

**In the World Trade Organization
Panel Proceedings**

**ARGENTINA – MEASURES RELATING TO TRADE IN GOODS AND SERVICES
(DS453)**

**Third Party Written Submission
by the European Union**

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1. INTRODUCTION

1. The European Union thanks the Panel for this opportunity to present its views in these proceedings. The European Union intervenes in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the obligations contained therein, in particular the General Agreement on Trade in Services (the GATS), the General Agreement on Tariffs and Trade (the GATT 1994), and the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU). Whilst not taking a final position on all the facts of this case, the European Union will provide its views on the legal claims advanced by the Parties to the dispute, reserving its right to further elaborate on these issues during the third-party session.
2. At the outset, the European Union would like to stress that it shares the concern of Argentina about tackling tax evasion and avoidance, including aggressive tax planning and harmful tax practices. The European Union also contributes to promoting globally minimum standards of good governance in tax matters (transparency, exchange of information and fair competition). The European Union considers that WTO Members have a wide range of measures at their disposal to achieve such an objective, including improving information exchange between tax authorities and appropriate anti-abuse measures. However, in taking such measures, WTO Members must comply with their obligations under WTO law.
3. In view of the claims and arguments made by Panama and Argentina in this dispute, the European Union has structured this submission in two main parts. The first part addresses the Parties' claims and arguments under the GATS (Section 3). The second part of this submission deals with the Parties' claims and arguments under the GATT 1994 (Section 4). Before turning to those issues, a brief reference to the measures at issue is made (Section 2).

2. MEASURES AT ISSUE

4. The measures at issue consist of a set of administrative and tax disincentives, restrictions to provide certain services (e.g. reinsurance and retrocession services), requirements for the establishment in the Argentine market, restrictions in the access to the capital market in Argentina, and restrictions on the repatriation of investments. These measures, provided across a number of Argentine legal instruments, apply to goods and services originating from a particular group of countries ("excluded countries"). In contrast, other countries ("beneficiary countries") are not subject to these measures.¹

¹ As of 8 January 2014, "beneficiary countries", thus those subject to the general treatment, are listed in an Argentine Act. Countries not included in such a list are subject to the measures at issue ("excluded countries"). See Panama's first written submission, para. 1.5. The European Union understands that Argentina disputes this terminology (see Argentina's first written submission, para. 95). However, from the point of view of the effects of the measures at issue on trade, the European Union considers it appropriate to refer to "excluded countries" as the group of countries which do not fall under the general regime, and "beneficiary countries" as the group of countries falling under the general regime, allegedly being more advantageous.

5. The following table summarises the measures and claims made by Panama in the present case² as well as the justifications invoked by Argentina.

No.	Measure	Claim	Justification
1	Withholding tax on profits derived from certain transactions	Article II:1 of the GATS	Article XIV(c)(i) of the GATS
2	Tax treatment imposed on entry of funds as an unjustified increase in wealth	Articles II:1 and XVII of the GATS / Article I:1 of the GATT	Articles XIV(c)(i) and (d) of the GATS / Article XX(d) of the GATT
3	Valuation of transactions	Articles II:1 and XVII of the GATS / Articles I:1, III:4 and XI:1 of the GATT	Articles XIV(c)(i) and (d) of the GATS / Article XX(d) of the GATT
4	Deduction of expenses incurred in transactions with parties abroad	Articles II:1 and XVII of the GATS	Articles XIV(c)(i) and (d) of the GATS
5	Reinsurance and retrocession services sector	Articles II:1, XVI:1 and XVI:2(a) of the GATS	Paragraph 2(a) of the Annex on Financial Services
6	Financial instruments	Article II:1 of the GATS	Paragraph 2(a) of the Annex on Financial Services
7	Requirements for the registration of companies, branches and shareholders from certain foreign service suppliers	Article II:1 of the GATS	Article XIV(c)(i) of the GATS
8	Repatriation of investments	Article II:1 of the GATS	Article XIV(c)(i) of the GATS

6. In this submission, the European Union will refer to these measures by its number (No.) or by using these short references.

3. CLAIMS UNDER THE GATS

7. In this section, the European Union will address the arguments of the parties in the following order: Article II:1 (MFN), Article XVII (National Treatment), Article XVI (Market Access), Article XIV (Exceptions) and paragraph 2(a) of the Annex on Financial Services of the GATS (Prudential Exception).

² See Panama's first written submission, paras. 1.8 and 5.1.

3.1. ARTICLE II:1 OF THE GATS (MFN)

3.1.1. Summary of Panama's arguments

8. According to Panama, Article II:1 of the GATS sets out the general obligation to grant services and service suppliers of any other Member treatment no less favourable than that accorded to like services and service suppliers of any other country. Panama considers that, when applying this provision, the following elements must be established:
- (i) the measure has to be covered by the GATS, i.e. there must be trade in services in one of the four modes specified in Article I:2 of the GATS;³ and the measure must affect trade in services;⁴
 - (ii) there must be "likeness" between the foreign services or service suppliers affected by the measures and services or service suppliers from other countries;⁵ and
 - (iii) the measure must extend "immediately" and "unconditionally" treatment no less favourable to services and service suppliers of a Member than the one accorded to like services and service suppliers from other countries.⁶
9. Panama argues that Argentina acts inconsistently with its obligations under Article II:1 of the GATS with respect to the eight measures challenged in this dispute.

3.1.1.1 Withholding tax on profits derived from certain transactions

10. Panama argues that various provisions of the "Income/Profits Tax Law" of Argentina (*Ley de Impuesto a las Ganancias*, LIG) impose a different tax burden on transactions between Argentine residents and legal entities based in a group of excluded countries as compared to transactions of the same kind between Argentine residents and legal entities based in beneficiary countries.⁷ The tax is applied in the form of a withholding at the time of the payment of the service by the Argentine resident.

³ I.e., cross-border trade in services (Mode 1), consumption abroad (Mode 2), commercial presence (Mode 3), and presence of natural persons of a Member in the territory of another Member (Mode 4).

⁴ In this regard, Panama observes that Article XXVIII (c) of the GATS offers a non-exhaustive list of measures that can affect trade in services, including those which deal with the purchase, payment and use of a service.

⁵ According to Panama's first submissions, when a measure provides different treatment to services or service suppliers which are substantially identical in all their main aspects and makes a distinction between them only because of their different "origin", it must be assumed that the two services or service suppliers are "like" (see Panama's first written submission, paras. 4.15-4.18).

⁶ Panama argues that Article II:1 of the GATS has to be interpreted in the sense that it imposes an obligation upon Members to extend to services and service suppliers from other Members any advantage which could create more favourable opportunities for competition *vis-à-vis* like services or like service suppliers from any other country (see Panama's first written submission, paras. 4.19-4.28).

⁷ Panama's first written submission, paras. 4.1-4.10.

11. With regard to credit, loans and placement of funds, when the creditor is a bank or a financial institution based abroad, the basic presumption of net profit under Argentine law is 43% of the payments corresponding to interest payments or remuneration. If the bank or financial institution is based in one of the excluded countries, the presumption of net profit is 100% of the payments mentioned above. Upon the basis of net profit presumptions, under Articles 92 and 93 of the LIG, Argentina applies a 35% tax rate. By applying the same tax rate to different taxable incomes, Panama claims that Argentina imposes an effective tax burden of 15.05% of the total value of the transactions between Argentine residents and banks or financial institutions based in beneficiary countries, whereas the tax burden amounts to 35% of the total value of the transactions between Argentine residents and banks or financial institutions based in the excluded countries.
12. Panama claims that Argentina violates Article II:1 of the GATS because the measure: (i) is covered by the GATS, as it affects the payment of services (namely the supply of credit, loans and placement of funds) supplied under Mode 1; (ii) involves like services and like service suppliers, as the only criterion for the distinction between the two categories of service suppliers lies in their origin; and (iii) provides less favourable treatment, by imposing a higher tax burden on transactions from excluded countries related to like services and involving like service suppliers.⁸

3.1.1.2 Tax treatment imposed on entry of funds as an unjustified increase in wealth

13. According to Panama, under Argentine law charges are generally determined upon the basis of taxpayers' income declarations. Nevertheless, when such declarations are not submitted or their content is questionable, the *Administración Federal de Ingresos Públicos* (AFIP) can determine the taxable amount *ex officio*. Moreover, it can do so even when the exact amount is unknown on the basis of the legal presumptions set up in Article 18 of the Law on Tax Procedure (*Ley del Procedimiento Tributario*, LPT). Panama argues that according to Article 18, letter (f) of the LPT, the entry of funds from "excluded countries", irrespective of the ways in which such transfer occurs, is considered an "unjustified increase in wealth". The entry of such funds, hence, is subject to the payment of profit tax, value added tax and the applicable domestic taxes. Under the challenged measures, Argentina taxes these funds by increasing the taxable amount by 10% and applies to this amount the corresponding tax rates. In order to rebut such a presumption, AFIP requires the taxpayer to prove several elements. According to Panama, any income from an excluded country is considered as an "unjustified increase in wealth", whereas income from other countries is subject to the general rule.⁹
14. Panama claims that Argentina violates Article II:1 of the GATS because the measure: (i) is covered by the GATS, as it affects the "supply" as well as the "use" of various types of services (namely loans, insurance, reinsurance and retrocession) provided under Mode 1; (ii) applies to a subset of services only because of their origin and, therefore, the services and service suppliers from excluded countries can be considered to be "like" the services and suppliers from

⁸ Panama's first written submission, paras. 4.13-4.28.

⁹ Panama's first written submission, paras. 4.43-4.96.

beneficiary countries; and (iii) provides less favourable treatment, by imposing a heavier burden on services and service suppliers from excluded countries compared to like services and service suppliers from beneficiary countries.¹⁰

3.1.1.3 Valuation of transactions

15. Panama claims that, contrary to what normally happens in reported transactions involving an Argentine resident and another person (whether or not domiciled in Argentina), when a transaction occurs between an Argentine resident and a person domiciled, established or residing in one of the "excluded countries", it is not considered, in any case, to be in line with normal arm's-length market practices or prices. Argentina requires such transactions to be valued in accordance with detailed procedures. According to Panama, the level of detail and the amount of information required in the case of transactions with persons from excluded countries is so high that it is likely to require the hiring of experts in order to prepare the relevant documentation. Moreover, failure to comply may give rise to administrative and criminal penalties.¹¹
16. Panama claims that Argentina violates Article II:1 of the GATS because the measure (i) is covered by the GATS, as they affect the "supply" of services provided under Mode 1 as well as Mode 2; (ii) applies based on the different origin of the suppliers and therefore the services and service suppliers from excluded countries can be considered to be "like" the services and suppliers from beneficiary countries; and (iii) provides less favourable treatment, by imposing a heavier burden on services and service suppliers from excluded countries compared to like services and service suppliers from beneficiary countries.¹²

3.1.1.4 Deduction of expenses incurred in transactions with parties abroad

17. Panama states that, generally, in Argentina taxpayers are given the possibility to deduct expenses incurred in transactions with both domestic and foreign parties and, typically, on the basis of the fundamental accounting principle of "accrual". According to this principle, profits and expenses are calculated on the moment when they accrued, irrespective of when the underlying obligation becomes effective. In contrast, when it comes to transactions involving persons from excluded countries, such deduction has to be made according to the time in which the payment of the obligation is actually made.¹³
18. Panama claims that Argentina violates Article II:1 of the GATS because the measure: (i) is covered by the GATS, as it affects the supply of various services including credit, loans and placement of funds from excluded countries under Mode 1; (ii) distinguishes among services solely on the basis of their origin, thus there is a presumption of "likeness" of services and service suppliers from excluded countries and services and service suppliers from beneficiary countries;

¹⁰ Panama's first written submission, paras. 4.97-4.128.

¹¹ Panama's first written submission, paras. 4.203-4.241.

¹² Panama's first written submission, paras. 4.242-4.249.

¹³ Panama's first written submission, paras. 4.297-4.305.

and (iii) provides services and service suppliers from excluded countries treatment less favourable than that granted to other foreign like services and service suppliers, by giving the latter a fiscal advantage.¹⁴

3.1.1.5 Reinsurance and retrocession services sector

19. Panama notes that Argentina prohibits the supply of reinsurance and retrocession services by providers from excluded countries under both Mode 1 (cross-border trade in services) and Mode 3 (commercial presence). Before 2011, foreign suppliers of reinsurance services faced no restrictions in the access to the market in Argentina, both under Mode 1 and Mode 3. After the reforms in 2011,¹⁵ with few exceptions, foreign suppliers can only provide reinsurance services in Argentina through Mode 3. However, such possibility is not given to branches or subsidiaries of companies established in countries that apply an income or profit tax with a rate of less than 20%, or in countries which either allow for secret in the composition and ownership of companies or are "tax heavens". Mode 1 trade in reinsurance service is only allowed when the amount or the characteristics of the risk cannot be covered by Argentine reinsurer, or the individual risk at stake is higher than USD 50 million. Such exceptions, either under Modes 3 or 1, are not available in any case for suppliers from excluded countries.¹⁶
20. Panama claims that Argentina violates Article II:1 of the GATS because the measure (i) is covered by the GATS, as it affects trade in reinsurance and retrocession services under Mode 1 and Mode 3; (ii) excludes from the exceptions foreign suppliers because of their origin, hence there is a presumption of "likeness" of services and service suppliers from excluded countries and services and service suppliers from beneficiary countries; and (iii) provides less favourable treatment, by not allowing suppliers from excluded countries to exercise trade under the same rules as those who apply to providers from beneficiary countries.¹⁷

3.1.1.6 Financial instruments

21. Panama claims that the Law on Capital Markets (*Ley de Mercado de Capitales*) prohibits intermediaries which are authorised to carry out operations in the capital market in Argentina from initiating operations with persons from excluded countries. In contrast, such limitation does not apply to operations with persons or entities established in beneficiary countries.¹⁸
22. Panama claims that Argentina violates Article II:1 of the GATS because the measure: (i) is covered by the GATS, as it affects the supply of portfolio management services under Mode 1; (ii) denies access to the capital market in Argentina to suppliers because of their origin, hence there is a presumption of "likeness" of services and service suppliers from excluded countries and services

¹⁴ Panama's first written submission, paras. 4.306-4.312.

¹⁵ These reforms were effectuated by Resolution 35.614 of 11 February 2011, Resolution 35.726 of 26 April 2011 and Resolution 35.794 of 19 May 2011.

¹⁶ Panama's first written submission, paras. 4.320-4.333.

¹⁷ Panama's first written submission, paras. 4.334-4.344.

