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**World Trade Organization
Before the Appellate Body**

**ARGENTINA – MEASURES RELATING TO TRADE IN GOODS
AND SERVICES**

(DS453)

(AB-2015-8)

**European Union
Third Participant Written Submission**

Geneva, 19 November 2015

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<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
<i>China – Rare Earths</i>	Panel Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
<i>EEC – Parts and Components</i>	GATT Panel Report, <i>European Economic Community – Regulation on Imports of Parts and Components</i> , L/6657, adopted 16 May 1990, BISD 37S/132
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI, p. 5751
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475)

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<i>US – Gambling</i>	Panel Report, <i>United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/ R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Malt Beverages</i>	GATT Panel Report, <i>United States – Measures Affecting Alcoholic and Malt Beverages</i> , DS23/R, adopted 19 June 1992, BISD 39S/206
<i>US – Section 337 Tariff Act</i>	GATT Panel Report, <i>United States Section 337 of the Tariff Act of 1930</i> , L/6439, adopted 7 November 1989, BISD 36S/345
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Shrimp</i>	Panel Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, p. 2821
<i>US – Underwear</i>	Appellate Body Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, p. 11
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1.

I. INTRODUCTION

1. The European Union makes this third participant written submission 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 rights and obligations contained therein, notably the General Agreement on Trade in Services (the GATS). In making this submission, the European Union refers to and re-iterates the submissions we made to the Panel.

II. EXECUTIVE SUMMARY¹

A. Like services and service suppliers

2. The first of four issues in this appeal concerns the interpretation of the concept of "likeness" in Articles II and XVII of the GATS. The European Union considers that it is appropriate to conclude that, if the distinction in a measure is exclusively based on origin, "likeness" can automatically be established and there is no need to further assess likeness criteria. Indeed, when a measure provides explicitly, or by necessary implication, for different regulatory treatment based on origin, there is a *de jure* distinction which is based on origin.
3. In case the measure itself draws up a list of countries that benefit from a certain "more favourable treatment", it cannot be disputed that the measure is based on origin explicitly. The European Union considers that the Panel did examine whether the regulatory distinction was exclusively based on origin and made a finding. Had the Panel found that the distinction in Decree No. 589/2013 was *not* exclusively based on origin, it would have had to assess whether the fact that a service was provided by a supplier from a country that is labelled as "non-cooperative" (which depends on the regulatory framework applicable in the home country) was reflected in the competitive relationship in the marketplace between the allegedly like services and suppliers. In particular, if consumers considered that this fact meant that they are not in a competitive relationship, the services and suppliers would not be "like".
4. In respect of the distribution of the burden of proof to show "likeness", the European Union considers that Panama was obliged to establish a *prima facie* case of "likeness". Once this proof is made, it is for the responding party to rebut these showings as it is more familiar with its own regulatory framework.

B. Treatment no less favourable

5. The second issue concerns the interpretation of the term "less favourable treatment" in Articles II and XVII of the GATS. With respect to the context of the term "treatment no less favourable" the European Union considers that the Panel's heavy reliance on the reference to "service suppliers" in the GATS and the

¹ Total words of the submission (including footnotes but excluding the executive summary) = 10511; total words of the executive summary = 1039.

distinction the Panel drew with Articles I and III:4 of the GATT 1994 would seem to be exaggerated. A close connection also exists between products and producers. However, the consideration of the connection between services and suppliers is most appropriately done in case of the determination of "likeness".

6. The European Union objects to the test that the regulatory framework in which suppliers operate may be taken into account when determining whether a measure provides "less favourable treatment" provided that these aspects affect the conditions of competition. Such a test is too short and pays insufficient attention to the reasons for neutralising a competitive advantage and thus to the objectives of the regulatory distinction. The European Union considers it inappropriate to develop a test under Articles II:1 and XVII of the GATS that would accept the neutralisation of a competitive advantage without even looking at the objectives of such neutralisation. In any event, a panel should do more than merely establish that the conditions of competition are modified. It must establish a genuine relationship between the measure and the detrimental impact on services or suppliers of a certain origin.

