 13 (referring to its response to advance Panel question No. 7, paras. 12 and 16).

exception must also demonstrate that the measure in question is a measure "affecting the supply of financial services".[1036]

7.823. We turn to consider whether, as the parties maintain, the legal standard established by paragraph 2(a) of the Annex on Financial Services requires Argentina to demonstrate that measures 5 and 6 are measures affecting the supply of financial services.

7.824. We note that paragraph 1(a) of the Annex on Financial Services provides as follows:

> ANNEX ON FINANCIAL SERVICES
>
> 1. Scope and Definition
>
> (a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement.

7.825. Thus, paragraph 1(a) defines the scope of the Annex on Financial Services as being confined to "measures affecting the supply of financial services". In our view, paragraph 1(a) serves as context for the interpretation of paragraph 2(a) of the same Annex. We therefore agree with the parties that for Argentina to be able to avail itself of the exception of paragraph 2(a) of the Annex on Financial Services, it must, in addition to meeting the other two requirements previously mentioned, demonstrate that measures 5 and 6 are "measures affecting the supply of financial services".

7.826. In addition to these three requirements, on the basis of the heading of paragraph 2 of the Annex on Financial Services, which reads "Domestic Regulation", Panama proposes a further preliminary requirement, namely, that the respondent must demonstrate that the measure constitutes a "domestic regulation".[1037]

7.827. We next examine whether, as maintained by Panama, the legal standard established by paragraph 2(a) of the Annex on Financial Services requires Argentina to demonstrate that measures 5 and 6 are "domestic regulations".

7.828. Panama considers that "after proving that a measure falls within the scope of the Annex on Financial Services, a responding Member must prove that the measure in question qualifies as a 'domestic regulation'".[1038] For these purposes, Panama considers that it must be proven that the measure is "a supplier's technical standard, qualification or licence, such as those 'relating to, for instance, the quality of the service supplied or the ability of the supplier to supply the service'".[1039] Considering that the paragraph in which the prudential exception is established is preceded by the heading "Domestic Regulation", Panama refers to the previous rulings of the Appellate Body in order to affirm that this heading forms part of the text of the prudential exception and informs the interpretation of the prudential exception by confining it to the type of measures envisaged in Article VI of the GATS, also entitled "Domestic Regulation".[1040]

7.829. Panama argues that an objective interpretation of the GATS "cannot give a divergent meaning to two provisions that explicitly cover the same subject, unless the terms used are expressly intended to have a different meaning".[1041] Moreover, Panama points out that other headings of the Annex on Financial Services are also directly correlated with specific articles of the GATS such as, for example, "Scope and Definition" (paragraph 1 of the Annex and Article I of the GATS); "Recognition" (paragraph 3 of the Annex and Article VII of the GATS); "Dispute Settlement" (paragraph 4 of the Annex and Articles XXII and XXIII of the GATS); and "Definitions"

[1036] Argentina's second written submission, para. 85; Panama's second written submission, para. 2.637; and European Union's third-party submission, para. 129.
[1037] Panama's second written submission, para. 2.651.
[1038] Panama's second written submission, para. 2.651.
[1039] Panama's second written submission, para. 2.651 (citing Panel Report, *US – Gambling*, para. 6.304).
[1040] Panama's second written submission, paras. 2.640, 2.642 and 2.643 (citing Appellate Body Reports, *China – Raw Materials*, para. 320; *US – Softwood Lumber IV*, para. 93; and *US – Carbon Steel*, para. 67).
[1041] Panama's second written submission, para. 2.643.

(paragraph 5 of the Annex and Article XXVIII of the GATS). Panama therefore argues that "[g]iven the limited number of questions covered in the Annex, as compared with those covered by the GATS, it is obvious that the paragraphs of the Annex refer directly and solely to those specific areas of the GATS in which it was considered pertinent to establish additional provisions for financial services" and that "all matters on which no specific provision was established in the Annex continue to be governed solely by the general provisions of the GATS".[1042] Panama also draws attention to a statement by the United States during the Uruguay Round which, according to Panama, appears to acknowledge this, but is not in our record.

7.830. Argentina sees no textual basis for such a narrow interpretation and considers that Panama's interpretation is in direct contradiction with the text of paragraph 2(a).[1043] Argentina considers that the words "[n]otwithstanding any other provisions of the Agreement" clearly indicate that paragraph 2(a) refers to any violation of the GATS, provided that it affects the supply of services. Argentina considers that this is confirmed by the context of the second sentence of paragraph 2(a) beginning "[w]here such measures do not conform with the provisions of the Agreement", which "clearly indicates that the first sentence applies to measures which are otherwise inconsistent with some provision of the GATS". Likewise, Argentina considers that the reference to "[n]othing in the Agreement" in paragraph 2(b) of the Annex "also indicates that the prudential exception is broad in its scope and applies to violations of any of the provisions of the GATS".[1044]

7.831. We note that the third parties which provided the Panel with input on this point consider that measures of any kind, not only those covered by Article VI of the GATS but also those addressed by other provisions of the GATS, are covered by paragraph 2(a) of the Annex on Financial Services.[1045]

7.832. Our starting point is the text of paragraph 2(a) of the Annex on Financial Services, which is reproduced in paragraph 7.811. We note that paragraph 2(a) contains two phrases which we find relevant: "[*n*]*o obstante las demás disposiciones del Acuerdo*" ("[n]otwithstanding any other provisions of the Agreement") and "[*c*]*uando esas medidas no sean conformes a las disposiciones del Acuerdo*" ("[w]here such measures do not conform with the provisions of the Agreement"). The Panel notes that both phrases refer to "provisions of the Agreement" in the plural and not to a single provision of the GATS. These references to "other provisions of the Agreement" and "the provisions of the Agreement" appear to concern any measure that is inconsistent with the GATS. The French text ("*Nonobstant toute autre disposition de l'Accord …[d]ans les cas où de telles mesures ne seront pas conformes aux dispositions de l'Accord*") seems to confirm this conclusion. Indeed, the reference to "any other provisions of the Agreement" (or "*toute autre disposition de l'Accord*"), which could be rendered in Spanish as "*cualquier otra disposición del Acuerdo*", appears to indicate that the measures covered by paragraph 2(a) of the Annex on Financial Services are those which affect the supply of financial services, whatever their nature.

7.833. Likewise, the reference to "[*c*]*uando esas measures no sean conformes a las disposiciones del Acuerdo*" ("[w]here such measures do not conform with the provisions of the Agreement"; "*[d]ans les cas où de telles mesures ne seront pas conformes aux dispositions de l'Accord*") in the second sentence of paragraph 2(a) of the Annex on Financial Services appears to relate to measures which could be inconsistent with any provision of the GATS.

7.834. As we have explained, Panama bases its position on the fact that paragraph 2 of the Annex on Financial Services is headed "Domestic Regulation". As Panama also points out, in *China – Raw Materials* the Appellate Body, citing previous reports, found the title of Article XI of the GATT 1994

[1042] Panama's second written submission, para. 2.644.
[1043] Argentina's second written submission, para. 80.
[1044] Argentina's second written submission, para. 81.
[1045] According to the European Union, "[p]aragraph 2(a) provides an exception from all the GATS obligations". Brazil points out that paragraph 2(a) "enshrines a particular justification for GATS-inconsistent measures for prudential reasons". For its part, the United States argues that "the prudential exception preserves the broad discretion of national authorities to protect the financial system." See European Union's third-party submission; para. 128; Brazil's third-party submission, para. 18; and United States' third-party submission, para. 21.

to be relevant for the purpose of interpreting its scope.[1046] We agree with Panama regarding the relevance of the title of a provision for interpreting the terms of that provision.

7.835. We note that the GATS does not contain any definition of the expressions "domestic regulation" and "regulation". We also note that the expression "domestic regulation" appears as the title not only of paragraphs 2(a) and 2(b) of the Annex on Financial Services but also, as Panama points out, of Article VI of the GATS. As we have already seen, Panama argues that "domestic regulations" are the "type of measures envisaged in Article VI of the GATS". Panama also argues that the respondent must prove that the measure "concerns a supplier's technical standard, qualification or licence", such as those "relating to, for instance, the quality of the service supplied or the ability of the supplier to supply the service". In arguing in this way, Panama appears to consider that the "domestic regulation" to which both Article VI of the GATS and paragraph 2 of the Annex on Financial Services refer includes only measures relating to qualifications, technical standards and licensing.

7.836. Panama's arguments confront us with two separate issues: on the one hand, whether the reference to "domestic regulation" in the heading of paragraph 2 of the Annex on Financial Services has the same significance as the similar reference in the title of Article VI of the GATS; and, on the other, whether the concept of "domestic regulation", referred to in Article VI of the GATS and also - according to Panama – in paragraph 2 of the Annex on Financial Services, covers only measures relating to qualifications, technical standards and licensing. We begin with the second issue.

7.837. A careful reading of Article VI of the GATS reveals that measures relating to qualifications, technical standards and licensing are mentioned only in paragraphs 4 and 5 of Article VI.[1047] Paragraph 4 of Article VI establishes a negotiating mandate for the development of multilateral disciplines "[w]ith a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services". We note that such disciplines have not yet been agreed by Members. Paragraph 5 of Article VI is a transitional provision which stipulates that "[i]n sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments …".

7.838. The Panel also points out that Article VI refers to other "domestic regulations", such as "measures of general application affecting trade in services" (Article VI:1), "administrative decisions affecting trade in services" (Article VI:2) and "authorization … for the supply of a service" (Article VI:3). In other words, the *universe* of "domestic regulation" is, for Article VI of the GATS itself, broader than that relating to technical standards, licensing and qualifications. For these reasons, it seems to us that Panama's characterization of what constitutes a "domestic regulation" covered by Article VI of the GATS is erroneous.

7.839. Despite what we consider to be Panama's erroneous characterization of "domestic regulation" under Article VI, it remains to be decided whether paragraph 2(a) of the Annex on Financial Services covers only measures that should be regarded as "domestic regulation" within the meaning of Article VI of the GATS.

7.840. As already mentioned, in our interpretative exercise we must take into account the heading of paragraph 2 of the Annex on Financial Services in interpreting the terms of

[1046] The Appellate Body explained:
> In addition, we note that Article XI of the GATT 1994 is entitled "General Elimination of *Quantitative* Restrictions". The Panel found that this title suggests that Article XI governs the elimination of "quantitative restrictions" generally. We have previously referred to the title of a provision when interpreting the requirements within the provision. In the present case, we consider that the use of the word "quantitative" in the title of the provision informs the interpretation of the words "restriction" and "prohibition" in Article XI:1 and XI:2. It suggests that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported.

See Appellate Body Report, *China – Raw Materials*, para. 320. (footnotes omitted)

[1047] Incidentally, we note that Article XVIII of the GATS (Additional Commitments) also refers to measures "regarding qualifications, standards or licensing matters".

paragraph 2(a). We must also bear in mind that the Appellate Body has stated that "interpretation must give meaning and effect to all the terms of a treaty" and "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[1048] Accordingly, we must take care to avoid an interpretation of the scope of paragraph 2(a) of the Annex on Financial Services that renders useless or redundant the terms used in that provision or other provisions of the GATS.

7.841. If we interpret the wording of paragraph 2(a) of the Annex on Financial Services as referring solely to measures that constitute domestic regulation under Article VI of the GATS, we could be reducing to inutility the explicit reference to "*las demás disposiciones del Acuerdo*" ("any other provisions of the Agreement"; "*toute autre disposition de l'Accord*"), which appears to relate to any other provision of the GATS and not only to Article VI. Likewise, the references "[*c*]*uando esas measures no sean conformes a las disposiciones del Acuerdo*" ("[w]here such measures do not conform with the provisions of the Agreement"; "*[d]ans les cas où de telles mesures ne seront pas conformes aux dispositions de l'Accord*") would be reduced to "a provision", Article VI of the GATS. We find implausible Panama's argument to the effect that the fact that the prudential exception covers only domestic regulations does not mean that it cannot justify violations of any provision of the GATS.[1049] Panama asserts, by way of example, that an absolute prohibition and a licensing system could both be inconsistent with the MFN treatment obligation of Article II:1 of the GATS. According to Panama, under such a scenario, only the licensing system would fall within the scope of the prudential exception.[1050] In our view, this example of Panama does not make sense. We cannot see how a system that provides for the granting of a licence for supplying a service can exist if the supply of that service is absolutely prohibited.

7.842. In this connection, we recall that the Appellate Body has explained that the words used in a provision must be "interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears".[1051] According to the Appellate Body, although the meaning attributed to the same term in other provisions of the same agreement may also be relevant context, it need not be identical, in all respects, to those other meanings.[1052]

7.843. Accordingly, we now propose to examine the context of paragraph 2(a) of the Annex on Financial Services. We note that, as immediate context, paragraph 2 of the Annex on Financial Services includes a subparagraph (b), which reads as follows:

> 2. Domestic Regulation
>
> ...
>
> (b) Nothing in the Agreement shall be construed to require a Member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

7.844. Like paragraph 2(a), paragraph 2(b) is also headed "Domestic Regulation". This paragraph refers specifically to the right of Members to maintain the confidentiality of certain information. Like paragraph 2(a), paragraph 2(b) defines its scope with reference to "[n]othing in this Agreement" ("*Ninguna disposición del Acuerdo*"; "*Aucune disposition de l'Accord*"). Here again, if we interpret paragraph 2(b) as referring exclusively to domestic regulation under Article VI of

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[1048] Appellate Body Report, *US — Gasoline*, p. 23 (footnotes omitted). See also Appellate Body Report, *US — Offset Act (Byrd Amendment)*, para. 271. In *Japan – Alcoholic Beverages II*, the Appellate Body considered that the principle of effectiveness (*ut res magis valeat quam pereat*) flowed from the general rule of interpretation set out in Article 31 of the Vienna Convention. See Appellate Body Report, *Japan – Alcoholic Beverages*, p. 12.

[1049] Panama's response to Panel question No. 50, p. 52.

[1050] Panama's response to Panel question No. 50, p. 52. In its second written submission, Panama states that "[a] prohibition or a quota on the number of foreign suppliers, for example, would not appear to be a domestic regulation, as would be, for example, requirements on the verification of qualifications or procedures for handling applications for permission to practise". See Panama's second written submission, para. 2.645.

[1051] Appellate Body Report, *EC – Asbestos*, para. 88. See also Appellate Body Report, *US – Clove Cigarettes,* footnote 273.

[1052] Appellate Body Report, *EC – Asbestos*, para. 88. See also Appellate Body Report, *US – Clove Cigarettes,* footnote 273.

the GATS, we could be curtailing the right of Members to confidentiality, since that right would not exist in the case of measures that did not qualify as domestic regulations.

7.845. Panama points out that other headings of the Annex on Financial Services are also directly correlated with specific articles of the GATS, for example, "Scope and Definition" (paragraph 1 of the Annex and Article I of the GATS); "Recognition" (paragraph 3 of the Annex and Article VII of the GATS); "Dispute Settlement" (paragraph 4 of the Annex and Articles XXII and XXIII of the GATS); and "Definitions" (paragraph 5 of the Annex and Article XXVIII of the GATS). We do not share Panama's view that there is an exact correspondence between the headings of the different sections of the Annex on Financial Services and the headings of the different articles of the GATS. For example, paragraph 4 of the Annex on Financial Services is headed "Dispute Settlement", a heading which does not appear in the same form in the text of the GATS. At best, the nearest approximation to this part of the Annex would be Article XXIII of the GATS, which is headed "Dispute Settlement and Enforcement".

7.846. Moreover, Panama argues that an objective interpretation of the GATS "cannot give a divergent meaning to two provisions that explicitly cover the same subject, unless the terms used are expressly intended to have a different meaning".[1053] According to Panama, "[g]iven the limited number of questions covered in the Annex, as compared with those covered by the GATS, it is obvious that the paragraphs of the Annex refer directly and solely to those specific areas of the GATS in which it was considered pertinent to establish additional provisions for financial services".[1054] It does not seem to us that in all the cases in which there may be a correlation between the headings of paragraphs of the Annex and those of the provisions of the GATS the matters dealt with are also identical. An obvious case is that of paragraph 2(b) of the Annex itself, which, as we have said, deals with the right of Members to maintain the confidentiality of certain information. Article VI of the GATS does not deal with questions concerning the disclosure of confidential information. These matters are addressed in Article III *bi*s of the GATS.[1055]

7.847. In the light of the foregoing, and for the sake of an interpretation that gives meaning to all the words of the treaty and does not reduce the words of paragraph 2 of the Annex on Financial Services to inutility or redundancy, we consider that the concept of "domestic regulation" in the heading of paragraph 2 of the Annex on Financial Services has a scope different from that of the similar concept in the heading of Article VI of the GATS. In our view, the text of paragraph 2(a) of the Annex on Financial Services (i.e. "[n]otwithstanding any other provisions of the Agreement" and "[w]here such measures do not conform with the provisions of the Agreement") indicates a scope greater than that of Article VI of the GATS, as is confirmed by the immediate context afforded by paragraph 2(b). The Panel therefore considers that paragraph 2(a) of the Annex on Financial Services covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a) of the said Annex and not only those measures that could be characterized as "domestic regulations" within the meaning of Article VI of the GATS.

7.848. We would also like to express our concern with regard to the serious systemic implications of the narrow interpretation proposed by Panama. Indeed, such an interpretation would drastically reduce the scope of the prudential exception, since it would provide an escape valve only for those "domestic regulations" which do not conform with Article VI of the GATS and not for those measures which may be covered by other provisions of the GATS (such as those relating to market access, national treatment or MFN treatment).

7.849. We agree with the concern expressed by some third parties in this dispute which also stress the broad policy space which this provision reflects.[1056] In particular, we find relevant the comment by the United States to the effect that Members' broad conception of the prudential

[1053] Panama's second written submission, para. 2.643.
[1054] Panama's second written submission, para. 2.644.
[1055] Article III *bis* entitled "Disclosure of Confidential Information" states:
Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.
[1056] Brazil's third-party submission, para. 20; United States' response to Panel question No. 13 (referring to its response to advance Panel question No. 7, para. 3). See also 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, document cited by the United States in its response to Panel question No. 7.

exception informed the scope of the commitments and limitations that they negotiated and inscribed in their schedules of specific commitments and MFN exemptions lists.[1057] Likewise, the European Union has stressed that this provision seems to have been left intentionally broad and notes that it is the result of a delicate compromise. Therefore, a narrow interpretation of the scope of application of the provision or of the conditions under which the prudential exception can successfully be invoked would go against the balance of rights and obligations of the Agreement.[1058]

7.850. The relevance of the role played by the broad view of the prudential exception in delimiting the scope of the specific commitments and the consequent process of recording each Member's limitations in their schedules of specific commitments and lists of exemptions from the MFN principle appears to be confirmed by paragraph 13 of the previously mentioned Explanatory Note by the Secretariat entitled "Scheduling of Initial Commitments in Trade in Services". We recall that in explaining what should be inscribed in a schedule of specific commitments under the GATS, this Note states that "any prudential measure justifiable under paragraph 2.1 of the Annex on Financial Services constitutes an exception to the Agreement and should not be scheduled".[1059]

7.851. In view of the foregoing, we consider that to be able to shield its measures 5 and 6 under the prudential exception, Argentina needs to satisfy three requirements: (i) that measures 5 and 6 are measures "affecting the supply of financial services"; (ii) that measures 5 and 6 were taken "for prudential reasons"; and (iii) that measures 5 and 6 have not been used "as a means of avoiding [Argentina's] commitments or obligations" under the GATS.

7.852. This order of analysis coincides with that proposed by the parties and third parties which have provided the Panel with input on this issue.[1060] Although panels are not obliged to follow the order of analysis proposed by the parties[1061], this Panel has no reservations about undertaking the interpretative analysis in the order proposed by the parties to this dispute. Therefore, the Panel will follow this order of analysis in examining whether measures 5 and 6 are covered by paragraph 2(a) of the Annex on Financial Services. We begin by examining the first requirement, namely, whether measures 5 and 6 are measures "affecting the supply of financial services".

7.3.7.2.4.1 First requirement: Whether measures 5 and 6 are measures "affecting the supply of financial services"

7.853. The first requirement that Argentina must meet is that its measures 5 and 6 are measures "affecting the supply of financial services" in accordance with paragraph 1(a) of the Annex on

[1057] United States' response to Panel question No. 13 (referring to its response to advance Panel question No. 7, para. 5).

[1058] European Union's response to Panel question No. 13, para. 35.

[1059] See the 1993 Guidelines, (Exhibits PAN-46 / ARG-79), para. 13. We recall that in *US – Gambling*, the Appellate Body considered that this Explanatory Note constituted a supplementary means of interpretation under Article 32 of the Vienna Convention. See Appellate Body Report, *US – Gambling*, para. 197. Reference should also be made to paragraph 20 of the revised Guidelines adopted by the Council for Trade in Services on 23 March 2001, which reproduces practically the entire text of paragraph 13 of the 1993 version. See the 2001 Guidelines, (PAN-45 / ARG-39), para. 20.

[1060] Argentina's response to Panel question No. 50, paras. 1-3; Panama's response to Panel question No. 50; and European Union's response to Panel question No. 13, paras. 31-33. In this connection, we note that Panama considered that there was a fourth requirement which Argentina had to meet in order to demonstrate that a measure is covered by the prudential exception, namely, "that the measure constitutes a 'domestic regulation'". See Panama's second written submission, para. 2.637. The Panel considered that paragraph 2(a) of the Annex on Financial Services covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a) of the Annex and not only those measures that can be characterized as "domestic regulations" within the meaning of Article VI of the GATS. See paragraph 7.847 above.

[1061] The freedom of panels to decide the order of their analysis was recognized by the Appellate Body in *Canada – Wheat Exports and Grain Imports*, where it stated that "[a]s a general principle, panels are free to structure the order of their analysis as they see fit. In so doing, panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member". See Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126. This could be compared with the manner in which Argentina is presenting its defence, since it is Argentina that is invoking the prudential exception. In *US - Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body recognized the possibility of panels opting for an order of analysis different from that suggested by the complaining party, "in particular, when this is required by the correct interpretation of the or application of the legal provision at issue". See Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 277.

Financial Services reproduced in paragraph 7.823. Thus, measures 5 and 6 must "affect" the supply of a particular type of services, namely, financial services.

7.854. With respect to what is meant by a measure "affecting" the supply of financial services, we recall that in *EC – Bananas III*, in discussing the scope of the GATS and, in particular, the interpretation of the words "measures by Members affecting trade in services" in Article I:1 of the GATS, the Appellate Body considered that:

> The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT 1947 is wider in scope than such terms as "regulating" or "governing".[1062]

7.855. In our view, in determining whether the measure "affects" the supply of financial services within the meaning of paragraph 1(a) of the Annex on Financial Services, the Panel can be guided by this jurisprudence of the Appellate Body. This leads us to the view that the word "affecting" in paragraph 1(a) of the Annex on Financial Services has a broader scope than such terms as "regulating" or "governing" and therefore covers any measure that has "an effect on" the supply of financial services.

7.856. We recall that we have already concluded that the eight measures at issue, and hence measures 5 and 6, are measures "affecting trade in services" within the meaning of Article I:1 of the GATS.[1063] Likewise, we have concluded that both measure 5 and measure 6 are inconsistent with Article II:1 of the GATS.[1064] In our view, if a measure is covered by the GATS since it affects trade in services and has been found to be inconsistent with that Agreement, it must be considered to be a measure "affecting" the supply of services.[1065] We must therefore establish whether the services whose supply is affected by measures 5 and 6 are "financial" in nature.

7.857. Argentina claims that the measures in question are measures "affecting the supply of financial services" within the meaning of paragraph 1(a) of the Annex on Financial Services because both "reinsurance and retrocession services" (regulated by measure 5) and the trading of "transferable securities" (regulated by measure 6) are specifically listed under the definitions of financial services in paragraph 5(a) of the Annex on Financial Services.[1066] We note that the services identified by Panama are reinsurance services[1067] (for measure 5) and portfolio management services (for measure 6)[1068], both financial in nature.[1069] We also note that, before listing the "financial services" to which we have referred, paragraph 5 of the Annex on Financial Services defines the concept of "financial service" as "any service of a financial nature offered by a financial service supplier of a Member". It is therefore our understanding that all the services subsequently listed in paragraph 5 of the Annex are services of "a financial nature".