¹⁸ Panama's first written submission, paras. 4.384-4.391.

and service suppliers from beneficiary countries; and (iii) provides for less favourable treatment by denying portfolio management services providers from excluded countries access to the Argentine capital market compared to suppliers from beneficiary countries.¹⁹

3.1.1.7 Requirements for the registration of companies, branches and shareholders from certain foreign service suppliers

23. This claim by Panama is related to certain requirements to be met in order to register a branch of a foreign company in the relevant public register of Buenos Aires. All foreign companies, according to the Law on Commercial Companies (Article 118) have to prove that they effectively exist under the laws of their countries, that they have elected a domicile in Argentina, that they have complied with all the publication and registration formalities, and have to justify the reason for opening a branch as well as to indicate the person on whose account it will be. Furthermore, there are special requirements for entities from excluded countries willing to establish a branch in Buenos Aires, including signed certificates and documentation concerning the activities of the main company. Finally, Panama notes that Article 192 of General Resolution No. 7/2005 of the Argentine Office of Corporations (*Inspección General de Justicia*, IGJ) states that this entity must appraise consistency with the requirements more stringently with regards to companies from "excluded countries".²⁰
24. Panama claims that Argentina violates Article II:1 of the GATS because the measure (i) is covered by the GATS, as it affects trade in services under Mode 3; (ii) sets out higher requirements solely on the basis of origin, hence there is a presumption of "likeness" of services and service suppliers from excluded countries and services and service suppliers from beneficiary countries; and (iii) provides for less favourable treatment, by applying requirements to the establishment of a branch of a company based in an excluded country in addition to those which generally apply to foreign companies.²¹

3.1.1.8 Repatriation of investments

25. Panama states that, in order to repatriate direct investments by the non-financial sector and portfolio investments, service suppliers from excluded countries need to require and obtain prior authorisation of the Central Bank of the Republic of Argentina (BCRA), according to Communication "A" 4940, as amended by Communication "A" 4692 of the BCRA. In contrast, foreign service suppliers exercising their activities in Argentina through Mode 3 for 365 days or more and having their headquarters in beneficiary countries can repatriate their investments without prior authorisation.²²

¹⁹ Panama's first written submission, paras. 4.392-4.405.

²⁰ Panama's first written submission, paras. 4.405-4.416.

²¹ Panama's first written submission, paras. 4.417-4.437.

²² Panama's first written submission, paras. 4.438-4.444.

26. Panama claims that Argentina violates Article II:1 of the GATS because the measure (i) is covered by the GATS, as it affects the supply of a service under Mode 3; (ii) applies differently to service suppliers according to their origin, therefore a presumption of likeness would apply; and (iii) accords foreign service suppliers in excluded countries seeking to repatriate investments treatment less favourable than that accorded to like service suppliers from beneficiary countries.²³

3.1.2. Summary of Argentina's arguments

27. Argentina makes the following arguments in response to Panama's claims under Article II:1 of the GATS. First, Argentina claims that Panama failed to make a *prima facie* case that less favourable treatment occurred since the measures do not apply to services or service suppliers from Panama. Second, even if a *prima facie* case of less favourable were made, Argentina claims that regulatory differences in the respective countries are relevant in assessing likeness. Third, the measures would not confer less favourable treatment to services and service suppliers of any Member.²⁴
28. With respect to the *first* argument, Argentina claims that Article II of the GATS requires evidence that the measures at issue confer less favourable treatment to services or service suppliers originating in the *complainant's* territory when compared to the treatment received by services and service suppliers of any other Member. Argentina claims that it would be impossible for the Panel to find in favour of Panama on this point because, in fact, Argentina accords to Panama the status of "cooperating country". Hence, no services or suppliers of Panama are currently affected by the measures.²⁵
29. Argentina further argues that, even if Article II of the GATS were to be applicable, Panama has failed to make a *prima facie* case because it has not indicated any service or service supplier of any other Member which was accorded a more favourable treatment compared to that received by Panama's services or service suppliers.²⁶ Finally, Argentina contends that it does not treat differently like services or service suppliers solely on the basis of their origin. Argentina claims that it follows objective criteria and internationally recognised standards to determine what services and service suppliers originate in jurisdictions that do not commit to transparency.²⁷
30. With respect to the *second* argument, Argentina claims that Article II of the GATS is not violated because the services and service suppliers at stake cannot be considered to be like services or service suppliers.²⁸ Argentina argues that, in contrast to what is the case for trade in goods, there is no established WTO case

²³ Panama's first written submission, paras. 4.445-4.457.

²⁴ Argentina's first written submission, paras. 139-236.

²⁵ Argentina's first written submission, para. 166.

²⁶ Argentina's first written submission, para. 171.

²⁷ Argentina's first written submission, para. 174.

²⁸ Argentina's first written submission, paras. 176-206.

law on likeness in services.²⁹ Argentina claims that services and service suppliers are naturally interconnected. Therefore, likeness has to be cumulatively established between services as well as service suppliers.³⁰ Argentina adds that the test for likeness needs to take into account the regulatory differences in the different jurisdictions, since the latter can modify substantially the conditions of competition between services and service suppliers.³¹

31. On that basis, Argentina claims that the origin of services or service suppliers is relevant in the assessment of likeness. A service originating in a jurisdiction that does not comply with internationally agreed standards on exchange of tax information has an advantage when compared to a service of the same nature originating in a "cooperating country". Therefore, Argentina maintains that the services and service suppliers originating in a "cooperating country" are not "like" when compared to those originating in a "non-cooperating country".
32. With respect to the *third* argument, Argentina claims that its measures do not accord less favourable treatment to Panama's services or service suppliers in comparison with services and service suppliers of any other Member. Argentina repeats that the stricter requirements introduced by the challenged measures do not apply to Panama.³² Further, as the measures are based on internationally accepted criteria, they can be considered to be justified. Finally, the application of defensive fiscal measures against "non-cooperating countries" would be necessary to restore a competitive equilibrium between services and service suppliers from cooperating countries and those from non-cooperating countries.³³

3.1.3. Observations by the European Union

33. The obligation of MFN treatment in Article II:1 of the GATS is part of the general obligations and disciplines contained in Part II of the GATS. Hence, in contrast to the obligations of market access in Article XVI of the GATS and national treatment in Article XVII of the GATS, it applies regardless of any specific commitments made by the WTO Member in question. Nonetheless, a WTO Member may maintain measures inconsistent with the MFN obligation in Article II:1 if such measures are listed in the Member's Annex on Article II exemptions,³⁴ or if they are consistent with any of the exceptions under the GATS.
34. The text of Article II:1 reads 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.

²⁹ Argentina's first written submission, para. 177.

³⁰ Argentina's first written submission, para. 184.

³¹ Argentina's first written submission, para. 188.

³² Argentina's first written submission, para. 222.

³³ Argentina's first written submission, para. 235.

³⁴ See Article II:2 of the GATS.

35. The analysis of a measure under Article II:1 involves three steps: (i) it must be determined whether the measure is covered by the GATS; (ii) it must be examined whether the services or suppliers at stake are "like"; and (iii) it must be established that the measure treats the services or suppliers from one WTO Member less favourably than the like services or suppliers from another country. The European Union will examine each of these elements below.

3.1.3.1 Measures covered by the GATS

36. Article II:1 applies "[w]ith respect to any measure covered by [the GATS]". According to Article I:1 of the GATS, a measure falls within the scope of the GATS when there is "trade in services" in one of the four modes of supply, and the measure also "affects" this trade in services.³⁵ According to the Appellate Body, the word "affecting" suggests a broad scope of the GATS.³⁶ It encompasses measures that directly govern trade in services, but also those that regulate other matters but nevertheless affect trade in services.³⁷ Further, Article I:3(b) of the GATS provides that the term "services" includes "any service in any sector except services supplied in the exercise of governmental authority". In turn, Article XXVIII(b) of the GATS provides that the terms "supply of a service" includes "the production, distribution, marketing, sale and delivery of a service".
37. The Appellate Body has stressed that, once the threshold determination of whether a measure is covered by the GATS is met, a panel must make an interpretation of the legal requirements in Article II:1 of the GATS, make factual findings as to the treatment of the services and service suppliers of different origin, and finally apply the interpretation of Article II:1 to the factual findings.³⁸ The Appellate Body warned against speculation about the treatment resulting from the measure at issue.³⁹
38. Argentina contests that Panama has met the minimum threshold of required evidence to demonstrate the existence of trade in services in the modes of supply at issue. Argentina notes that Panama is currently designated as a "cooperating country".⁴⁰ Argentina further claims that it was not demonstrated that, for the WTO Members that Panama listed as "excluded countries" in its submission, there is trade in any of the relevant services in the modes of supply at issue.⁴¹
39. The European Union understands Argentina's argument to be that, in order to demonstrate that there is "trade in services", the complainant must show *actual* trade flows of the services in the modes of supply at stake. Nonetheless, the Appellate Body has stressed that the absence of *actual* trade effects does not

³⁵ Appellate Body Report, *Canada – Autos*, paras. 170-171.

³⁶ Appellate Body Report, *EC – Bananas III*, para. 220.

³⁷ Panel Report, *EC – Bananas III (US)*, para. 7.285.

³⁸ Appellate Body Report, *Canada – Autos*, para. 171.

³⁹ Appellate Body Report, *Canada – Autos*, paras. 172 and 174.

⁴⁰ Argentina's first written submission, paras. 128, 143 and 166.

⁴¹ Argentina's first written submission, paras. 143-144.

preclude a WTO Member from successfully bringing a claim against a measure under WTO law.⁴²

40. Moreover, specifically with respect to WTO obligations that prohibit discrimination, panels and the Appellate Body have repeatedly found that what these obligations protect is the equality of competitive opportunities, rather than actual trade volumes.⁴³ It would thus not be necessary to show actual trade effects to substantiate a claim under a WTO provision prohibiting discrimination. However, that does not mean that a complainant's claim can rest on simple assertion. Rather, it must be founded on a careful analysis of the contested measure and of its implications in the marketplace,⁴⁴ based on its design, structure and expected operation.
41. In this regard, the European Union notes that Argentina has stressed that, although Panama has been designated by Argentina as a "cooperating country" as of 1 January 2014, there have been identified serious deficiencies in its regulatory framework for exchange of information as part of the stage 1 peer review at the Global Forum and that, according to Argentina, there is no guarantee that the exchange of information will be implemented in practice.⁴⁵ There seems thus a very real risk that Panama would be designated again by Argentina as a non-cooperating country, thereby falling under the "excluded countries" category. Consequently, since the measures "affect trade in services", the European Union considers that the measures at issue are covered under the GATS.

3.1.3.2 Likeness of services or service suppliers

42. Like for other non-discrimination obligations, when applying Article II:1 of the GATS to a measure, it is necessary to determine whether the services or service suppliers are "like". The Appellate Body has never interpreted this concept in the context of services, but a number of panels have addressed the meaning of "likeness" in the GATS. Furthermore, a panel may interpret the meaning of "likeness" in the GATS also in light of relevant findings relating to trade in goods.⁴⁶ Nonetheless, the European Union agrees with the warning expressed by the panel in *China – Electronic Payment Services* that a panel should be careful not to automatically transpose to the GATS the analytical framework for

⁴² Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, para. 469. See also Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 469. In the same vein, the European Union notes that Argentina does not appear to rebut the presumption of nullification or impairment contained in Article 3.8 of the DSU.

⁴³ See e.g. Appellate Body Report, *EC – Seal Products*, paras. 5.82 and 5.87, Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16 and Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215. See also, in respect of Article 2.1 of the TBT Agreement, Panel Report, *US – Clove Cigarettes*, paras. 7.438-7.445 and, in respect of Article XVII of the GATS, Panel Report, *EC – Bananas III (US)*, para. 7.320, which is also cited by Argentina in Argentina's first written submission, para. 145 (footnote 106).

⁴⁴ Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

⁴⁵ Argentina's first written submission, paras. 129-130.

⁴⁶ Appellate Body Report, *EC – Bananas III*, para. 231.

- determining "likeness" as developed in respect of the multilateral agreements on trade goods.⁴⁷
43. Article II:1 of the GATS refers to likeness of *services* as well as of *service suppliers*.⁴⁸ The determination of "like services" and "like service suppliers" should take into account the particular circumstances of each case and thus be made on a case-by-case basis.⁴⁹
44. First, with regard to likeness of *services*, when determining likeness under Article II:1 of the GATS the panel in *EC – Bananas III* considered the "nature and characteristics" of the services transactions at stake.⁵⁰ In *China – Electronic Payment Services*, the panel also considered the likeness of services, this time under the obligation of national treatment in Article XVII of the GATS. The panel noted that "a likeness determination should be based on arguments and evidence that pertain to the competitive relationship of the services being compared".⁵¹ The panel derived this from Article XVII:3 of the GATS, which 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.
45. The panel noted that only if the foreign and domestic services in question are in a competitive relationship can a measure of a Member modify the conditions of competition in favour of one or other of these services.⁵²
46. The European Union recognizes that the language contained in Article XVII:3 of the GATS is not contained in Article II of the GATS. Nonetheless, the European Union considers that both principles (MFN and National Treatment) should be read harmoniously.⁵³ Both Articles II and XVII of the GATS speak to the competitive relationship between services and suppliers allegedly discriminated against. In this respect, it is worth nothing that the Appellate Body has also referred to the principle that "likeness" should be determined on the basis of an analysis of competitive relationships in the market in respect of other provisions of WTO law where the explicit language from Article XVII:3 of the GATS was not present either. In particular, regarding Article III:4 of the GATT 1994, the Appellate Body stated that a determination of likeness "is, fundamentally, a determination about the nature and extent of a competitive relationship between

⁴⁷ Panel Report, *China – Electronic Payment Services*, para. 7.698.

⁴⁸ In this respect, the European Union notes that, while the GATT could have made an explicit reference to products/goods and goods providers, such a distinction (made in the GATS context) does not exist.

⁴⁹ See Panel Report, *China – Electronic Payment Services*, para. 7.701, referring to the Appellate Body findings in respect of "like products" in Article III of the GATT 1994: Appellate Body Report, *EC – Asbestos*, para. 101 and Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 113.

⁵⁰ Panel Report, *EC – Bananas III (US)*, para. 7.322.

⁵¹ Panel Report, *China – Electronic Payment Services*, para. 7.702.

⁵² Panel Report, *China – Electronic Payment Services*, para. 7.700.

⁵³ Appellate Body Report, *EC – Seal Products*, paras. 5.90 and 5.109.

- and among products".⁵⁴ Also with respect to Article III:2 of the GATT 1994, the Appellate Body repeated that, when determining likeness, a panel makes "a determination about the nature and extent of a competitive relationship between and among the products".⁵⁵ Hence, [Article XVII:3 is nothing more than an explicit reaffirmation of the need to focus on the competitive relationship to determine likeness](#). Therefore, also in respect of the determination of "likeness" in Article II:1 of the GATS, taking into account the "nature and characteristics" of the services transactions at stake,⁵⁶ if the services "are essentially or generally the same in competitive terms",⁵⁷ they should be considered "like services".
47. Second, in respect of the likeness of *service suppliers*, once the panel in *EC – Bananas III* had concluded that the services were "like", the panel continued, noting that "to the extent that entities provide these like services, they are like service suppliers".⁵⁸ These findings were not reviewed by the Appellate Body. The panel in *Canada – Autos* repeated this statement.⁵⁹ In *China – Electronic Payment Services*, the panel specified that "the fact that service *suppliers* provide like *services* may in some cases raise a presumption that they are 'like' service suppliers".⁶⁰ Yet, "in the specific circumstances of other cases, a *separate* inquiry into the 'likeness' of the *suppliers* may be called for".⁶¹
48. A situation where such presumption of "likeness" of service suppliers could apply is in cases, like the present one, where the distinction made by the measures at issue is exclusively based on the supplier's origin (i.e. whether or not the service or supplier falls under the list of "beneficiary countries"). In those cases, the suppliers under the measure "are the same in all material aspects except for origin".⁶² According to the panel in *China – Publications and Audiovisual Products*, "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".⁶³
49. Argentina disputes Panama's claim that the distinctions Argentina draws between services and service suppliers from different WTO Members in the measures at issue are solely based on origin. Argentina argues that Decree 589 – which identifies the "cooperating countries" – applies objective and internationally recognized criteria that are not exclusively based on origin.⁶⁴

⁵⁴ Appellate Body, *EC – Asbestos*, paras. 99 and 103. Notably, the Appellate Body stressed that it was "not saying that *all* products which are in *some* competitive relationship are 'like products' under Article III:4". *Ibid*, para. 99 (original emphasis).