C. The exception in Article XIV (c) of the GATS

7. With respect to the interpretation of Article XIV(c) of the GATS, the European Union notes that what should be analysed under sub-paragraph (c) is whether the aspects of the measures that have given rise to the findings of inconsistency with an obligation in the GATS meet the requirements of that sub-paragraph.
8. The European Union considers that the existing exceptions in Article XIV of the GATS should be read in an evolutionary and non-restrictive manner, on the basis of customary rules for interpretation of international agreements, while accommodating for developments in societal concerns and for policy objectives that the negotiating parties of the GATT 1994 or the GATS may not have been aware of at the time. Such an approach was confirmed already by the Appellate Body in *US – Shrimp*.
9. At the same time, the European Union notes that sub-paragraph (c) should not be interpreted such as to enable circumvention of conditions attached to the exceptions in the GATS. When relying on Article XIV(c), the responding Member needs to (i) identify the laws and regulations with which the challenged measure is intended to secure compliance; (ii) prove that those laws and regulations are not in themselves inconsistent with WTO law; and (iii) provide that the measure challenged is designed to secure compliance with those laws or regulations. Furthermore, the responding Member must also show that the measure is "necessary" under Article XIV(c), demonstrating that there are no less trade restrictive alternative measures reasonably available, which make an equivalent contribution to the objective pursued. Finally, the responding Member must demonstrate that the measure meets the conditions of the chapeau of Article XIV(c) of the GATS.
10. The European Union agrees that a "coincidence between the objectives of the relevant measures and its enforcement mechanisms" is not "dispositive" for

finding that the conditions of Article XIV(c) are met. What a responding Member must identify under Article XIV(c) of the GATS are the specific obligations with which the enforcement measures secure compliance.

D. Scope of the "Prudential Exception"

11. With respect to the scope of the prudential exception in Paragraph 2(a) of the GATS Annex on financial Services, the European Union disagrees with Panama's argument that measures that would fall within the scope of one of the six types of prohibited market access limitations, listed in Article XVI:2 of the GATS, could not be justified under the prudential exception because they would not be "domestic regulations". The European Union does not consider that there are certain violations of obligations in the GATS, particularly Article XVI, that could not be justified under the prudential exception. The prudential exception provides no limitation on the types of measures covered by its scope other than the prudential rationale that leads to their adoption.

III. OBSERVATIONS BY THE EUROPEAN UNION

12. The European Union observes that this case raises a variety of systemic issues, in particular the interpretation of the fundamental concepts of "likeness" and "less favourable treatment" in the non-discrimination obligations in the GATS; the interpretation of sub-paragraph (c) of the general exceptions provision in Article XIV of the GATS; and the interpretation of the scope of the prudential exception in Paragraph 2(a) of the GATS Annex on Financial Services.
13. Before providing its views on these issues, the European Union takes this opportunity to stress the delicate task that the interpreters of the covered agreements are called upon to fulfil when having to determine the consistency of measures taken by WTO Members with their obligations under WTO law. Treaty interpreters have to give meaning to different concepts in these agreements while respecting the balance between the right to regulate in order to meet policy objectives, on the one hand, and the objective of promoting economic growth through trade liberalisation, on the other hand.
14. In particular, with respect to the multilateral regulation of trade in services, in the fourth recital of the preamble of the GATS, the WTO Members indeed recognised the "right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives". On the other hand, the Members stressed in the third recital their desire to "the early achievement of progressively higher levels of liberalization of trade in services". The trade liberalisation project in the GATS is aimed at "securing an overall balance of rights and obligations, while giving due respect to national policy objectives". Therefore, the importance of respecting the balance between the right to regulate and the trade liberalisation obligations is firmly recognised in the context of the GATS.