7.858. Consequently, we consider that both measure 5 and measure 6 are measures affecting the supply of financial services within the meaning of paragraph 1(a) of the Annex on Financial Services. We now proceed to examine whether Argentina has also demonstrated that measures 5 and 6 are measures taken "for prudential reasons".

[1062] Appellate Body Report, *EC – Bananas III*, para. 220.

[1063] See section 7.3.1.2.4 above.

[1064] See section 7.3.2.2.4 above.

[1065] We also recall that in the context of the claims under Article XVII of the GATS we found that the concept of measures "affecting the supply of services" is closely linked to the concept of "affecting trade in services", given that the concept of "trade in services" is defined in Article I of the GATS as the "supply of a service" by means of one of the four modes of supply identified in that provision. See para. 7.474 above.

[1066] Argentina's second written submission, para. 85. The Panel notes that the trading of transferable securities is covered by the services cited in paragraph 5(a)(x) of the Annex on Financial Services.

[1067] We recall that Panama also made claims in relation to the retrocession services sector but the Panel considered that these services are not covered by measure 5. See section 7.1.4 above.

[1068] See paragraph 7.97 above.

[1069] Reinsurance services are mentioned in paragraph 5(a)(ii) of the Annex on Financial Services, while portfolio management services are covered by the services indicated in paragraph 5(a)(xiii) of that Annex ("Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services").

7.3.7.2.4.2 Second requirement: Whether measures 5 and 6 were taken for prudential reasons

7.859. Once it has been established that measures 5 and 6 affect the supply of financial services within the meaning of paragraph 1(a) of the Annex on Financial Services, the next requirement that Argentina must demonstrate is that measures 5 and 6 were taken for prudential reasons.

7.860. The crux of the matter is therefore what is meant by a measure taken "for prudential reasons". In this connection, we note that Panama uses the terms "measures taken for prudential reasons" and "prudential measures" as synonyms.[1070] In a footnote in its second written submission, Panama observes in this respect that paragraphs 3 and 4 of the Annex on Financial Services refer to "prudential measures" and "prudential issues", respectively, which, according to Panama, confirms that the key term for the purposes of the Annex on Financial Services is "prudential", and not so much the terms "reasons", "measures" or "issues".[1071] Argentina does not refer specifically to this question, but uses both terms without distinction.[1072]

7.861. The Panel is not convinced by this assertion of Panama nor is it convinced that the two concepts – "measures for prudential reasons" and "prudential measures" – signify the same thing or have the same effects. Firstly, we note that the prudential exception does not speak of "prudential measures" but of "measures for prudential reasons". We therefore consider that it is the reason which must be "prudential" and not the measure *per se*. The meaning of the two expressions cannot be the same and, in our opinion, this is an important aspect to be borne in mind when interpreting this provision. In other words, the GATS does not seek to identify measures that could be characterized as *specifically* prudential, such as those usually cited in the context of the standards defined by the Basel Committee on Banking Supervision.[1073] Nor does paragraph 2(a) of the Annex on Financial Services refer to any international norm to be used as a guide when deciding on the nature of a measure in the light of the Agreement. Rather, instead of exempting a specific *type* of measures from the obligations and commitments under the GATS, the exception makes it possible to exempt or exonerate any measure affecting the supply of financial services that has been taken "*for prudential reasons*".

7.862. Contrary to what Panama suggests, we consider that the use made of expressions such as "prudential measures" and "prudential issues" in paragraphs 3 and 4 of the Annex on Financial Services, respectively, corresponds to actual provisions of the Annex and has a specific meaning whose interpretation is not at issue in this dispute. The interpretation proposed by Panama would run counter to an effective interpretation of paragraph 2(a) since it would not give meaning to the term "reasons" used in that provision.

7.863. Therefore, in answering the question of what is meant by a measure being taken "for prudential reasons", we consider it useful to divide our analysis into two parts: first, we will examine the meaning of the concept "prudential reasons" in paragraph 2(a) of the Annex on Financial Services; and second, we will analyse what is meant by a measure having been taken "for" prudential reasons.

(a) The meaning of the concept of "prudential reasons"

7.864. We begin by analysing the meaning of the term "*motivos cautelares*" (prudential reasons) in the Spanish version of paragraph 2(a) of the Annex on Financial Services of the GATS.

7.865. The dictionary of the Spanish Royal Academy defines "*motivo*" (motive) as "[*q*]*ue mueve o tiene eficacia o virtud para mover; Causa o razón que mueve para algo*"[1074] (that which moves or has efficacy or power to move; moving cause or reason for something) and "*cautelar*" (prudential)

[1070] Panama's second written submission, para. 2.653 and footnote 624; and Argentina's first written submission, para. 560.

[1071] Panama's second written submission, footnote 624.

[1072] Argentina's first written submission, para. 560.

[1073] See the "Core principles for effective banking supervision", established by the Basel Committee on Banking Supervision, in particular Principles 14 to 29 relating to "prudential regulations and requirements" (September 2012 version, Spanish text can be viewed at: http://www.bis.org/publ/bcbs230_es.pdf).

[1074] *Diccionario de la Lengua Española*, 23rd edition, Real Academia Española (Espasa Calpe, 2014), Vol. II, p. 1503.

as "[*p*]*reventivo, precautorio; Dicho de una measure o de una regla: Destinada a prevenir la consecución de determinado fin o precaver lo que pueda dificultarlo*"[1075] ([p]reventive, precautionary; said of a measure or rule intended to prevent a particular outcome or guard against that which might impede it). The same dictionary defines "*preventivo*" (preventive) as "[*q*]*ue previene*"[1076] (that which prevents) and the verb "*prevenir*" as "[*p*]*reparar, aparejar y disponer con anticipación lo necesario para un fin; Prever, ver, conocer de antemano o con anticipación un daño o perjuicio; Precaver, evitar, estorbar o impedir algo; Advertir, informar o avisar a alguien de algo; Imbuir, impresionar, preocupar a alguien, induciéndole a prejuzgar personas o cosas; Anticiparse a un inconveniente, dificultad u objeción; Disponer con anticipación, prepararse de antemano para algo*"[1077] ([p]repare, get ready, and provide in advance for that which is necessary for a purpose; foresee, see, be aware beforehand or in advance of possible harm or injury; guard against, avoid, hamper or hinder something; warn, inform or notify someone of something; imbue, impress or worry someone, thereby inducing him to prejudge persons or things; anticipate an obstacle, difficulty or objection; make provision in advance or prepare for something beforehand). The definition of "*precautorio*" (precautionary) in the same dictionary is "[*q*]*ue precave o sirve de precaución*"[1078] ([t]hat which guards against or serves as a precaution). The definition of "*precaver*" (guard against, forestall) is "[*p*]*revenir un riesgo, daño o peligro, para guardarse de él y evitarlo*"[1079] ([t]o anticipate a risk, injury or danger, to protect oneself from it and avoid it).

7.866. As on previous occasions, we consider it appropriate to refer to the ordinary meaning of the equivalent terms in the equally authentic English and French versions of paragraph 2(a) of the Annex on Financial Services. The English version of this paragraph refers to "prudential reasons". In the *Shorter Oxford Dictionary*, the word "prudential" is defined as "*[o]f, involving or characterized by prudence; exercising prudence, esp. in business affairs*".[1080] In French, the words used are "*raisons prudentielles*". The dictionary *Le Petit Robert* does not define the word "*prudentiel*" but we do find the word "*prudent*" which is defined as "[*q*]*ui a, montre de la prudence" (*having or showing prudence).[1081] The definition of "*prudence*" *i*s "*[a]ttitude d'esprit d'une personne qui, réfléchissant à la portée et aux conséquences de ses actes, prend ses dispositions pour éviter des erreurs, des malheurs possibles, s'abstient de tout ce qu'elle croit pouvoir être source de dommage*"[1082] ([a]ttitude of a person who, reflecting on the significance and consequences of his acts, takes steps to avoid mistakes and possible mishaps, and refrains from anything that might be a source of harm).

7.867. All these definitions, whatever the official language we examine, tend to characterize the expression "prudential reasons" ("*motivos cautelares*", "*raisons prudentielles*") as "causes" or "reasons" of a "preventive" or "precautionary" nature. In this respect, we note that Argentina and third parties such as Brazil and the United States also consider that the term "prudential" ("*cautelar*") should be interpreted in the sense of "precautionary".[1083]

7.868. In our view, this understanding of the concept "prudential reasons" as referring to "preventive or precautionary reasons" finds support in the list of prudential reasons set out in paragraph 2(a) of the Annex on Financial Services. In the Panel's opinion, this list throws light on the type of "prudential reasons" envisaged in this paragraph. The list, which constitutes the immediate context for the concept "prudential reasons", follows the word "including" so that, as mentioned above[1084], the list of reasons should be regarded as indicative and not exhaustive, unlike, for example, the subparagraphs of Article XIV of the GATS. We note that the parties and

[1075] *Diccionario de la Lengua Española*, 23rd edition, Real Academia Española (Espasa Calpe, 2014), Vol. I, p. 470.
[1076] *Diccionario de la Lengua Española*, 23rd edition, Real Academia Española (Espasa Calpe, 2014), Vol. II, p. 1783.
[1077] *Diccionario de la Lengua Española*, 23rd edition, Real Academia Española (Espasa Calpe, 2014), Vol. II, p. 1783.
[1078] *Diccionario de la Lengua Española*, 23rd edition, Real Academia Española (Espasa Calpe, 2014), Vol. II, p. 1770.
[1079] *Diccionario de la Lengua Española*, 23rd edition, Real Academia Española (Espasa Calpe, 2014), Vol. II, p. 1770.
[1080] Shorter Oxford English Dictionary, 6th edition, W.R. Trumble, A. Stevenson (editors) (Oxford University Press, 2007), p. 2386.
[1081] *Dictionnaire de la Langue Française Le Petit Robert*, (Dictionnaires Le Robert, 2000), p. 2033
[1082] *Dictionnaire de la Langue Française Le Petit Robert*, (Dictionnaires Le Robert, 2000), p. 2033.
[1083] United States' third-party submission, footnote 13; and Brazil's third-party submission, para. 18.
[1084] See para. 7.819 above.

third parties that have commented on this provision are in agreement as regards the indicative and non-exhaustive nature of the list of prudential reasons included in the prudential exception.[1085]

7.869. The indicative list of prudential reasons in paragraph 2(a) of the Annex on Financial Services includes by way of example "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".[1086] These examples are in themselves extremely broad and point to various aspects of prudential reasons – aspects that have to do, *inter alia*, with the protection of consumers of financial services broadly speaking or with the maintenance of the integrity and stability of the financial system. Being merely illustrative, the list contained in paragraph 2(a) could include other prudential reasons beyond those explicitly cited.[1087]

7.870. In the Panel's opinion, the meaning and importance that Members attach to these prudential reasons may vary over time, depending on different factors, including the perception of the risk prevailing at different points in time. In this connection, we recall that on various occasions the Appellate Body has stated that Members, in applying concepts equally important for society, such as those covered by Article XX of the GATT 1994, are entitled to determine the level of protection they consider appropriate.[1088] This was also the conclusion of the panel in *US – Gambling*, with reference to other policy objectives under Article XIV of the GATS.[1089]

7.871. Although these statements were made in the context of Articles XX of the GATT 1994 and XIV of the GATS, we believe that they also apply to prudential reasons such as "the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier" or "the integrity and stability of the financial system" within the framework of paragraph 2(a) of the Annex on Financial Services. The nature and scope of financial regulation at different times reflect the knowledge, experience and scales of values of governments at the moment in question. We therefore consider that WTO Members should have sufficient freedom to define the prudential reasons that underpin their measures, in accordance with their own scales of values.

7.872. In our view, this interpretation corresponds to the object and purpose of the GATS, as set out in its own preamble, which 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".[1090]

[1085] Argentina's first written submission, para. 553, and response to Panel question No. 52; Panama's response to Panel question No. 52; Brazil's response to Panel question No. 14; United States' response to advance Panel question No. 7; and European Union's response to Panel question No. 14.

[1086] We note that it is not clear that the phrase "to ensure the integrity and stability of the financial system" is one of the possible prudential reasons, since this expression is preceded by the conjunction "or" after a comma, which would appear to indicate that it concerns another type of measures in addition to those for "prudential reasons". Thus, the first sentence of the prudential exception could be understood as authorizing Members to take "measures for prudential reasons, including …, or to …". The same structure can be found in the authentic versions in Spanish and French. However, the parties and the third parties appear to consider that this is one more prudential reason. The Panel takes note of the relevant arguments of the parties and third parties, but does not consider it necessary to examine these arguments any further since there is no need to resolve this issue for the purposes of the present dispute.

[1087] The United States expressed a similar view in its response to advance Panel question No. 7.

[1088] See Appellate Body Report, *Korea – Various Measures on Beef*, para. 176; and *EC – Asbestos*, para. 168.

[1089] The panel reasoned as follows:

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

See Panel Report, *US – Gambling*, para. 6.461 (footnotes omitted).

[1090] Fourth recital of the GATS.

7.873. We therefore agree with the third parties concerning the evolutionary nature of the concept of "prudential reasons". Thus, for the European Union, the concept of "prudential reasons" is "of an intrinsically evolutionary nature", and the fact that Members have agreed on a non-exhaustive list of reasons is evidence of that. According to the European Union, as the recent financial crisis has revealed, it is not always possible to anticipate the consequences of turbulence in the financial markets or the financial system or to avoid them, and the prudential toolbox is in constant evolution, as is shown by the plethora of recommendations made by the international financial organizations in recent years.[1091] According to the United States, as the financial crisis of 2008 and its aftermath have amply demonstrated, the risks in the financial sector can evolve over time, on the basis of the changing circumstances in that sector, and have consequences that can threaten the entire economy and the well-being of nations.[1092] Likewise, Brazil argues that not only may measures be taken broadly to protect investors, depositors and the financial system as a whole, but may also be adopted in a precautionary manner.[1093] According to Brazil, the prudential exception allows Members to act broadly and plan ahead, taking into account the fact that many of the threats to financial stability come from multiple and complex market factors, as shown by the financial crisis of 2008.[1094]

7.874. We also note that the international community has recognized that the build-up of financial risks can be hard to discern and address. In the words of the G-20:

> Policy-makers, regulators and supervisors, in some advanced countries, did not adequately appreciate and address the risks building up in financial markets, keep pace with financial innovation, or take into account the systemic ramifications of domestic regulatory actions.[1095]

7.875. Accordingly, our interpretation appears to be consistent with the concerns of the international community regarding the nature and impact of the financial risks and the consequent need to preserve sufficient flexibility when determining the prudential reasons to which the regulation should respond.

7.876. We note that Panama takes a view of "prudential" different from that which we have just described. In this connection, we recall that Panama confuses the concept of "measures … for prudential reasons" with that of "prudential measures". As previously indicated, Panama considers that the prudential nature of the measure necessitates the existence of at least two requirements: *fumus boni iuris* and *periculum in mora*. According to Panama, the first requirement (appearance of good law) calls for the claim to have a certain amount of plausibility, the actual existence of a risk and the possibility of its materialization. The second requirement (danger in delay) is related to the risk of an imminent legal injury being suffered as a consequence of a delay in the adoption of the measure. It is the risk of imminent injury that bestows on prudential measures their generally urgent character.[1096] Panama maintains that there must be a risk whose materialization is imminent if the adoption of the measure is delayed.[1097]

7.877. We do not see in the text of paragraph 2(a) of the Annex on Financial Services any indication that the only prudential reasons envisaged are those which, as Panama argues, involve avoiding "a risk whose materialization is imminent if the adoption of the measure is delayed".[1098] In fact, the indicative nature of the list of prudential reasons in paragraph 2(a) of the Annex on Financial Services on the one hand reflects the difficulty of having an exhaustive list of reasons capable of underpinning specific measures in the financial sector, and on the other denotes a desire to allow Members to adapt their measures in the financial sector to the changing and unpredictable nature of the risks that might arise. Therefore, taking into account the ordinary meaning of the words "prudential reasons" and the illustrative list of these reasons, there is nothing in the text of paragraph 2(a) to suggest this idea of "imminence".

[1091] European Union's response to Panel question No. 13, para. 36.

[1092] United States' response to Panel question No. 13 (referring to its response to advance Panel question No. 7, para. 13).

[1093] Brazil's third-party submission, para. 18.

[1094] Brazil's third-party submission, para. 20.

[1095] G20, *Declaration of the Summit on Financial Markets and the World Economy* (2008), (Exhibit ARG-14), para. 3 (exhibit provided in English and translated into Spanish by the WTO Secretariat).

[1096] Panama's second written submission, para. 2.655.

[1097] Panama's second written submission, para. 2.708.

[1098] Panama's second written submission, para. 2.708.

7.878. In our view, it is important to understand that "systemic" problems may be incubating or gestating over the course of time and erupt rapidly; hence the importance of being prepared for them in advance.[1099] For example, in the particular case of the insurance sector, a situation of failure – and, ultimately, the possibility of contagion and financial instability, together with a threat to the protection of the consumers of these services – might be slow to emerge.[1100]

7.879. In the light of the foregoing, we conclude that the expression "*motivos cautelares*" (prudential reasons) refers to those "causes" or "reasons" that motivate financial sector regulators to act to prevent a risk, injury or danger that does not necessarily have to be imminent.

(b) Measures taken "for" prudential reasons

7.880. Having determined the meaning of the term "prudential reasons", we continue our analysis by examining the question of when a measure is taken "for" prudential reasons.

7.881. We recall that Argentina argues that this step in the analysis under paragraph 2(a) of the Annex on Financial Services requires the determination of whether there is a "rational relationship" between the measure and its prudential objective.[1101] For Argentina, a measure taken "for prudential reasons" is a measure intended to avoid an outcome that conflicts with an objective established or envisaged by the corresponding authority, which may have adverse or pernicious consequences for the rights protected by that authority.[1102] Moreover, for Argentina, a central aspect of what makes a measure prudential has to do with its fitness for the purpose of preventing the event, or the effects resulting therefrom, which the measure is intended to avoid.[1103]

7.882. Panama considers that the measures must have been taken for a "specific cause or reason". According to Panama, it is the *prudential* nature of the measure taken by the respondent that should be subjected to the closest scrutiny by a panel in this phase of the examination.[1104] Moreover, Panama maintains that when a panel assesses whether a measure taken by a Member is "for prudential reasons" within the meaning of paragraph 2(a) of the Annex on Financial Services, it should examine whether there is a real risk of imminent injury if that measure is not adopted or its adoption is delayed.[1105]

7.883. We note that several third parties have commented on the sort of examination we should carry out in order to determine whether a measure has been taken for prudential reasons. The European Union agrees with the parties that the use of the preposition "for" implies a rational relationship of ends and means between the measure and the prudential reason.[1106] For the United

[1099] In this connection, we note that the third parties share this reading with the Panel with respect to the first sentence of paragraph 2(a) of the Annex on Financial Services in the sense of allowing Members not only to respond to situations of imminent peril for the financial system but also to foresee sufficiently in advance the emergence of situations that pose a threat to the financial system. Thus, Brazil argues that not only may the measures be taken broadly to protect investors, depositors and the financial system as a whole, but may also be adopted in a precautionary manner. According to Brazil, the prudential exception allows Members, instead of reacting to individual risks posed in specific sectors or areas of the financial world, to act broadly and plan ahead, since many of the threats to financial stability may come from multiple and complex factors in various markets, as the recent global financial crisis of 2008 proved. See Brazil's third-party submission, paras. 18 and 19.

[1100] The International Association of Insurance Supervisors, the sector's governing body at world level, recognizes this possibility:

> [S]ystemic risk with a bearing on financial stability and the real economy posed by the insurance sector is of a different nature because of the insurance business model. In the insurance sector the time horizon plays a relevant role, for systemic problems tend to emerge over a longer time horizon than for banking. While banking failures may arise in a matter of hours or days, insurance failures usually take months or years, although loss of insurance capacity could emerge in weeks, if insurers or reinsurers cease offering cover after serious problems are discovered.

See International Association of Insurance Supervisors, *Systemic Risk and the Insurance Sector*, 25 October 2009, (Exhibit ARG-140), para. 25 (exhibit provided in English and translated into Spanish by the WTO Secretariat).

[1101] Argentina's second written submission, para. 79, and responses to Panel questions No. 53 and 87.

[1102] Argentina's first written submission, para. 560.

[1103] Argentina's second written submission, para. 89.

[1104] Panama's response to Panel question No. 87.

[1105] Panama's second written submission, para. 2.661.

[1106] The European Union offers the following explanation:

States, the Member must, as an initial matter, identify a "prudential reason" "for" which the measure was taken.[1107]

7.884. Carrying out an appropriate examination to determine whether a measure has been taken for prudential reasons is no easy task. If we compare paragraph 2(a) of the Annex on Financial Services with the general exceptions of Articles XIV of the GATS and XX of the GATT 1994, we note that, unlike some of the subparagraphs of these provisions[1108], the prudential exception does not require the measures to be "necessary". Hence it does not seem obvious to us *a priori* that the text of paragraph 2(a) of the Annex on Financial Services justifies the imposition of a "necessity" test requiring the measure to be the least trade-restrictive, as established within the context of the general exceptions of the GATT 1994 and the GATS. In this respect, we agree with the parties and various third parties. For Argentina, the prudential exception does not justify the use of a "necessity" test or other more deferential standard, such as that stemming from the expression "relating to".[1109] Panama does not refer to a "necessity" test, but considers that the measures must have been taken for a "specific cause or reason". According to Panama, it is the *prudential* nature of the measure taken by the respondent that should be the subject of the closest scrutiny by a panel in this phase of the examination.[1110] The European Union considers that, unlike many of the paragraphs in Article XX of the GATT 1994 and Article XIV of the GATS, which specify that the measure must be "necessary" for achieving the legitimate objective, paragraph 2(a) does not require that the measure should be the least trade-restrictive means of achieving the stated objective.[1111] According to the United States, the expression "for prudential reasons" neither requires nor permits an assessment of the extent to which the measure contributes to the realization of the end pursued.[1112]

Unlike many of the paragraphs in Article XX of the GATT 1994 and XIV of the GATS, which specify that the measure must be "necessary" for achieving the legitimate objective, paragraph 2(a) does not require that the measure should be the least trade-restrictive means to achieve the stated objective. The use of the word "for" in the phrase "measures for prudential reasons" signifies a means-ends relation between the measure and the prudential objective. Hence, the Member taking the measure at issue must demonstrate a rational relationship of ends and means between the objective and the measure at issue.

See European Union's third-party submission, para. 132 (translated into Spanish by the WTO Secretariat). The European Union reiterates this argument in its response to Panel question No. 13.

[1107] The United States considers that:

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.

See United States' response to Panel question No. 13 (referring to its response to advance Panel question No. 7, para. 12) (translated into Spanish by the WTO Secretariat).

[1108] Namely, subparagraphs (a), (b) and (c) of Article XIV of the GATS and subparagraphs (a), (b) and (d) of Article XX of the GATT 1994.

[1109] For Argentina,

[I]f the authors of the prudential exception had wanted that exception to be applied more strictly, they would have provided a less deferential standard, such as that of 'necessity' which, according to the Appellate Body, '*is located … closer to the pole of indispensable than to … making a contribution to*'. They could also have subjected the prudential exception to an intermediate level of deference, such as 'relating to', which, according to the Appellate Body, refers to measures which are '*primarily aimed at the conservation of exhaustible natural resources, within the meaning of Article XX(g) of the GATT*'. However, the authors of the prudential exception agreed that the text of that provision should be couched in the broadest possible terms, requiring only that the measure be taken 'for prudential reasons'. This language implies a very deferential standard, which requires the Panel to examine the prudential objectives of the measure and try to determine whether there is a rational relationship between those prudential objectives and the measure in question.

See Argentina's response to Panel question No. 53 (emphasis original).