⁵⁵ Appellate Body Report, *Philippines – Distilled Spirits*, para. 119.

⁵⁶ Panel Report, *EC – Bananas III*, para. 7.322.

⁵⁷ Panel Report, *China – Electronic Payment Services*, para. 7.702.

⁵⁸ Panel Report, *EC – Bananas III (US)*, para. 7.322.

⁵⁹ Panel Report, *Canada – Autos*, para. 10.248.

⁶⁰ Panel Report, *China – Electronic Payment Services*, para. 7.705 (emphasis added).

⁶¹ Panel Report, *China – Electronic Payment Services*, para. 7.705 (emphasis added).

⁶² Panel Report, *China – Publications and Audiovisual Products*, para. 7.975.

⁶³ Panel Report, *China – Publications and Audiovisual Products*, para. 7.795.

⁶⁴ Argentina's first written submission, para. 174.

50. The European Union disagrees. In this respect, it appears that the measures at issue operate *de jure* by reason of origin, i.e., those services and suppliers originating in countries listed as "cooperating" or "beneficiary" countries fall under the general, more advantageous treatment, whereas others do not. Given the design of Argentina's measures, the European Union considers it irrelevant at this stage of determining likeness how the list was drawn up.
51. In any event, even examining the manner in which the list of "beneficiary" countries has been drawn, the European Union wonders to what extent Argentina has followed and applied objective criteria. Argentina refers to international standards on transparency in tax matters and alleged deficiencies identified in the framework of the Global Forum with regard to Panama's regulatory framework on transparency. Yet, at the same time, Decree 589/2013 provides that a country may be designated "cooperating" if it has entered into negotiations with Argentina in order to exchange information. The European Union wonders to what extent Argentina's decision whether to accept to enter into negotiations and thus confer the status of "beneficiary country" is based on objective criteria and not merely a discretionary decision, disregarding compliance with international standards or effective tax cooperation. We recall that, as explained in paragraph 41 above, although serious deficiencies were found with regard to Panama's regulatory system in the framework of the Global Forum and Argentina itself noted that there was no guarantee that the exchange of information will be implemented in practice, Argentina still designated Panama as a "cooperating country". In other words, it appears that the Argentine authorities have discretion to decide which countries belong to the "excluded country" category and which countries fall under the "beneficiary country" category, even if the country in question does not yet meet those objective criteria and there would be no reasonable expectations that it would meet them in the near future.⁶⁵ Consequently, it would appear that, contrary to what Argentina claims, the distinction drawn by the measures at issue between "beneficiary" and "excluded" countries is *de facto* based on the origin of the services and service suppliers.
52. In the opinion of the European Union, even assuming *arguendo* that the distinctions drawn in the measures at issue were not solely based on origin, it may be that an assessment of competitive relationship between the services and suppliers from the "excluded" and "beneficiary" countries will lead to the conclusion that these services and suppliers are "like". Argentina argues that, because the characteristics of the services are often inseparable from the characteristics of the service provider, the origin of the service supplier – and in

⁶⁵ For the sake of clarity, the European Union considers that WTO Members are entitled to make a case-by-case assessment of the tax regulatory framework of another country with a view to entering into negotiations for an exchange of information agreement. Such case-by-case assessment may allow to overrule any negative assessment of the Global Forum (which is based on an examination of the practices between the country concerned and all other Global Forum members) in case the country concerned (e.g. Panama) effectively complies with the international tax standard in its relationship with its counterpart (e.g. Argentina). However, in cases where a country merely identifies another country that do not yet comply with those standards and/or where there is no reasonable expectations that such a country will do so in the near future, such a selection would appear to be discretionary and, thus, subject to discrimination claims.

particular the regulatory framework of the territory in which it operates – can be highly relevant to determine "likeness" of services.⁶⁶

53. In this regard, the European Union notes that a statement by the Chairman of the Group on Negotiations in Services issued at an informal meeting on 10 December 1993 summarised various notes by the GATT Secretariat on tax issues. In respect of Article II of the GATS, it was stated that:

Article II prohibits a Member from treating one foreign service supplier less favourably than another on the basis of their respective countries of origin. To the extent that services suppliers in different jurisdictions are not in "like" circumstances, a tax measure which distinguishes between a foreign service supplier located in a lower-tax jurisdiction and another foreign service supplier would not violate the MFN obligation.⁶⁷

54. This statement highlights the importance of determining whether the service suppliers are "like" before a conclusion can be reached on whether a measure that draws distinctions based on the tax regimes applying in the different suppliers' home jurisdictions violates the MFN obligation.
55. The European Union has explained in paragraphs 44 to 46 above, how existing WTO jurisprudence clarified how it should be determined whether suppliers are "like". Panels and the Appellate Body have concluded, both in the context of the GATT 1994 as well as the GATS, that a determination of "likeness" must be based on arguments and evidence that pertain to the competitive relationship of the services being compared. Only to the extent that certain characteristics of the service supplier are reflected in the competitive relationship between the services at issue, could it be concluded that the suppliers are not "like". The European Union considers that, even if there may be a number of international standards and criteria on transparency in tax matters that consumers are aware of, it appears that the distinctions Argentina draws are discretionary and do not correspond to adherence to such standards nor the likelihood of such adherence in the near future. The European Union considers it possible that the service providers are in fact in a competitive relationship from a market perspective (and, therefore "like"), even if Argentina considered that they should be regulated differently.

3.1.3.3 Less favourable treatment

56. The final step in the analysis under Article II:1 of the GATS is whether the measure at issue provides less favourable treatment to services or suppliers of any other Member when compared to the like services or suppliers of any other country. The Appellate Body has stated that "no less favourable treatment" in Article II:1 of the GATS "include[s] *de facto*, as well as *de jure*, discrimination".⁶⁸
57. WTO Members have the obligation to accord any more favourable treatment given to any country "immediately and unconditionally" to other WTO Members. In

⁶⁶ Argentina's first written submission, paras. 182, 185, 187.

⁶⁷ Group of Negotiations on Services, Informal GNS Meeting – 10 December 1993, Chairman's Statement, MTN.GNS/49, 11 December 1993, page 2.

⁶⁸ Appellate Body Report, *EC – Bananas III*, para. 234. See also Appellate Body Report, *Canada – Autos*, para. 141.

other words, as soon as an advantage is granted to services or suppliers from one country, it must without further delay be extended to services or suppliers of other WTO Members. A WTO Member adopting the measure may not attach additional conditions to obtaining the advantage that are not imposed upon other WTO Members. As the European Union explains in paragraphs 162 to 172 below, WTO jurisprudence relating to trade in goods has clarified that the requirement to extend advantages "unconditionally" does not imply that no conditions may be attached to the granting of the advantage in the first place. Rather, what matters is that the regulatory distinctions drawn between like imported products must not result in a detrimental impact on the competitive opportunities for like imported products from any Member.⁶⁹ The same applies, *mutatis mutandis*, to Article II:1 of the GATS.⁷⁰

58. The Appellate Body has noted that the interpretation of the term "treatment no less favourable" in Article II:1 of the GATS can be made in light of the existing jurisprudence relating to the corresponding MFN obligation for trade in goods, in particular in Article I of the GATT 1994.⁷¹ Article I:1 of the GATT 1994 requires an assessment of whether the measure at issue modifies the conditions of competition for the products at issue. The Appellate Body has found that it must be determined under Article I:1 whether the measure gives "a competitive advantage"⁷² to a product from one country that is not extended to like products from other WTO Members. The Appellate Body has thus considered that the broad meaning of the word "advantage"⁷³ in Article I:1 covered "competitive advantages" and, given that the question under the MFN obligation is whether or not the measure at issue extends this advantage to like products, an examination of the modification of the conditions of competition must be made.
59. Article I:1 of the GATT 1994 does not contain the language "treatment no less favourable" that figures in Article II:1 of the GATS. Nonetheless, the European Union considers that other goods-related MFN obligations explicitly contain this language.⁷⁴ In light of this, the European Union considers that the determination of whether the measures at issue provide less favourable treatment to certain like services or suppliers requires an assessment of whether the conditions of competition are modified.

⁶⁹ See Appellate Body Report, *EC – Seal Products*, para. 5.88.

⁷⁰ In this respect, the European Union observes that Article II:3 of the GATS exceptionally contemplates the possibility for WTO Members of granting "advantages to adjacent countries in order to facilitate exchanges to contiguous frontier zones of services that are both locally produced and consumed". Naturally, a Member may have reasons not to provide the same advantage to countries that are not adjacent and, thus, may modify the conditions of competition to the detriment of other foreign services or service suppliers. However Article II:3 of the GATS explicitly recognizes that the general prohibition under Article II:1 does not apply in this case.

⁷¹ Appellate Body Report, *EC – Bananas III*, para. 231.

⁷² Appellate Body Report, *EC – Bananas III*, para. 207.

⁷³ Appellate Body Report, *EC – Bananas III*, para. 206.

⁷⁴ See e.g. Article IX:1 of the GATT 1994 and Article 2.1 of the TBT Agreement. In respect of the latter provision, the Appellate Body agreed that an assessment must be made of "whether [the] measure modifies the conditions of competition in the relevant market" (see Appellate Body Report, *US – Tuna II (Mexico)*, para. 214).

60. Nonetheless, a finding that the measure at issue modifies the conditions of competition, requires that the detrimental impact of a regulatory distinction on competitive opportunities for like imported products is attributable to, or has a genuine relationship with, the measure at issue. With regard to Article III:4 of the GATT 1994, the Appellate Body noted in *Dominican Republic – Import and Sale of Cigarettes* that "the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports *if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product*".⁷⁵ In that dispute, it was the small market share of the importer that explained the higher impact of the measure at issue (a higher per unit cost of the bond requirement) on that importer. In the context of Article III:2 of the GATT 1994, the Appellate Body has found that for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities for imported products".⁷⁶ The European Union considers that the same analysis applies in case of other prohibitions to discriminate such as the one contained in Article II:1 of the GATS (as well as in case of Article XVII of the GATS).
61. Again, the European Union refers to the 1993 Chairman's summary of the GATT Secretariat background notes on tax issues, where it was noted that:
- Measures designed to ensure the neutrality or integrity of the taxation system can be viewed as ensuring that service suppliers, in the structuring of their transactions, do not benefit from conditions of competition more favourable than others in similar circumstances.⁷⁷
- [...]
- Furthermore, where a list is maintained either of "qualifying" or "excluded" countries, with respect to application of certain measures, the maintenance of such a list would not in itself be inconsistent with Article II of the GATS as long as it is drawn up on the basis of objective criteria designed to safeguard the Member's tax base or counter tax evasion or avoidance and not on the basis of nationality distinctions.⁷⁸
62. The Panel thus needs to determine whether the measures at issue modifies the conditions of competition to the detriment of foreign services or service suppliers, and whether such an effect can be attributed genuinely to the measures at issue. In the European Union's view, the fact that Argentina maintains discretion in selecting the countries falling under the category of "beneficiary countries", even

⁷⁵ Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96 (emphasis added).

⁷⁶ Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134

⁷⁷ Group of Negotiations on Services, Informal GNS Meeting – 10 December 1993, Chairman's Statement, MTN.GNS/49, 11 December 1993, page 1.

⁷⁸ Group of Negotiations on Services, Informal GNS Meeting – 10 December 1993, Chairman's Statement, MTN.GNS/49, 11 December 1993, page 2.

when they do not meet the alleged objective criteria, may be relevant for the Panel's analysis.

3.2. ARTICLE XVII OF THE GATS (NATIONAL TREATMENT)

3.2.1. Summary of Panama's arguments

63. Panama argues that Argentina acts inconsistently with its obligations under Article XVII of the GATS with respect to three measures challenged in this dispute.⁷⁹

3.2.1.1 Tax treatment imposed on entry of funds as an unjustified increase in wealth⁸⁰

64. Panama claims that this measure is inconsistent with Article XVII of the GATS because: (i) Argentina undertook specific commitments to accord national treatment to services of maritime and air transport insurance (CCP 81293) and reinsurance and retrocession services (CCP 81299) under Mode 1, by inserting the entry "None" in the relevant part of its Schedules; (ii) the measure affects the "supply" and the "use" of the services as provided for by Article XXVIII (b) and (c)(i) of the GATS; and (iii) the legal presumption of unjustified increase in wealth only applies when there is an entry of funds from the excluded countries. The same presumption does not apply when the service supplier is based in Argentina. Thus, Panama argues that this amounts to less favourable treatment.⁸¹

3.2.1.2 Valuation of Transactions⁸²

65. Panama requests the Panel to find that Argentina is in violation of Article XVII of the GATS because: (i) Argentina undertook full commitments to accord national treatment in cross-border trade in services in all sectors, with the notable exclusion of some specific financial services as reported in footnote 252 of Panama's first written submission;⁸³ (ii) the measure is covered by the GATS, as it affects cross-

⁷⁹ See Measures No. 2, 3 and 4 of the table above. Panama's first written submission, paras. 4.136-4.151.

⁸⁰ For a description of this measure, see para. 13 above.

⁸¹ As the only criterion for the distinction applied by the measure is the origin of the service suppliers, there is presumption of likeness of foreign and domestic services (see Panama's first written submission, paras. 4.152-4.171).

⁸² For a description of this measure, see para. 15 above.

⁸³ Namely: life, accident and health insurance services; non-life insurance; 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; payment and money transmission services; guarantees and commitments; trading on own account or for clients, whether on an exchange or not, or in any other form, of the following: payment and money transmission services, guarantees and commitments; 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.), 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; 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, such as cash or portfolio management, all forms of collective

border trade in professional services (namely legal and accounting services); and (iii) by imposing higher administrative requirements, expenses and taxes on the Argentinean consumer who buys a service from suppliers based in excluded countries than those imposed on who buys a like domestic service, the measure accords less favourable treatment to a subgroup of foreign services and service suppliers and modifies the conditions of competition.⁸⁴

3.2.1.3 Deduction of expenses incurred in transactions with parties abroad⁸⁵

66. Panama claims that this measure is inconsistent with Article XVII of the GATS because: (i) Argentina undertook specific commitments on national treatment under Mode 1 in all the scheduled sectors; (ii) the measure affects cross-border trade in professional services (namely legal and accounting consultancy) from excluded countries; and (iii) by imposing higher administrative and fiscal requirements and higher expenses on services from excluded countries as compared to like domestic ones, the measures provides less favourable treatment to the former.⁸⁶

3.2.2. Summary of Argentina's arguments

67. Argentina develops its arguments under Article XVII together with those under Article II. Thus, to the extent that Argentina's arguments relating to Panama's claims under Article XVII of the GATS are the same as those made as a response to Panama's claims under Article II:1 of the GATS, the European Union refers to its summary of Argentina's arguments in paragraphs 27 to 32 above.