15. This important balance is by no means unique to the GATS. The first recital of the preamble of the Marrakesh Agreement establishing the World Trade Organization sets as objective "expanding the production of and trade in goods and services", while at the same time recognises the importance of non-trade objectives which allow "for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment". Furthermore, in the fifth and sixth recitals of the preamble of the TBT Agreement the Members recognised the balance between the desire to avoid "creat[ing] unnecessary obstacles to international trade" and the right to take "measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices". The Appellate Body has noted that this balance "is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX".²
16. The European Union considers that the balance between the right to regulate in order to meet national policy objectives, on the one hand, and the trade liberalisation obligations to promote economic growth, on the other hand, permeates each and every WTO Agreement. This balance needs to be found on a case-by-case basis and depends on the structural set-up of the agreements at issue: in some cases obligations and exceptions must be read together,³ in other cases the obligations must be read in their context to determine their limits.⁴ At the same time, the meaning of the right to regulate is evolutionary: what constitutes a permissible policy objective that is pursued by a regulation cannot be strictly limited to a formalistic reading of the policy objectives explicitly listed in the WTO agreements. Existing exceptions should be read in an evolutionary and non-restrictive manner, on the basis of customary rules for interpretation of international agreements, while accommodating for developments in societal concerns and for policy objectives that the negotiating parties of the GATT 1994 or the GATS may not have been aware of at the time.
17. With these considerations in mind, the European Union will provide its views on these issues below, whilst not taking a final position on the facts of this case.

A. Articles II:1 and XVII:1 of the GATS: "like services and service suppliers"

18. A main point of contention between the parties to this dispute before the Panel was the interpretation of the non-discrimination obligations in Article II:1 (most-favoured-nation treatment) and Article XVII:1 (national treatment) of the GATS. These provisions read as follows:

² Appellate Body Report, *US – Clove Cigarettes*, para. 96.

³ This was, for instance, done by the Appellate Body in *EC – Seal Products*.

⁴ This was, for instance, done by the Appellate Body in *US – Clove Cigarettes* when interpreting Article 2.1 of the TBT Agreement.

Article II

Most-Favoured-Nation Treatment

1. 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.

Article XVII

National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.¹⁰

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.

19. Although these obligations make different comparisons to determine whether measures are discriminatory, they have two terms in common: first, the term "like services and service suppliers" and second, the term "treatment no less favourable".

20. The first issue before the Appellate Body is the Panel's findings concerning likeness in both Articles II:1 and XVII:1 of the GATS. The Panel has made a single interpretation of the meaning of likeness in these provisions, noting that:

In our view, the likeness analysis under Article II of the GATS does not differ from the likeness analysis under Article XVII of the GATS in the sense that it requires an approach based on the competitive relationship. [...]⁵

21. The European Union agrees that the term "like" in both provisions should be given the same meaning and scope, since both principles (MFN and national treatment) should be read harmoniously.⁶ Both Articles II and XVII of the GATS speak to the competitive relationship between services and suppliers allegedly discriminated against.⁷

⁵ Panel Report, *Argentina – Financial Services*, para. 7.161 (footnotes omitted).

⁶ Appellate Body Report, *EC – Seal Products*, para. 5.123.

⁷ Similarly, when comparing Articles I:1 and III:4 of the GATT 1994, the Appellate Body has noted that "notwithstanding the textual differences between Articles I:1 and III:4, each provision is concerned, fundamentally, with prohibiting discriminatory measures by requiring, in the context of Article I:1, equality of competitive opportunities for like imported products from all Members, and,

