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ARGENTINA – MEASURES RELATING TO TRADE IN GOODS AND SERVICES

NOTIFICATION OF AN OTHER APPEAL BY ARGENTINA UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 2 November 2015, from the delegation of Argentina, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23 of the *Working Procedures for Appellate Review* (WT/AB/WP/6) ("Working Procedures"), Argentina hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law and legal interpretation contained in the report of the Panel in *Argentina – Measures Relating to Trade in Goods and Services* (WT/DS453) ("Panel Report").

2. The issues that Argentina raises in this other appeal relate to the Panel's findings that services and service suppliers located in jurisdictions that Argentina designates as "cooperative" and "non-cooperative" under Decree No. 589/2013 and the defensive tax measures at issue in this dispute are "like" within the meaning of Articles II:1 and XVII of the General Agreement on Trade in Services ("GATS").

3. In particular, Argentina seeks review of the Panel's finding that services and service suppliers located in "cooperative" and "non-cooperative" jurisdictions are "like" under Article II:1 of the GATS.¹ The Panel erred in its interpretation and application of Article II:1 in concluding that the services and service suppliers at issue are "like" on the grounds that the measures at issue provide differential treatment "by reason of origin".² If the Appellate Body were to conclude that services and service suppliers may be considered "like" when a measure provides differential treatment "exclusively on the basis of origin", Argentina respectfully request that the Appellate Body find that the Panel erred in concluding that the services and services suppliers are "like" in the absence of a finding that the measures at issue provide differential treatment "exclusively" on the basis of origin.³

4. Argentina further considers that the Panel committed legal error under Article II:1 of the GATS by reversing the burden of proof and finding that it was incumbent upon Argentina to demonstrate that the services and service suppliers located in "cooperative" and "non-cooperative" jurisdictions are *not* like under that provision.⁴

5. The Panel also erred in its interpretation and application of Article XVII of the GATS when it relied on its erroneous likeness finding under Article II:1 to conclude that services and service suppliers located in Argentina are "like" those located in "non-cooperative" jurisdictions.⁵ In addition to the fact that the Panel's findings under Article II:1 were themselves in error, the

¹ Panel Report, para. 7.186.

² Panel Report, paras. 7.153-7.185 and 7.365.

³ Panel Report, paras. 7.185, 7.186, 7.365.

⁴ Panel Report, paras. 7.171-7.185, but in particular para. 7.179.

⁵ Panel Report, paras. 7.481-7.489.

Panel's findings under Article II:1 were not sufficient to establish likeness under Article XVII of the GATS. Argentina therefore requests that the Appellate Body modify the Panel's reasoning while upholding its ultimate conclusion that measures 2, 3 and 4 are not inconsistent with Article XVII of the GATS.⁶

6. With respect to Panama's claims under both Article II:1 and Article XVII of the GATS, Argentina further considers that the Panel committed legal error by making a *prima facie* case of likeness for Panama in the absence of evidence and legal argument.

7. Alternatively, in the event that the Appellate Body were to find that Argentina bore the burden of proving likeness under Articles II:1 and XVII of the GATS, or that Panama had otherwise established a *prima facie* case of likeness, Argentina claims on appeal that the Panel failed to act consistently with its duties to conduct an objective assessment of the matter under Article 11 of the DSU in reaching its findings under those provisions. The Panel ignored uncontested evidence on the panel record which demonstrated that the differences in regulatory frameworks between cooperative and non-cooperative jurisdictions affect the nature and extent of the competitive relationship among services and service suppliers located in these different types of jurisdictions, to the extent that they cannot be considered "like" under Articles II:1 and XVII of the GATS.⁷ Should the Appellate Body sustain this alternative claim of error, Argentina requests that the Appellate Body complete the legal analysis and find, on the basis of the Panel's factual findings and uncontested evidence on the panel record, that these categories of services and service suppliers are not like under Articles II:1 and XVII of the GATS.

8. For these reasons, Argentina respectfully requests that the Appellate Body reverse the Panel's finding that services and service suppliers located in "non-cooperative" jurisdictions are "like" services and service suppliers located in "cooperative" jurisdictions and in Argentina under Articles II:1 and XVII of the GATS, respectively.⁸ Consequently, Argentina respectfully requests that the Appellate Body (1) reverse the Panel's ultimate finding that the measures at issue in this dispute are inconsistent with Article II:1 of the GATS⁹; and (2) modify the basis for the Panel's ultimate finding that measures 2, 3, and 4 are not inconsistent with Article XVII.¹⁰

9. Pursuant to Rule 23(3) of the Working Procedures, Argentina files this Notice of Other Appeal together with its Other Appellant's Submission with the Appellate Body Secretariat.

10. Pursuant to Rule 23(2)(c)(ii)(C) of the Working Procedures, this Notice of Other Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel, without prejudice to Argentina's ability to rely on other paragraphs of the Panel Report in its other appeal.

⁶ Panel Report, para. 7.525.

⁷ See e.g., Panel Report, paras. 7.509-7.521.

⁸ Panel Report, paras. 7.185, 7.186, 7.365, 7.488 and 7.489.

⁹ Panel Report, paras. 7.367 and 8.2.b.

¹⁰ Panel Report, paras 7.523-7.525 and 8.2.c.