3.2.3. Observations by the European Union

68. With regard to three measures at issue, Panama claims a violation of the national treatment obligation in Article XVII:1 of the GATS. This obligation is contained in Part III of the GATS ("Specific Commitments") and thus applies only to the extent Argentina has made a specific commitment to apply this obligation in the services sector and mode of supply at stake, and subject to the conditions and qualifications Argentina would have inscribed in its Schedule of specific commitments. The text of Article XVII:1 reads as follows:

investment management, custodial depository and trust services; settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments; new financial services. See Schedule of Specific Commitments of Argentina (authentic in Spanish only).

⁸⁴ Since the measure applies by virtue of the origin of the services, there is a presumption of likeness between services and service suppliers from excluded countries and domestic services and service suppliers. Panama's first written submission, paras. 4.250-4.259.

⁸⁵ For a description of this measure, see para. 17 above.

⁸⁶ Since the measure applies by virtue of the origin of the services, Panama argues that there is a presumption of likeness between services and service suppliers from excluded countries and domestic services and service suppliers (see Panama's first written submission, paras. 4.313-4.319).

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

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.

69. In order to establish a violation under Article XVII:1 of the GATS, a complainant needs to demonstrate the existence of three elements:⁸⁷ (i) it must be determined whether Argentina has undertaken national treatment commitments with respect to the services sector and mode of supply at stake; (ii) it needs to be demonstrated that the measures at issue affect trade in services; and (iii) it must be established that the measures accord less favourable treatment to services or service suppliers of other Members, in comparison to like domestic services or suppliers.

3.2.3.1 Specific national treatment commitments

70. The obligation of national treatment applies only to the extent Argentina has made a specific commitment for the services sector and mode of supply at stake. Moreover, even if a specific commitment was made, this commitment may be subject to conditions and qualifications. If the entry corresponding to the services sector and mode of supply at stake reads "none", Argentina has made a full commitment, without any limitations (except for those inscribed in the cross-sectoral "horizontal" section). The entry may also read "unbound", meaning that there is no obligation in the mode of supply for the sector at stake,⁸⁸ or may specify a specific measure that, although inconsistent with the national treatment obligation, may still be maintained. As Panama points out, in respect of maritime and transport insurance services, as well as reinsurance and retrocession services, Argentina inscribed "none" for modes 1 to 3.⁸⁹ Hence, in respect of these services and modes of supply, Argentina has a full national treatment commitment, without any limitations.

3.2.3.2 Measures affecting trade in services

71. The second element of the GATS Article XVII analysis calls for an examination of whether the measures at issue affect the supply of services.⁹⁰ The word "affecting" was interpreted by the Appellate Body in the context of Article I:1 of the GATS, which determines the scope of this agreement. The Appellate Body found that the "ordinary meaning of this term implies a measure that has 'an effect on', which

⁸⁷ See Panel Report, *China – Electronic Payment Services*, para. 7.641, and Panel Report, *China – Publications and Audiovisual Products*, paras. 7.942 and 7.956.

⁸⁸ Appellate Body Report, *US – Gambling*, para. 215 (footnote 257).

⁸⁹ Panama's first written submission, para. 4.152.

⁹⁰ Panel Report, *China – Electronic Payment Services*, para. 7.680.

indicates a broad scope of application".⁹¹ Panama must thus establish that the measures at issue have an effect on the supply of services. Nonetheless, as the European Union explained in paragraphs 39 to 40 above, it is not necessary to show actual trade effects to substantiate a claim under a WTO provision prohibiting discrimination.

3.2.3.3 Less favourable treatment of services or suppliers from another Member in comparison with like domestic services or suppliers

72. The third element of the GATS Article XVII enquiry involves determining whether the measures at issue accord to services or service suppliers of any other Member "treatment less favourable" than that accorded to the domestic "like services and service suppliers". As explained in paragraph 44 above, the panel in *China – Electronic Payment Services* noted in respect of Article XVII:1 of the GATS that "a likeness determination should be based on arguments and evidence that pertain to the competitive relationship of the services being compared".⁹² The panel derived this from Article XVII:3 of the GATS.
73. The European Union recalls that, like Article II:1 of the GATS, Article XVII:1 refers to the treatment of both services and service suppliers. To determine likeness of services, the panel should take into account the "nature and characteristics" of the services transactions at stake.⁹³ If the services "are essentially or generally the same in competitive terms",⁹⁴ they should be considered "like services".
74. With respect to the likeness of service suppliers, the determination of the existence of "like services" raises a presumption that the suppliers that provide these services are also "like".⁹⁵ In cases where the distinction made by the measure at issue is exclusively based on the suppliers' origin and the suppliers under the measure "are the same in all material aspects except for origin", the "like service suppliers" requirement is met and there is no need for "a more detailed analysis" of the competitive relationship between the suppliers.⁹⁶ For cases where a more detailed analysis is undertaken, the European Union explained in paragraph 54 above that only to the extent certain characteristics of the service supplier are reflected in the competitive relationship between the services at issue, could it be concluded that the suppliers are not "like".
75. Once the "likeness" of the services or suppliers is established, it must finally be considered whether the measures at issue "modif[y] the conditions of competition in favour of services or service suppliers of the Member compared to like services

⁹¹ Appellate Body Report, *EC – Bananas III*, para. 220. The panel in *China – Electronic Payment Services* found this interpretation, made in the context of Article I:1 of the GATS, "equally relevant and persuasive when looked at in the context of [the] Article XVII analysis". See Panel Report, *China – Publications and Audiovisual Products*, para. 7.681 (footnote 873).

⁹² Panel Report, *China – Electronic Payment Services*, para. 7.702.

⁹³ Panel Report, *EC – Bananas III (US)*, para. 7.322.

⁹⁴ Panel Report, *China – Electronic Payment Services*, para. 7.702.

⁹⁵ Panel Report, *China – Electronic Payment Services*, para. 7.705.

⁹⁶ Panel Report, *China – Publications and Audiovisual Products*, para. 7.975.

or service suppliers of any other Member", as specified in Article XVII:3 of the GATS. The European Union explained in paragraphs 60 to 62 above that, as part of the analysis of whether the measures at issue provide less favourable treatment to imported services or suppliers, a panel needs to determine whether the adverse effect on the competitive opportunities for certain services or suppliers can genuinely be attributed to the measure at issue. If the regulatory distinction is not premised on clear criteria, but allows for a wide margin of discretion in selecting beneficiary countries, this element will be relevant for a finding of less favourable treatment. The European Union considers that, *mutatis mutandis*, the same analysis should be carried out in the context of Article XVII of the GATS.

3.3. ARTICLE XVI OF THE GATS (MARKET ACCESS)

3.3.1. Summary of Panama's arguments

76. Panama notes that Article XVI of the GATS provides the obligation for Members to grant foreign service and service suppliers market access in their domestic markets in sectors in which they have undertaken commitments. According to Panama, Article XVI:1 establishes a general principle to provide to services or service suppliers from another WTO Member treatment no less favourable than that provided under the terms, limitations and conditions agreed and specified in Argentina's Schedule of commitments. Article XVI:2 includes the limitations to market access that Members shall not keep, unless otherwise specified in their schedules. Article XVI:2(a) of the GATS includes "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". Panama argues that in order for a complainant to make a *prima facie* case of violation of Article XVI:2(a) of the GATS, it has to first prove that the respondent has undertaken specific commitments in the "Market Access" section of its Schedule. As a second step, then, it has to specify in which way the challenged measure amounts to an inadmissible limitation of market access.⁹⁷
77. Panama argues that Argentina acts inconsistently with its obligations under Articles XVI:1 and XVI:2(a) of the GATS with respect to the measure specifically applying to the reinsurance and retrocession services sector.⁹⁸
78. In particular, with respect to the measure relating to the reinsurance and retrocession services sector,⁹⁹ Panama claims that Argentina violates Articles XVI:1 and XVI:2(a) of the GATS because Argentina undertook commitments with regards to reinsurance and retrocession services (CCP 81299) under Market Access and decided not to apply limitations to Mode 1 ("None"). In contrast, with regard to Mode 3 in the same subsector, Argentina imposed a limitation according to which "Authorization of the establishment of new entities is suspended". However, Panama argues that the temporal application of such limitation expired with the adoption of a new resolution adopted by the supervisory authority in October 1998 and that, therefore, Argentina has a full commitment with regard to

⁹⁷ Panama's first written submission, paras. 4.345-4.365.

⁹⁸ See Measure No. 5 of the table above.

⁹⁹ For a description of this measure, see para. 19, above.

Mode 3 in reinsurance and retrocession services. The prohibition to supply reinsurance and retrocession services imposed on providers from excluded countries provides, according to Panama, treatment less favourable than what is listed in the Schedule of commitments of Argentina.

79. According to Panama, with regard to Mode 1, Argentina limits the number of suppliers of reinsurance services because the prohibition imposed on suppliers from excluded countries to provide such services has the equivalent effect of a limitation of the number of suppliers, thus contrary to Article XVI:2(a) of the GATS. With regard to Mode 3, Argentina totally prohibits the supply of reinsurance services through commercial presence of providers from excluded countries. According to Panama, such a limitation based on nationality is incompatible with Article XVI:2(a) of the GATS.¹⁰⁰

3.3.2. Summary of Argentina's arguments

80. In response to Panama's claims of violation of Article XVI of the GATS, Argentina argues that Panama's description of the measures at issue does not correspond to the actual situation.¹⁰¹ Argentina claims that one relevant measure – Resolution 35.615 – was amended by Resolution 38.284 of 25 March 2014.
81. This amendment is relevant with respect to Panama's claims under Mode 3.¹⁰² Argentina claims that under the "new rules" branches of foreign reinsurance undertakings must certify that their parent company is established in a territory that is "cooperating for fiscal transparency purposes", as specified in Decree 589/2013. When the parent company is not established in such territory, the branch must attest that it is supervised by a body that fulfils similar tasks to that of the SSN and with whom it has signed a memorandum of understanding. The branch must further certify that the parent is established in a territory that is designated as a cooperating state in the context of the fight against money laundering and terrorist financing according to the criteria of the Financial Action Task Force. If this is not the case, the SSN will assess the request of establishment with increased attention and may apply appropriate measures.¹⁰³
82. Argentina then turns to Panama's substantive claims. With respect to Mode 1, Argentina argues that its measures do not prohibit the provision of reinsurance services under Mode 1. Rather, they would only establish conditions under which foreign entities can participate in the provision of such services.¹⁰⁴
83. With respect to Mode 3, Argentina rejects Panama's argument that the change of Argentina's domestic legislation amounts to a modification of its commitments under Mode 3 in the reinsurance and retrocession subsector. Argentina maintains that there is no ambiguity in its entry under Mode 3. In its view, the suspension of

¹⁰⁰ Panama's first written submission, paras. 4.366-4.383.

¹⁰¹ Argentina's first written submission, para. 407.

¹⁰² Argentina notes that Resolution 38.284 did not modify Resolution 35.615 with respect to "admitted reinsurers" supplying services through Mode 1 (see Argentina's first written submission, para. 433, footnote 228).

¹⁰³ Argentina's first written submission, paras. 430-431.

¹⁰⁴ Argentina's first written submission, paras. 456-466.

the authorisation of new reinsurance and retrocession entities under Mode 3 is still in force and Argentina has not expressed the intention to modify its schedule pursuant to Article XXI of the GATS.¹⁰⁵ On this basis, Argentina claims its measures do not constitute a violation of Article XVI of the GATS.

3.3.3. Observations by the European Union

84. Panama challenges Argentina's prohibition to supply reinsurance and retrocession services by means of Modes 1 or 3 in case the suppliers originate in the excluded countries. The European Union understands that the two exceptions to the alleged general prohibition to supply services by means of Mode 1 do not apply to suppliers from excluded countries. Moreover, the possibility to provide reinsurance and retrocession services by means of a branch (Mode 3) is not available to suppliers from excluded countries. Panama claims that this not only violates Article II:1 of the GATS, but also the market access obligation in Article XVI:1 and XVI:2(a) of the GATS.
85. Like the obligation of national treatment, the market access obligation in Article XVI of the GATS applies only to the extent Argentina has made a specific commitment to apply this obligation in the services sector and mode of supply at stake, and subject to the terms, limitations and conditions specified in Argentina's Schedule of specific commitments. The text of the obligation in Article XVI:1 reads as follows:

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

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.

86. Where Argentina has made a market access commitment for the service sector and mode of supply at stake, this entails an obligation not to restrict market access through the use of six types of measures. These measures are described in Article XVI:2 of the GATS, which reads in relevant part:
- (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;

¹⁰⁵ Argentina's first written submission, paras. 477-479.

- (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;⁹
- (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
- (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.

⁹ Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

87. Several panels have noted that these "six types of measures form a closed or exhaustive list".¹⁰⁶ The measures listed in sub-paragraphs (a) to (d) and (f) of Article XVI:2 are quantitative in nature, while sub-paragraph (e) is not.¹⁰⁷
88. In the European Union's view, the analysis under Article XVI requires (i) an examination of the precise terms of Argentina's Schedule of commitments to determine whether there is with respect to the services and mode of supply at issue a market access commitment; and (ii) a determination that the challenged measures constitute impermissible limitations falling within the scope of one of the measures listed in sub-paragraphs (a) to (f) of Article XVI:2 of the GATS.¹⁰⁸

3.3.3.1 Argentina's market access commitments

89. As indicated in Article XX:3 of the GATS, WTO Members' Schedules of commitments are an integral part of the GATS. Therefore, just as when interpreting the GATS, in interpreting Argentina's Schedules of specific commitments, the Panel should adhere to the customary rules of interpretation of public international law, as codified in Articles 31 and 32 of the Vienna

¹⁰⁶ Panel Report, *China – Publications and Audiovisual Products*, para. 7.1353; Panel Report, *US – Gambling*, paras. 6.318, 6.298-6.299; Panel Report, *China – Electronic Payment Services*, paras. 7.628-7.629.

¹⁰⁷ See Appellate Body Report, *US – Gambling*, para. 214; and Panel Report, *US – Gambling*, para. 6.278.

¹⁰⁸ Appellate Body Report, *US – Gambling*, para. 143. See also Panel Report, *China – Publications and Audiovisual Products*, para. 7.1354.