22. The Appellate Body has until now never pronounced itself on the conditions for determining "likeness" of services and service suppliers. In view of the European Union, the determination of "likeness" is the first step in the interpretation and application of WTO law to Members' regulatory measures where the treaty interpreter must confer a proper weight to essential principles such as the right to regulate to meet national policy objectives and trade liberalisation. If services or services suppliers are not alike because they are not in a competitive relationship, members have the right to regulate them differently under GATS XVII. Indeed, if services or suppliers that are treated differently by a Member's regulatory measure are not considered to be "like", the analysis of a potential violation of the non-discrimination obligations could already stop there. The European Union therefore agrees with the Panel's reliance on the Appellate Body's findings in *EC – Asbestos* when concluding that "regulatory concerns play a role in determining likeness to the extent that they are relevant to the examination of certain 'likeness' criteria and are reflected in the products' competitive relationship".⁸ In that case, the Appellate Body observed that:

Under Article III:4, evidence relating to health risks may be relevant in assessing the *competitive relationship in the marketplace* between allegedly "like" products.⁹

23. Regulatory concerns, such as health risks, may thus be considered as part of the assessment of whether two products are "like", provided these health risks are reflected in the competitive relationship in the marketplace between the products. In other words, e.g. if consumers consider that two products are not in a competitive relationship because they take into account health concerns that the products may raise, the conclusion must be that the products are not "like". The same applies to services and suppliers, as noted by the Panel in this case. If the regulatory framework in the home country of the service or the supplier addresses particular concerns for consumers, and these concerns are properly reflected in the consumers' perceptions of competitive relationship between the different services or suppliers, the services or suppliers would not be "like".
24. The Panel examined the likeness of the services and service suppliers from cooperative and non-cooperative countries (in case of Article II) and from non-cooperative countries and Argentina (in case of Article XVII) on the basis of the following test. First, the Panel considered whether the difference in treatment between services and suppliers from cooperative and non-cooperative countries is due to origin. Second, the Panel examined whether the difference in treatment is based *exclusively* on origin, or whether there is also some "other factor" explaining the difference in treatment.¹⁰ The Panel found that it "lies with Argentina to provide that this 'other factor' affects the competitive relationship between services and service suppliers, for example, by showing its effect on the characteristics of the service and consumers' preferences".¹¹

in the context of Article III:4, equality of competitive opportunities for imported products and like domestic products" (Appellate Body Report, *EC – Seal Products*, para. 5.82).

⁸ Panel Report, *Argentina – Financial Services*, para. 7.178.

⁹ Appellate Body Report, *EC – Asbestos*, para. 115 (original emphasis).

¹⁰ Panel Report, *Argentina – Financial Services*, para. 7.166.

¹¹ Panel Report, *Argentina – Financial Services*, para. 7.179.

25. Argentina challenges the Panel's determination of likeness. Argentina argues (i) that there is no "origin-based" presumption in the likeness determination in the GATS; (ii) if this presumption would apply, the Panel should have made a finding that the distinction in Argentina's measures was "exclusively" based on origin to conclude that the services and suppliers were "like"; and (iii) the Panel erred in placing the burden of proof on Argentina to demonstrate that the regulatory distinction was not exclusively based on origin.

1. The existence of an "origin-based" presumption of likeness in the GATS

26. The Panel based its first step in the test of determining likeness (*i.e.* whether the difference in treatment is due to origin) on the findings by the panel in *China – Publications and Audiovisual Products* that:

When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the "like service suppliers" requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin. [...] We observe that in cases where a difference of treatment is not exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis would probably be required to determine whether service suppliers on either side of the dividing line are, or are not, "like".

27. The European Union considers that it is appropriate to conclude that, if the distinction in a measure is exclusively based on origin, "likeness" can automatically be established and there is no need to further assess likeness criteria. Indeed, when a measure provides explicitly, or by necessary implication, for different regulatory treatment based exclusively on origin, there is a *de jure* distinction which is based on origin.¹²
28. Argentina challenges this finding by the Panel by referring to the fact that Articles II:1 and XVII:1 refer to both services and service suppliers. In the opinion of Argentina, this is a fundamental difference between the GATS and the multilateral agreements on trade in goods.¹³ According to Argentina, "[w]hereas the characteristics of goods are usually intrinsic to the good itself, the characteristics of services are frequently inseparable from a characteristic of the service supplier, either at a specific point in time or throughout the period that the service is being supplied".¹⁴ Therefore, the origin of a service or service supplier "may be highly relevant to its characteristics", since these characteristics may be the "result of the regulatory framework within which the service supplier operates".¹⁵
29. The European Union agrees that the intangible nature of services implies that there exists generally a close connection between the characteristics of a service and the

¹² See also Appellate Body Report, *Canada – Autos*, para. 100, explaining what constitutes a subsidy that is *de jure* contingent upon exports.