[1110] Panama's response to Panel question No. 87.

[1111] See footnote 1106 above.

[1112] In the response of the United States we find the following:

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). Some of the general exceptions in GATT and GATS, for example, expressly require a measure to be "necessary" to achieve a purpose, such

7.885. Nor does it seem to us that we can simply transpose the previous rulings by the Appellate Body with respect to Article XX(g) of the GATT 1994, which allow the adoption of inconsistent measures "relating to the conservation of … resources …". In this respect, we agree with Argentina that the prudential exception does not justify the use of a standard such as that stemming from the expression "relating to".[1113]

7.886. We must therefore proceed to interpret the text of paragraph 2(a) of the Annex on Financial Services on the basis of the ordinary meaning of its terms, in their context, while taking into account the object and purpose of the GATS.

7.887. We note that the Spanish Royal Academy defines the preposition "*por*" (for), in its most relevant sense, as "[*d*]*enota causa*" (denoting cause).[1114] In English, the *Shorter Oxford* dictionary defines the preposition "*for*" as "[*a*]*ffecting, with regard to, or in respect of*" or "*[h]aving (the thing mentioned) as a reason or cause*".[1115] In French, the dictionary *Le Petit Robert* defines the preposition "*pour*" as "*destiné à (qqn, qqch.)*" (intended for (someone, something)) or "*à cause de*" (because of"). Thus, the meaning is similar in all three languages.[1116]

7.888. A measure taken "for" prudential reasons would therefore be a measure with a prudential cause. This interpretation is reinforced by the meaning of the Spanish word "*motivo*", which also suggests the "cause or reason" for something.

7.889. In this connection, Argentina's interpretation – in proclaiming a "rational relationship" between the measure and its prudential objective[1117] and that the measure must be fit for the purpose of preventing the event, or the effects resulting therefrom, which the measure is intended to avoid[1118] – seems to us to be in keeping with the idea derived from the meaning of the words "for" and "reasons" that in the measure's design, structure and architecture there must be a rational relationship of cause and effect between the measure and the prudential reason for it. In this connection, we note that this is also, at least partially, the interpretation favoured by Panama. Certainly, Panama considers that the measures must have been taken for a "specific cause or reason". According to Panama, it is the prudential nature of the measure taken by the respondent that should be the subject of the closest scrutiny by a panel in this phase of the examination.[1119]

7.890. We do not agree with Panama's interpretation that "prudential measures" should be transitional, provisional or short-term in nature[1120] and therefore can remain in place only for as long as the factual circumstances that justified their adoption continue to exist.[1121] Firstly, we recall that, as indicated earlier, the expression "prudential measures" does not appear as such in paragraph 2(a), since that paragraph refers to "measures for prudential reasons". Secondly, nothing in the ordinary meaning of the words "prudential reasons" conveys the idea of a time-limit, either for the reasons or for the measures. Finally, even if we were to accept that precautions are limited to situations of imminent danger, we cannot agree with Panama's premise that the existence of "imminent" danger necessarily and solely calls for measures of a "transitional, provisional or short-term" nature.[1122] As a matter of principle, an "imminent" danger may give rise to long-lasting measures to avoid the recurrence of similar situations in the future. Therefore, in our opinion, the measures for prudential reasons envisaged in paragraph 2(a) of the Annex on Financial Services may be urgent measures to confront an imminent risk, temporary or

as: "necessary" to protect public morals or to maintain public order; "necessary" to protect human, animal or plant life or health; or "necessary" to ensure compliance with laws or regulations that are not inconsistent with the agreement.
See United States' response to Panel question No. 13 (referring to its response to advance Panel question No. 7, para. 14) (translated into Spanish by the WTO Secretariat).

[1113] See footnote 1109 above.

[1114] *Diccionario de la Lengua Española*, 23rd edition, Real Academia Española (Espasa Calpe, 2014), Vol. II, p. 1756.

[1115] *Shorter Oxford English Dictionary*, 6th edition, A. Stevenson (ed.) (Oxford University Press, 2007), p. 1010.

[1116] *Dictionnaire de la Langue Française Le Petit Robert*, (Dictionnaires Le Robert, 2000), p. 1959.

[1117] Argentina's second written submission, para. 79.

[1118] Argentina's second written submission, para. 89.

[1119] Panama's response to Panel question No. 87.

[1120] Panama's second written submission, para. 2.656.

[1121] Panama's second written submission, para. 2.656. Panama bases these arguments on Articles 74.1, 74.2 and 76.1 of the ICJ Rules of Court.

[1122] Panama's second written submission, para. 2.656.

provisional measures, or even permanent (or long-lasting) measures, which might be taken even in the absence of an imminent risk that would prevent fulfilment of one of the motives or reasons mentioned in that paragraph.[1123] In our view, it is the nature of the situation that threatens a particular prudential objective that will dictate the nature of the measure.

7.891. Hence, it seems to us that the use of the word "for" in the phrase "measures for prudential reasons" denotes a rational relationship of cause and effect between the measure and the prudential reason. Thus, the Member taking the measure in question must demonstrate that in its design, structure or architecture there is a rational relationship of cause and effect between the measure it seeks to justify under paragraph 2(a) and the prudential reason provided. A central aspect of this rational relationship of cause and effect is the adequacy of the measure to the prudential reason, that is, whether the measure, through its design, structure and architecture, contributes to achieving the desired effect. Whether a measure has been taken "for prudential reasons", that is, whether there is a rational relationship of cause and effect between the measure and the reason, can only be determined on a case-by-case basis, taking account of the particular characteristics of each situation and each dispute.

7.892. We continue our analysis by examining whether Argentina has demonstrated that its measures 5 and 6 were taken for prudential reasons, that is, whether the reasons identified by Argentina qualify as "prudential" within the meaning of paragraph 2(a) of the Annex on Financial Services and, if so, whether there exists a rational relationship of cause and effect between measures 5 and 6 and their respective prudential reasons. We begin by examining measure 5.

(c) Whether measure 5 was taken "for prudential reasons"

7.893. Argentina maintains that the prudential purpose for which measure 5 was taken was to protect the financial consumer, in its different variants, including insurance, from the distortions, manipulations and abusive situations that may arise precisely when the institution responsible for reinsuring a particular risk is not known, for lack of an effective exchange of information. According to Argentina, "[i]f the reinsurer is located in a non-cooperative jurisdiction, the Argentine authorities will not have access to information on, among other things, the effective ownership of the reinsurer, whether it is adequately capitalized, whether its sources of funds are legitimate, or whether there is any risk of the transaction being used to launder money. Thus, transactions of this type expose the insurance markets in Argentina to greater systemic risk."[1124] According to Argentina, measure 5 responds to the need to preserve the integrity of the financial system insofar as the funds involved in many suspected money-laundering operations often come from countries which, precisely because they are non-cooperative for tax transparency purposes, draw a veil – intentionally or unintentionally – over information needed to carry out controls. Argentina argues that, where non-cooperative jurisdictions are concerned, it is impossible for the Argentine authority regulating securities to determine whether the sources of funds are legitimate or whether the financial services supplier is subject to proper control and supervision by a regulatory body in its home jurisdiction.

7.894. Argentina claims that "another central aspect of a prudential measure has to do with its suitability for the purpose of preventing the event, or the effects resulting therefrom, which the measure is intended to avoid. In this respect, measure 5 is directly and specifically related to the need to preserve, as fittingly as possible, the soundness of the Argentine financial system".[1125] Argentina explains that this is due to the importance of the insurance sector – defined in broad terms and including companies operating in the reinsurance and retrocession segment – as the second largest institutional investor in the Argentine capital market.[1126] Argentina explains that reinsurance and retrocession services enable the country's insurers to transfer part of their

[1123] Moreover, we note that in other provisions of the WTO Agreements, when the authors wanted to limit the scope of a provision to measures of a temporary or urgent nature they did so explicitly. Examples include Article XI:2(a) of the GATT 1994, which refers to "[E]xport prohibitions or restrictions temporarily applied" and Article XII of the GATT 1994, which includes expressions such as "imminent threat" (Article XII:2(a)), "parties … shall progressively relax [the application of restrictions under Article XII:2(a)] as such conditions improve … and shall eliminate the restrictions when conditions would no longer justify their institution or maintenance" (Article XII:2(b)). This provision, in its turn, specifies how to proceed "[i]f there is a persistent and widespread application of import restrictions under this Article" (Article XII:5).

[1124] Argentina's second written submission, para. 88.

[1125] Argentina's second written submission, para. 89.

[1126] Argentina's second written submission, para. 89.

portfolio risk to third parties located in Argentina or abroad, thus freeing up additional capital to finance more insurance policies in Argentina. However, in the event of the insolvency or failure of a foreign reinsurer, the insured party in Argentina would be unable to collect its claim against that reinsurer, but would continue to be responsible for paying out claims under the original insurance contract. Therefore, the failure of the foreign reinsurer presupposes an additional burden on the financial capacity of the original insurer, which in turn could lead to the failure of the original insurer and thus produce a "domino effect" on the Argentine insurance market.[1127] For this reason, the Argentine authority – SSN – has not only to protect the fiduciary relationship between the reinsurance company and the policy holders but also to preserve the soundness of the system, so as to ensure appropriate conditions for safeguarding insurance contracts and the fiduciary relationship between the companies and the policy holders.[1128]

7.895. Argentina claims that measure 5 is duly proportional to the objective pursued.[1129] According to Argentina, in the recitals of SSN Resolution No. 35.615/2011 themselves it is expressly stated "[t]hat, on the basis of the experience accumulated, it has been found necessary to upgrade the control mechanisms designed to ensure the necessary solvency of insurers and reinsurers operating within the national territory and, moreover, the fairness and technical reasonableness of the respective contract conditions". Argentina points out that the regulations establish additional requirements, which compensate for the lack of direct and effective access to information.[1130]

7.896. Panama replies that Argentina has not explained why its measure should be considered to have been taken "for prudential reasons". According to Panama, although Argentina maintains that its measure pursues the objective of "safeguarding the financial consumer" and responds to the need "to preserve the integrity of the financial system", the vague and extremely general references to "distortions, manipulations and abusive situations" suffered by consumers and to "many suspected money-laundering operations" are far from constituting an adequate explanation of the specific risks that Argentina seeks to avoid by means of the measure relating to reinsurance services. Panama maintains that the mere assertion that a measure has been taken to protect consumers and the financial system cannot suffice to show that it is in fact a prudential measure.[1131] In Panama's opinion, Argentina should have explained, for example, what would be the specific risk or risks to which the Argentine consumers would be exposed by contracting for reinsurance services with non-cooperative country suppliers, or what systemic risk created by non-cooperative country reinsurers could affect the stability of the Argentine financial system, or how the imposition of "additional requirements" on non-cooperative country reinsurers could be considered to be a measure designed to deal with and "mitigate the [existing] risks" by preventing them from materializing.[1132]

7.897. Panama also doubts whether the necessary solvency of the reinsurance companies could be ensured by the existence of an agreement or memorandum of understanding between two government agencies. Panama does not understand how the risk that the Argentine consumer might not receive the agreed coverage because of the reinsurance company's lack of funds is in any way forestalled or mitigated by the SSN's ability to contact *ex post facto* its counterpart in another jurisdiction once the risk has materialized. For Panama, to avoid the risk of insolvency ex ante, it is not necessary or effective to discriminate between reinsurance companies on the basis of their origin or impose conditions on the official counterparts of the SSN. According to Panama, what would be effective would be to apply control measures or impose minimum capital requirements on every reinsurance company, regardless of its origin.[1133]

7.898. For the purpose of determining whether measure 5 was taken "for prudential reasons", the Panel will proceed in two stages. First, we will analyse whether the reasons identified by Argentina with respect to measure 5 are "prudential" within the meaning of paragraph 2(a) of the Annex on Financial Services. That is to say, whether the issue is one of "causes" or "reasons" that prompt the regulatory authorities of the insurance sector to act to forestall a risk, injury or danger which, as previously mentioned, does not have to be imminent. If we find that there are "prudential

[1127] Argentina's second written submission, para. 87.
[1128] Argentina's second written submission, para. 90.
[1129] Argentina's first written submission, para. 568.
[1130] Argentina's first written submission, para. 568.
[1131] Panama's second written submission, paras. 2.676 and 2.677.
[1132] Panama's second written submission, para. 2.677.
[1133] Panama's second written submission, para. 2.678.

reasons", the next step will be to analyse whether the measure was taken "for" the said prudential reasons, that is, whether there exists a rational relationship of cause and effect between measure 5 and the prudential reasons identified by Argentina.

(i) Whether the reasons identified by Argentina are "prudential" within the meaning of paragraph 2(a) of the Annex on Financial Services

7.899. We recall that Argentina has identified the following prudential reasons for adopting measure 5, namely: as a precaution to protect the insured; to ensure the solvency of insurers and reinsurers; to guard against the systemic risk that might arise as a result of the insolvency and failure of reinsurance companies and lead to the collapse of direct insurance companies; and to guarantee the integrity of the market.[1134]

7.900. We note first of all that, as Argentina points out, the recitals of SSN Resolution No. 35.615/2011 mention among its objectives the need to upgrade "the control mechanisms designed to ensure the necessary solvency of insurers and reinsurers operating within the national territory and, moreover, the fairness and technical reasonableness of the respective contract conditions".[1135]

7.901. We also note that, as argued by Argentina, reinsurance services are vital for the smooth functioning of the insurance market.[1136] In a document entitled "General Solvency Criteria. Reinsurance Operations", the Association of Latin American Insurance Supervisors (ASSAL) states that "[r]einsurance is an essential part of the insurance industry since, from a technical point of view, it enables the institutions to spread their risks adequately and, from a financial point of view, it expands their ability to underwrite risks by limiting their potential losses, particularly where the risks are high."[1137] Moreover, as is also argued by Argentina, ensuring the solvency of the insurers and reinsurers is a *sine qua non* condition for ensuring financial stability and preventing systemic risk.[1138] This is confirmed by ASSAL, which points out that "in planning its surveillance activities the supervisory authority for the insurance industry should always pay due attention to the solvency and liquidity of the institutions".[1139] ASSAL also explains that an insurance institution is exposed to solvency problems due to "[t]he foreign reinsurers to which it cedes risks: depending on their quality or 'security', it is feasible for them to encounter problems stemming from the failure to fulfil these transferred responsibilities, for which, in general, they lack the backing of technical reserves or minimum liable equity capital".[1140]

7.902. Moreover, in a 2009 document of the International Association of Insurance Supervisors, entitled "Systemic Risk and the Insurance Sector", it is indicated that "[s]ystemic risk may arise in the insurance sector when insurance market capacity declines or disappears. It could be caused by, for example, the failure of one or more insurers or by the withdrawal of insurance or reinsurance cover."[1141] Further on, in the same document, it is explained that one source of an insurance failure could be via reinsurance exposure: "A sudden failure of a reinsurer may cause direct insurers to lose protection for lines of direct insurance and thus come under financial stress."[1142]

7.903. We note that Argentina makes a similar argument, pointing out that SSN Resolution No. 35.615/2011 is part of a series of "actions and measures taken to avoid reinsurer insolvency,

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[1134] Argentina's first written submission, para. 563; and second written submission, paras. 86-90.
[1135] Argentina's first written submission, para. 568, and Exhibits PAN-36 / ARG-27.
[1136] Argentina's second written submission, para. 87.
[1137] Association of Latin American Insurance Supervisors (ASSAL), General solvency criteria – Reinsurance operations, August 1999, (Exhibit ARG-88), para. 1.
[1138] Argentina's second written submission, para. 87.
[1139] ASSAL, General solvency criteria – Reinsurance operations, (Exhibit ARG-88), para. 16.
[1140] ASSAL, General solvency criteria – Reinsurance operations, (Exhibit ARG-88), para. 18(a).
[1141] See International Association of Insurance Supervisors, *Systemic Risk and the Insurance Sector*, 25 October 2009, (Exhibit ARG-140), para. 16 (exhibit provided in English and translated into Spanish by the WTO Secretariat).
[1142] See International Association of Insurance Supervisors, *Systemic Risk and the Insurance Sector*, 25 October 2009, (Exhibit ARG-140), para. 20 (exhibit provided in English and translated into Spanish by the WTO Secretariat).

it being understood that the failure of an entity would affect the stability of the direct insurers and, in general, the insured and the injured parties".[1143]

7.904. In our view, in the light of the arguments and evidence presented above, the reasons identified by Argentina with respect to measure 5 – to protect the insured, to ensure the solvency of insurers and reinsurers, and to avoid the possible systemic risk of the insolvency and failure of direct insurance companies – are prudential in nature and in conformity with our interpretation of the expression "prudential reasons" in paragraph 2(a) of the Annex on Financial Services.

7.905. It remains to determine whether measure 5 was taken "for" these prudential reasons, that is, as we previously indicated, whether there is a rational relationship of cause and effect between the measure and these prudential reasons. We recall that a central aspect of this rational relationship of cause and effect is the adequacy of the measure to the prudential reason, that is, whether the measure contributes to achieving the desired effect.

(ii) Whether measure 5 was taken for the prudential reasons identified by Argentina

7.906. As described in section 2.3.6 above, measure 5 consists of the imposition of requirements on non-cooperative country service suppliers in order for them to be able to gain access to the Argentine reinsurance services market. Argentina maintains this measure under points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011.

7.907. According to the actual wording of two of the provisions under which measure 5 is maintained (paragraphs 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011 as amended by SSN Resolution No. 38.284/2014), Argentina imposes different treatment on reinsurance service providers depending on whether or not they are established and registered in cooperative countries. Thus, if a foreign company is unable to show that it or its parent company is established and registered in a cooperative country, it must be shown that: (i) the foreign company or its parent company is subject to control and supervision by a body that performs functions similar to those of the SSN; and (ii) that the body in question has signed a memorandum of understanding on cooperation and information exchange with the SSN.

7.908. It will be recalled that the conditions under which a country is considered to be "cooperative for tax transparency purposes " are laid down in Decree No. 589/2013. As explained in section 2.2 above, Decree No. 589/2013 establishes the following conditions for a country to be considered cooperative, namely: (i) to have signed with Argentina a tax information exchange agreement or an international double taxation convention with a broad information exchange clause, provided that the information is effectively exchanged; or (ii) to have initiated with Argentina the negotiations necessary for concluding such an agreement and/or convention.[1144] If neither of these requirements is met, the country is deemed to be non-cooperative.[1145]

7.909. At the beginning of our analysis, we expressed agreement with Argentina that a crisis in the insurance and reinsurance sector involving a loss of insurance or reinsurance capacity might occur within a short period of time and harm financial stability and the real economy.[1146] As we

[1143] Argentina's first written submission, para. 459.
[1144] Article 1 of Decree No. 589/2013, (Exhibit PAN-3 / ARG-35).
[1145] We note, however, that AFIP Resolution No. 3.576/2013, "adopted in exercise of the powers conferred by Article 2(b) of Decree No. 589" exhibits slight differences in comparison with Decree No. 589/2013. On the one hand, Article 1 of this Resolution establishes three categories of cooperative country: "(a) cooperative countries which have signed a double taxation convention or information exchange agreement, with a positive assessment of effective exchange of information; (b) cooperative countries with which a double taxation convention or information exchange agreement has been signed but it has not been possible to assess effective exchange; and (c) cooperative countries with which the process of negotiating or ratifying a double taxation convention or information exchange agreement has been initiated". We also note that the third category refers to initiation of the negotiation or ratification process, whereas Decree No. 589/2013 refers only to negotiation. See AFIP Resolution No. 3.576/2013, (Exhibits PAN-3 / ARG-37).
[1146] Argentina's response to Panel question No. 85, para. 22.

saw above, the International Association of Insurance Supervisors (IAIS) has expressed a similar view.[1147]

7.910. As this Panel has already stated[1148], measures taken "for prudential reasons" include those that seek to look ahead and make the necessary arrangements in advance to achieve a certain prudential objective in the financial sector. In this respect, it seems to us that requesting relevant information from the regulatory authorities of other jurisdictions forms part of measures intended to look ahead and make the arrangements necessary to achieve a certain prudential objective in the financial sector, in this case to ensure the solvency of insurers and reinsurers and avoid the systemic risk that could arise from the insolvency and failure of direct insurance companies, as is argued by Argentina. In our view, having adequate and timely information concerning the foreign reinsurance company is fundamental for the purpose of anticipating crises or systemic risks which, as we have seen, could be incubating in an imperceptible manner over time and suddenly erupt. Viewed from this standpoint, we understand the reasoning behind the *requirement of information exchange* between insurance supervisors in points 18(a) and 20(f) I) of Annex I to SSN Resolution No. 35.615/2011, which we find perfectly valid.

7.911. Nevertheless, as stated above, a central aspect of the rational relationship of cause and effect is the adequacy of the measure to the prudential reason, that is to say, whether the measure, through its design, structure and architecture, contributes to achieving the desired effect. We will consider this aspect next.

7.912. We begin by noting that the determination as to who is "cooperative" and who is "non-cooperative" is made by applying Decree No. 589/2013. Decree No. 589/2013 establishes the conditions for a country to be considered cooperative, namely: (i) to have signed with Argentina a tax information exchange agreement or an international double taxation convention with a broad information exchange clause, provided that the information is effectively exchanged; or (ii) to have initiated with Argentina the negotiations necessary for concluding such an agreement and/or convention.[1149] If neither of these requirements is met, the country is deemed to be non-cooperative.[1150]

7.913. In other words, Decree No. 589/2013 serves to determine not only those that are cooperative and exchange information but also, by default, those that are "non-cooperative" and whose companies will be required, under the second paragraphs of points 18(a) and 20(f) I), to show that they are subject to control and supervision by a body: (i) which performs functions similar to those of the SSN, and (ii) with which the SSN has signed a memorandum of understanding on cooperation and information exchange. It is in the mechanism under Decree No. 589/2013 for determining who is cooperative and who is non-cooperative that we see, as explained below, a crucial problem.

7.914. Decree No. 589/2013 also authorizes the AFIP to "draw up a list of the countries, dominions, jurisdictions, territories, associate States and special tax regimes considered cooperative for tax transparency purposes, to publish it on its website (http://www.afip.gob.ar) and to keep that publication up to date". In fact, this list has practical effects. In the case of measure 5, inclusion in the list enables a reinsurance company of the country concerned automatically to meet the first requirement laid down in points 18(a) and 20(f) I) of Annex I to SSN Resolution No. 35.615/2011.

7.915. We note that the first criterion of Decree No. 589/2013 stipulates that, for a country to be considered a cooperative country, it must have signed with Argentina a tax information exchange agreement or an international double taxation convention with a broad exchange-of-information clause, provided that the information is effectively exchanged. We also note that the Global Forum's Standard C.1.8 in the section "Exchanging Information – Essential Elements" states that "[e]xchange of information mechanisms should provide for effective exchange of information and

[1147] See International Association of Insurance Supervisors, *Systemic Risk and the Insurance Sector*, 25 October 2009, (Exhibit ARG-140), para. 25 (exhibit provided in English and translated into Spanish by the WTO Secretariat).

[1148] See paragraphs 7.867 and 7.879 above.

[1149] Article 1 of Decree No. 589/2013, (Exhibits PAN-3 / ARG-35).

[1150] See footnote 1145 above.

should … be in force; where agreements have been signed, jurisdictions must take all steps necessary to bring them into force expeditiously".[1151]

7.916. However, we note that, in the case of the criterion relating to the initiation of the negotiation of a double taxation convention or an information exchange agreement, there is no formal mechanism for the effective exchange of information between Argentina and the country with which it is negotiating. Argentina nonetheless grants cooperative country status to countries that are in the negotiating process, with respect to which it does not have access to tax information given that there is as yet no agreement or convention in place. Leaving aside the dispute between the parties as to whether Panama met this requirement and did, in fact, initiate negotiations[1152], this would be the case of Panama, for example, which Argentina considers to be a cooperative country, even though it has not signed any of the agreements provided for in Decree No. 589/2013.[1153] This means that jurisdictions with which Argentina is in the process of negotiating tax information exchange agreements are considered cooperative despite the fact that Argentina continues to have no access to tax information, the exchange of which is the *raison d'être* of its defensive measures.