- Convention on the Law of Treaties,¹⁰⁹ to determine the common intention of the WTO Members.¹¹⁰
90. With respect to the services sector at issue – reinsurance and retrocession – Argentina's Schedule of specific commitments¹¹¹ specifies the entry "None" for market access in Mode 1. This means that Argentina made a full market access commitment, without limitations.
91. With regard to Mode 3, Argentina has specified that "[t]he authorisation of the establishment of new entities is suspended" ("La autorización para la instalación de nuevas entidades se encuentra suspendida"). This limitation does not indicate any end date for the suspension of granting new authorisations. Panama argues that this limitation is not relevant any more since the suspension of authorisations would have ended from the entry into force of Resolution 25.804 on 1 October 1998. Resolution 25.804 repealed Resolution 13.828 of 9 June 1977 that had suspended the authorisation of new reinsurance or retrocession entities. According to Panama, this modification of Argentina's domestic legal framework also affects Argentina's limitation in the market access-column of its Schedule.
92. The European Union disagrees with Panama's argument that a modification of domestic law also implies a modification of the Member's limitations in that Member's Schedule of commitments. In specifying that the authorisation of new entities providing reinsurance services would be suspended, Argentina bound the situation existing on 15 April 1995 (*i.e.* the date of entry into force of the GATS, including the Schedule of commitments). At that time, the authorisation of new entities would not be granted, since it was suspended without specification of an end date. This limitation did not refer to any specific Argentine law or regulation. The fact that Argentina's domestic legal framework for reinsurance changed in 1998, and, as a result of Resolution 25.804 became more open to the establishment of new entities, does not affect the obligations Argentina undertook in the framework of the GATS. Argentina's commitments in its Schedule of commitments are the minimum liberalisation commitments to which Argentina has bound itself internationally. Unilateral liberalisation does not affect the extent of Argentina's international obligations. This implies that, if Argentina wanted to re-impose the restrictions for which it had inscribed a limitation in its market access column, it would not be prevented from doing so by its GATS commitments.¹¹²
93. It is immaterial, absent any specific commitment in that regard, to conduct an analysis of the modifications in the domestic legislation of the WTO Member that made the commitments at issue. Article XVI:1 of the GATS requires every WTO Member to "accord services and service suppliers of any other Member treatment no less favourable than *that provided for under the terms, limitations and*

¹⁰⁹ Appellate Body Report, *US – Gasoline*, p. 17.

¹¹⁰ Appellate Body Report, *US – Gambling*, para. 160. See also Panel Report, *China – Electronic Payment Services*, paras. 7.8-7.10.

¹¹¹ Argentina, Schedule of Specific Commitments, GATS/SC/4, 15 April 1994.

¹¹² To draw an analogy with other relevant provisions under the GATT, the European Union notes that if a Member has bound its tariffs on product X at 10% and then adopts a law whereby the as applied rate is 5% for a particular period of time (e.g. one year), such a Member would not be prevented from raising its tariff rate again up to the bound level (10%).

conditions agreed and specified in its Schedule".¹¹³ Therefore, the commitments in the Schedule represent the only possible benchmark for the evaluation of whether less favourable treatment occurred.

94. Therefore, in the view of the European Union, while Argentina has a full market access commitment for reinsurance or retrocession services falling within CPC Code 81299 supplied through Mode 1, Argentina's market access commitment for supply of those services through Mode 3 does not prevent Argentina to refuse authorisation for new entities providing reinsurance or retrocession services by means of a commercial presence in Argentina.

3.3.3.2 Does Argentina's measure constitute a limitation covered by sub-paragraph XVI:2(a) of the GATS?

95. As a second step in the analysis of Panama's claim under Article XVI, it must be established that the challenged measures constitute a limitation falling within the scope of sub-paragraph (a) of Article XVI:2 of the GATS.¹¹⁴ The market access obligation in Article XVI of the GATS does *not* cover *all and any* measures that somehow may impede the access to the market. Rather, the obligation only covers those measures that are of the type listed in paragraph 2 of Article XVI of the GATS.¹¹⁵ Given that Panama's claim concerns sub-paragraph (a) of paragraph 2 of Article XVI of the GATS, it must be determined whether the measure at issue constitutes a "limitation[]" on the number service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test".
96. The Appellate Body has found in respect of the words "numerical quotas" in Article XVI:2(a) of the GATS that the thrust of Article XVI:2(a) "is not on the *form* of limitations, but on their *numerical*, or *quantitative*, nature".¹¹⁶ At the same time, the Appellate Body warned that that it did not mean to say that "the words 'in the form of' should be ignored or replaced by the words 'that have the effect of'".¹¹⁷ The Appellate Body thus clarified that even a measure that is not formally called a "quota", can still fall within the scope of Article XVI:2(a). What matters is whether this measure is "numerical" or "quantitative" in nature. If it is quantitative in its thrust and, therefore, limits the supply of a service as a quota would do, it would arguably qualify as a measure of the type specified in Article XVI:2(a) of the GATS.¹¹⁸ The question is thus whether the measure at issue imposes a quantitative limit on the number of service suppliers.¹¹⁹ Measures that are not covered by one of the sub-paragraphs of Article XVI:2 may still be challenged under other obligations in the GATS, including Articles II, VI or XVII.

¹¹³ Emphasis added.

¹¹⁴ Appellate Body Report, *US – Gambling*, para. 143.

¹¹⁵ See Panel Report, *China – Publications and Audiovisual Products*, para. 7.1353; Panel Report, *US – Gambling*, paras. 6.318, 6.298-6.299; Panel Report, *China – Electronic Payment Services*, paras. 7.628-7.629.

¹¹⁶ Appellate Body Report, *US – Gambling*, para. 232.

¹¹⁷ Appellate Body Report, *US – Gambling*, para. 232.

¹¹⁸ Panel Report, *China – Electronic Payment Services*, para. 7.592.

¹¹⁹ Appellate Body Report, *US – Gambling*, para. 227.

97. The European Union wonders whether the measure at issue as it is described by Panama, *i.e.* the prohibition to supply reinsurance and retrocession services by means of Modes 1 or 3 in case the suppliers originate in the excluded countries, qualifies as a measure that imposes a quantitative limit on the number of service suppliers in the sense of Article XVI:2(a) of the GATS.¹²⁰ Rather than imposing a maximum limit on the number of service suppliers, the measure appears to impose a qualitative requirement, namely that the reinsurance and retrocession service suppliers must not originate in countries that fail to meet the minimum transparency standards in respect of tax information. There is no limit on the total number of service suppliers that could provide their reinsurance or retrocession services in Argentina through Modes 1 or 3. Therefore, the Panel may find it appropriate to scrutinise this measure only under Article II:1 of the GATS rather than under Article XVI:2(a) of the GATS.

3.4. ARTICLE XIV OF THE GATS (EXCEPTIONS)

3.4.1. Summary of Argentina's arguments

98. According to Argentina, in the event that the Panel would find its measures to be in violation of Articles II and XVII of the GATS, certain of these measures are nevertheless justified under the exceptions in Article XIV(c) and (d) of the GATS.
99. Argentina notes, with reference to case law relating to Article XX of the GATT and Article XIV of the GATS, that two conditions need to be satisfied for a measure in order to be justified under them: first, the measure is provisionally justified under one of the paragraphs of these provisions; and, second, the measure meets the conditions in the *chapeau* of the provision.¹²¹

3.4.1.1 Article XIV(c) of the GATS

100. Argentina invokes subparagraph (i) of Article XIV(c) of the GATS as a justification for Measures No. 1, 2, 3, 4, 7 and 8.
101. Argentina describes the legal standard under Article XIV(c)(i) as follows: *first*, the measures are adopted to secure compliance with laws and regulations which are not inconsistent with the provisions of the GATS and relate to the prevention of deceptive or fraudulent practices; and, *second*, the measures are necessary in order to achieve that objective.¹²²
102. With regard to the *first* element, Argentina claims that its measures promote the application of its fiscal laws and regulations, which are not inconsistent with the GATS. Such measures would be adopted to mitigate the risk of the "artificial erosion" of the fiscal basis through a series of fraudulent and deceptive operations between taxpayers in Argentina and entities based in non-cooperating countries.¹²³

¹²⁰ In any event, as explained in paragraphs 91 to 94 above, the European Union does not consider that Argentina has made a market access commitment for Mode 3 with respect to reinsurance and retrocession services.

¹²¹ Argentina's first written submission, paras. 259-261.

¹²² Argentina's first written submission, paras. 244-260.

¹²³ Argentina's first written submission, paras. 262-267.

103. With regard to the *second* element, Argentina argues that its measures are "necessary" to secure the compliance with its fiscal laws and regulations. According to Argentina, the measures eliminate the fiscal benefits deriving from fraudulent transactions between Argentinean taxpayers and persons established in non-cooperating countries. Therefore, they would serve the interest of ensuring the consistent enforcement of Argentinean fiscal laws and regulations.¹²⁴ Further, according to Argentina, the goal to protect the Argentine fiscal system is of paramount importance, also according to internationally agreed standards. Finally, Argentina concludes that the measures adopted do not restrict trade excessively, as the fiscal measures do not prohibit trade with non-cooperating countries but can simply be complied with by providing the necessary information.¹²⁵
104. Argentina then turns to the test under the *chapeau* of Article XIV of the GATS. Argentina argues that the regulatory distinction between cooperating and non-cooperating countries does not amount to an arbitrary or unjustifiable discrimination. In its view, this is because it is able to easily obtain the relevant information to apply its fiscal regulations in case of the first category of countries. In contrast, this would not be the case for non-cooperating countries.¹²⁶ Argentina adds that this distinction is based on internationally agreed standards set up by the Global Forum and the OECD to whom Panama itself committed to adhere.¹²⁷

3.4.1.2 Article XIV(d) of the GATS

105. Argentina also invokes Article XIV(d) of the GATS as a justification for Measures No. 2, 3 and 4. Argentina argues that the legal standard for this provision is as follows: *first*, the difference in treatment provided by the measure aims at ensuring the equitable and effective imposition and collection of direct taxes with regard to services and service suppliers of other Members; *second*, the measures are necessary and suitable to establish a difference in treatment which would ensure the equitable and effective imposition and collection of direct taxes; *third*, the application of fiscal laws is an interest of highest importance; and *fourth* the measures do not restrict trade excessively. Finally, Argentina has to prove that the measures are also consistent with the *chapeau* of the provision.
106. With regard to the *first* element, Argentina argues that, with the aim of ensuring fiscal transparency, it adopted "defensive" fiscal measures that restored an effective and equitable tax imposition on services and service providers from non-cooperating countries.¹²⁸
107. With regard to the *second* element, Argentina explains that the requirement of a higher amount of information or the establishment of a presumption of unjustified increase in wealth is a suitable means to restore a situation of equitable and effective imposition and collection of direct taxes.¹²⁹

¹²⁴ Argentina's first written submission, paras. 272-274.

¹²⁵ Argentina's first written submission, paras. 297-305.

¹²⁶ Argentina's first written submission, para. 319.

¹²⁷ Argentina's first written submission, para. 321.

¹²⁸ Argentina's first written submission, para. 360.

¹²⁹ Argentina's first written submission, paras. 370-374.

108. With regard to the *third* element, Argentina maintains that the application of fiscal laws and regulations is an interest of the highest importance, and is also recognized by international bodies such as the Global Forum.¹³⁰
109. With regard to the *fourth* element, Argentina claims it has adopted the least trade restrictive means, and restates that the measures were enacted with the aim to adequately protect its fiscal system.¹³¹
110. In respect of the chapeau, Argentina claims that the distinction in treatment between domestic services and service suppliers is not arbitrary or unjustifiable, nor amounts to a disguised restriction to trade. Argentina's authorities would experience difficulties to access relevant information in case of services and service suppliers originating in non-cooperating countries. Moreover, the distinction in treatment would be in line with internationally agreed standards.¹³²

3.4.2. Observations by the European Union

3.4.2.1 Measures necessary to secure compliance with laws or regulations relating to the prevention of deceptive and fraudulent practices (Article XIV(c)(i) of the GATS)

111. Argentina invokes the application of Article XIV(c)(i) of the GATS with regard to measures number 1, 2, 3, 4 and 7.¹³³ The text of Article XIV(c)(i) reads as follows:

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;

112. Article XIV of the GATS has a similar two-tiered structure as Article XX of the GATT 1994. A panel must examine *first*, whether a measure is provisionally justified under one of the paragraphs of Article XIV; and, *second*, whether the measure meets the requirements of the chapeau of Article XIV.¹³⁴
113. Neither panels nor the Appellate Body have interpreted Article XIV(c)(i) of the GATS until now. Yet, the GATT 1994 contains a somewhat similar – but not

¹³⁰ Argentina's first written submission, paras. 381-385.

¹³¹ Argentina's first written submission, paras. 386-389.

¹³² Argentina's first written submission, paras. 395 and 396.

¹³³ See the table with the list of measures above at page 2.

¹³⁴ Appellate Body Report, *US – Gambling*, para. 292, referring to Appellate Body Report, *US – Shrimp*, para. 147 and Appellate Body Report, *US – Gasoline*, p. 20.

- identical – provision in Article XX(d). In respect of the latter provision, the Appellate Body has found that two elements must be shown: (i) the measure must be one designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994; and (ii) the measure must be "necessary" to secure such compliance.¹³⁵
114. The same structure of analysis applies to Article XIV(c) of the GATS.¹³⁶ Therefore, in order to assess the measures at issue under subparagraph (i) of Article XIV(c) of the GATS, the Panel must determine whether (i) they are adopted to *secure compliance* with laws and regulations which are not inconsistent with the provisions of the GATS; (ii) they are adopted to ensure the enforcement of laws and regulation that *relate to the prevention of deceptive and fraudulent practices*;¹³⁷ and, (iii) they are *necessary* to secure compliance. With regard to the latter element, the Appellate Body has clarified that a measure is not "necessary", when there are less trade restrictive alternative measures reasonably available, which make an equivalent contribution to the objective pursued.¹³⁸ The comparison of the alternative measures with the measure at issue must take place in light of the importance of the interests and values at stake.¹³⁹
115. The European Union questions whether measures that seek to protect a WTO Member's tax revenues fall under Article XIV(c) of the GATS. Subparagraphs (i) to (iii) in Article XIV(c) appear to specify measures posing concerns to the users of the services in question. In other words, Article XIV(c) would appear to permit measures to secure compliance with law or regulations and that address concerns from the perspective of the *service user*. In this respect, a measure that only addresses concerns of the tax authorities to collect revenue would not appear to fall under the scope of this provision.
116. Even if the scope of Article XIV(c) would extend to measures that concern tax matters, it is not obvious that Argentina's measures would qualify under subparagraph (i) of that provision. The European Union considers that particular attention should be paid to the question whether the laws and regulations with which the measures at issue allegedly seek to secure compliance aim at preventing *deceptive or fraudulent practices*. It is not straightforward whether some of the practices that taxpayers adopt in order to pay fewer taxes in accordance with the relevant laws are deceptive or fraudulent; or rather concern tax *avoidance* practices.¹⁴⁰ In this regard, the European Union notes that the panel in *China* –

¹³⁵ Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

¹³⁶ The Appellate Body has found previous decisions under Article XX of the GATT 1994 relevant for the analysis under Article XIV of the GATS (see Appellate Body Report, *US – Gambling*, para. 291).

¹³⁷ Since the last part of subparagraph (i) ("... or to deal with the effects of a default on services contracts") was not invoked by Argentina, the European Union does not elaborate with regard to that aspect in this third party submission.

¹³⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178.