¹³ Argentina's Appellant Submission, para. 57.

¹⁴ Argentina's Appellant Submission, para. 58.

¹⁵ Argentina's Appellant Submission, para. 60.

characteristics of the suppliers. For instance, the qualities of a medical treatment may depend to the greatest extent on the qualities of the doctor (as a qualified person) providing the treatment. That is, the nature of the medical service provided is closely related to the qualifications of the professional providing the service. In addition to the fact that "trade in services" covers four modes of supply,¹⁶ this close connection between the services and the supplier explains the reference to both services and suppliers in the GATS.

30. However, the European Union contests that this connection is unique to services. Indeed, as Argentina itself notes, in *US – Malt Beverages* the panel considered that the differential treatment accorded to large and small breweries did not alter the likeness determination because there was no evidence that "the size of breweries affected the nature of the beer product or otherwise affected beer as a product".¹⁷ Conversely, if the characteristics of the product are affected by the quality of the producer, this would seem to have a bearing on the likeness determination, to the extent they are properly reflected in the competitive relationship of the products. For instance, the cleanliness of a slaughterhouse may affect the consumers' perception of the qualities and characteristics of the meat produced by that slaughterhouse in the sense that the resulting products do not compete with each other.
31. In sum, in the opinion of the European Union, the explicit reference to both services and service suppliers in Articles II and XVII of the GATS – and the contrast with the GATT 1994 where no reference to producers is made – cannot support an argument that a presumption of likeness in case a measure makes distinctions that are exclusively based on origin does not apply in case of the GATS. If the distinction in the measure is exclusively based on origin, then likeness is established.

2. Determination whether the distinction is origin-based

32. A panel must determine whether the measure at issue makes distinctions that are indeed exclusively based on origin, either explicitly or by necessary implication, before the presumption of likeness can apply. In case the measure itself draws up a list of countries that benefit from a certain "more favourable treatment", it cannot be disputed that the measure is based on origin explicitly. Therefore, the European Union agrees with Panama that when a measure "on its face, distinguishes between products, services, or service suppliers only because of their origin (a *de jure* distinction), there is no logical reason not to proceed on the assumption that the goods, services, or service suppliers covered by the measures are 'like'".¹⁸ In such a situation, there is no need to further inquire into the reasons for the origin-based

¹⁶ "Trade in services" may take place through the creation of a "commercial presence" by a foreign service supplier in the host territory where the service is supplied (See Article I:2(c) of the GATS) or by means of the presence of a natural person that is an independent service supplier (See Article I:2(d) of the GATS). Therefore, the treatment to be considered is not solely that granted to services offered in the host Member, but also to the suppliers present in that Member.

¹⁷ Panel Report, *US – Malt Beverages*, para. 5.19, cited in Argentina's Appellant Submission, para.

^{52.}
¹⁸ Panama's Appellee Submission, paras. 5.3 and 5.9.