7.917. The situation between Panama and Argentina illustrates the consequences of using this criterion. As Argentina explains, Panama was included "as from 1 January 2014 as a 'cooperative country for tax transparency purposes' under Decree No. 589/2013 and AFIP Resolution No. [3576]/2013, after negotiations to conclude an agreement on the exchange of information for tax purposes had been initiated as from November 2013 … ".[1154] That is to say that, up until 31 December 2013, Argentina regarded Panama as a "non-cooperative" country. From 25 March 2014,[1155] by virtue of Panama's inclusion in the list of cooperative countries from 1 January 2014, simply because Argentina considered that negotiations had been initiated, reinsurance companies established and registered in Panama were considered to be in compliance with the first of the requirements laid down by points 18(a) and 20(f) I) of Annex I to SSN Resolution No. 35.615/2011. In both cases, that is, both before 31 December 2013 and after 31 December 2013, Panama did not exchange any kind of tax information with Argentina, as follows from Panama's constant refusal during these proceedings to consider that it had initiated negotiations or that it intended to open negotiations with Argentina for the purposes of signing a tax information exchange agreement.[1156]

7.918. Moreover, the use of this criterion of initiation of negotiations (but without the existence of a formal agreement or effective information exchange), together with the periodicity with which the list of cooperative countries is updated, creates other problems. According to Argentina, this list is updated annually at the beginning of the fiscal year. At the time of distribution of this report to the parties, the list of countries that Argentina considers to be cooperative continues to be the one published on the AFIP web page on 1 January 2014. Panama, which, according to Argentina, initiated negotiations with Argentina in November 2013, is on the list of cooperative countries. However, other jurisdictions (Belarus, Cameroon, Côte d'Ivoire, Cyprus, Gabon, Gibraltar and Hong Kong (China)) with which Argentina initiated negotiations in the course of 2014[1157], still do not have the status of cooperative countries. In other words, these jurisdictions are in the same situation as Panama – they are negotiating, according to Argentina, but presumably not

[1151] See Global Forum, *Terms of Reference* (2010), (Exhibit ARG-40), p. 8 (exhibit provided in English and translated into Spanish by the WTO Secretariat).

[1152] We recall that Panama maintains that it never initiated negotiations with Argentina, whereas Argentina asserts that these negotiations began in November 2013. See Panama's response to Panel question No. 7(a); and Argentina's response to Panel question No. 10(c).

[1153] In this connection, it should be pointed out that the parties disagree as to whether negotiations on a double taxation convention or information exchange agreement were initiated. Whereas Argentina considers that the negotiations began in November 2013, Panama claims that these negotiations were never initiated. See Panama's response to Panel question No. 7 and Argentina's first written submission, paras. 131 and 132.

[1154] Argentina's response to Panel question No. 10(c) and (d), p. 21.

[1155] As previously mentioned, points 18 and 20(f) of SSN Resolution No. 35.615/2011 were amended by SSN Resolution No. 38.284/2014, which entered into force on 25 March 2014. Points 18 and 20(f) of Annex I to SSN Resolution No. 35.615/2011, as worded prior to the amendment of March 2014, established prohibitions on the supply of reinsurance services by suppliers from non-cooperative countries via modes 1 and 3. The amendment introduced by SSN Resolution No. 38.284/2014 eliminated that prohibition and made the supply of reinsurance services by suppliers from non-cooperative countries conditional upon the satisfaction of certain requirements. See paras. 2.25-2.33 above.

[1156] Panama's response to Panel question No. 7, p. 12.

[1157] Argentina's response to Panel question No. 10(b)(i), p. 21.

exchanging information. However, given that Panama was included in the list, Panamanian reinsurance companies are treated differently, for the purposes of measure 5, from reinsurance companies established and registered in any of the other jurisdictions mentioned.

7.919. In view of the foregoing, we consider that measure 5, and in particular the fact that Argentina does not require relevant information from the insurance regulators of jurisdictions which are officially cooperative but have not concluded an information exchange agreement or effectively exchanged information, does not have a rational relationship of cause and effect with the prudential reasons identified by Argentina.

7.920. Hence we conclude that Argentina has not demonstrated that measure 5 was taken for prudential reasons within the meaning of paragraph 2(a) of the Annex on Financial Services.

(d) Whether measure 6 was taken "for prudential reasons"

7.921. Argentina argues that measure 6 is intended to protect investors from the distortions, manipulations and abusive situations that occur when the beneficial owner of the securities operation is unknown for lack of an effective exchange of information[1158], and to preserve the integrity and smooth functioning of the Argentine capital market.[1159] According to Argentina, securities operations with non-cooperative jurisdictions expose the Argentine financial market to increased risk of systemic failure, since in transactions of this kind the Argentine regulator is unable to obtain access to information about the effective ownership of the party ordering the transaction and the legitimacy of the source of its funds, and neither can it know whether the foreign entity is subject to appropriate supervision in its home jurisdiction. For this reason, Argentina maintains that securities transactions with entities located in non-cooperative jurisdictions pose risks which may not be present in transactions with entities located in cooperative jurisdictions, including risks of money laundering, tax evasion and non-payment for securities operations.[1160]

7.922. Argentina argues that seeking transparency and knowledge of the beneficial owner of foreign legal persons is one of the ways of combating the above-mentioned threats. According to Argentina, this is why the FATF recommends that countries adopt measures to prevent the misuse of legal persons for money laundering or terrorist financing. Argentina maintains that countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and the control of legal persons that the competent authorities can obtain or have access to in a timely fashion.[1161]

7.923. Argentina explains that prominent among the "preventive measures" that countries should impose on their financial institutions to achieve these various objectives are those relating to "customer due diligence", namely:[1162] identifying the customer and verifying the customer's identity; identifying the beneficial owner and the ownership and control structure of the customer; and conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the duration of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer and their business and risk profile, including, where necessary, the source of funds. Argentina argues that the purpose of these due diligence measures is twofold: first, to prevent the unlawful use of legal persons and other legal structures, by gaining a sufficient understanding of the customer to be able to properly assess the potential money laundering and terrorist financing risks associated with the business relationship; and second, to take appropriate steps to mitigate the risks.[1163]

7.924. According to Argentina, in the case of transactions ordered by persons from non-cooperative countries, as a consequence of the lack of a tax information exchange agreement with Argentina or a memorandum of understanding on cooperation and information exchange with the CNV, it is impossible to ensure compliance with any of the above-mentioned preventive measures.

[1158] Argentina's first written submission, paras. 564-566.
[1159] Argentina's first written submission, para. 562.
[1160] Argentina's second written submission, para. 92.
[1161] Argentina's response to Panel question No. 85(b), para. 11. See also the FATF Recommendations, (Exhibit ARG-25), Recommendations 24 and 25.
[1162] FATF, Recommendations, (Exhibit ARG-25), Recommendation 10.
[1163] FATF, Recommendations, (Exhibit ARG-25), Interpretive Note to Recommendation 10, p. 64.

Likewise according to Argentina, in the case of non-cooperative countries, neither the stock market intermediaries (nor the CNV or any other government agency) are assured of being able to identify the customer or the beneficial owner ordering the transactions, or who it is that stands behind them, as in the case of the customers of investment portfolio managers.[1164] Argentina points out that FATF Recommendation 10 itself explicitly states that if the financial institution is unable to comply with the due diligence measures in question it should not perform the requested transaction:

> Where the financial institution is unable to comply with the [customer due diligence measures] … it should be required not to open the account, commence business relations or perform the transaction; or should be required to terminate the business relationship; and should consider making a suspicious transactions report in relation to the customer.[1165]

7.925. Argentina explains that the FATF methodology for assessing compliance with the said recommendation, established in 2013, reiterates the same requirement not to perform the transaction when the customer and/or beneficial owner and the ownership and control structure cannot be identified.[1166] In this respect, the regulations of the CNV could not be more in keeping with what is required by the FATF. It is the international standards themselves which stipulate that, as a prudential measure, the institution should "not … perform the transaction", thus reinforcing compliance with the recommendation of the International Organization of Securities Commissions (IOSCO) to establish policies and procedures intended to *minimize the risk* of intermediaries being used as vehicles for money laundering. In questioning measures of this kind, Panama's claim clashes head-on with the international efforts to safeguard the integrity of the financial system against the risks that stem from money laundering and with prudential regulation in general.

7.926. Argentina argues that IOSCO's principles include one that calls on different jurisdictions to establish information exchange mechanisms that specify when and how to exchange public and non-public information with their domestic and foreign counterparts, which is precluded in the case of countries that do not comply with these international standards.[1167] According to Argentina, information exchange agreements are strongly recommended by IOSCO, which points out that such agreements make it possible to assist foreign regulators when evidence of a possible violation of the regulations lies outside their jurisdiction. According to Argentina, without such agreements, regulators such as the CNV lack the tools to carry out their regulatory tasks. Argentina cites the following paragraph from an IOSCO document:

> Securities regulators have long used information-sharing arrangements, typically known as memoranda of understanding or MOUs, to facilitate consultation, cooperation and the exchange of information in securities enforcement matters. These enforcement MOUs permit regulators who suspect there has been a violation of their laws … to seek ad hoc assistance from their overseas counterparts when evidence of the possible violation may lie outside their jurisdictions.[1168]

7.927. Argentina argues that, in accordance with international standards, countries should ensure that competent authorities such as the CNV can rapidly, constructively and effectively provide the widest range of international cooperation in relation to money laundering, associated predicate

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[1164] Argentina's response to Panel question No. 85(b), para. 15.

[1165] Argentina's response to Panel question No. 85(b), para. 16 (referring to FATF Recommendations, (Exhibit ARG-25), Recommendation 10, p. [16]) (emphasis original).

[1166] Argentina's response to Panel question No. 85(b), para. 17 (referring to FATF, "Methodology for assessing technical compliance with the FATF Recommendations and the effectiveness of AML/CFT systems", 2013, p. 44, viewed at http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf: "Where a financial institution is unable to comply with relevant CDD measures: (a) it should be required not to open the account, commence business relations or perform the transaction; or should be required to terminate the business relationship."

[1167] Argentina's first written submission, para. 530.

[1168] See Argentina's response to Panel question No. 85(b), para. 19 (referring to IOSCO, *Principles Regarding Cross-Border Supervisory Cooperation – Final Report*, May 2010, p. 31. http://www.iosco.org/library/pubdocs/pdf/IOSCOPD322.pdf) (exhibit provided in English and translated into Spanish by the WTO Secretariat).

offences and terrorist financing. Argentina explains that countries should do so both spontaneously and upon request and that there should be a legal basis for providing cooperation. According to Argentina, FATF's international recommendations in this respect are very clear and encourage countries to negotiate and sign memoranda of understanding with their foreign counterparts:[1169]

> Should a competent authority need bilateral or multilateral agreements or arrangements, such as a Memorandum of Understanding (MOU), these should be negotiated and signed in a timely way with the widest range of foreign counterparts.[1170]

7.928. Panama argues that, since Argentina has sought to justify the restrictions on the reinsurance and capital markets concurrently under the prudential exception, its justification of the discriminatory measure affecting access to the Argentine capital market suffers from the same defects that Panama has already identified with respect to the measure relating to reinsurance services.[1171] According to Panama, the general references to "distortions, manipulations and abusive situations" suffered by consumers or to "many suspected money laundering operations" do not suffice clearly and understandably to explain the nature of the specific risks that Argentina seeks to guard against by means of the measure, which discriminates between portfolio managers of different origins.[1172]

7.929. According to Panama, Argentina had a duty to explain what would be the specific risk to which Argentine consumers would be exposed by contracting for the services of an investment portfolio manager of some non-cooperative country, and how the imposition of the conditions envisaged in the CNV's Rules is a measure designed to take into account and "mitigate the risks" created by managers of non-cooperative countries. According to Panama, Argentina has not explained how the alleged risks for consumers and the financial system in general can be prevented or guarded against *ex ante* by imposing conditions not on the asset managers or the banking entities that operate in the Argentine market but on their governments.[1173]

7.930. According to Panama, even if the Panel were to consider that the prudential exception applies to the Argentine measure relating to the access of foreign portfolio managers to the securities market, paragraph 2(b) of the Annex on Financial Services of the GATS would not appear to allow measures such as those that Argentina seeks to impose.[1174] For Panama, the aim of the Argentine measure is precisely to force other Members to disclose information to the Argentine Government, by making access of foreign portfolio managers to the Argentine market conditional on the negotiation and signature of information exchange agreements.[1175] Panama considers that the exception in paragraph 2(a) of the Annex on Financial Services of the GATS, when read in the light of paragraph 2(b), in no way makes it possible to justify measures of this kind.[1176] Panama therefore considers that Argentina has failed to meet its burden of proving that the measure relating to access to the Argentine capital market was taken "for prudential reasons" within the meaning of paragraph 2(a) of the Annex on Financial Services of the GATS.[1177]

(i) Whether the reasons identified by Argentina are "prudential" within the meaning of paragraph 2(a) of the Annex on Financial Services

7.931. As with measure 5, for the purpose of determining whether measure 6 was taken "for prudential reasons", the Panel will proceed in two stages. First, we will analyse whether the reasons identified by Argentina with respect to measure 6 are "prudential" within the meaning of paragraph 2(a) of the Annex on Financial Services. That is to say, whether they are "causes" that motivate the financial sector regulators to act to prevent a risk, injury or danger which, as we have already said, does not have to be imminent. If we determine that there are "prudential reasons", then, as the next step, we will analyse whether the measure was taken "for" those

[1169] Argentina's response to Panel question No. 85(b), para. 20.
[1170] See FATF, Recommendations, (Exhibit ARG-25), Recommendation 40, p. 31.
[1171] Panama's second written submission, para. 2.714.
[1172] Panama's second written submission, para. 2.714.
[1173] Panama's second written submission, para. 2.715.
[1174] Panama's second written submission, para. 2.716.
[1175] Panama's second written submission, para. 2.716.
[1176] Panama's second written submission, para. 2.716.
[1177] Panama's second written submission, para. 2.717.

prudential reasons, i.e., whether there is a rational relationship of cause and effect between measure 6 and the prudential reasons identified by Argentina.

7.932. We begin our analysis by noting that measure 6 forms part of the New Text of the CNV's Rules (N.T. 2013) issued by the CNV under the regulatory powers conferred on it by Article 155 of Law No. 26.831 on the Capital Market, enacted on 27 December 2012.[1178] This Law is regulated by N.T. 2013. Among the objectives of the Capital Market Law, its first article mentions the following: "To strengthen the mechanisms for protecting and preventing abuses against small investors, within the framework of the protective function of consumer law". In our view, this objective relates specifically to investor protection (within the framework of the consumer protection function), as argued by Argentina.

7.933. Moreover, we note that Article 39 of the Capital Market Law, in dealing with negotiable securities trading systems, imposes upon them the obligation to "ensure the full effectiveness of the principles of investor protection, fairness, efficiency, transparency, non-fragmentation and reduction of systemic risk".[1179] All these objectives and principles are, in this Panel's opinion, prudential reasons that may fall within the framework of paragraph 2(a) of the Annex on Financial Services.

7.934. We also note that the Capital Market Law empowers the CNV not only to regulate, supervise, inspect, monitor and sanction all persons that engage in activities *related* to the public offering of negotiable securities, but also to issue regulations for preventing money laundering and terrorist financing, which therefore appear, in this Panel's opinion, to be additional prudential reasons that should inform the regulatory provisions of the Law.[1180] It is in this context that, in our opinion, Title XI of N.T. 2013, which heads measure 6 and is entitled "Prevention of Money Laundering and Terrorist Financing", should be understood. In our view, this confirms the Argentine argument that the prudential reasons of measure 6 include the prevention of money laundering and terrorist financing.[1181]

7.935. The Panel also agrees with Argentina that the prevention of money laundering and terrorist financing strengthens the integrity and stability of the financial system. Argentina cites the International Monetary Fund (IMF), which considers that money laundering and terrorist financing can undermine the integrity and stability of the financial system and its institutions and destabilize a country's finances and macroeconomy and, ultimately, global financial stability.[1182] As the IMF points out, the prevention of money laundering and terrorist financing strengthens the integrity of the financial system and macroeconomic stability at both national and international level.[1183] According to Argentina, prominent among the numerous international initiatives adopted

[1178] Law No. 26.831 on the Capital Market of 27 December 2012 (Capital Market Law), (Exhibits PAN-48 / ARG-49).

[1179] Capital Market Law, (Exhibits PAN-48 / ARG-49).

[1180] See Article 19 of the Capital Market Law, in particular its paragraphs (a), (c), (d) and (p), (Exhibits PAN-48 / ARG-49).

[1181] Argentina's response to Panel question No. 85(b), para. 21.

[1182] Argentina's response to Panel question No. 85(b), para. 7 (reproducing the following passage from an IMF publication):

> The international community has made the fight against money laundering and terrorist financing a priority. The IMF is especially concerned about the possible consequences money laundering, terrorist financing, and related crimes have on the integrity and stability of the financial sector and the broader economy. These activities can undermine the integrity and stability of financial institutions and systems, discourage foreign investment, and distort international capital flows. They may have negative consequences for a country's financial stability and macroeconomic performance, resulting in welfare losses, draining resources from more productive economic activities, and even have destabilizing spillover effects on the economies of other countries. In an increasingly interconnected world, the negative effects of these activities are global, and their impact on the financial integrity and stability of countries is widely recognized … Strong AML/CFT [anti-money laundering and combating the financing of terrorism] regimes enhance financial sector integrity and stability, which in turn facilitate countries' integration into the global financial system. They also strengthen governance and fiscal administration. The integrity of national financial systems is essential to financial sector and macroeconomic stability both at the national and international levels.

See IMF, "The IMF and the Fight Against Money Laundering and the Financing of Terrorism", 5 September 2014 (English text available at: http://www.imf.org/external/np/exr/facts/aml.htm).

[1183] Argentina's response to Panel question No. 85(b), para. 8 (where Argentina reproduces the following excerpt from an IMF publication in English): "Strong AML/CFT [anti-money laundering and combating the

in pursuit of these objectives is the Financial Action Task Force (FATF), which is recognized as the body primarily responsible for developing global standards for combating money laundering and terrorist financing.[1184] We find these arguments, as well as the IMF's assessment, convincing.

7.936. Moreover, as Argentina explains, the exchange of information is an objective promoted by the international community, within the context of the FATF and IOSCO, among others. The recommendations emanating from these organizations are aimed at preventing and/or discouraging commercial transactions when the customer or beneficial owner ordering the transactions, or those behind them, cannot be identified, as in the case of the customers of investment portfolio managers. In our view, it is not necessary to reiterate Argentina's arguments in this respect, which we find convincing.[1185]

7.937. In our view, in the light of the arguments and evidence submitted by Argentina, the reasons for measure 6, including investor protection, the reduction of systemic risk, and the prevention of money laundering and terrorist financing offences, are prudential in nature and in conformity with our interpretation of the expression "prudential reasons" in paragraph 2(a) of the Annex on Financial Services.

7.938. It remains to be determined whether measure 6 was taken "for" these prudential reasons, that is, as indicated above, whether the measure has a rational relationship of cause and effect with these prudential reasons. We recall that a central aspect of this rational relationship of cause and effect is the adequacy of the measure to the prudential reason, that is, whether the measure contributes to achieving the desired effect.

(ii) Whether measure 6 was taken for the prudential reasons identified by Argentina

7.939. As we described in section 2.3.7 above, measure 6 consists in the imposition of requirements which stock market intermediaries[1186] must meet in order to be able to carry out transactions ordered by persons from non-cooperative countries. Argentina maintains this measure under Title XI, Section III, Article 5 of the Rules of the National Securities Commission (CNV).[1187]

7.940. Title XI, Section III, Article 5 of the CNV Rules allows Argentine stock market intermediaries to pursue transactions undertaken or ordered by persons established, domiciled or resident in non-cooperative countries in the context of a public offering of negotiable securities, forward contracts, futures or options of any kind and other financial instruments and products provided that two requirements are met: (i) that the persons established, domiciled or resident in non-cooperative countries who place the order with the stock market intermediary have the status of intermediaries registered with an entity under the control and supervision of a body that performs functions similar to those of Argentina's CNV, and (ii) that this body has signed a memorandum of understanding on cooperation and information exchange with Argentina's CNV.[1188] However, Argentine stock market intermediaries are not subject to these requirements when carrying out transactions undertaken or ordered by persons from cooperative countries.

7.941. It will be recalled that the conditions under which a country is considered to be "cooperative for tax transparency purposes" are laid down in Decree No. 589/2013. As explained

financing of terrorism] regimes enhance financial sector integrity and macroeconomic stability both on a national and international level". See IMF, *Anti-money laundering and combating the financing of terrorism – Inclusion in surveillance and financial stability assessments*, p. 6 (English text available at: http://www.imf.org/external/np/pp/eng/2012/121412a.pdf; translated into Spanish by the WTO Secretariat).

[1184] See Argentina's response to Panel question No. 85(b), para. 8 (referring to IMF, "The IMF and the Fight Against Money Laundering and the Financing of Terrorism", 5 September 2014 (English text available at: https://www.imf.org/external/np/exr/facts/aml.htm).

[1185] See footnote 1182 above; Argentina's response to Panel question No. 85(b), paras. 9 and 10 (referring to IOSCO, *Objectives and Principles of Securities Regulation*, May 2003, p. 16 (English text available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf); and FATF Recommendations (Exhibit ARG-25), Recommendations 24 and 25.

[1186] The term "stock market intermediaries" is taken to mean the persons indicated in Article 1 of the CNV's Rules, including "trading agents, settlement and clearing agents, distribution and placement agents, and collective investment product management agents".

[1187] CNV Rules 2013, (Exhibits PAN-58 / ARG-50).

[1188] See section 2.3.7 above.

in section 2.2 above, Decree No. 589/2013 establishes the following conditions for a country to be considered cooperative, namely: (i) to have signed with Argentina a tax information exchange agreement or an international double taxation convention with a broad information exchange clause, provided that the information is effectively exchanged; or (ii) to have initiated with Argentina the negotiations necessary for concluding such an agreement and/or convention.[1189] If neither of these requirements is met, the country is deemed to be non-cooperative.[1190]

7.942. As this Panel has already stated, the measures that can be taken for prudential reasons include those that seek to look ahead and make the necessary arrangements in advance to achieve a certain prudential objective in the financial sector. In this respect, it seems to us that requesting relevant information from the regulatory authorities of other jurisdictions forms part of actions designed to look ahead and make the arrangements necessary to achieve a certain prudential objective in the financial sector, in this case, investor protection, the reduction of systemic risk and the prevention of money laundering and terrorist financing offences. In particular, the effective availability of information about the identity of the customer or beneficial owner who orders or effects the transactions, or those that stand behind them, is, as we have seen, essential for preventing money laundering and terrorist financing offences. Viewed from this standpoint, we understand the reasoning behind the measure 6 requirement that when persons who order or effect operations through Argentine stock market intermediaries come from non-cooperative countries, they must show that (i) in their home jurisdiction, they have the status of intermediaries registered with an entity under the control and supervision of a body that performs functions similar to those of Argentina's CNV and (ii) that this body has signed a memorandum of understanding on cooperation and information exchange with Argentina's CNV. However, as stated above, a central aspect of this rational relationship of cause and effect is the conformity of the measure itself with the prudential reason, that is, whether the measure, through its design, structure and architecture, contributes to achieving the desired effect. We will address this aspect below.

7.943. We note, first of all, that the determination as to those that are "cooperative" and those that are "non-cooperative" under measure 6 is based on the application of Decree No. 589/2013. In other words, the Decree serves to determine not only those that are cooperative and exchange information but also, by default, those that are "non-cooperative" and on which the requirements mentioned in the previous paragraph are to be imposed (that is, having to show (i) that in their home jurisdiction, they have the status of intermediaries registered with an entity under the control and supervision of a body that performs functions similar to those of Argentina's CNV; and (ii) that the body in their home jurisdiction has signed a memorandum of understanding on cooperation and information exchange with Argentina's CNV). As with measure 5, it is in the mechanism used by measure 6 for determining who is cooperative and who is not that we see a fundamental problem. The arguments we used in paragraphs 7.912-7.918 above apply, *mutatis mutandis*, to measure 6.