¹³⁹ Appellate Body Report, *US – Gambling*, para. 307.

¹⁴⁰ In this sense, it is useful to note that the Spanish version of this provision refers to "la prevención de prácticas que induzcan a error y prácticas fraudulentas" and the French version refers to "la prévention des pratiques de nature à induire en erreur et frauduleuses". Thus, Article XIV(c)(i) would appear to deal with practices that may lead to an error or to fraud (see Appellate Body Report, *US – Softwood Lumber IV*, para. 59 ("[A] treaty interpreter should seek the meaning that

Auto Parts referred to the distinction between tax *avoidance* and tax *evasion* made in *Black's Law Dictionary*. Tax evasion would entail illegal actions and thus correspond to tax fraud, whereas tax avoidance would entail actions that make use of legally available opportunities.¹⁴¹

117. It does not seem that the measures mentioned in subparagraph (i) of Article XIV(c) encompass also measures relating to the prevention of tax avoidance. In this light, the European Union notes that, unlike Article XIV(c), Article XIV(d) of the GATS makes explicit reference to the "collection of direct taxes" and refers in footnote 6 to "avoidance or evasion of taxes".
118. Whether the measures at issue aim at preventing deceptive or fraudulent practices as opposed to avoiding paying taxes in a particular territory pursuant to the relevant legal framework is a factual matter that the Panel should examine in this case.
119. Once it would be determined that the measure at issue qualifies under subparagraph (i) of Article XIV(c), the Panel must determine whether the measure is applied in a manner that meets the conditions in the chapeau of Article XIV. Under the chapeau, it is required that the measures are not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail or a disguised restriction to trade in services.
120. The key issue under the chapeau is to assess the actual operation of Argentina's measures. The Appellate Body in *US – Gasoline* indeed stated that "[t]he chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, *but rather the manner in which that measure is applied*".¹⁴²
121. In this respect, the European Union considers that the apparent discretion in the decision by Argentina whether to designate a territory as a "cooperating" jurisdiction for the purpose of tax information matters raises concerns as to whether the manner in which the measures are applied violates the conditions in the chapeau of Article XIV. This is particularly the case because 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 (with reference to the conclusions in the framework of the Global Forum) and is designated as a

gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language") and Article 33(3) of the Vienna Convention).

¹⁴¹ Panel Report, *China – Auto Parts*, para. 7.335 ("...we observe that such concepts are relatively well defined in the context of domestic tax law. For example, *Black's Law Dictionary* provides the following definitions: "tax avoidance" is defined as "the act of taking advantage of *legally available* tax-planning opportunities in order to minimize one's tax liability"; and "tax evasion" is defined as "the wilful attempt to defeat or *circumvent the tax law* in order to *illegally reduce* one's tax liability; tax evasion is *punishable by both civil and criminal penalties* – also termed as *tax fraud*") (original emphasis, footnote omitted).

¹⁴² Appellate Body Report, *US – Gasoline*, p. 22 (emphasis added). See also Appellate Body Report, *US – Shrimp*, para. 115; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 215; Appellate Body Report, *EC – Seal Products*, para. 5.302.

cooperating jurisdiction as of 1 January 2014,¹⁴³ it appears that Argentina is not necessarily making distinctions on the basis of international standards or effective tax cooperation on a bilateral basis. In this respect, the classification of countries that do not meet the required objective criteria within the category of "beneficiary countries" would appear to amount to an arbitrary or unjustified discrimination.

3.4.2.2 Measures aimed at ensuring equitable or effective imposition or collection of direct taxes (Article XIV(d) of the GATS)

122. Argentina also invokes Article XIV(d) of the GATS with regard to Measures No. 2, 3 and 4. Article XIV(d) reads as follows:

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: (...)

- (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective⁶ imposition or collection of direct taxes in respect of services or service suppliers of other Members

⁶ Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:

- (i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or
- (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or
- (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or
- (iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or
- (v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or
- (vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.

¹⁴³ Argentina's first written submission, paras. 129-132.

Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.

123. This provision contains an exception for measures that are found to be inconsistent with the national treatment obligation of Article XVII of the GATS. Hence, it does *not* provide a justification for violations of any other GATS obligations. A measure will be justified provided the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members. Footnote 6 to Article XIV provides an indicative list of measures that perform such task. The third measure described in footnote 6 indeed concerns measures that apply to non-residents or residents "in order to prevent the avoidance or evasion of taxes, including compliance measures". Thus, Article XIV(d) directly speaks to measures adopted with the aim of preventing tax evasion or tax avoidance. WTO Members are thus legitimately entitled to adopt measures in order to prevent tax evasion or tax avoidance insofar as they do so in a WTO compatible manner.
124. Once it is established that the measure at issue qualifies as a measure under paragraph (d) of Article XIV of the GATS, the panel must assess the application of this measure under the chapeau of Article XIV. The Panel should thus evaluate whether the distinctions that Argentina draws, through the application of its measures, do not amount to arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction of international trade. In this regard, the European Union refers again to its concerns with respect to the application of Argentina's measures, as explained in paragraph 121 above.

3.5. PARAGRAPH 2 (A) OF THE GATS ANNEX ON FINANCIAL SERVICES (PRUDENTIAL EXCEPTION)

3.5.1. Summary of Argentina's arguments

125. Argentina claims that in the event the Panel will find Measures No. 5 and 6 to be in violation of one or more GATS provisions, they are however covered by the prudential exception in Paragraph 2(a) of the GATS Annex on Financial Services.
126. Argentina claims that the measures challenged by Panama pursue two prudential objectives. First, the measures would pursue the protection of the consumers of financial services, including insurance, who may be otherwise unaware of actions involving distortion, manipulation and abuse.¹⁴⁴ Argentina claims that, with regard to services and service suppliers originating in non-cooperating countries, regulatory authorities are not in the position to clearly assess whether the source of funds is legal and to what extent service providers are subject to controls and adequate taxation in their country of origin.¹⁴⁵ Second, the measures would also ensure the integrity of the financial system by reducing systemic risk. Argentina claims that the measures adopted grant regulatory authorities the access to the relevant information in order to exercise an adequate supervision. In turn, this

¹⁴⁴ Argentina's first written submission, para. 564.

¹⁴⁵ Argentina's first written submission, paras. 565-566.

would prevent that illegal activities take place. Argentina would thus avoid systemic risk.¹⁴⁶

3.5.2. Observations by the European Union

127. Argentina invokes the "prudential exception" in Paragraph 2(a) of the GATS Annex on Financial Services with respect to Measures No. 5 and 6. The text of Paragraph 2(a) 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.
128. The words "[n]otwithstanding any other provisions of the Agreement [i.e. the GATS]" demonstrate that Paragraph 2(a) provides an exception from all the GATS obligations. This is also demonstrated by the first part of the second sentence, which specifies that "[w]here such measures do not conform with the provisions of the [GATS]", they shall not be used as a means of avoiding commitments or obligations. Paragraph 2(a), second sentence thus provides a justification for measures that would otherwise violate the GATS. Nonetheless, the use of this exception is not without conditions.
129. The European Union first of all notes that the scope of the prudential exception is determined by the scope of the GATS Annex on Financial Services, in which it is contained. Paragraph 1(a) of the Annex indicates that it "applies to measures affecting the supply of financial services". The European Union does not consider that this means that only measures directly regulating the financial services sector would be caught within the scope of the prudential exception. Nonetheless, a Member invoking Paragraph 2(a) is required to establish how such measures "affect[] the supply of financial services".
130. While not taking position on the facts of this case, the European Union considers that an assessment of a measure under the prudential exception in Paragraph 2(a) of the Annex on Financial Services involves a two-step analysis.
131. *First*, the party that invokes the provision has to demonstrate, in accordance with the general principle of *actori incumbit probatio*, that the measure adopted is taken for prudential reasons. Paragraph 2(a) provides an indicative list of such prudential reasons (protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier) and includes the objective of ensuring the integrity and stability of the financial system. Yet, given that this list is not exhaustive (as is evidenced by the word "including" in the first sentence of

¹⁴⁶ Argentina's first written submission, para. 567.

Paragraph 2(a)), there can also be other prudential reasons in addition to the ones explicitly mentioned in Paragraph 2(a).

132. 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.
133. *Second*, the second sentence of Paragraph 2(a) specifies that where the measures at issue "do not conform with" the GATS, "they shall not be used as a means of avoiding the Member's commitments or obligations under the [GATS]". Hence, even if a measure violating the GATS pursues a prudential objective, it must be determined whether, through the use of this measure, the Member is trying to avoid its commitments and obligations under the GATS.
134. The European Union notes that, like the second sentence of Paragraph 2(a), other provisions in the covered agreements express this "anti-avoidance" or "anti-circumvention" principle. In particular, Article 10.1 of the *Agreement on Agriculture* provides:

Prevention of Circumvention of Export Subsidy Commitments

Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent commitments.

135. The Appellate Body has found that "the verb 'circumvent' means, *inter alia*, 'find a way round, evade ...'" and that "Article 10.1 is designed to prevent Members from circumventing or 'evading' their 'export subsidy commitments'".¹⁴⁷ Article 10.1 also focuses on the *application* of export subsidies.
136. The rationale of the second sentence of Paragraph 2(a) is also comparable to that of the *chapeau* of the general exception clauses in Article XX of the GATT 1994 and Article XIV of the GATS. With regard to the function of the chapeau, the Appellate Body has stated that "the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised reasonably, so as not to frustrate the rights accorded to other Members by the substantive rules of the GATS".¹⁴⁸ The Appellate Body has also noted that the chapeau is in fact:

¹⁴⁷ Appellate Body Report, *US – FSC*, para. 148 (footnote omitted).

¹⁴⁸ Appellate Body Report, *US – Gambling*, para. 339, referring to the original statement of the Appellate Body with regard to the chapeau of Article XX of the GATT 1994 in Appellate Body Report, *US – Gasoline*, p. 22.

...but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights.¹⁴⁹

137. The chapeau thus prevents the *abuse* or *misuse* of a Member's right to invoke the exceptions in Article XX of the GATT 1994 or Article XIV of the GATS.¹⁵⁰ The WTO Member invoking an exception bears the burden of demonstrating that the use of the exceptions does not constitute such abuse.¹⁵¹
138. The European Union again recalls that the Appellate Body found that the conditions in the chapeau address the manner in which a measure is *applied*.¹⁵² The manner in which a measure is applied can, according to the Appellate Body, "most often be discerned from the *design, architecture, and revealing structure of a measure*".¹⁵³
139. Hence, under the general exceptions under the GATT 1994 or the GATS, even if a Member is able to demonstrate that a measure that was found to be discriminatory pursues a legitimate objective, it must still be assessed whether, in the application of the measure (as may be discerned from its design, architecture and revealing structure), the Member is not abusing its rights under the exception to avoid its obligations.
140. Similarly, under the second sentence of Paragraph 2(a) of the GATS Annex on Financial Services, it must be assessed whether the measure at issue, as it is applied in practice (e.g. through the exceptions that are provided to it), is genuinely pursuing the prudential objective or is rather used to avoid Argentina's obligations and commitments. In this regard, the European Union notes that the discretion that Argentina appears to maintain in designating a country as "cooperating" or not¹⁵⁴ is of particular relevance to the Panel's analysis.

4. CLAIMS UNDER THE GATT 1994

4.1. ARTICLE I:1 (MFN)

4.1.1. Summary of Panama's arguments

141. Panama understands the legal standard of Article I:1 of the GATT 1994 to be composed of four steps:

¹⁴⁹ Appellate Body Report, *US – Shrimp*, para. 158.

¹⁵⁰ Appellate Body Report, *EC – Seal Products*, para. 5.297.

¹⁵¹ Appellate Body Report, *US – Gasoline*, pp. 22-23 and Appellate Body Report, *EC – Seal Products*, para. 5.297.

¹⁵² Appellate Body Report, *US – Gasoline*, p. 22; Appellate Body Report, *US – Shrimp*, para. 115; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 215; Appellate Body Report, *EC – Seal Products*, para. 5.302.

¹⁵³ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29 (emphasis added).

¹⁵⁴ See para. 120 above.

- (i) the measure has to be covered by Article I:1 of the GATT 1994, *i.e.*, the measure has to be "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 importation and exportation and with respect to all matters referred to in paragraphs 2 and 4 of Article III".
 - (ii) the measure has to be linked to an "advantage, favour, privilege or immunity granted [...] to any product originating in or destined for any other country". Panama understands this test as applying to situations in which the conditions of competition are modified;
 - (iii) the products are "like products". Panama claims that when the basis for the application of a measure lies solely in the origin of a good, a presumption of likeness with the similar domestic good is established without the need of a more detailed analysis; and
 - (iv) the "advantage, favour, privilege or immunity" is not accorded immediately and unconditionally to the like products originating in or destined for the territories of all other contracting parties. Panama understands that the two terms have to be interpreted as follows: "immediately", in its ordinary meaning, means "without the interposition of anything"; "unconditionally" means that the "advantage, privilege (...)" has to be extended to like goods from any other Member without the imposition of any conditions, as the requirement was interpreted in the Panel Report in *Canada – Autos*.¹⁵⁵
142. Panama argues that Argentina acts inconsistently with its obligations under Article I:1 of the GATT 1994 with respect to two measures challenged in this dispute.¹⁵⁶

4.1.1.1 Tax treatment imposed on entry of funds as an unjustified increase in wealth¹⁵⁷

143. Panama argues that Argentina violates its obligation under Article I:1 of the GATT 1994 because (i) the measure is covered by Article I:1 of the GATT 1994 insofar as it can be qualified as belonging to the category of "rules and formalities in connection with (...) exportation". According to Panama, the measure has a negative effect on the payment that the Argentinean exporter receives as compensation for the shipment of its products. The Argentinean exporter who ships goods to excluded countries and receives the related payment is subject to a presumption of unjustified increase in wealth, with the consequences already explained in the description of the measure; (ii) the measure gives an advantage to the Argentinean exporter who ships its goods to beneficiary countries as opposed to the one who does the same with excluded countries; (iii) since the criterion for the different application of the measure is represented by the destination of the exports, a presumption of "likeness" of the goods is satisfied; and (iv) the

¹⁵⁵ Panama's first written submission, paras. 4.176-4.185.

¹⁵⁶ See Measures 2 and 3 of the table above.