- distinction as part of the "likeness" determination.¹⁹ In turn, in cases where the measure at issue sets criteria on the basis of which the measure is applied to some countries and not to others, a further inquiry may be required to examine the nature of those criteria and their relationship with an origin-based distinction or other factors. Such a measure may be found to be *de facto* discriminatory, depending on the facts of the case.
33. In this particular case, in addition to finding that the measure at issue contained a list of cooperative countries, the Panel examined the conditions in Decree No. 589/2013 for a country to be considered cooperative, noting that countries that have not signed a double taxation convention or an information exchange agreement and with which there is no exchange of tax information were on the list of cooperative countries.²⁰ This was the case for Panama. Hence, the list of countries that were labelled "cooperative" did not match the objective criteria that Argentina alleged it had applied. The Panel then concluded that this makes "it impossible for us to compare relevant services and service suppliers in order to evaluate relevant 'other factor(s)' in addition to their origin"²¹ and that, therefore, "the services and service suppliers of cooperative and non-cooperative countries are like by reason of origin".²²
34. Therefore, in the view of the European Union, contrary to what Argentina claims in its Appellant Submission, the Panel did examine whether the regulatory distinction was exclusively based on origin and made a finding. The European Union notes that, had the Panel found that the distinction in Decree No. 589/2013 was *not* exclusively based on origin, it would have had to assess whether the fact that a service was provided by a supplier from a country that is labelled as "non-cooperative" (which depends on the regulatory framework applicable in the home country) affected the competitive relationship in the marketplace between the allegedly like services and suppliers, in line with the Appellate Body's findings in *EC – Asbestos*.²³ For instance, the Panel could have found that the recognised criteria on exchange of tax information affected the competitive relationship of foreign suppliers, in the sense that, *inter alia*, consumers had a different perception of the services so provided and thus considered they are not in a competitive relationship. If this was the case, the services and suppliers would not be "like".

3. Burden of proof

35. In respect of the distribution of the burden of proof to show "likeness", the European Union agrees with Argentina that Panama was obliged to establish a *prima facie* case that services and service suppliers located in jurisdictions that

¹⁹ See also Panama's Appellee Submission, paras. 5.22-5.24.

²⁰ Panel Report, *Argentina – Financial Services*, para. 7.183.

²¹ Panel Report, *Argentina – Financial Services*, para. 7.184.

²² Panel Report, *Argentina – Financial Services*, para. 7.185.

²³ Appellate Body Report, *EC – Asbestos*, para. 115.

Argentina designates as non-cooperative pursuant to Decree No. 589/2013 are "like" the services and service suppliers located in jurisdictions that Argentina designates as cooperative.²⁴ Indeed, consistent with what the Appellate Body has stated in *US – Wool Shirts and Blouses*, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".²⁵ In case of a claim of violation of a non-discrimination obligation, proof of "likeness" is part of the burden that rests upon the complainant.

36. However, once the complainant has made such *prima facie* case – by explaining that the measure is exclusively based on origin, or by showing that, even if the measure is not exclusively based on origin, the services or suppliers are in a competitive relationship – it is for the responding party to rebut these showings. The European Union agrees with Panama that a "Member's regulatory concerns can be multiple and difficult to discern".²⁶ Being more familiar with its own regulatory framework, the responding party may be able to advance more detailed argumentation why the services or suppliers should not be considered to be "like".

B. Articles II:1 and XVII:1 of the GATS: "treatment no less favourable"

37. Once it is established that the services or suppliers from the different origins are "like", it must be determined whether the measure at issue provides "less favourable treatment" to the services or suppliers from one WTO Member compared to the products from another country (in case of Article II:1) or to the foreign services or suppliers when compared to the domestic services or suppliers (in case of Article XVII:1 of the GATS).
38. The determination of whether there is "less favourable treatment" because of a WTO Member's measure is a second step in the analysis where the treaty interpreter must confer a proper weight to essential principles such as the right to regulate to meet national policy objectives and trade liberalisation. Before the Panel, the parties disputed whether the regulatory framework in which service suppliers operate must be taken into account in the analysis of "treatment no less favourable" in the non-discrimination obligations in Articles II:1 and XVII:1 of the GATS. This question was also a major point of debate in previous goods-related disputes.²⁷
39. The Panel interpreted the term "treatment no less favourable" examining its ordinary meaning, the context of this expression, as well as the object and purpose of the GATS. With regard to the context, the Panel noted that the non-discrimination provisions cover both services and service suppliers and that this

²⁴ Argentina's Appellant Submission, para. 68.