7.944. In the light of the foregoing, we consider that measure 6, in particular the fact that it does not impose specific requirements on persons who order or effect stock market operations in Argentina and come from jurisdictions which are officially cooperative but have not concluded an information exchange agreement or effectively exchanged information, does not have a rational relationship of cause and effect with the prudential reasons identified by Argentina. We therefore conclude that measure 6 was not adopted for the prudential reasons identified by Argentina.

7.3.7.2.4.3 Third requirement: Whether measures 5 and 6 have not been used "as a means of avoiding [Argentina's] commitments or obligations" under the GATS

7.945. Having concluded that Argentina has failed to demonstrate that measures 5 and 6 were taken for prudential reasons within the meaning of paragraph 2(a) of the Annex on Financial Services, we consider it unnecessary to continue our examination under paragraph 2(a) of the Annex on Financial Services and, therefore, we will not examine whether Argentina has demonstrated that measures 5 and 6 have not been used as a means of avoiding Argentina's commitments or obligations under the GATS.

[1189] Article 1 of Decree No. 589/2013, (Exhibits PAN-3 / ARG-35).
[1190] See footnote 1145 above.

7.3.7.2.5 Conclusion

7.946. We have concluded that the reasons identified by Argentina in relation to measures 5 and 6, respectively, are "prudential" reasons within the meaning of paragraph 2(a) of the Annex on Financial Services.

7.947. We have also concluded that measure 5, and in particular the fact that it does not require relevant information from the insurance regulators of jurisdictions that are officially cooperative but have not concluded an information exchange agreement or effectively exchanged information, does not have a rational relationship of cause and effect with the prudential reasons identified by Argentina.

7.948. Moreover, we have concluded that measure 6, and in particular the fact that it does not impose specific requirements on persons that order or effect stock market operations in Argentina and come from jurisdictions that are officially cooperative but have not concluded an information exchange agreement or effectively exchanged information, does not have a rational relationship of cause and effect with the prudential reasons identified by Argentina.

7.949. Accordingly, the Panel concludes that measure 5 (requirements relating to reinsurance services) and measure 6 (requirements for access to the Argentine capital market) are not covered by paragraph 2(a) of the Annex on Financial Services because they were not taken for prudential reasons within the meaning of that provision.

7.4 Findings under the GATT 1994

7.4.1 Introduction

7.950. In the present case, in addition to its claims under the GATS, Panama also challenges measures 2 and 3 under the GATT 1994. As explained in section 7.2 above, the possibility of a measure being simultaneously inconsistent with the GATS and the GATT 1994 has been accepted by the Appellate Body in previous disputes. We therefore now turn to an examination of Panama's claims under the GATT 1994.

7.4.2 Panama's claims under Article I:1 of the GATT 1994

7.4.2.1 Main arguments of the parties

7.4.2.1.1 Panama

7.951. Panama maintains that both measure 2 and measure 3 are inconsistent with Article I:1 of the GATT 1994.[1191]

7.952. With respect to measure 2, Panama claims that the presumption of unjustified increase in wealth imposed by the unnumbered article added after Article 18 of the LPT qualifies as a "rule and formality in connection with exportation",[1192] as well as a "charge imposed on the international transfer of payments" for exports[1193] and is therefore covered by Article I:1 of the GATT 1994.

7.953. Panama maintains that the measure is covered by the GATT 1994 since, although the measure affects the tax status of a buyer or seller of a product "with respect to a direct tax (e.g. gains tax), at the same time it affects aspects of the merchandise transactions (e.g. payments)".[1194] Panama explains that if the payment of direct taxes or the appearance of related tax contingencies is linked with the purchase or sale of certain products, those products will be implicitly affected by the rule governing the tax situation of the buyer or seller as the payer of a direct tax.[1195] Panama points out that the direct or indirect nature of the taxes linked with this measure is not a relevant aspect when analysing whether it falls within the scope of Article I:1 of

[1191] Panama's request for the establishment of a panel, pp. 3 and 4.
[1192] Panama's first written submission, para. 4.187. See also Panama's responses to Panel questions Nos. 55 and 89.
[1193] Panama's first written submission, para. 4.187.
[1194] Panama's second written submission, para. 2.370.
[1195] Panama's second written submission, para. 2.370.

the GATT 1994.[1196] Panama observes that the fact that a measure is contained in tax legislation that taxes wealth or imposes direct taxes is not an impediment to finding that the measure affects trade in goods. Panama relies on the *US – FSC*[1197] dispute, claiming that both the panel and the Appellate Body found that a measure which offered benefits with respect to a direct tax influenced the decision-making of the taxpayer to the detriment of the imported product, in contravention of Article III:4 of the GATT.[1198]

7.954. In Panama's opinion, measure 2 qualifies as a "rule and formality in connection with exportation".[1199] Panama argues that the expression "all rules and formalities in connection with importation and exportation" in Article I:1 of the GATT 1994 has been broadly interpreted by previous panels, which makes it possible to bring within the scope of this provision measures related to exports such as, for example, measure concerning payment for exports.[1200] Panama cites the panel report in *US – Poultry (China)* in support of its argument that "this category of measures has a broad scope, since it encompasses not only measures directly related to the import or export process, but also those relating to other aspects of exportation or measures that affect export performance.[1201]"[1202] Panama maintains that the requirement or formality to keep the usual supporting documents for the transaction indicates that the measure is based on (and therefore linked with) the export process. Panama explains that the moment of declaration of the tax is irrelevant, as is the fact that the export operation has been completed before the presumption arises.[1203] Moreover, Panama observes that the fact that the requirement presumably has to be met in the same way by other exporters only goes to show that the measure is redundant and unnecessary.[1204]

7.955. In its first written submission Panama also claims that the presumption of an unjustified increase in wealth imposed by the unnumbered article following Article 18 of the LPT qualifies as a "charge imposed on the international transfer of payments" for exports.[1205] According to Panama, the fiscal consequences of a finding of unjustified increase in wealth constitute a "charge" insofar as they consist in the obligation to pay gains tax, VAT and internal taxes with respect to the international transfer of payments for exports.[1206]

7.956. Panama asserts that this is the case for Argentine residents who export goods to non-cooperative countries and who therefore receive payments as consideration which result in the application of the above-mentioned presumption. Panama maintains that the broad coverage accorded to the word "advantage" encompasses the fact that Argentine exporters who export to cooperative countries are not affected by the presumption of unjustified increase in wealth, whereas this presumption does apply to income received by exporters who export to non-cooperative countries.[1207]

7.957. Panama argues that the products of non-cooperative countries and those of cooperative countries may be considered "like" since they differ only in their origin.[1208] Moreover, Panama claims that the advantage is not granted immediately and unconditionally to like products exported to non-cooperative countries.[1209]

7.958. Where measure 3 is concerned, Panama claims that the measure, which requires products imported from persons located in non-cooperative countries to be valued on the basis of the transfer pricing regime, is covered by Article I:1 of the GATT 1994 because it is a rule connected with the determination of the tax base for an internal tax levied on the taxpayers who market the

[1196] Panama's response to Panel question No. 89.
[1197] Panama refers to Appellate Body Report, *US – FSC (Article 21.5 - EC),* paras. 207-222. See Panama's response to Panel question No. 55.
[1198] Panama's response to Panel question No. 55.
[1199] Panama's comments on Argentina's response to Panel question No. 92.
[1200] Panama's first written submission, para. 4.188.
[1201] (Footnote original) Panel Report, *US – Poultry (China)*, para. 7.410.
[1202] Panama's response to Panel question No. 55.
[1203] Panama's response to Panel question No. 55.
[1204] Panama's comments on Argentina's response to Panel question No. 92.
[1205] Panama's first written submission, para. 4.187.
[1206] Panama's first written submission, para. 4.190.
[1207] Panama's first written submission, para. 4.193; and second written submission, para. 2.379.
[1208] Panama's first written submission, paras. 4.196 and 4.197.
[1209] Panama's first written submission, paras. 4.200 and 4.201.

products and not on the products themselves. Panama considers that this measure would be covered by Article III:4 of the GATT 1994.[1210] Alternatively, according to Panama, the measure is a rule or formality in connection with the importation or exportation of goods within the meaning of Article I:1 of the GATT 1994.[1211]

7.959. As in the case of measure 2, Panama argues that the products of non-cooperative countries and those of cooperative countries may be considered to be "like" since they differ only in origin.[1212]

7.960. Panama maintains that the measure imposes additional requirements and charges on Argentine taxpayers which are not imposed on import and export transactions conducted with persons located in cooperative countries. According to Panama, for imports of goods from non-cooperative countries, subjection to the transfer pricing regime means additional declaration formalities, uncertainties, and costs involved in the collection, processing and assessing of information and the hiring of an accountant. Panama explains that none of this affects imports of like goods from cooperative countries.[1213] Panama argues that these latter goods receive an advantage, favour, privilege or immunity not extended to goods from non-cooperative countries. Hence, in Panama's opinion, for those taxpayers who decide to do business with persons from cooperative countries there is an advantage that is not extended to the services and service suppliers of non-cooperative countries, thereby altering the conditions of competition to the detriment of the services and service suppliers of non-cooperative countries.[1214]

7.4.2.1.2 Argentina

7.961. For its part, Argentina asserts that measure 2 is not a "rule or formality in connection with exportation".[1215] In this respect, Argentina considers that measure 2 does not affect international trade in goods because the tax is declared only after the foreign trade operation has been completed.[1216] According to Argentina, taxing the wealth of the domestic taxpayer does not constitute an aspect of the import process or affect the actual imports.[1217] Argentina explains that measure 2 imposes a method for the determination of the income liable to domestic taxation in Argentina and that the fact that this income may partly derive from import or export transactions does not imply that Argentina's domestic tax measures are border measures subject to the disciplines of Article I:1 of the GATT 1994.[1218] Argentina bases its argument on the Appellate Body report in *China – Auto Parts*, according to which a "panel must then seek to identify the leading or core features of the measure at issue, those that define its 'centre of gravity' for purposes of characterizing the charge that it imposes as an ordinary customs duty or an internal charge."[1219] According to Argentina, the fact that part of the income taxable in Argentina may come from import or export operations does not suffice to show that the "centre of gravity" of gains tax in Argentina is the importation or exportation of goods.[1220] For Argentina, measure 2 is part of the tax and therefore inseparable from it.[1221]

7.962. Argentina also questions whether the panel report in *US – Poultry (China)* serves to support the description of measure 2 as a "rule in connection with exportation". According to Argentina, in the present case the fact of being able to exercise the power of imposing a lawful tax on the wealth of all domestic taxpayers cannot be understood as "another aspect of exportation", particularly if the taxpayers can prove that the export operation has actually been completed. Moreover, Argentina explains that measure 2 does not affect the tax liability of the Argentine

[1210] The arguments of the parties relating to whether measure 3 is a measure covered by Article III:4 are set out in section 7.4.3.1 below.
[1211] Panama's first written submission, para. 4.263.
[1212] Panama's first written submission, paras. 4.264 and 4.265; and second written submission, para. 2.479.
[1213] Panama's first written submission, para. 4.241; and second written submission, para. 2.481.
[1214] Panama's first written submission, paras. 4.266-4.268.
[1215] Argentina's response to Panel question No. 92.
[1216] Argentina's first written submission, para. 661.
[1217] Argentina's first written submission, para. 671.
[1218] Argentina's second written submission, para. 97.
[1219] Argentina's second written submission, para. 97 (citing Appellate Body Report, *China – Auto Parts*, para. 171).
[1220] Argentina's second written submission, para. 97.
[1221] Argentina's comments on Panama's response to Panel question No. 89.

taxpayer or related contingencies with respect to the product exported. In Argentina's opinion, the tax liability remains the same provided it is possible to demonstrate the origin of the payments received in connection with activities duly carried out. Argentina considers that Panama has not identified the negative effect on payment for exports to which it alludes or how it impacts on payment.[1222] Argentina also considers that the measures at issue in this case and those examined in *US – Poultry (China)* differ with regard to their "purpose, architecture and design, … context and … effect and scope", so that the analytical framework used by the panel in *US – Poultry (China)* would not apply in the present dispute.[1223]

7.963. Argentina recalls that the panel in *US – Poultry (China)* believed that "the establishment and implementation of a rule by the FSIS is a prerequisite for the importation of poultry products into the United States. We also recall that we have concluded that the effect of Section 727, which is a legislative provision, was to prohibit the importation of Chinese poultry products into the United States."[1224] Argentina argues that measure 2 is not a "necessary condition" for the purchase or sale of a product. The measure does not have the effect of prohibiting, in any respect, sales of products from Argentina to Panama, so that it is not a prerequisite for being able to carry out an export operation. Nor do its effects result in a prohibition on exports of products to Panama.[1225]

7.964. Argentina argues in its defence that neither does measure 2 qualify as a "charge imposed on the international transfer of payments" since it admits evidence to the contrary (rebuttable presumption) and the tax treatment affects the assets of the taxpayer and not the income derived from the international transaction *per se*.[1226] Moreover, Argentina recalls that the presumption becomes applicable once the export transaction has been completed, for the purpose of determining the tax base for gains tax.[1227] Argentina points out that Panama has confined itself to asserting, in its second written submission, that measure 2 is covered by the expression "rules and formalities in connection with … exportation", without offering any arguments concerning the characterization of the measure as a "charge". In Argentina's opinion, Panama's argument for determining the inconsistency of the measure with Article I:1 of the GATT 1994 is not coherent since Panama describes measure 2 as a "rule or formality in connection with exportation" which has a negative effect on payment (and not as a "charge imposed on the international transfer of payments for … exports"), whereas in endeavouring to prove that there is an advantage, Panama asserts that the measure imposes procedural and fiscal charges on the exporter.[1228]

7.965. Argentina maintains that measure 2 does not generate an advantage, privilege or immunity for exporters who ship their products to cooperative countries, since they are also required to produce all the documentation necessary to carry out the export operation.[1229] In this connection, Argentina points out that the measure does not discriminate between like products according to their destination and does not accord differential treatment on the basis of the destination of Argentine exports. According to Argentina, the destination of the product exported is not a variable that forms part of the measure. The measure is not related with the destination of the Argentine goods but rather with the assets of the Argentine taxpayer.[1230]

7.966. Argentina believes that, in the context of export operations, Article I of the GATT 1994 concerns the treatment accorded to the products destined for Panama and not the treatment accorded to the exporters of those products. Under the legislation challenged by Panama, the presumption of unjustified increase in wealth is not necessarily triggered when products originating in Argentina are exported to Panama. The destination of the product exported is not the application variable used by the measure at issue, since that variable is the country of origin of the

[1222] Argentina's response to Panel question No. 92.
[1223] Argentina's response to Panel question No. 93.
[1224] Argentina's response to Panel question No. 92 (citing Panel Report, *US – Poultry (China)*, para. 7.409). In *US – Poultry (China)* the abbreviation FSIS stands for "Food Safety and Inspection Service".
[1225] Argentina's response to Panel question No. 92.
[1226] Argentina's first written submission, paras. 673 and 674.
[1227] Argentina's first written submission, para. 675.
[1228] Argentina's response to Panel question No. 92.
[1229] Argentina's first written submission, para. 682; and response to Panel question No. 92.
[1230] Argentina's response to Panel question No. 92.

payments which accrue to the Argentine taxpayer, irrespective of the destination of the product exported.[1231]

7.967. Where measure 3 is concerned, Argentina considers that it imposes a method on the determination of the income subject to internal taxation in Argentina and that the fact that the income in question may derive in part from import or export transactions does not imply that Argentina's domestic tax measures are border measures subject to the disciplines of Article I:1 of the GATT 1994.[1232] According to Argentina, this type of valuation is not a requirement, but applies when it is not possible to establish the international price for import or export operations.[1233] Argentina claims that the different requirements that may be imposed, depending on the entity with which the transaction is effected (cooperative or non-cooperative jurisdiction), "are not for the purpose of customs valuation and do not involve the granting of any advantage, favour, privilege or immunity with respect to customs duties or charges of any kind".[1234]

7.4.2.2 Assessment by the Panel

7.4.2.2.1 Introduction

7.968. The issue before the Panel is whether measure 2 (presumption of unjustified increase in wealth) and measure 3 (transaction valuation based on transfer prices) are inconsistent with Article I:1 of the GATT 1994.[1235] In reply to these claims made by Panama, Argentina asserts that the two measures are not covered by the legal provision in question.[1236]

7.969. We will begin by examining the wording of Article I:1 of the GATT 1994 in order to establish the legal standard applicable, taking into account the way in which it has been interpreted by previous panels and the Appellate Body. We will then proceed to determine whether measures 2 and 3 infringe that provision.

7.4.2.2.2 The relevant legal provision

7.970. Article I:1 of the GATT 1994 reads as follows:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III*, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

7.971. In *EC – Seal Products*, the Appellate Body recalled that Article I:1 sets out a fundamental non-discrimination obligation under the GATT 1994[1237], which is "pervasive" and a "cornerstone of the GATT", as well as being "one of the pillars of the WTO trading system".[1238]

[1231] Argentina's response to Panel question No. 92; and comments on Panama's response to Panel question No. 89.

[1232] Argentina's second written submission, para. 97.

[1233] Argentina's first written submission, para. 690, (footnote original) Law on Gains Tax, text amended by Decree 649/97. ARG-42.

[1234] Argentina's first written submission, para. 704.

[1235] Panama's first written submission, paras. 5.1.b(iii) and 5.1.c(iii).

[1236] Argentina's first written submission, paras. 668-687 and 696-706; and second written submission, para. 97. See also Argentina's response to Panel questions Nos. 92 and 93.

[1237] Appellate Body Report, *EC – Seal Products*, para. 5.86. In *Canada – Autos*, the Appellate Body explained that the object and purpose of Article I:1 of the GATT 1994 is "to prohibit discrimination among like products originating in or destined for different countries". Moreover, it noted that this prohibition of discrimination "also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis". See Appellate Body Report, *Canada – Autos*, para. 84.

[1238] Appellate Body Report, *EC – Seal Products*, para. 5.86 (referring to Appellate Body Reports, *Canada – Autos*, para. 69; *US – Section 211 Appropriations Act*, para. 297; and *EC – Tariff Preferences*, para. 101).

7.972. In that same dispute, the Appellate Body summarized the existing case law in relation to the legal standard applicable to the examination of a claim under Article I:1 of the GATT 1994. Thus, the Appellate Body identified four elements that must be demonstrated in order to establish an inconsistency with Article I:1 of the GATT 1994:

> Based on the text of Article I:1, the following elements must be demonstrated to establish an inconsistency with that provision: (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are "like" products within the meaning of Article I:1; (iii) that the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members. Thus, if a Member grants *any* advantage to *any* product originating in the territory of *any* other country, such advantage must be accorded "immediately and unconditionally" to like products originating from all other Members.[1239]

7.973. Our analysis of Panama's claims under Article I:1 of the GATT 1994 therefore begins by establishing whether measures 2 and 3 fall within the scope of that provision. Only if they do may we extend our analysis to the other elements which make up the legal standard of Article I:1 of the GATT 1994.

7.974. From the wording of the provision it follows that the following types of measures fall within its scope: (i) customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports; (ii) the method of levying such duties and charges; (iii) all rules and formalities in connection with importation and exportation; and (iv) all matters referred to in paragraphs 2 and 4 of Article III of the GATT 1994.[1240]

7.975. In the case of measure 2, Panama first claimed that this measure "qualifies as a 'rule and formality in connection with exportation'"[1241] and was so designed that it "imposes 'a charge on the international transfer of payments' for exports".[1242] However, in its second written submission, Panama appears to focus solely on the consideration of this measure as a rule or formality in connection with exportation.[1243]

7.976. With regard to measure 3, Panama maintains that there are two ways in which this measure can be covered by Article I:1 of the GATT 1994: (i) by regarding it as a rule linked with the determination of the tax base for an internal tax that falls not on the products but on the taxpayers and is thus covered by Article III:4 of the GATT 1994 and, consequently, by Article I:1 as well; or (ii) alternatively, by regarding the measure as a rule or formality in connection with importation or exportation within the meaning of Article I:1 of the GATT 1994.[1244]

7.977. Below, we examine each of these measures for the purpose of establishing whether they are covered by Article I:1 of the GATT 1994.

7.4.2.2.3 The question of whether measure 2 is covered by Article I:1 of the GATT 1994

7.978. As previously explained, in support of its claim under Article I:1 of the GATT 1994, Panama characterizes measure 2 as a "rule and formality in connection with exportation" or as a "charge imposed on the international transfer of payments for … exports".[1245] In order to determine whether measure 2 can be deemed to belong to one or both of these categories, we consider it relevant to recall the content of measure 2.

7.979. As described in detail in section 2.3.3 above, measure 2 consists of a presumption of unjustified increase in wealth applicable to any entry of funds "irrespective of its nature or

[1239] Appellate Body Report, *EC – Seal Products*, para. 5.86 (emphasis original).
[1240] Panel Report, *EC – Commercial Vessels*, para. 7.80.
[1241] Panama's first written submission, para. 4.187.
[1242] Panama's first written submission, para. 4.190.
[1243] Panama's second written submission, para. 2.373.
[1244] Panama's first written submission, para. 4.263.
[1245] See para. 7.954 above.

category or the type of transaction involved" – for the benefit of Argentine taxpayers – coming from non-cooperative countries in the context of an *ex officio* determination by the AFIP of the taxable subject matter for the purpose of gains tax. This presumption can be rebutted if the taxpayer proves conclusively that the funds were earned from activities actually carried out by the taxpayer or by a third party in those countries or from placements of "duly declared funds". Argentina maintains this measure pursuant to the unnumbered article following Article 18 of the LPT.[1246]

7.4.2.2.3.1 Whether measure 2 is a rule and formality in connection with exportation

7.980. Below, we examine whether Panama has demonstrated that measure 2 constitutes a rule and formality in connection with exportation within the meaning of Article I:1 of the GATT 1994.

7.981. In accordance with the usual rules of interpretation of public international law, we first explore the ordinary meaning of the words "*reglamento*" and "*formalidad*" used in the Spanish text. The Spanish Royal Academy defines "*reglamento*" as "[*c*]*olección ordenada de reglas o preceptos, que por la autoridad competente se da para la ejecución de una ley o para el régimen de una corporación, una dependencia o un servicio*" ([o]rdered collection of rules or precepts laid down by the competent authority for the implementation of a law or for the regulation of a corporation, agency or service) or "[*n*]*orma jurídica general y con rango inferior a la ley, dictada por una autoridad administrativa*" (general legal rule of lower status than a law, issued by an administrative authority).[1247] The corresponding term used in the English text of Article I:1 of the GATT 1994 is "rules", which can be understood to mean "a principle, regulation, or maxim governing individual conduct; a principle governing scholarly or scientific procedure or method" or "a principle regulating practice or procedure; a dominant custom or habit. Also, accepted or prescribed principles, method, practice, custom"[1248], which appears to give the word a broad meaning as compared with the more formal definition of the Spanish Royal Academy, which makes reference to a type of legal rule that elaborates on a rule of higher standing. The term chosen for use in the French version, "*réglementation*" ("*ensemble de règles, de règlements, de prescriptions qui concernent un domaine particulier*" (set of rules, regulations, requirements relating to a particular area) or "*action de réglementer*" (act of regulating))[1249] also appears to refer to instruments of a legal nature in general. In our view, the unnumbered article added after Article 18 of the LPT to maintain measure 2 can be characterized as a "rule", "*reglamento*", or "*réglementation*".