¹⁵⁷ For a description of this measure, see para. 13, above.

advantage is not extended "immediately" and "unconditionally" to Argentinean exporters whose goods are sold to excluded countries.¹⁵⁸

4.1.1.2 Valuation of transactions¹⁵⁹

144. Panama claims that Argentina is in violation with its obligations under Article I:1 of the GATT 1994 because (i) the measure is covered by Article I:1 of the GATT 1994, as the submission of the valuation of transactions regarding imported goods from excluded countries to the transfer prices regime is a measure linked to the determination of the income tax. Therefore, it belongs to the category of "rules and formalities in connection with (...) exportation", hence it is covered by Article I:1 of the GATT 1994; (ii) the submission of the valuation of transactions to the transfer prices regime does not apply to importers of goods from beneficiary countries and exporters of goods to beneficiary countries, hence it gives them an advantage; (iii) since the reason for the application of two distinct regimes only lies in the origin or the destination of the goods, a presumption of likeness is established; and (iv) the advantage is not extended "immediately" and "unconditionally" to importers of goods from excluded countries nor to exporters of goods to excluded countries.¹⁶⁰

4.1.2. Summary of Argentina's arguments

145. Argentina understands the legal standard under Article I:1 of the GATT 1994 to be, according to the Panel Report on *EC-Bananas III*, the following: i) the measure has to be covered by Article I:1 of the GATT 1994; ii) the measure provides an advantage to goods originating in any country; iii) such advantage has to be extended immediately and unconditionally to like goods originating in any other Member.¹⁶¹
146. With regard to measure number 2, Argentina argues claims that it is not a fully-fledged imposition as it allows the affected suppliers to provide evidence to the contrary so not to incur in the tax treatment applied to unjustified increase in wealth.¹⁶² Moreover, Argentina adds that the declaration on the taxable income only takes place when the trade operation has already ended, hence does not have any effect on international trade in goods.¹⁶³
147. Argentina, argues that a tax on the wealth of the taxpayer cannot be considered to affect the trade in goods and to represent one of the measures cited in Article I:1 of the GATT 1994 on the basis of which the supposed advantage is given.¹⁶⁴ As the measure applies to a subsequent moment to that in which the transaction for the

¹⁵⁸ Panama's first written submission, paras. 4.186-4.202.

¹⁵⁹ For a description of this measure, see para. 15, above.

¹⁶⁰ Panama's first written submission, paras. 4.263-4.270.

¹⁶¹ Argentina's first written submission, para. 664.

¹⁶² Argentina's first written submission, para. 660.

¹⁶³ Argentina's first written submission, para. 661.

¹⁶⁴ Argentina's first written submission, para. 671.

commercial operations takes place, Argentina claims that it does not affect trade in goods, hence it is not covered by Article I:1 of the GATT 1994.¹⁶⁵

148. With regard to measure number 3, Argentina maintains that it requires specific information with a view to determining the valuation of transactions in every case the importation and exportation of goods take place and that the different amount of information required to suppliers from cooperating countries compared to those from non-cooperating ones is not functional to the awarding of any advantage.¹⁶⁶ Therefore, Argentina concludes that Article I:1 of the GATT 1994 does not apply to the case at issue.

4.1.3. Observations by the European Union

149. As explained below, the European Union considers that Article I:1 of the GATT 1994 appears to be applicable in the present case. The European Union will also provide its views about the legal standard of Article I:1 of the GATT 1994, while not taking a position on the facts of this case.

4.1.3.1 Application of the GATT 1994

150. It is not the first time that the issue of the relationship between GATT 1994 and GATS comes under the scrutiny of the WTO judiciary. The Appellate Body in *Canada – Periodicals* held that obligations of both agreements can co-exist and, more importantly, that one does not override the other. Therefore, "the entry into force of the GATS (...) does not diminish the scope of application of the GATT 1994."¹⁶⁷
151. In *EC – Bananas III* the Appellate Body had the opportunity to clarify its understanding of the relationship between these two agreements. The Appellate Body clarified that a measure could simultaneously fall under the GATT 1994 as well as the GATS, but the "specific aspects" of that measure that need to be examined under each of the agreements may be different. In particular, the Appellate Body noted that:

Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same

¹⁶⁵ Argentina's first written submission, para. 687.

¹⁶⁶ Argentina's first written submission, para. 704.

¹⁶⁷ Appellate Body Report, *Canada – Periodicals*, p. 19.

measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case by case basis. This was also our conclusion in the Appellate Body Report in *Canada – Periodicals*.¹⁶⁸

152. It does not seem that this case presents grounds on which the established case law on the issue of the relationship between the GATT 1994 and the GATS could or should be reversed. It is fair to argue that the measures challenged by Panama apply to goods as well as services and service suppliers and that, therefore, the different facets of the measures need to be analysed under the GATT 1994 and the GATS accordingly.
153. More specifically, with respect to measure No. 2, the fact that the measure applies to a subsequent moment to that in which the transaction for the commercial operations takes place does not mean that such a measure has no effect on trade in goods. In this respect, it is quite telling that Article I:1 of the GATT 1994 also covers regulatory measures such as those listed in paragraphs 2 and 4 of Article III of the GATT 1994. Also, in *Thailand – Cigarettes (The Philippines)*, the panel found that a VAT exemption for resellers of domestic cigarettes violated both paragraphs 2 and 4 of Article III of the GATT 1994.¹⁶⁹
154. Moreover, the European Union notes that Article I:1 of the GATT 1994 also applies with respect to customs duties and charges "imposed on the international transfer of payments for imports or exports". In this respect, if an advantage is granted with respect to the international transfer of payments for imports or exports, it would appear that trade in goods would be affected.
155. Thus, a measure may fall under the GATT and GATS, panels should scrutinise how the measure affects trade in goods in a manner that is contrary to the GATT, as well as how the same measure affects trade in services.

4.1.3.2 Legal standard under Article I:1 of the GATT 1994

156. Article I:1 of the GATT 1994 provides, in its relevant part, that:
- [W]ith respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any [Member] 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 [Members].
157. 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

¹⁶⁸ Appellate Body Report, *EC – Bananas III*, p. 221.

¹⁶⁹ Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.637, 7.7644 and 7.738.

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.¹⁷⁰

158. The Appellate Body in *Canada – Autos* discussed the object and purpose of Article I:1 as follows:

Th[e] object and purpose [of Article I] is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis.¹⁷¹

159. Thus, in order to establish a violation of Article I:1, there must be an advantage, of the type covered by Article I and which is not accorded immediately and unconditionally to all "like products" of all WTO Members.¹⁷²

160. The term "advantage" within Article I:1 of the GATT 1994 has been interpreted broadly by the Appellate Body. In *Canada – Autos*, the Appellate Body discussed the significance of "any advantage ... granted by any Member to any product" as follows:

We note next that Article I:1 requires that 'any advantage, favour, privilege or immunity granted by any Member 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 Members.' (emphasis added) The words of Article I:1 refer not to some advantages granted 'with respect to' the subjects that fall within the defined scope of the Article, but to 'any advantage'; not to some products, but to 'any product'; and not to like products from some other Members, but to like products originating in or destined for 'all other' Members.¹⁷³

161. The panel in *EC – Bananas III* considered that "advantages" within the meaning of Article I:1 are those that create "more favourable competitive opportunities" or affect the commercial relationship between products of different origins.¹⁷⁴ Thus, such advantages affect the commercial opportunities in such a way as to create "more favourable competitive opportunities" for products of a certain origin. This is in line with the approach taken in respect of Article III of the GATT 1994.

162. The requirement to extend such advantages "unconditionally" does not imply that no conditions may be attached to the granting of the advantage in the first place.

¹⁷⁰ Appellate Body Report, *EC – Seal Products*, para. 5.86.

¹⁷¹ Appellate Body Report, *Canada – Autos*, para. 84.

¹⁷² Panel Report, *EC – Bananas III (Article 21.5 – US)*, para. 7.555; and Panel Report, *Indonesia – Autos*, para. 14.138, citing to Appellate Body Report, *EC – Bananas III*, para. 206.

¹⁷³ Appellate Body Report, *Canada – Autos*, para. 79.

¹⁷⁴ Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.239.

Indeed, the Appellate Body recently confirmed that it is not correct to state that "Article I:1 prohibits a Member from attaching *any* conditions to the granting of an 'advantage' within the meaning of Article I:1".¹⁷⁵ In particular, the Appellate Body noted that:

Article I:1 *permits regulatory distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member.*¹⁷⁶

163. The Appellate Body continued clarifying that:

Instead, [Article I:1] prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from *any* Member. Conversely, Article I:1 permits regulatory distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member".¹⁷⁷

164. Thus, where a measure modifies the conditions of competition between like imported products to the detriment of the third-country imported products at issue, it is inconsistent with Article I:1.¹⁷⁸

165. In the context of Article III:4 of the GATT 1994, the Appellate Body has further clarified how to determine whether the measure at issue modifies the conditions of competition to the detriment on imported products:

In determining whether the detrimental impact on competitive opportunities for like imported products is attributable to, or has a genuine relationship with, the measure at issue, the relevant question is "whether it is the governmental measure at issue that 'affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory'".¹⁷⁹

166. In other words, 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 to support a finding that imported products are treated less favourably.

167. An example where such a genuine relationship did not exist was in *Dominican Republic – Cigarettes*, where the Appellate Body observed that the alleged less favourable treatment was not attributed to the measure at issue (i.e. the bond requirement) since the difference in treatment was the result of the importer and domestic producers having different market shares.¹⁸⁰

¹⁷⁵ Appellate Body Report, *EC – Seal Products*, para. 5.88.

¹⁷⁶ Appellate Body Report, *EC – Seal Products*, para. 5.88 (emphasis added).

¹⁷⁷ Appellate Body Report, *EC – Seal Products*, para. 5.88 (emphasis added).

¹⁷⁸ Appellate Body Report, *EC – Seal Products*, para. 5.90.

¹⁷⁹ Appellate Body Report, *EC – Seal Products*, para. 5.105.

¹⁸⁰ Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96. See also Appellate Body Report, *US – Clove Cigarettes*, footnote 372 to para. 179.

168. An example where such a genuine relationship did exist was in *EC – Bananas III*, where the Appellate Body found that:

Articles I and II of the GATT 1994 have been applied, in past practice, to measures involving *de facto* discrimination. We refer, in particular, to the panel report in *European Economic Community – Imports of Beef from Canada*, which examined the consistency of EEC regulations implementing a levy-free tariff quota for high quality grain-fed beef with Article I of the GATT 1947. Those regulations made suspension of the import levy for such beef conditional on production of a certificate of authenticity. The only certifying agency authorized to produce a certificate of authenticity was a United States agency. The panel, therefore, found that the EEC regulations were inconsistent with the MFN principle in Article I of the GATT 1947 as they had the effect of denying access to the EEC market to exports of products of any origin other than that of the United States.¹⁸¹

169. In this respect, Article I:1 of the GATT 1994 does not require that any advantage has to apply in the exact and same manner to all imports irrespective of their source. Like the test of Article III:4 of the GATT 1994, the test of Article I is about discrimination, not about deregulation. Members are allowed to introduce legislation of any kind as long as they do not modify the conditions of competition to the detriment of like imported products.

170. The GATT panel in *US – MFN Footwear* also followed this approach in the context of an MFN claim when stating that:

The Panel noted that Article I would in principle permit a contracting party to have different countervailing duty laws and procedures for different categories of products, or even to exempt one category of products from countervailing duty laws altogether. The mere fact that one category of products is treated one way by the United States and another category of products is treated another is therefore in principle not inconsistent with the most-favoured-nation obligation of Article I:1.¹⁸²

171. Similarly, in *EEC – Minimum Import Prices*, the EU authorities required a payment deposit from all countries that could not guarantee a specified a minimum import price. However, because the payment of the deposit was requested by all exporting countries falling into this category, the GATT Panel ruled that the EC scheme was not considered to be a violation of Article I:1 of the GATT 1947.¹⁸³

172. In sum, Article I:1 prohibits discrimination among like imported products originating in, or destined for, different countries. In so doing, Article I:1 preserves the equality of competitive opportunities for like imported products from all Members and, thus, prohibits imposing conditions that have a detrimental impact on the competitive opportunities for like imported products from any Member.

¹⁸¹ Appellate Body Report, *EC – Bananas III*, para. 232 (footnotes omitted).

¹⁸² *GATT Panel Report, US – MFN Footwear*, para. 6.11.

¹⁸³ *GATT Panel Report, EEC – Minimum Import Prices*, Para. 4.19.

4.2. ARTICLE III:4 (NATIONAL TREATMENT)

4.2.1. Summary of Panama's arguments

173. Panama understands the legal standard for Article III:4 of the GATT 1994 to consist of three steps:
- (i) the measure at issue belongs to the category of "laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of products" in the internal market of a Member;
 - (ii) the imported products affected by the measure at issue are like products compared to domestic products; and
 - (iii) the imported products are accorded treatment less favourable than that given to like domestic products.¹⁸⁴
174. Panama argues that Argentina acts inconsistently with its obligations under Article III:4 of the GATT 1994 with respect to one measure challenged in this dispute.¹⁸⁵
175. In particular, with respect to the measure relating to the valuation of transactions,¹⁸⁶ Panama claims that the measure is inconsistent with Article III:4 of the GATT 1994 because (i) the measure at issue is the result of the application of different pieces of legislation, namely Articles 8, 14 and 15 of the LIG, Articles 21 *et seq.* of the RIG and RG 1122. Therefore, it falls under the category of "laws, regulations and requirements"; (ii) the regulatory distinction between domestic products and goods imported from excluded countries is, in Panama's view, exclusively based on the origin of the latter; and (iii) the submission of the valuation of transactions to the transfer prices regime does not apply to transactions on Argentine goods, hence imported goods from excluded countries are accorded treatment less favourable than that given to domestic goods.¹⁸⁷

4.2.2. Summary of Argentina's arguments

176. Argentina agrees with Panama with regard to the standard of review under Article III:4 of the GATT 1994.¹⁸⁸ Argentina argues that measure 3 does not affect the conditions according to which products can be bought and sold nor does it modify the conditions of competition between national and imported products at the detriment of the latter. Argentina maintains that requiring information for fiscal purposes does not affect the "internal sale, offering for sale, purchase, transportation, distribution or use" of merchandises.¹⁸⁹ Moreover, Argentina claims that Panama has not specified the product that would be negatively affected by the measure adopted by Argentina, hence it claims that it is impossible to

¹⁸⁴ Panama's first written submission, paras. 4.273-4.275.

¹⁸⁵ See Measure 3 of the table above.

¹⁸⁶ For a description of this measure, see para. 15, above.

¹⁸⁷ Panama's first written submission, paras. 4.276-4.280.

¹⁸⁸ Argentina's first written submission, para. 711.

¹⁸⁹ Argentina's first written submission, para. 715.

determine whether "likeness" between a foreign good and the similar domestic one occurs.¹⁹⁰ Finally, Argentina claims that the additional information requirements in connection with commercial operations with non-cooperating countries are put in place in order to restore a situation of adequate level of information; hence they do not amount to a less favourable treatment.¹⁹¹

4.2.3. Observations by the European Union

177. Article III:4 of the GATT 1994 provides that:

The products of the territory of any Member imported into the territory of any other Member 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.

178. It is thus well acknowledged that three elements must be examined to assess a measure's consistency with Article III:4 of the GATT 1994: (i) whether the measure is a law, regulation or requirement affecting the internal sale, offering for sale, purchase, or use of goods; (ii) whether the products at issue are like; and (iii) whether imported products are afforded less favourable treatment than that given to the like domestic products.¹⁹²

179. With respect to (i), the panel in *India – Autos*, referring to previous GATT reports, held that there are two distinct situations which would be characterised under the term "requirement": (1) obligations which an enterprise is "legally bound to carry out"; and (2) obligations which an enterprise "voluntarily accepts in order to obtain an advantage from the government". The panel also established that it is irrelevant whether a measure has actually been enforced, as it is merely its enforceability that matters.¹⁹³

180. Moreover, under GATT and WTO jurisprudence, the term "affecting" has consistently been defined broadly. In particular, it has been well established that it "implies a measure that has "an effect on" and this indicates a broad scope of application".¹⁹⁴ This term therefore goes beyond laws and regulations which directly govern the conditions of sale, use or purchase to cover also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products. Thus, requesting to provide certain information relating to import or export transactions may also amount to a measure affecting the "internal sale, offering for sale, purchase, transportation, distribution or use" of merchandises.