7.982. However, it does not appear that this legal provision can be characterized as a "*formalidad*" (formality), understood to mean "[*c*]*ada uno de los requisitos para ejecutar algo*" (each of the requirements for carrying something out) or "[*m*]*odo de ejecutar con la exactitud debida un acto público*" (way of correctly executing a public instrument).[1250] Our view appears to be confirmed by the panel in *Argentina – Import Measures*, which also investigated the ordinary meaning of the word "formality" in the context of Article VIII of the GATT 1994. The panel stated that the word "'formality' is [a] small point of practice that, though seemingly unimportant, must [usually] be observed to achieve a particular legal result." More generally, a "formality" is related to "[c]onformity to rules; propriety; rigid or merely conventional observance of forms".[1251] The ordinary meaning of the word "*formalité*" in French ("*opération prescrite par la loi, la règle, et qui est liée à l'accomplissement de certains actes (juridiques, administratifs, religieux) comme condition de leur validité*")[1252] (operation prescribed by law or regulation and linked with the performance of certain acts (legal, administrative, religious) as a condition of their validity) also appears to confirm our view that measure 2 does not have the characteristics of a "formality".

7.983. Having concluded that measure 2 can be characterized as a "rule", we must now determine whether measure 2, insofar as it is a rule, is "in connection with exportation". Indeed,

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[1246] Law on Tax Procedure, (Exhibits PAN-9 / ARG-45).

[1247] *Diccionario de la Lengua Española*, 23rd edition, Real Academia Española (Espasa Calpe, 2014), Vol. II, p. 1882.

[1248] *Shorter Oxford English Dictionary*, 6th edition, A. Stevenson (ed.) (Oxford University Press, 2007), p. 2628.

[1249] *Dictionnaire de la Langue Française Le Petit Robert*, (Dictionnaires Le Robert, 2000), p. 2140.

[1250] *Diccionario de la Lengua Española*, 23rd edition, Real Academia Española (Espasa Calpe, 2014), Vol. I, p. 1047.

[1251] Panel Report, *Argentina – Import Measures*, para. 6.432 (emphasis original; footnotes omitted).

[1252] *Dictionnaire de la Langue Française Le Petit Robert*, (Dictionnaires Le Robert, 2000), p. 1064.

Article I:1 of the GATT 1994 does not apply to any rule but only to those "in connection with importation and exportation". As we have pointed out, Panama characterizes measure 2 as a "rule in connection with exportation".

7.984. The words "*relativo a las … exportaciones*" (in connection with … exportation) help to define the types of measures that must conform with the obligation not to grant "less favourable treatment" to like products. The ordinary meaning of the term "*relativo a*" is "[*q*]*ue guarda relación con alguien o con algo*" (having a relationship with someone or something).[1253] If we examine the English version of this provision, we find that the term chosen by the negotiators is not "relating to" but "in connection with". The term "in connection with" performs a similar function in Article VIII:1 of the GATT 1994, where the types of measures subject to the disciplines of that provision are also defined. In *China – Raw Materials*, when interpreting similar terminology ("imposed on or in connection with … exportation") in the context of Article VIII:1 of the GATT 1994, the panel defined the word "connection" (*conexión*) as "[a] causal or logical relationship or association" and the verb "connect" (*conectar*) as "associate in occurrence or action".[1254] The panel considered that this terminology indicated that Article VIII:1 of the GATT 1994 applied to the charges imposed at the time of ("on") or in association with ("in connection with") exportation.[1255] The panel explained that "[b]eyond temporal connotations, the phrase 'on or in connection with ... exportation' may also mean that fees or charges that are *associated* with exportation, or that are linked or logically related to exportation, would fall within the scope of Article VIII".[1256] We agree with that panel in considering that for a measure to be considered a rule "in connection with" exportation, there must be a certain association, link or logical relationship between the measure and the exports.

7.985. We note that in French the term used is "*afférentes aux*" which could be defined as "*qui se rapporte aux"* (which relates to).[1257] Hence, in the French version of the Agreement, as in the English version, we encounter the idea that the measure must be associated, linked or have a logical relationship with exportation, which goes to confirm the interpretation indicated in the previous paragraph.

7.986. We also find support for this interpretation in measures that previous panels have considered to be included in the category of "rules and formalities in connection with importation" within the context of Article I:1 of the GATT 1994, for example, rules on the allocation of tariff quotas and import licensing procedures (*EC – Bananas III*)[1258], advance import declaration, additional legalization fees and customs control requirements (*Colombia – Ports of Entry*)[1259], the rules and formalities for the revocation of countervailing duties in the context of anti-dumping investigations (*US – Anti-Dumping and Countervailing Duties (China)*)[1260] or the measure that prohibited the use of funds to make it possible to import poultry from China (*US – Poultry (China)*), which we examine below. In all these cases, there was an association, link or logical relationship between the measure at issue and imports.

7.987. Argentina refers us to the Appellate Body report in *China – Auto Parts*, asserting that "a panel must then seek to identify the 'leading or core features' of the measure at issue, those that define its 'centre of gravity' for purposes of characterizing the charge that it imposes as an ordinary customs duty or an internal charge".[1261] We agree with Argentina that in this case also it is important to examine the core features that define the centre of gravity of measure 2 to establish whether there actually is such an association, link or logical relationship between the measure and exportation.

7.988. As already explained, measure 2 consists in a rebuttable presumption of an unjustified increase in wealth in the case of any entry of funds "irrespective of its nature or category or the

[1253] *Diccionario de la Lengua Española*, 23rd edition, Real Academia Española (Espasa Calpe, 2014), Vol. II, p. 1888.
[1254] Panel Report, *China – Raw Materials*, para. 7.822 (emphasis original).
[1255] Panel Report, *China – Raw Materials*, para. 7.823.
[1256] Panel Report, *China – Raw Materials*, para. 7.824 (emphasis original).
[1257] *Dictionnaire de la Langue Française Le Petit Robert*, (Dictionnaires Le Robert, 2000), p. 41.
[1258] Panel Report, *EC – Bananas III*, paras. 7.189, 7.221, 7.240 and 7.255.
[1259] Panel Report, *Colombia – Ports of Entry*, para. 7.342.
[1260] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 14.167.
[1261] Argentina's second written submission, para. 97 (citing Appellate Body Report, *China – Auto Parts*, para. 171).

type of transaction involved" – in favour of Argentine taxpayers – from non-cooperative countries. This presumption, for which the LPT provides, is a tool used by the AFIP in the context of an *ex officio* determination of the tax base for the purpose of calculating the gains tax payable by Argentine taxpayers. We take tax base to mean the monetary base to which the tax rate is applied for calculating the tax liability, in this case, with respect to gains tax.[1262] Hence, measure 2 would be fiscal in nature, being a tool for calculating one of the elements of the tax.

7.989. We note that the measure 2 presumption operates in relation to "any" entry of funds, irrespective of its nature or category or the type of transaction involved, so that it would not, *a priori*, be related, linked or logically associated with exports effected by the Argentine taxpayer. Although measure 2 does not rule out the possibility that, hypothetically, certain entries of funds from non-cooperative countries might derive from payments for goods exported by Argentine taxpayers, it does not seem to us that its centre of gravity resides in the possible logical relationship, association or link with exportation. The presumption, which is rebuttable, is applied according to the geographical provenance of the funds and not according to whether or not they derive from export operations. In our view, the fact that, hypothetically, part of the income of an Argentine taxpayer subject to gains tax might come from payments for exports does not suffice to support the conclusion that measure 2 has, as a core feature or "centre of gravity", its relationship, linkage or association with exports made by the Argentine taxpayer.

7.990. We do not consider correct Panama's argument that the requirement to retain the usual supporting documents relating to the transaction in order to rebut the presumption of unjustified increase in wealth indicates that measure 2 is founded on (and linked with) the process of exportation.[1263] Measure 2 establishes a requirement applicable to all taxpayers in general, regardless of the activity that gives rise to the payments on which the tax in question is imposed.[1264] This is indicated by the unnumbered article following Article 18 of the LPT itself, in providing for the presumption to be applied to any entry of funds "irrespective of its nature or category or the type of transaction involved".

7.991. In defence of its position that a measure related to a direct tax (such as gains tax) can be regarded as a rule in connection with exportation, Panama cites the *US – FSC* case.[1265] Panama claims that both the panel in that dispute and the Appellate Body found that a measure that conferred benefits with respect to a direct tax influenced the taxpayer's decision-making to the detriment of the product imported, in contravention of Article III:4 of the GATT 1994.[1266] From this precedent, Panama concludes that the fact that a measure is contained in fiscal legislation that levies a tax on assets or imposes direct taxes is no obstacle to it being found that that legislation affects trade in goods. According to Panama, if the measure that affects the tax status of a buyer or seller of a product "with respect to a direct tax (e.g. gains tax) simultaneously affects aspects of the goods transactions (e.g. payments), it is a measure that will be covered by the GATT".[1267]

7.992. Firstly, we note that the precedent in question concerns the interpretation of the words "affecting … use" in the context of Article III:4 of the GATT 1994, so that its relevance for the purposes of our discussion under Article I:1 is not obvious. Leaving this aside, we note that the measure at issue in *US – FSC* consisted of the exemption from United States income tax of the part of the foreign-source income received by a foreign sales corporation that came from exports.

[1262] In "Constitutional Principles on Tax Matters ", (Exhibit PAN-83), the elements of the taxable event are indicated, by way of illustration, as being: the subject, the object, the tax base, the tax rate, etc. In developing the theory of reservation to law in favour of the State in tax matters, jurists have established the following fundamental elements of the tax: the obligor, the taxable event, the tax base and the tax rate. The obligor is the one who pays the tax, i.e. the taxpayer; the taxable event is that which gives rise to the tax liability (for example, income or profit); the tax base is the expression of the taxable event in monetary terms, i.e. the base to which the relevant tax rate or percentage is applied in order to calculate the tax liability. See Menéndez Moreno, Alejandro and others, *Derecho Financiero y Tributario. Parte general. Lecciones de cátedra*, 2009, 10th edition, p. 92, Editorial Lex Nova, Spain; and Romero-Flor, Luis María, *La reserva de ley como principio fundamental del derecho tributario*, in *Derecho y Políticas Públicas*, Vol. 15, No. 18, July-December 2013.

[1263] Panama's comments on Argentina's response to Panel question No. 92.

[1264] Article 33 of the LPT stipulates that all taxpayers must keep invoices for a period of ten years. See Argentina's response to Panel question No. 92.

[1265] Panama refers to Appellate Body Report, *US – FSC (Article 21.5 - EC)*, paras. 207-222. See Panama's response to Panel question No. 55.

[1266] Panama's response to Panel question No. 55.

[1267] Panama's second written submission, para. 2.370.

These corporations were engaged in certain activities related to the sale of goods produced in the United States for export.[1268] The centre of gravity of this measure, that is, the core feature that triggered the application of the tax exemption, was precisely exportation. As we have explained, we do not consider that this is the case with measure 2.

7.993. We note that Panama's arguments concerning the characterization of measure 2 as a rule and formality in connection with exportation are mainly based on the panel report in *US – Poultry (China)*. According to Panama, it follows from this report that the category of "rule and formality in connection with exportation" has a broad scope, since it encompasses not only measures directly related to the process of importation or exportation, but also those measures which relate to other aspects of exportation or have an impact on actual exports.[1269]

7.994. We recall that the measure at issue in *US – Poultry (China)* prohibited the use of funds by the United States authorities to allow poultry products to be imported from China.[1270] As Argentina points out, the decision of the United States authorities concerning the equivalence of the Chinese sanitary measures in this respect was a prerequisite for the importation of the products into the United States. Hence the lack of funds for carrying out such an examination had the effect of prohibiting the importation of Chinese poultry products into the United States.[1271] In the light of these facts, the panel considered that the measure in question, although it did not directly regulate imports of poultry products from China, had an impact on the actual imports since its immediate effect was to prohibit them.

7.995. We agree with Panama that the panel in *US – Poultry (China)* accorded a broad meaning to this category of measures covered by Article I:1 of the GATT 1994. Nevertheless, we consider that the broad interpretation adopted by that panel does not mean that any measure that has a hypothetical or remote connection with importation or exportation can be considered to be covered by Article I:1 of the GATT 1994.

7.996. In this respect, it should be pointed out that, in *US – Poultry (China)*, the panel based itself on a previous case, *India – Autos,* in interpreting the expression "import restrictions" in the context of Article XI of the GATT 1994. The panel in *India – Autos* explained that "import restrictions" within the meaning of Article XI of the GATT 1994 consisted of restrictions "with regard to" or "in connection with" the importation of the product. Therefore, the expression was not limited to measures which directly relate to the "process" of importation, but might also encompass measures which otherwise relate to other aspects of the importation of the product.[1272] On the basis of this ruling in *India – Autos*, the panel in *US – Poultry (China)* took a broad view of a rule in connection with importation according to which this expression covered measures related to aspects of importation over and above the process of importation *per se*. More particularly, that panel concluded that the measure at issue was "in connection with importation" because, although it did not relate specifically to the process of importation itself, it had an impact such that it prohibited actual importation.

7.997. In our view, this is not the case with the measure with which we are currently concerned. Measure 2 does not have the effect of prohibiting exportation nor does it seem to have an impact on actual exports, beyond the fact that there is a possibility that, on certain occasions, some of the income of an Argentine taxpayer might result from exports for which the payments come from non-cooperative countries, or some Argentine taxpayers might decide not to receive payments from non-cooperative countries so as not to be subject to measure 2. As we have already mentioned, what triggers the application of measure 2 is not the export operation but the entry of funds from non-cooperative countries, which could be the result of numerous situations or operations, including exportation to the countries in question.

[1268] Appellate Body Report, *US – FSC*, para. 11.

[1269] Panama's response to Panel question No. 55 (referring to Panel Report, *US – Poultry (China)*, para. 7.410).

[1270] The measure at issue was Section 727 of the 2009 Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act which stipulated: "None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China". See Panel Report, *US – Poultry (China),* para. 2.2.

[1271] Argentina's response to Panel question No. 92 (citing Panel Report, *US – Poultry (China),* para. 7.409).

[1272] Panel Report, *India – Autos*, para. 7.257.

7.998. We agree with Argentina that the difference between the measures analysed in *US – Poultry (China)* and measure 2 with regard to their nature, design, structure, scope and effects makes it reasonable to assume that the analytical framework within which that panel examined the measure at issue, as well as its conclusions, cannot readily be transposed to the present dispute.[1273]

7.999. If we were to opt for the interpretation advocated by Panama, we would be broadening the scope of Article I:1 of the GATT 1994 to include a government measure that might hypothetically affect exports or imports. Indeed, such an interpretation might mean that any government measure would be covered by that provision if it were possible to prove a remote and hypothetical relationship with imports or exports. We believe that this would generate an expansion of the scope of Article I:1 that would result in an almost unlimited number of measures being encompassed by that provision, since it would cover every type of measure that had any sort of connection with the process of exportation or importation, however tenuous.

7.1000. The Panel therefore considers that Panama has failed to demonstrate that measure 2 constitutes a "rule and formality in connection with exportation" within the scope of Article I:1 of the GATT 1994.

7.4.2.2.3.2 Whether measure 2 is a charge imposed on the international transfer of payments for exports

7.1001. We turn to examine Panama's claim that measure 2 is a "charge imposed on the international transfer of payments for exports" within the meaning of Article I:1 of the GATT 1994. In this connection, we note that, in its first written submission, Panama briefly argues that the fiscal consequences of a finding of an unjustified increase in wealth constitute a "charge" insofar as they involve the payment of gains tax, VAT and internal taxes with respect to the international transfer of payments for exports.[1274] However, as Argentina points out, in its subsequent submissions and statements Panama does not return to this line of argument but concentrates on maintaining that measure 2 is a "rule or formality in connection with exportation". The Panel views Panama's attitude as an abandonment of the line of argument in question. However, for precautionary reasons, we will examine whether measure 2 is a charge imposed on the international transfer of payments for exports, as Panama maintains in its first written submission.

7.1002. In this connection, Argentina claims that measure 2 does not qualify as a "charge imposed on the international transfer of payments" either, since it admits evidence to the contrary (rebuttable presumption) and the tax treatment affects the assets of the taxpayer and not the actual income from the international transaction.[1275] Moreover, Argentina recalls that the presumption is applied once the export operation has been completed, for the purpose of determining the tax base for gains tax.[1276]

7.1003. We note that the Spanish Royal Academy defines the Spanish word "*carga*" (charge) as "[*i*]*mpuesto o tributo ligado a una propiedad o a un estado y al uso que de estos se hace*" ([t]ax or levy linked to a property or a situation and the use made thereof).[1277] In the context of Article VIII:1 of the GATT 1994, the panel in *China – Raw Materials* defined the equivalent English term "charge" as "pecuniary burden, cost", "expense", or "[a] price required or demanded for service rendered or goods supplied".[1278]

7.1004. However, Article I:1 of the GATT 1994 does not govern any charge but only, according to the Spanish version, those "*que gravan las transferencias internacionales de fondos efectuadas en concepto de pago de … exportaciones*" (imposed on the international transfer of payment for … exports). The Spanish Royal Academy defines the verb "*gravar*" as "[*i*]*mponer un gravamen*" ([t]o

[1273] Argentina's response to Panel question No. 93.
[1274] Panama's first written submission, para. 4.190.
[1275] Argentina's first written submission, paras. 673 and 674.
[1276] Argentina's first written submission, para. 675.
[1277] *Diccionario de la Lengua Española*, 23rd edition, Real Academia Española (Espasa Calpe, 2014), Vol. I, p. 438.
[1278] Panel Report, *China – Raw Materials*, para. 7.820. (footnote original) *Shorter Oxford English Dictionary*, 5th edition, L. Brown (editor) (Oxford University Press, 2002), Vol. 1, p. 382.

impose a levy).[1279] To fall within the scope of Article I:1 of the GATT 1994, that levy or charge must be imposed on the international transfer of payments for imports or exports. Panama maintains that, in the present case, the charge affects the international transfer of payments for exports.

7.1005. Our interpretation appears to be confirmed by the English version which speaks of "charges" "imposed on the … exportation". In the context of Article VIII:1, which also refers to "charges imposed on", the panel in *China – Raw Materials* defined the word "impose" as "put, apply, or bestow", "lay or inflict (a tax, duty, charge, obligation, etc.) (on or upon), esp. forcibly; compel compliance with".[1280] The English word "on" is defined as "[d]uring, or at some time during (a specified day or part of day); contemporaneously with (an occasion)", "in or at", "exactly at or just coming up to (a specified time), just before or after in time", "on the occasion of (an action)".[1281] Therefore, to fall within the scope of Article I:1 of the GATT 1994, the charge in question must be imposed on the international transfer of payments during, contemporaneously with or on the occasion of the said transfer. The French text "*impositions … qui frappent les transferts internationaux de fonds*" confirms this interpretation.

7.1006. According to Panama, the fiscal consequences of a finding of unjustified increase in wealth constitute a "charge" insofar as they lead to the payment of gains tax, VAT and internal taxes with respect to the international transfer of payments for exports. In our view, the measure at issue and hence what should constitute a "charge" are not the fiscal consequences of a finding of unjustified increase in wealth, i.e. the possible consequences of the application of measure 2. Our task is to determine whether measure 2 is a "charge". Measure 2 is a tool that takes the form of a presumption that the AFIP uses to calculate one of the elements of the gains tax, namely, the tax base, and is therefore fiscal in nature. It does not seem to us that it can be characterized as a "charge" as defined above, since the presumption challenged by Panama cannot be characterized as a "pecuniary burden, cost", "expense", or "[a] price required or demanded for service rendered or goods supplied ".[1282]

7.1007. Even assuming that measure 2 could be considered a charge, we note that, in accordance with the wording of Article I:1 of the GATT 1994, such a charge must be imposed on the international transfer of payments for exports. The presumption in question affects not the international transfer of payments but the assets of the taxpayer. In fact, the presumption is not applied during or on the occasion of the transfer of payments but at the time of calculating the tax on the gains of the Argentine taxpayer, irrespective of the time at which the transfer took place.

7.1008. Consequently, the Panel considers that Panama has failed to demonstrate that measure 2 constitutes a "charge imposed on the international transfer of payments for … exports" under Article I:1 of the GATT 1994.

7.4.2.2.3.3 Conclusion

7.1009. Having concluded that Panama has failed to demonstrate that measure 2 constitutes a "rule and formality in connection with exportation" or a "charge … imposed on the international transfer of payments for … exports" within the meaning of Article I:1 of the GATT 1994, the Panel does not consider it necessary to continue the analysis of Panama's claim concerning the inconsistency of measure 2 with Article I:1 of the GATT 1994.

7.1010. In view of the foregoing, the Panel dismisses Panama's claim under Article I:1 of the GATT 1994 because Panama has failed to demonstrate that measure 2 (presumption of unjustified increase in wealth) constitutes a "rule and formality in connection with … exports" or a "charge … imposed on the international transfer of payments for … exports" within the meaning of Article I:1 of the GATT 1994.

[1279] *Diccionario de la Lengua Española*, 23rd edition, Real Academia Española (Espasa Calpe, 2014), Vol. I, p. 1124.

[1280] Panel Report, *China – Raw Materials*, para. 7.822. (footnote original) *Shorter Oxford English Dictionary*, 5th edition, L. Brown (editor) (Oxford University Press, 2002), Vol. 1, p. 1331.

[1281] Panel Report, *China – Raw Materials*, para. 7.822. (footnote original) *Shorter Oxford English Dictionary*, 5th edition, L. Brown (editor) (Oxford University Press, 2002), Vol. 2, p. 1996.

[1282] See para. 7.1002 above.

7.4.2.2.4 The question of whether measure 3 is covered by Article I:1 of the GATT 1994

7.1011. We continue our analysis by examining the second measure challenged by Panama in relation to Article I:1 of the GATT 1994, namely, measure 3. As previously explained, Panama maintains that there are two ways in which this measure may be included under Article I:1 of the GATT 1994: (i) as a measure covered by Article III:4 of the GATT 1994; or (ii) alternatively, as a rule or formality in connection with importation and exportation within the meaning of Article I:1 of the GATT 1994.[1283] In order to determine whether measure 3 can be regarded as belonging to one or both of these categories, we consider it pertinent to recall the content of measure 3.

7.1012. As described in detail in section 2.3.4 above, measure 3 consists in the application of methods of transaction valuation based on transfer prices for the purpose of determining the tax base for the gains tax payable by Argentine taxpayers with respect to transactions effected with persons from non-cooperative countries. Therefore, like measure 2, measure 3 is a tool for determining the tax base for the gains tax payable by the Argentine taxpayer. As far as the claims under the GATT 1994 are concerned, Argentina maintains this measure by virtue of paragraph 5 of Article 8 of the LIG.[1284]

7.1013. We will therefore begin by examining whether Panama has demonstrated that measure 3 is covered by Article I:1 of the GATT 1994 as a matter referred to in Article III:4 of the GATT 1994.

7.4.2.2.4.1 Whether measure 3 is a matter referred to in Article III:4 of the GATT 1994

7.1014. Below, we examine whether measure 3 is a matter referred to in Article III:4 of the GATT 1994. We begin by reproducing the text of that Article:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

7.1015. It follows from the wording of this provision that for a measure to be covered by Article III:4 of the GATT 1994 it must (i) consist of a "law, regulation or requirement" and (ii) "affect[ing] the internal sale, offering for sale, purchase, transportation, distribution or use" of the products concerned.

7.1016. With regard to the first element, Panama claims that measure 3 is derived from a law, regulation or requirement since it stems from Articles 8, 14 and 15 of the LIG, in conjunction with Article 21 of the RIG and the articles incorporated after Article 21 of the RIG, and General Resolution No. 1122.[1285] Argentina does not appear to contest this point. In our view, the provisions cited by Panama fall within the category of laws, regulations or requirements.

7.1017. The main difference between the parties resides in the second element, namely, whether measure 3 "affect[s] the internal sale, offering for sale, purchase, transportation, distribution or use" of the products. Taking into account the scope of Panama's claims, our task is to examine whether measure 3 affects the sale, offering for sale, purchase or use of imported products.[1286] Below, we recall the existing precedents that we could use as a guide.

7.1018. In *US – FSC (Article 21.5 – EC)*, the Appellate Body determined that the measure at issue, under which a taxpayer seeking to obtain a tax exemption must "ensure that, in the manufacture of qualifying property, it does not 'use' imported input products, whose value comprises more than 50 per cent of the fair market value of the end-product", "affected" the

[1283] Panama's first written submission, para. 4.263.
[1284] Gains Tax Law, (Exhibits PAN-4 / ARG-42).
[1285] Panama's first written submission, para. 4.276.
[1286] Panama's first written submission, para. 4.281.

internal use of the imported products because it created an incentive for a manufacturer not to use imported inputs.[1287] In its analysis, the Appellate Body observed that the clause in which the word "affecting" appears – "in respect of all laws, regulations and requirements *affecting* their [the products'] internal sale, offering for sale, purchase, transportation, distribution or use" – serves to define the scope of application of Article III:4. The word "affecting" would therefore operate as a link between the identified types of government action (laws, regulations and requirements) and specific transactions, activities and uses relating to products in the marketplace ("internal sale, offering for sale, purchase, transportation, distribution or use"). The Appellate Body explained that it is, therefore, "not *any* 'laws, regulations and requirements'" which are covered by Article III:4, but "only those which '*affect*' the specific transactions, activities and uses mentioned in that provision. Thus, the word 'affecting' assists in defining the types of measure that must conform to the obligation not to accord 'less favourable treatment' to like imported products, which is set out in Article III:4."[1288]

7.1019. The Appellate Body also considered that the word "affecting" performs a similar function in Article I:1 of the GATS[1289] and referred to its findings in *EC – Bananas III,* where it stated that:

> [t]he ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a *broad scope of application*. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing".[1290] (emphasis added; footnote omitted)

7.1020. After referring to its previous report, the Appellate Body in *US – FSC (Article 21.5 – EC)* concluded that in view of the similar function of the identical word, "affecting", in Article III:4 of the GATT 1994, this word, in that provision, had a "broad scope of application".[1291]

7.1021. The panel in *India – Autos* found that the "indigenization requirements" (requirements to use a minimum quantity of domestically produced parts) and the "trade balancing requirements" (requirements to export products equivalent in value to the products imported) created incentives for car manufacturers to purchase Indian parts and components rather than imported parts and components and, consequently, "affected" the internal sale, offering for sale, purchase and use of imported parts and components in the Indian market within the meaning of Article III:4 of the GATT 1994.[1292] The panel maintained that "the fact that a provision is not necessarily primarily aimed at regulating the offering for sale or use of the product on the domestic market is thus not an obstacle to its 'affecting' them".[1293]

7.1022. In a subsequent case, *China – Auto Parts,* the Appellate Body, after referring to the above-mentioned reports, confirmed the panel's finding[1294] according to which the measures at issue created an incentive for manufacturers to limit their use of imported parts relative to

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[1287] In paragraph 212 of its report in *US – FSC (Article 21.5 of the DSU – EC)*, the Appellate Body offered the following explanation:

> A manufacturer's use of imported input products always counts against the 50% ceiling in the fair market value rule, while in contrast, the same manufacturer's use of like domestic input products has no such negative implication.

[1288] Appellate Body Report, *US – FSC (Article 21.5 – EC),* para. 208.

[1289] Appellate Body Report, *US – FSC (Article 21.5 – EC),* para. 209.

[1290] Appellate Body Report, *EC – Bananas III*, para. 220.

[1291] Appellate Body Report, *US – FSC (Article 21.5 – EC),* para. 210.

[1292] This panel reasoned that to meet the "indigenization requirement", car manufacturers had to purchase Indian parts and components rather than imported goods. Where the trade balancing requirements are concerned, the panel thought that they imposed an additional burden on car manufacturing companies which imported parts (an obligation to export goods of equivalent value). The panel took the view that as the use of domestic parts by a manufacturer would not carry this burden, the trade balancing condition created an incentive to use domestic parts. See Panel Report, *India – Autos*, paras. 7.195-7.198 and 7.307-7.309.

[1293] Panel Report, *India – Autos*, para. 7.305.

[1294] The panel found that "the administrative procedures imposed on any auto manufacturer using imported auto parts as well as the criteria set out in the measures, combined with the assessment of the charge which is based on the final assembly internally, create an incentive for auto manufacturers to use domestic auto parts instead of imported auto parts". See Panel Report, *China – Auto Parts,* para. 7.257.

domestic parts. The Appellate Body explained that these incentives "affect" the conditions of competition for imported auto parts on the Chinese internal market.[1295]

7.1023. Consequently, the precedents accord a broad meaning to the scope of application of Article III:4 of the GATT 1994 and indicate that that provision also covers those measures which, even though their main objective is not to regulate the internal sale, offering for sale, purchase or use of the product, affect the conditions of competition of the products in question on the domestic market.

7.1024. In order to understand the scope of the broad interpretation described above, we consider it appropriate to examine the measures at issue in the different cases concerned. We observe that the common denominator of these measures was the granting of all kinds of incentives to encourage the use of local products to the detriment of imports, that is, in such a way as to protect the domestic industry[1296], so that the measures were found to affect the conditions of competition in the domestic market. We note that in the case of all these measures there was an obvious link between the incentives and the origin of the products in question. It was therefore logical and reasonable that these measures, even though they did not directly regulate the internal sale, offering for sale, purchase, transportation, distribution or use of these products, should nevertheless have affected these activities because of the advantages they accorded to those who opted for the domestic product rather than the imported one.

7.1025. In our case, measure 3, judging from its own wording, does not appear to incorporate an incentive to encourage the use of local products to the detriment of imports; in fact, it makes no mention of local or imported products. We recall that measure 3 consists of a tool used by the AFIP to calculate the tax base for the gains tax in situations in which the Argentine taxpayer has carried out transactions with persons established in non-cooperative countries. In these cases, measure 3 orders the use of the transfer price rules and procedures between related parties, irrespective of whether such a relationship exists.

7.1026. The fact that measure 3 does not directly regulate the sale, purchase or use of imported products would not *a priori* be an obstacle to its being able to "affect" those activities within the broad meaning of Article III:4, so that Argentina's argument that measure 3 does not directly govern the conditions of purchase or sale of products would not be valid in this respect.[1297] However, that is not to say that a broad interpretation of the term "to affect" implies that any measure can fall within the scope of Article III:4 of the GATT 1994. If we follow the pattern of previous cases, for measure 3 to fall within the scope of that provision, it would have to include a certain link with the imported or local products so that it could be established that it affected the conditions of competition of the imported products on the Argentine market.

7.1027. Panama argues that measure 3 affects the conditions of competition on the Argentine market because the onerous nature of transaction valuation based on the transfer pricing regime, due to its administrative and related fiscal consequences, makes it a measure that affects the decision-making process of the purchaser of imported products and, ultimately, the sale. Panama also maintains that this measure affects the purchase and use of these imported products, since, given the obligatory onerousness of the measure, a buyer aware of the administrative burdens will obviously be discouraged from purchasing and then using products imported from non-cooperative countries.[1298]

7.1028. We are unconvinced by Panama's summary reasoning in this respect. In our view, the broad scope attributed in previous cases to the interpretation of the term "affect" does not mean that any measure that might hypothetically affect the conditions of competition of hypothetical products could be covered by Article III:4 of the GATT 1994. In this case, we do not consider it proven that, once products from non-cooperative countries have entered the Argentine market,

[1295] Appellate Body Report, *China – Auto Parts*, para. 195.

[1296] In this connection, we recall that the Appellate Body stated that "[i]t is well established that the general principle expressed in Article III:1 – that internal measures should not be applied to afford protection to domestic production – informs the rest of Article III, including Article III:4. … Article III:4 is, itself, an expression of the principle set forth in Article III:1". See Appellate Body Report, *EC – Seal Products*, paras. 5.114 and 5.115 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18).

[1297] Argentina's first written submission, para. 712.

[1298] Panama's responses to Panel questions No. 57 and 90.

measure 3 affects the conditions of competition of imports from non-cooperative countries on the Argentine market in such a way that the domestic industry is protected.

7.1029. Consequently, the panel considers that Panama has failed to demonstrate that measure 3 (transaction valuation based on transfer prices) falls within the scope of Article III:4 of the GATT 1994, and that it is therefore also not covered by Article I:1 of the GATT 1994.

7.1030. We proceed now to examine Panama's alternative argument, namely, whether measure 3 is a rule and formality in connection with importation or exportation within the meaning of Article I:1 of the GATT 1994.

7.4.2.2.4.2 Whether measure 3 is a rule and formality in connection with importation or exportation within the meaning of Article I:1 of the GATT 1994

7.1031. We recall that measure 3 consists in the application of transaction valuation methods based on transfer prices for the purpose of determining the tax base for the gains tax payable by Argentine taxpayers, with respect to transactions effected with persons from non-cooperative countries. Accordingly, like measure 2, measure 3 is a tool for determining the tax base for the gains tax payable by the Argentine taxpayer. Argentina maintains this measure under paragraph 5 of Article 8 of the LIG.[1299]

7.1032. With respect to the notion of "rule", we refer to the conclusions of our examination of measure 2.[1300] We therefore consider that paragraph 5 of Article 8 of the LIG, by which measure 3 is maintained, can be characterized as a "rule" ("*reglamento*", "*réglementation*"). However, as in the case of measure 2, it does not seem that such legal provisions can be characterized as "formalities", in the Spanish sense of "[*c*]*ada uno de los requisitos para ejecutar algo*" (each of the requirements for carrying something out) or "[*m*]*odo de ejecutar con la exactitud debida un acto público*" (way of correctly executing a public instrument).[1301]

7.1033. We also refer to our conclusions in relation to measure 2, according to which for a measure to be regarded as a rule in connection with ("*relativo a*") exportation (or importation), there must be a certain association, link or logical relationship between the measure and exportation (or importation).[1302] To establish whether there is such an association, link or logical relationship between measure 3 and exportation or importation, we will examine the core features that define the centre of gravity of the measure.

7.1034. However, we note that Panama has not explained how, in its view, measure 3 is "in connection with" importation or exportation. As it has not put forward any arguments in this respect, we conclude that Panama has failed to demonstrate that measure 3 is a rule and formality in connection with importation or exportation within the meaning of Article I:1 of the GATT 1994.

7.1035. Consequently, the Panel refrains from making a finding in relation to Panama's claim under Article I:1 of the GATT 1994.

7.4.2.2.5 Conclusion

7.1036. Having concluded that Panama has failed to demonstrate that measure 3 constitutes "a matter referred to in Article III:4" or "a rule and formality in connection with exportation or importation" within the meaning of Article I:1 of the GATT 1994, the Panel does not deem it necessary to continue the analysis of Panama's claim concerning the inconsistency of measure 3 with Article I:1 of the GATT 1994.

7.1037. In view of the foregoing, the Panel dismisses Panama's claim under Article I:1 of the GATT 1994, because Panama has failed to demonstrate that measure 3 (transaction valuation based on transfer prices) constitutes "a matter referred to in Article III:4" or "a rule and formality in connection with exportation or importation" within the meaning of Article I:1 of the GATT 1994.

[1299] Gains Tax Law, (Exhibits PAN-4 / ARG-42).
[1300] See paras. 7.981 and 7.982 above.
[1301] *Diccionario de la Lengua Española*, 23rd edition, Real Academia Española (Espasa Calpe, 2014), Vol. I, p. 1047.
[1302] See paras. 7.984 and 7.985 above.

7.4.3 Panama's claims under Article III:4 of the GATT 1994

7.4.3.1 Main arguments of the parties

7.4.3.1.1 Panama

7.1038. Panama claims that measure 3 is inconsistent with Article III:4 of the GATT 1994[1303] because making Argentine taxpayers subject to the transfer pricing regime for the valuation of imported goods when sold by persons from non-cooperative countries means that those goods are accorded treatment less favourable than that granted to domestic goods sold by persons located in Argentina.[1304]

7.1039. According to Panama, to be covered by this provision a measure does not have to govern the purchase or sale of products directly. What is important is to determine that (i) the measure is contained in a law, regulation or requirement, within the meaning of Article III:4, and that (ii) it affects the sale, offering for sale, purchase or use of imported products. Panama claims that both requirements are met in relation to measure 3.[1305]

7.1040. Panama claims that measure 3 is covered by Article III:4 of the GATT 1994 since it derives from a law, regulation or requirement, inasmuch as it is based on Articles 8, 14 and 15 of the LIG, in conjunction with Article 21 of the RIG and the articles incorporated after Article 21 of the RIG, and General Resolution No. 1122.[1306] According to Panama, measure 3 is "a measure linked with the determination of gains tax".[1307] Panama argues that measure 3 is a measure that affects the internal sale, purchase or use of products on the Argentine market and that, accordingly, it falls within the scope of application of Article III:4 and, hence, Article I:1 of the GATT 1994. Panama explains that the onerous nature of transaction valuation based on the transfer pricing regime, due to its administrative and related fiscal consequences, makes it a measure that affects the process of decision-making by the purchaser of imported products and, ultimately, the sale. Panama maintains that this measure also affects the purchase and use of the imported products, since, given the obligatory onerousness of the measure, a buyer aware of the administrative burdens will obviously be discouraged from purchasing and then using products imported from non-cooperative countries. Panama stresses that it is not a measure which imposes a tax, as such.[1308]

7.1041. Panama argues that in previous cases the scope of Article III:4 of the GATT 1994 was understood to be broad and to cover all those measures that alter or could alter the conditions of competition in the marketplace. Panama cites the Appellate Body report in *US – FSC* in order to argue that, as in the context of Article I:1 of the GATS, the word "affect" in Article III:4 of the GATT 1994 denotes a measure that has "an effect on" and, therefore, the word "affecting" has "a broad scope of application".[1309] Moreover, Panama explains that, in *China – Auto Parts*, the Appellate Body considered that the measures at issue created incentives for the use of domestic parts since they imposed administrative procedures, and associated delays, on automobile manufacturers using imported parts. In the opinion of the Appellate Body, such incentives "affected" the conditions of competition for imported auto parts relative to domestic auto parts on the Chinese internal market.[1310]

7.1042. Panama claims that, since the distinction is based on the origin of the products, the requirement of likeness between the imported and the domestic products is met.[1311] Panama considers that a measure does not have to mention specific products as long as it affects importation within the framework of Article III:4 of the GATT 1994. In its opinion, if a measure distinguishes between import transactions on the basis of origin, the case law has established that

[1303] Request for the establishment of a panel submitted by Panama.
[1304] Panama's first written submission, para. 4.271.
[1305] Panama's response to Panel question No. 57.
[1306] Panama's first written submission, para. 4.276.
[1307] Panama's first written submission, para. 4.263.
[1308] Panama's response to Panel questions No. 57 and 90.
[1309] Panama's response to Panel question No. 90 (citing Appellate Body Report, *US – FSC*, para. 210).
[1310] Panama's response to Panel question No. 90 (citing Appellate Body Report, *China – Auto Parts*, para. 195).
[1311] Panama's first written submission, paras. 4.277 and 4.278 (citing Panel Report, *China – Publications and Audiovisual Products*, para. 7.975).

the measure affects like products.[1312] In reply to Argentina's argument to the effect that products imported from non-cooperative countries and those of domestic origin have "intrinsic differences", Panama argues that the criterion of product "likeness" based on the origins indicated by Argentina in a politically established list in no way corresponds to "intrinsic differences" between the products.[1313]

7.1043. According to Panama, the subjection of goods imported from persons located in non-cooperative countries to the transfer pricing regime imposes on the Argentine taxpayer additional administrative requirements, economic charges and tax contingencies not imposed on transactions involving goods of Argentine origin. In Panama's opinion, because of their onerous nature for a purchaser in Argentina, these requirements and charges deprive the imported products of effective opportunities for competing in the Argentine market[1314] and therefore the measure in question accords products originating in or coming from non-cooperative countries treatment less favourable than that granted to like products of domestic origin.[1315]

7.4.3.1.2 Argentina

7.1044. Argentina responds that Panama has failed to demonstrate that measure 3 is inconsistent with Article III:4 of the GATT 1994. According to Argentina, the transfer price regulations establish rules relating to the calculation of income subject to tax in Argentina in transactions between Argentine taxpayers and related parties located abroad. Argentina explains that this "measure lays down the criteria for establishing the true value of the transaction as if it were an 'arm's [length] transaction for the purposes of gains tax assessment and collection in Argentina".[1316] In Argentina's opinion, requesting detailed information with respect to the value of each transaction, like the estimation of alternative values derived from the application of the various methods of valuation provided for in Article 15 of the LIG, does not affect the internal sale, offering for sale, purchase, transportation, distribution or use of these products or alter the conditions of competition to the detriment of the imported products.[1317]

7.1045. Argentina maintains that even assuming, for the sake of argument, that the transfer pricing regime is a measure that falls within the scope of Article III:4 of the GATT 1994, Panama has not identified the specific products affected by the measure challenged, so that it is not possible to assess their likeness with the domestic products.[1318] Argentina argues that Panama has failed to demonstrate that the products in question are "like" within the meaning of Article III:4 of the GATT 1994.[1319] Argentina refers to the Appellate Body report in *US – Clove Cigarettes* in order to argue that the regulatory concerns underlying a measure may be relevant to the analysis of the likeness criteria under Article III:4 of the GATT 1994, "'to the extent they have an impact on the competitive relationship between and among the products concerned'".[1320] For Argentina, the regulatory concerns that led it to distinguish between cooperative and non-cooperative countries have a direct impact on the conditions of competition between the market products of the categories of countries in question, and for the same reasons it suggests that these products are not "like" within the meaning of Article III:4 of the GATT 1994.[1321]

7.1046. Argentina argues that it is not enough to assert that measure 3 has an effect "in favour of" products of domestic origin to affirm that the measure accords "less favourable treatment", but that Panama should have shown that measure 3, linked to a direct tax applicable to all Argentine taxpayers, is applied to imported products in such a way as to protect the domestic industry.[1322]

[1312] Panama's second written submission, para. 2.485.
[1313] Panama's second written submission, para. 2.486 (referring to Argentina's first written submission, para. 721).
[1314] Panama's first written submission, para. 4.279; and second written submission, para. 2.486.
[1315] Panama's first written submission, para. 4.280.
[1316] Argentina's second written submission, para. 99.
[1317] Argentina's first written submission, para. 712; and second written submission, para. 99.
[1318] Argentina's first written submission, paras. 718 and 719.
[1319] Argentina's second written submission, para. 100.
[1320] Argentina's second written submission, para. 100 (citing Appellate Body Report, *US – Clove Cigarettes*, para. 119) (emphasis original).
[1321] Argentina's second written submission, para. 100.
[1322] Argentina's comments on Panama's response to Panel question No. 90.

7.1047. Argentina asserts that any differential treatment there may be derives from the intrinsic characteristics of the products and is not the result of the application of the measure. Argentina points out that the requirements laid down for imported products are not "additional requirements" since they are aimed at obtaining adequate information. As evidence of this, Argentina notes that these requirements also apply to domestic products in the case of related enterprises.[1323]

7.4.3.2 Assessment by the Panel

7.1048. Given our conclusion in paragraph 7.1036 above, to the effect that Panama has failed to demonstrate that measure 3 is a matter referred to in Article III:4 of the GATT 1994, the Panel does not consider it necessary to continue the analysis of Panama's claim relating to the inconsistency of measure 3 with Article III:4 of the GATT 1994.

7.1049. In view of the foregoing, the Panel dismisses Panama's claim under Article III:4 of the GATT 1994 because Panama has failed to demonstrate that measure 3 (transaction valuation based on transfer prices) is a matter referred to in Article III:4 of the GATT 1994.

7.4.4 Panama's claims under Article XI:1 of the GATT 1994

7.4.4.1 Main arguments of the parties

7.4.4.1.1 Panama

7.1050. Panama claims, alternatively to its claim under Article III:4 of the GATT 1994, that transaction valuation based on the transfer pricing regime is inconsistent with Article XI:1 of the GATT 1994.[1324] According to Panama, the measure in question is a restriction on the importation and exportation of goods within the meaning of Article XI:1 of the GATT 1994 because "the requirements, procedures and charges deriving from the transfer pricing regime impose restrictive conditions on the importation and exportation of goods sold by persons located in [non-cooperative] countries".[1325]

7.1051. In response to Argentina's argument that the requirement of transaction valuation based on transfer prices is in the nature of a tax and hence is not covered by the GATS, Panama claims that the measure is based on methodological requirements, administrative formalities and costs even though it does not impose a tax as such. In Panama's opinion, if Argentina's assertion were correct, Argentina would be acknowledging that the measure is a tax measure and, as such, clearly covered by Article I:1 of the GATT 1994.[1326] According to Panama, measure 3 is "a measure linked with the determination of gains tax"[1327] but is not a measure that qualifies as a customs duty, tax or other charge. The charges imposed by measure 3 do not, as such, impose a tax but impose costs on the purchase of goods coming from or destined for non-cooperative countries, altering the decision-making process with respect to the purchase or sale of those products.[1328]

7.1052. Panama observes that the procedure imposed by measure 3 is complex[1329] and does not necessarily lead to a clear solution. In Panama's opinion, if taxpayers fail to meet the information requirements imposed by the regulations, they could be exposed to sanctions and fines.[1330] Panama points out that even compliance with the relevant requirements and procedures could give rise to corrections leading to an increase in the tax burden or sanctions of other kinds.[1331] According to Panama, given the complexities of the regime, the pragmatic alternative would be to avoid goods transactions with persons domiciled in non-cooperative countries and thus be spared

[1323] Argentina's first written submission, paras. 721-723.
[1324] Panama's request for the establishment of a panel, p. 4.
[1325] Panama's first written submission, para. 4.291. See also Panama's second written submission, para. 2.490.
[1326] Panama's second written submission, para. 2.489 (referring to Argentina's first written submission, para. 728).
[1327] Panama's first written submission, para. 4.263.
[1328] Panama's response to Panel questions No. 58 and 91.
[1329] Panama indicates that the procedure takes between 3 and 10 weeks. See Panama's first written submission, para. 4.237.
[1330] Panama's first written submission, para. 4.238.
[1331] Panama's first written submission, para. 4.241.

the fiscal, economic and administrative charges to which that option would give rise.[1332] Hence Panama believes that measure 3 acts as a limiting condition on purchases (imports) and sales (exports), thereby constituting a restriction on the importation and exportation of goods.[1333]

7.4.4.1.2 Argentina

7.1053. Argentina claims that Panama has failed to show that measure 3 constitutes a measure maintained "on the importation" or "on the exportation" of any product under Article XI:1 of the GATT 1994. Argentina points out that the challenged measure does not fall within the scope of Article XI:1 since it is a tool for determining the tax base which, by its design, structure and architecture, takes the form of a tax.[1334] For Argentina, this measure imposes methods for determining income subject to internal taxation in Argentina. In its opinion, the fact that that income may derive in part from import or export transactions does not suggest that Argentina's internal tax measures are border measures subject to the obligation under Article XI:1 of the GATT 1994.[1335] Argentina recalls that Articles 8 and 15 of the LIG fall within the context of Chapter I "Subject and Object of the Tax", so that they are part of the tax insofar as they determine two of its basic elements. In Argentina's opinion, it is not possible, as Panama contends, to separate the components of the tax, as if there could be a tax without a subject or object or a tax base.[1336]

7.1054. It is Argentina's understanding that what Panama calls "methodological requirement" is that which defines the basis of assessment within the object of the tax, in accordance with the title of Chapter I of the LIG. Argentina refers to the exhibit "*Principios Constitucionales en Materia Tributaria*" (Constitutional Principles on Tax Matters) submitted by Panama (Exhibit PAN-83) and explains that the table in which the rule of law is summarized states that "there can be no tax without a legal basis" and that "in order to be imposed a tax must meet the formal requirements of a law" and that "the law must define the taxable event and the elements thereof: subject, object, tax base and tax rate". For Argentina, this means that "the determination of the tax base is subject to a constitutionally enforced legality requirement that is inherent in the tax as such" and that "'tax' is nothing other than the conjunction of subject, object, tax base and tax rate". Therefore, Argentina argues, "tax as such", as defined by Panama, must be similarly understood. So measure 3 is excluded from the scope of Article XI:1 of the GATT 1994 since that provision is not applicable with respect to taxes.[1337]

7.1055. Argentina also claims that, in the event that the Panel might consider that the measure in question does not constitute a tax and is subject to Article XI:1 of the GATT 1994, Panama has failed to show that the measure constitutes a "limiting condition" within the meaning of Article XI:1 of the GATT 1994.[1338] Argentina maintains that the measure does not constitute a "limiting condition" on importation given that it only operates once the products have entered the Argentine market and has a tax assessment and collection function.[1339] It is the tax authorities, not the customs authorities, that verify compliance with the measure.[1340] Moreover, Argentina claims that Panama has failed to show that this measure involves a restriction on importation and/or exportation that can be expressed in "quantitative terms".[1341]

7.1056. Argentina seeks support in the Appellate Body report in *China – Auto Parts*, according to which a panel should examine the "core features" of the measure in question, that is to say, those that define its "centre of gravity", in order to determine whether it is a border measure or an internal measure.[1342] Argentina argues that measure 3 is clearly aimed at determining the amount of income received by Argentine taxpayers with a view to assessing their internal taxes, separately from and independently of the duties or charges that may have been levied at the border when the goods were originally imported or exported. In Argentina's opinion, the fact that part of the income

[1332] Panama's first written submission, para. 4.284.
[1333] Panama's second written submission, para. 2.490.
[1334] Argentina's first written submission, paras. 728 and 731.
[1335] Argentina's second written submission, para. 97.
[1336] Argentina's response to Panel question No. 94.
[1337] Argentina's response to Panel question No. 94.
[1338] Argentina's first written submission, para. 727; and response to Panel question No. 94.
[1339] Argentina's first written submission, para. 734.
[1340] Argentina's first written submission, para. 735.
[1341] Argentina's first written submission, para. 743.
[1342] Argentina's second written submission, para. 97 (citing Appellate Body Report, *China – Auto Parts*, para. 171).

subject to taxation in Argentina may come from import or export operations does not suffice to show that the "centre of gravity" of the taxes on income or profits in Argentina is the importation or exportation of goods.[1343] Argentina maintains that Panama appears to agree with Argentina in this respect.[1344] Argentina also relies on the panel report in *Dominican Republic – Import and Sale of Cigarettes*, according to which "not every measure affecting the opportunities for entering the market would be covered by Article XI, but only those measures that constitute a prohibition or restriction on the importation of products, i.e. those measures which affect the opportunities for importation itself." [1345]

7.4.4.2 Assessment by the Panel

7.4.4.2.1 Introduction

7.1057. The question placed before the Panel is whether, as Panama maintains, measure 3 is inconsistent with Article XI:1 of the GATT 1994. This is an alternative claim to that made under Article III:4 of the GATT 1994. As we have concluded that measure 3 is not covered by Article III:4, we now proceed to examine Panama's alternative or subsidiary claim under Article XI:1 of the GATT 1994.