¹⁹⁰ Argentina's first written submission, paras. 716 – 719.

¹⁹¹ Argentina's first written submission, paras. 721 – 723.

¹⁹² Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.

¹⁹³ Panel Report, *India – Autos*, paras. 7.183 – 7.184. See also Panel Report, *Canada – Autos*, para. 10.73 (where "letters of undertaking" submitted by certain firms at the request of the Canadian Government were considered to be "requirements").

¹⁹⁴ Panel Report, *India – Autos*, para. 7.196

181. What is affected by the requirement helps distinguishing between measures that violate Article III:4 (i.e., affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products) and Article XI:1 of the GATT 1994 (i.e., measures limiting the importation of products). The use of the term "importation" in Article XI, rather than "imports", or "imported products", suggests that what is targeted in Article XI:1 is exclusively those restrictions which relate to the importation itself, and not to already imported products.¹⁹⁵ It is the nature of the measure as a restriction in relation to importation which is the key factor to consider in determining whether a measure may properly fall within the scope of Article XI:1. In contrast, when the restriction is imposed on the sale, use or purchase of imported products, such a measure is considered an internal measure falling under Article III:4 of the GATT 1994. That being said, there may be cases when a measure can affect both the conditions of competition between imported products and domestic products after importation, as well as the opportunities for importation.¹⁹⁶
182. With respect to (ii), a number of panels have held the view that where a difference in treatment between domestic and imported products is based exclusively on the products' origin, it is correct to treat products as "alike" within the meaning of Article III:4. In that case, there is no need to establish the likeness between imported and domestic products in terms of the traditional criteria – that is, their physical properties, end-uses and consumers' tastes and habits.¹⁹⁷ In other words, it is sufficient for purposes of satisfying the "like product" test for a complaining party to demonstrate that there can or will be domestic and imported products that are "like".¹⁹⁸ In this respect, the fact that certain information is required from some products originating in excluded countries while such information is not required from domestic product does not make both products "intrinsically different" or "alike".
183. With respect to (iii), the meaning of the term "treatment no less favourable" in Article III:4 has been considered by panels and the Appellate Body in prior disputes. As a result, the following propositions are well established. First, the term "treatment no less favourable" requires effective equality of opportunities for imported products to compete with like domestic products. Second, a formal difference in treatment between imported and domestic like products is neither necessary, nor sufficient, to establish that imported products are accorded less favourable treatment than that accorded to like domestic products. Third, because Article III:4 is concerned with ensuring effective equality of competitive opportunities for imported products, a determination of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products. If the outcome of this assessment is that the measure has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount

¹⁹⁵ Panel Report, *India – Autos*, para. 7.259. See also GATT Panel Report, *Canada – FIRA*, para. 5.14; and Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.261.

¹⁹⁶ Panel Report, *Turkey – Rice*, para. 7.253.

¹⁹⁷ Panel Report, *Turkey – Rice*, para. 7.214 and the cases cited therein.

¹⁹⁸ Panel Report, *China - Publications and Audiovisual Products*, paras. 7.1444-1447.

to treatment that is "less favourable" within the meaning of Article III:4. Finally, for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities for imported products.¹⁹⁹

184. In *EC – Seal Products*, the Appellate Body recently clarified that the proposition that distinctions may be drawn between imported and like domestic products without necessarily according less favourable treatment to the imported products implies only that the "treatment no less favourable" standard, under Article III:4, means something more than drawing regulatory distinctions between imported and like domestic products. There is, however, a point at which the differential treatment of imported and like domestic products amounts to "treatment no less favourable" within the meaning of Article III:4. The Appellate Body has demarcated where that point lies, in the following terms:

[T]he mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favourably within the meaning of Article III:4. Rather, what is relevant is whether such regulatory differences distort the conditions of competition to the detriment of imported products. If so, then the differential treatment will amount to treatment that is "less favourable" within the meaning of Article III:4.²⁰⁰

185. In the European Union's view, without taking a position of the specific facts of this case, requiring additional information from imported products (when compared to the information requested from domestic products) may alter the conditions of competition and, ultimately, may cause less favourable treatment contrary to Article III:4 of the GATT 1994.

4.3. ARTICLE XI:1 (QUANTITATIVE RESTRICTIONS)

4.3.1. Summary of Panama's arguments

186. With respect to one measure²⁰¹ Panama claims in the alternative that it is inconsistent with Article XI:1 of the GATT 1994. Panama understands that under Article XI:1 of the GATT 1994 Members are prohibited to impose prohibitions or restrictions on imports or exports other than duties, taxes or other charges.²⁰²
187. In particular, with respect to the measure relating to the valuation of transactions,²⁰³ Panama claims that the measure is inconsistent with Article XI:1 of the GATT 1994 because it imposes restrictions on the import of goods from excluded countries, by generating additional costs and risks related to the underlying transactions, thus amounting to a quantitative restriction. Likewise,

¹⁹⁹ Appellate Body Report, *EC – Seal Products*, para. 5.101.

²⁰⁰ Appellate Body Report, *EC – Seal Products*, para. 5.109 (citing Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 128).

²⁰¹ See Measure 3 of the table above.

²⁰² Panama's first written submission, paras. 4.285-4.290.

²⁰³ For a description of this measure, see para. 15, above.

according to Panama, the measure imposes a limitation on the export of goods from Argentina to excluded countries, by imposing administrative and fiscal surcharges on such transactions, thus leading to a quantitative restriction.²⁰⁴

4.3.2. Summary of Argentina's arguments

188. Argentina is of the view that the measure challenged by Panama does not fall under the scope of Article XI:1 of the GATT 1994 because: (i) it is a tax; (ii) it does not amount to a restriction on imports of goods; and (iii) the complainant failed to prove that a quantitative restriction occurred. Therefore, in the view of the respondent, Article XI:1 of the GATT 1994 does not apply to the case at issue.²⁰⁵

4.3.3. Observations by the European Union

189. Article XI:1 of the GATT 1994 contains one of the fundamental principles of the GATT/WTO legal system,²⁰⁶ the general prohibition of quantitative restrictions. Specifically, this provision states that:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses 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.

190. Thus, Article XI:1 foresees the elimination of import and export restrictions or prohibitions other than duties, taxes or other charges. Should the Panel characterise measure No. 3 as a "tax", such a measure would not fall under the scope of that provision.
191. In any event, in making such a determination the Panel should take into account that in *India – Quantitative Restrictions* the panel found that the text of Article XI:1 of the GATT 1994 is "broad" in scope, providing for a general ban on import or export restrictions or prohibitions "other than duties, taxes or other charges":

[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'. As was noted by the panel in *Japan – Trade in Semi-conductors*, the wording of Article XI:1 is comprehensive: it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.' The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'.²⁰⁷

²⁰⁴ Panama's first written submission, paras. 4.291-4.296.

²⁰⁵ Argentina's first written submission, paras. 725 – 744.

²⁰⁶ Panel Report, *Turkey – Textiles*, para. 9.63.

²⁰⁷ Panel Report, *India – Quantitative Restrictions*, para. 5.128 (footnotes omitted).

192. Therefore, the term "other measures" is meant to encompass a "broad residual category",²⁰⁸ including not only laws or regulations but more broadly also any measure instituted or maintained by a Member which prohibits or restricts the importation of products, irrespective of the legal status of the measure.²⁰⁹
193. With respect to the core obligation set out in Article XI:1, the European Union recalls that the panel in *Brazil – Retreaded Tyres* stated that the term "prohibition" in Article XI:1 meant that "Members shall not forbid the importation of any products of any other Member into their markets".²¹⁰ As for the term "restriction", the panel in *Colombia – Ports of Entry*, after reviewing several GATT and WTO cases, concluded that the term "restriction" includes a condition that limits importation and, thus, "restrictions" in the sense of Article XI:1 contemplate measures that create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly and that, in an Article XI:1 analysis, it is important to look at the design of the measure and its potential to adversely affect importation.²¹¹ The panel added that "a measure that has identifiable negative consequences on the importation of a product will result in a restriction on importation under Article XI:1".²¹² Similarly, the panel in *India – Quantitative Restrictions* concluded that the word "restriction" encompasses "a limitation on action, a limiting condition or regulation";²¹³ and, in *India – Autos*, the panel noted that the term "restriction" covers conditions that have a "limiting effect ... on importation itself", such as measures that make the right to import contingent on export performance, domestic investment, and the satisfaction of other limiting conditions.²¹⁴
194. Most recently, the Appellate Body in *China – Raw Materials* noted that:
- The term "prohibition" is defined as a "legal ban on the trade or importation of a specified commodity". The second component of the phrase "[e]xport prohibitions or restrictions" is the noun "restriction", which is defined as "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation", and thus refers generally to something that has a limiting effect. (...) 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.²¹⁵

²⁰⁸ Panel Report, *Argentina – Hides and Leather*, para. 11.17.

²⁰⁹ GATT Panel Report, *Japan – Semi-Conductors*, para. 106.

²¹⁰ Panel Report, *Brazil – Retreaded Tyres*, para. 7.11. In that case, the panel also found a violation of Article XI:1 where fines did not impose a *per se* restriction on importation, but acted as an absolute disincentive to importation by penalising it and making it "prohibitively costly". The panel concluded that the fines of R\$400, which exceeded the normal per unit value of a typical retreaded tyres (R\$100-280), were "significant enough" to have a restrictive effect on importation in violation of Article XI:1 (see Panel Report, *Brazil – Retreaded Tyres*, paras. 7.370 – 7.372).

²¹¹ Panel Report, *Colombia – Ports of Entry*, para. 7.240.

²¹² Panel Report, *Colombia – Ports of Entry*, para. 7.243.

²¹³ Panel Report, *India – Quantitative Restrictions*, para. 5.128.

²¹⁴ Panel Report, *India – Autos*, paras. 7.277-7.281. See also Panel Report, *China – Raw Materials*, paras. 7.204-7.207.

²¹⁵ Appellate Body Report, *China – Raw Materials*, paras. 319-320.

195. Thus, Article XI:1 of the GATT 1994 encompasses a limiting condition on the importation, thereby covering those prohibitions and restrictions that have a limiting effect on the quantity or value of a product being imported or exported.
196. In sum, Article XI:1 of the GATT 1994 forbids any measure instituted or maintained by a Member, irrespective of its legal status, that prohibits or restricts the importation of products. A measure is thus inconsistent with Article XI:1 of the GATT 1994 when it bans the importation of products or includes a condition that limits importation or restricts market access for imported products.
197. As mentioned before,²¹⁶ the Panel should determine whether the measure at issue affects the importation of goods or imported products. The target in Article XI:1 is exclusively those restrictions which relate to the importation itself, and not to already imported products. When the restriction is imposed on the sale, use or purchase of imported products, such a measure is considered an internal measure falling under Article III:4 of the GATT 1994.

4.4. ARTICLE XX (D) OF THE GATT 1994 (GENERAL EXCEPTIONS)

4.4.1. Summary of Argentina's arguments

198. Argentina argues that, in the event that the Panel will find its measures to be in violation of relevant provisions of the GATT 1994, such measures are justified under Article XX (d) of the GATT 1994. Argentina claims that its measures pursue the objectives of granting an equitable fiscal treatment, avoiding tax frauds and accessing relevant information.²¹⁷ Moreover, Argentina claims that the measures do not constitute a means of arbitrary or unjustified discrimination, nor do they amount to a disguised restriction on international trade, hence they fulfil the conditions for the application of Article XX (d) of the GATT 1994.²¹⁸

4.4.2. Observations by the European Union

199. Article XX of the GATT provides to defending parties the possibility to justify measures which are inconsistent with some other provision of the GATT (such as the ones discussed above). In the present case, Argentina seeks to justify its measure under the "general exception" of Article XX(d) of the GATT, which reads as follows:

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 WTO Member of measures ...

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provision of this Agreement, including those relating to customs enforcement ...

²¹⁶ See para. 181 above.

²¹⁷ Argentina's first written submission, para. 748.

²¹⁸ Argentina's first written submission, para. 750.

200. Article XX imposes a "two-tiered" test. It must first be established whether the measure is provisionally justified under one or another of the particular exceptions listed in Article XX, i.e. paragraph (d) in the present case. Second, the measure must be examined under the introductory clause (the "chapeau") of Article XX.²¹⁹
201. With regard to the first tier of the test, the Appellate Body has specified that to be justified provisionally under paragraph (d) of Article XX, two elements must be shown: (a) the measure must be one designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994; and (b) the measure must be "necessary" to secure such compliance.²²⁰ A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met. A determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.²²¹
202. The European Union does not question the need for WTO Members to adopt measures in order to fight against tax fraud or avoid the legitimate collection of taxes. However, as mentioned before, the European Union wonders to which extent the measures at issue contribute to the mentioned objective if Argentina can select countries, such as Panama, that do not meet the relevant international transparency requirements.
203. Even if Argentina succeeds in demonstrating that the measures at issue are provisionally justified under subparagraph (d) of Article XX, the Panel would still need to analyse whether the measure meets the requirements in the chapeau of Article XX. The chapeau addresses not so much the questioned measure or its specific contents as such, "but rather the manner in which that measure is applied".²²² More specifically, the chapeau prevents a WTO Member from applying measures justified under one of the sub-paragraphs in Article XX in a manner that constitutes (a) "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or (b) "a disguised restriction on international trade". In respect of the first requirement in the chapeau, the Appellate Body has stated that a measure would violate the chapeau "when [that] measure ... is applied in a discriminatory manner 'between countries where the same conditions prevail', and when the reasons given for this discrimination bear no rational connection to the objective ... or would go against that objective".²²³ In respect of the second requirement, the Appellate Body noted that "'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken

²¹⁹ Appellate Body Report, *US – Gasoline*, p. 22.

²²⁰ Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

²²¹ Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.

²²² Appellate Body Report, *US – Gasoline*, p. 22.

²²³ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.

under the guise of a measure formally within the terms of an exception listed in Article XX”,²²⁴

204. The Panel should thus evaluate whether the distinctions that Argentina draws, through the application of its measures, do not amount to arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction of international trade. In this regard, the European Union refers again to its concerns with respect to the application of Argentina's measures, as explained in paragraph 121 above.

5. CONCLUSION

205. The European Union considers that this case raises important questions on the interpretation of Articles II:1, XIV, XVI and XVII of the GATS (as well as the Annex on Financial Services) and Articles I:1, III:4, XI:1 and XX of the GATT 1994. While not taking a final position on the merits of the case, the European Union requests the Panel to carefully review the scope of the claims in light of the observations made in this submission. The European Union reserves its right to make further comments at the third party session of the first substantive meeting with the Panel.

²²⁴ Appellate Body Report, *US – Gasoline*, p. 25.