7.1058. As with Panama's other claims under the GATT 1994, Argentina argues that the challenged measure does not fall within the scope of application of Article XI:1 of the GATT 1994.[1346]

7.1059. We will begin by examining the text of Article XI:1 of the GATT 1994 in order to establish the legal standard applicable, taking into account the way in which it has been interpreted by previous panels and the Appellate Body.

7.4.4.2.2 The relevant legal provision

7.1060. Article XI:1 of the GATT 1994 reads as follows:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

7.1061. Thus, this provision seeks to eliminate prohibitions and restrictions (i) on the importation of any product of the territory of any other contracting party, or (ii) on the exportation or sale for export of any product destined for the territory of any other contracting party. We note that the text of Article XI:1 provides for the elimination of prohibitions and restrictions "other than duties, taxes or other charges". In *China – Raw Materials*, the Appellate Body confirmed that "duties, taxes or other charges" were excluded from the scope of application of Article XI:1 of the GATT 1994.[1347]

7.1062. In that case the Appellate Body examined the concepts of "prohibition" and "restriction". The Appellate Body pointed out that the word "prohibition" (*"prohibición"*) is defined as "a legal ban on the trade or importation of a specified commodity"[1348] and "restriction" (*"restricción"*) is defined as "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation"[1349] "and thus refers generally to something that has a limiting effect".[1350]

[1343] Argentina's second written submission, para. 97.

[1344] Argentina's second written submission, footnote 64 (referring to Panama's first written submission, para. 4.263).

[1345] Argentina's response to Panel question No. 94 (citing Panel Report, *Dominican Republic – Import and Sale of Cigarettes,* para. 7.261).

[1346] Argentina's first written submission, paras. 728 and 731.

[1347] Appellate Body Report, *China – Raw Materials*, para. 321.

[1348] Appellate Body Report, *China – Raw Materials*, para. 319 (referring to the *Shorter Oxford English Dictionary*, 6th edition, W.R. Trumble, A. Stevenson (editors) (Oxford University Press, 2007), Vol. 2, p. 2363).

[1349] Appellate Body Report, *China – Raw Materials*, para. 319 (referring to the *Shorter Oxford English Dictionary*, 6th edition, W.R. Trumble, A. Stevenson (editors) (Oxford University Press, 2007), Vol. 2, p. 2553).

In previous cases, panels opted to accord a broad meaning to the concept of "restriction"[1351], concluding that Article XI:1 is applicable to conditions which are "limiting" or have a "limiting effect".[1352]

7.1063. The Appellate Body also noted that Article XI of the GATT 1994 is entitled "General Elimination of Quantitative Restrictions". After mentioning previous occasions on which reference had been made to the title of a provision in interpreting the requirements laid down therein[1353], it considered that the use of the word "quantitative" in the title of Article XI informs the interpretation of the terms "restriction" and "prohibition". The Appellate Body concluded that the title "suggests that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported".[1354]

7.1064. We begin by examining whether measure 3 is covered by Article XI:1 of the GATT 1994.

7.4.4.2.3 The question of whether measure 3 is covered by Article XI:1 of the GATT 1994

7.1065. We recall that Panama claims that measure 3 is a restriction on the importation and exportation of goods. Before examining whether measure 3 constitutes a quantitative restriction, we will proceed to determine whether, as Argentina argues, this measure constitutes a tax, which would exclude it from the scope of Article XI:1 of the GATT 1994 by virtue of the wording of the provision itself, which bans prohibitions and restrictions "other than duties, taxes or other charges".

7.1066. We agree with the panel in *Brazil – Retreaded Tyres*[1355] that to determine whether a measure falls within the types of measures covered by Article XI:1 of the GATT 1994 we must examine its nature.

7.1067. We recall that measure 3 consists in the application of transaction valuation methods based on transfer prices for the purpose of determining the tax base for the gains tax payable by Argentine taxpayers in connection with transactions effected with persons from non-cooperative countries. Therefore, measure 3 is a tool for determining the tax base for the tax on the gains of the Argentine taxpayer. Argentina maintains this measure under paragraph 5 of Article 8 of the LIG.[1356] As Argentina points out[1357], both provisions come within the framework of Chapter I of the LIG entitled "Subject and Object of the Tax", so that they form part of the provisions that govern two of the elements of a tax. As Argentina also points out (and as we have previously explained) the "*Principios Constitucionales en Materia Tributaria*" (Constitutional Principles on Tax Matters) specify that "there can be no tax without a legal basis" and that "the law must define the taxable event and the elements thereof: subject, object, tax base and tax rate".[1358] In our view, the nature of a tool used to calculate the tax base, that is, one of the elements of gains tax, cannot, in the present case, be other than fiscal. Consequently, we consider that the fiscal nature of measure 3 excludes it from the scope of application of Article XI:1 of the GATT 1994.

7.4.4.2.4 Conclusion

7.1068. Having concluded that measure 3 is fiscal in nature and therefore is not covered by the disciplines of Article XI:1, the Panel does not consider it necessary to continue its analysis of Panama's claim concerning the inconsistency of measure 3 with Article XI:1 of the GATT 1994.

[1350] Appellate Body Report, *China – Raw Materials*, para. 319.
[1351] Panel Report, *India – Quantitative Restrictions*, para. 5.128.
[1352] Panel Reports, *India – Autos*, para. 7.270; *Colombia – Ports of Entry*, paras. 7.233 and 7.234; *Brazil – Retreaded Tyres*, para. 7.371; and *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.252 and 7.258.
[1353] The Appellate Body in *China – Raw Materials* refers to its reports in *US – Softwood Lumber IV*, para. 93, and *US – Carbon Steel*, para. 67.
[1354] Appellate Body Report, *China – Raw Materials*, para. 320.
[1355] Panel Report, *Brazil – Retreaded Tyres,* para. 7.372.
[1356] Gains Tax Law, (Exhibits PAN-4 / ARG-42).
[1357] Argentina's response to Panel question No. 94.
[1358] Constitutional Principles on Tax Matters, (Exhibit PAN-83), pp. 1 and 2.

7.1069. In view of the foregoing, the Panel dismisses Panama's claim under Article XI:1 of the GATT 1994 because measure 3 (transaction valuation based on transfer prices), being fiscal in nature, is not covered by that provision.

7.4.5 Argentina's defence under Article XX(d) of the GATT 1994

7.4.5.1 Main arguments of the parties

7.4.5.1.1 Argentina

7.1070. In the event that the Panel should find that Argentina acted inconsistently with Articles I:1, III:4 and XI:1 of the GATT 1994 with respect to the measures in question, Argentina argues that it has shown that its measures are justified under Article XX(d) of the GATT 1994. To this end, Argentina incorporates for reference the arguments it provided in relation to Article XIV(c) of the GATS as a basis for concluding that the treatment it applies to the entry of funds as an unjustified increase in wealth (measure 2) and its transaction valuation regime based on transfer price methodologies (measure 3) are "necessary to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT 1994.[1359]

7.4.5.1.2 Panama

7.1071. In response to Argentina's defence under Article XX(d) of the GATT 1994, Panama argues that Argentina has invoked that provision without even identifying the specific laws or regulations with which it is sought to secure compliance through the application of the transfer pricing regime. According to Panama, without this basis, it is impossible to establish whether the measure in question is intended, or necessary, to achieve the compliance objective protected under Article XX(d) of the GATT 1994.[1360]

7.1072. Panama argues that the application of the presumption of unjustified increase in wealth (measure 2)[1361] and the transfer pricing regime (measure 3)[1362], on the basis of a list of cooperative countries that does not correspond to objective criteria with respect to countries that face like conditions with regard to tax transparency and information exchange, constitutes a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail.

7.4.5.2 Assessment by the Panel

7.1073. We recall that, in the event of measure 2 being found to be inconsistent with Article I:1 of the GATT 1994 and measure 3 inconsistent with Articles I:1, III:4 and/or XI:1 of the GATT 1994, Argentina invokes the exception under Article XX(d) of the GATT 1994 to justify both measures.[1363] Having dismissed Panama's claims under Article I:1 of the GATT 1994 (in relation to measure 2 and measure 3) and under Articles III:4 and XI:1 of the GATT 1994 (in relation to measure 3), the Panel refrains from ruling on whether these measures are covered under the exception provided for in Article XX(d) of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. As set out in greater detail above, the Panel *finds* that, with respect to the Panel's terms of reference:

a. the replacement of Decree No. 1344/1998, as amended by Decree No. 1037/2000, by Decree No. 589/2013 does not prevent us from examining the eight measures at issue in the light of the system introduced by Decree No. 589/2013, in which a distinction is made between cooperative and non-cooperative countries;

[1359] Argentina's second written submission, para. 101.
[1360] Panama's second written submission, paras. 2.384 and 2.493.
[1361] Panama's second written submission, para. 2.385.
[1362] Panama's second written submission, para. 2.493.
[1363] Argentina's first written submission, para. 746. See also second written submission, para. 101.

b. measure 5 (requirements relating to reinsurance services), as elaborated by Article 4 of SSN Resolution No. 35.794/2011 and in conformity with the amendment introduced by SSN Resolution No. 38.284/2014, forms part of the Panel's terms of reference;

c. measure 5 (requirements relating to reinsurance services) covers only reinsurance services and therefore does not cover retrocession services.

8.2. With respect to the claims made by Panama under the GATS, the Panel *finds* as follows:

a. having determined that Panama has demonstrated that there is trade in services and that the eight measures at issue in the present dispute are measures "affecting trade in services" within the meaning of Article I:1 of the GATS, the GATS is applicable to measure 1 (withholding tax on payments of interest or remuneration), measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices), measure 4 (payment received rule for the allocation of expenditure), measure 5 (requirements relating to reinsurance services), measure 6 (requirements for access to the Argentine capital market), measure 7 (requirements for the registration of branches) and measure 8 (foreign exchange authorization requirement);

b. measure 1 (withholding tax on payments of interest or remuneration), measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices), measure 4 (payment received rule for the allocation of expenditure), measure 5 (requirements relating to reinsurance services), measure 6 (requirements for access to the Argentine capital market), measure 7 (requirements for the registration of branches) and measure 8 (foreign exchange authorization requirement) are inconsistent with Article II:1 of the GATS because they do not accord, immediately and unconditionally, to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like services and service suppliers of cooperative countries;

c. measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices), and measure 4 (payment received rule for the allocation of expenditure) are not inconsistent with Article XVII of the GATS because they accord to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like Argentine services and service suppliers, in the relevant services and modes in which Argentina has undertaken specific commitments;

d. measure 1 (withholding tax on payments of interest or remuneration), measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices), measure 4 (payment received rule for the allocation of expenditure), measure 7 (requirements for the registration of branches) and measure 8 (foreign exchange authorization requirement) are not covered under the exception of Article XIV(c) of the GATS because their application constitutes arbitrary and unjustifiable discrimination within the meaning of the *chapeau* of Article XIV of the GATS;

e. measure 5 (requirements relating to reinsurance services) and measure 6 (requirements for access to the Argentine capital market) are not covered by paragraph 2(a) of the Annex on Financial Services because they were not taken for prudential reasons within the meaning of that provision.

8.3. Further in relation to Panama's claims under the GATS, the Panel *dismisses* Panama's claim under Article XVI:2(a) of the GATS because measure 5 (requirements relating to reinsurance services) is not covered by that provision, inasmuch as it does not regulate service suppliers within the meaning of Article XVI:2(a) of the GATS.

8.4. The Panel also *dismisses* Panama's claim under Article XVI:1 of the GATS with respect to measure 5 (requirements relating to reinsurance services) because Panama has failed to establish a *prima facie* case of inconsistency in this respect.

8.5. Moreover, as we have found that measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices) and measure 4 (payment received rule

for the allocation of expenditure) are not inconsistent with Article XVII of the GATS because they accord to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like Argentine services and service suppliers, in the relevant services and modes in which Argentina has undertaken specific commitments, the Panel *refrains from ruling* on whether these measures are covered under the exception provided for in Article XIV(d) of the GATS.

8.6. With respect to Panama's claims under the GATT 1994:

a. the Panel *dismisses* Panama's claim under Article I:1 of the GATT 1994, because Panama has failed to demonstrate that measure 2 (presumption of unjustified increase in wealth) constitutes a "rule and formality in connection with exportation" or "a charge imposed on the international transfer of payments for … exports" within the meaning of Article I:1 of the GATT 1994;

b. the Panel also *dismisses* Panama's claim under Article I:1 of the GATT 1994, because Panama has failed to demonstrate that measure 3 (transaction valuation based on transfer prices) constitutes "a matter referred to in Article III:4" or "a rule and formality in connection with exportation or importation" within the meaning of Article I:1 of the GATT 1994;

c. likewise, the Panel *dismisses* Panama's claim under Article III:4 of the GATT 1994, because Panama has failed to demonstrate that measure 3 (transaction valuation based on transfer prices) is a matter referred to in Article III:4 of the GATT 1994;

d. the Panel also *dismisses* Panama's claim under Article XI:1 of the GATT 1994, because measure 3 (transaction valuation based on transfer prices), being fiscal in nature, is not covered by that provision.

8.7. Finally, also with respect to Panama's claims under the GATT 1994, having dismissed Panama's claims under Article I:1 of the GATT 1994 (in relation to measure 2 – presumption of unjustified increase in wealth – and measure 3 – transaction valuation based on transfer prices) and Articles III:4 and XI:1 of the GATT 1994 (in relation to measure 3 – transaction valuation based on transfer prices), the Panel *refrains from ruling* on whether these measures are covered under the exception provided for in Article XX(d) of the GATT 1994.

8.8. In accordance with the provisions of Article 19.1 of the DSU, having found Argentina's actions to be inconsistent with its obligations under Article II:1 of the GATS, we recommend that the DSB request Argentina to bring its measures into conformity with its obligations under the GATS.

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APPENDIX 1. – ARGENTINA'S SCHEDULE OF SPECIFIC COMMITMENTS (GATS/SC/4) OF 15 APRIL 1994
(This is authentic in Spanish only)

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
I. HORIZONTAL COMMITMENTS			
ALL SERVICES INCLUDED IN THIS SCHEDULE	**(3) Acquisition of land:** unbound in frontier areas (150 km in land frontier areas and 50 km in coastal areas) (4) Unbound, except for measures concerning the following categories of personnel: <u>Senior personnel</u> **Managers:** persons in an enterprise or organization who primarily direct a department or subdivision. They supervise and control the work of other supervisory, professional or managerial staff. They have the authority to hire or dismiss personnel, recommend their hiring or dismissal or take other personnel action such as promotion or leave authorization. They exercise discretionary authority over day-to-day activities. Does not include first-line supervisors unless those supervised are professionals, nor employees who primarily perform tasks required for the provision of the service.	(4) Unbound, except for measures concerning the categories of personnel indicated in the market access column	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
	Executives: persons in the organization who primarily direct the management of the organization. They exercise wide latitude in decision-making and receive only supervision or direction from high-level executives, the board of directors or stockholders. They do not directly perform tasks related to the provision of the service(s) of the organization **Specialists:** persons in an enterprise or organization who possess knowledge at an advanced level of expertise and who possess proprietary knowledge of the organization's services, research equipment, techniques or management. Independent professionals may be included in this category.		

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
II. SECTOR SPECIFIC COMMITMENTS			
1. BUSINESS SERVICES			
A. <u>Professional services</u>	(1), (3), (4) Persons seeking to provide professional services must obtain recognition of their professional degree, enrol in the relevant college and establish legal domicile in Argentina Legal domicile: does not involve residence requirement		
(a) Legal services (CPC 861)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(b) Accounting, auditing and book-keeping services (CPC 862)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(d) Architectural services (CPC 8671)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
(e) Engineering services (CPC 8672)	(1) None	(1) None	
	(2) None	(2) None	
	(3) None	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
B. Computer and related services			
(a) Consultancy services related to the installation of computer hardware (CPC 841)	(1) None	(1) None	
	(2) None	(2) None	
	(3) None	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
(b) Software implementation services (CPC 842)	(1) None	(1) None	
	(2) None	(2) None	
	(3) None	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
(c) Data processing services (CPC 843)	(1) None	(1) None	
	(2) None	(2) None	
	(3) None	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
(d) Database services (CPC 844)	(1) None	(1) None	
	(2) None	(2) None	
	(3) None	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
(e) Other (CPC 845 + 849)	(1) None	(1) None	
	(2) None	(2) None	
	(3) None	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
F. Other business services			
(a) Advertising services (CPC 871)	(1) None	(1) None	
	(2) None	(2) None	
	(3) None	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
(b) Market research and public opinion polling services (CPC 864)	(1) None	(1) None	
	(2) None	(2) None	
	(3) None	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
(c) Management consulting services (CPC 865)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(h) Services incidental to mining (CPC 833 + 5115)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(o) Building cleaning services (CPC 874)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(s) Assembly or convention services (CPC 87909*)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
(t) Other (CPC 8790)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
2. COMMUNICATION SERVICES			
B. Courier services (CPC 7512)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
C. Telecommunication services			
(h) Electronic mail (CPC 7523**)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(i) Voicemail (CPC 7523**)	(1) None (2) None (3) None (4) Unbound, except as indicated in the	(1) None (2) None (3) None (4) Unbound, except as indicated in the	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
	horizontal section	horizontal section	
(j) On-line information and database retrieval (CPC 7523**)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(k) Electronic data interchange services (CPC 7523**)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(l) Enhanced/value-added facsimile services (including store and forward, store and retrieve) (CPC 7523**)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(m) Code and protocol conversion	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
(n) On-line information and/or data processing (including transaction processing) (CPC 843**)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(o) Other	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
3. CONSTRUCTION AND RELATED ENGINEERING SERVICES			
A. General construction work for buildings (CPC 512)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
C. Assembly and erection of prefabricated constructions (CPC 514 + 516)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
D. Building completion and finishing work (CPC 517)	(1) None	(1) None	
	(2) None	(2) None	
	(3) None	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
E. Other (CPC 511 + 515 + 518)	(1) None	(1) None	
	(2) None	(2) None	
	(3) None	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
4. DISTRIBUTION SERVICES			
B. Wholesale trade services (CPC 622)	(1) None	(1) None	
	(2) None	(2) None	
	(3) None	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
C. Retail trade services (CPC 631 + 632) 6111 + 6113 + 6121	(1) None	(1) None	
	(2) None	(2) None	
	(3) None	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
D. Franchising services (CPC 8929)	(1) None	(1) None	
	(2) None	(2) None	
	(3) None	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
7. FINANCIAL SERVICES[1]			
A. All insurance services and insurance-related services			
(a) Life, accident and health insurance services (CPC 8121)	(1) Unbound	(1) Unbound	
	(2) Unbound	(2) Unbound	
	(3) Authorization of the establishment of new entities is suspended	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
(b) Non-life insurance services (CPC 8129)	(1) Unbound	(1) Unbound	
	(2) Unbound	(2) Unbound	
	(3) Authorization of the establishment of new entities is suspended	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	

[1] Processed data must remain in the country so as to be available for consultation by the competent authority. This measure does not prevent the data from also being transferred abroad.

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
- Maritime and air transport insurance services (CPC 8129(3)	(1) None (2) None (3) Authorization of the establishment of new entities is suspended (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(c) Reinsurance and retrocession services (CPC 81299*)	(1) None (2) None (3) Authorization of the establishment of new entities is suspended (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
B. Banking and other financial services (excluding insurance)	Financial operations by the Government and State-owned enterprises are excluded from the conditions specified in this schedule; they may carry out their operations through the entities they designate. In order to engage in stock market transactions it is necessary to be a member and share-holder of the Securities Exchange.		
(a) Acceptance of deposits and other repayable funds from the public (CPC 81115-81119)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
(b) Lending of all types including consumer credit, mortgage credit, factoring and financing of commercial transactions (CPC 81113)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(c) Financial leasing services (CPC 8112)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
d) Payment and money transmission services (CPC 81339**)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(e) Guarantees and commitments (CPC 81199**)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
(f) Trading on own account or for clients, whether on an exchange or not, or in any other form, of the following:			
- Money market instruments (cheques, bills, certificates of deposit, etc.) (CPC 81339**)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
- Foreign exchange (CPC 8133(3)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
- Derivative products, including, but not limited to, futures and options (CPC 81339**)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
- Exchange rate and interest rate instruments, such as swaps, forward interest-rate agreements, etc. (CPC 81339*)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
- Transferable securities (CPC 81321*)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
- Other negotiable instruments and financial assets, including bullion (CPC 81339**)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(g) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues (CPC 8132)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
(h) Money broking (CPC 81339**)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(i) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial depository and trust services (CPC 8119** + 81323*)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(j) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments (CPC 81339** or 81319**)	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
(k) Advisory and other auxiliary financial services for any of the activities listed in Article IB of document MTN.TNC/W/50, including credit reference and analysis, investment and portfolio research and advice, and advice on acquisitions and on corporate restructuring and strategy. (CPC 8131 or 8133)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
(l) Provision and transfer of financial information, financial data processing and related software by suppliers of other financial services (CPC 8131)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
New financial services	(1) Unbound (2) Unbound (3) Unbound (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) Unbound (3) None (4) Unbound, except as indicated in the horizontal section	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
9. TOURISM AND TRAVEL-RELATED SERVICES			
A. Hotels and restaurants (including catering) (CPC 641/643)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
B. Travel agencies and tour operators services (CPC 7471)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
C. Tourist guide services (CPC 7472)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
D. Other	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

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