²⁵ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

²⁶ Panama's Appellee Submission, para. 5.47, referring to Appellate Body Report, *US – Clove Cigarettes*, para. 113.

²⁷ In particular in the *EC – Seal Products* dispute, but also in the older *Japan – Alcoholic Beverages* dispute, where the Appellate Body rejected the so-called "aims and effects" test developed by the GATT Panel in *US – Malt Beverages* (See Appellate Body Report, *Japan – Alcoholic Beverages*, pp. 18-19).

reference to suppliers is linked to the nature of the services. According to the Panel:

[this] appears to indicate that the regulatory framework in which service suppliers operate may in certain circumstances be relevant in the context of the GATS since it has a direct impact on the service through the natural or legal person supplying the service.²⁸

40. The Panel concludes that:

[...] the mention of service suppliers might lead the interpreter, in light of the specific circumstances of each dispute, to take other aspects into account in its interpretation of 'treatment no less favourable', for example, the relevant regulatory aspects concerning service suppliers which have an impact on the conditions of competition. Consideration of these regulatory aspects could, depending on the case, mean that certain regulatory distinctions between service suppliers established by a Member do not necessarily constitute 'treatment ... less favourable' within the meaning of Article II:1 GATS.²⁹

41. Hence, the Panel accepts that, in order to determine whether treatment is less favourable, it must be assessed whether the measure modifies the conditions of competition. Such assessment must take into account regulatory aspects relating to services and service suppliers that may affect the conditions of competition. In this particular case, this regulatory aspect concerned the question whether Argentina is able to have access to tax information on foreign suppliers.

42. Panama appeals the Panel's interpretation of the term "treatment no less favourable", arguing that the Panel (i) misinterpreted the context of this expression; (ii) misunderstood the object and purpose of the GATS; and (iii) failed to be guided by previous Appellate Body jurisprudence.

1. Context of the term "treatment no less favourable"

43. With respect to the context of the term "no less favourable", the European Union notes that the Panel relied heavily on the reference to service suppliers in Articles II:1 and XVII:1 of the GATS to conclude that the determination of whether a measure provides "less favourable treatment" should take into account regulatory aspects relating to services and service suppliers that may affect the conditions of competition.

44. The European Union agrees with Panama that the Panel's heavy reliance on the reference to "service suppliers" in the GATS and the distinction the Panel drew with Articles I and III:4 of the GATT 1994 would seem to be exaggerated.³⁰ As the European Union explained, if the characteristics of the product are affected by the quality of the producer and this is reflected in the consumer's perception of the competitive relationship between the products, this would seem to have a bearing

²⁸ Panel Report, *Argentina – Financial Services*, para. 7.212.

²⁹ Panel Report, *Argentina – Financial Services*, para. 7.232.

³⁰ Panama's Appellant Submission, para. 3.46.

on the likeness determination of the goods, in the same way as this is the case for services and suppliers.

45. The European Union notes that such consideration of the link between services and suppliers is most appropriately done in case of the determination of "likeness". The European Union has explained in paragraphs 29-30 above that in view of the intangible nature of services, there is a close connection between the characteristics of services and the characteristics of the suppliers. In determining likeness of services and suppliers, the regulatory framework in which the suppliers operate can have an impact on the likeness of the suppliers and of the services, to the extent that these regulatory characteristics are properly reflected in the competitive relationship between the services and the suppliers.

2. Consideration of the object and purpose of the GATS

46. The European Union agrees with the Panel that the GATS seeks to achieve:

[...] a balance between the objective of expanding trade in conditions of transparency and progressive liberalization, on the one hand, and, on the other, the right of Members to regulate the supply of services in their territories and to establish new regulations in this regard in order to meet national policy objectives.³¹

47. In other words, a treaty interpreter must confer a proper weight to essential principles such as the right to regulate to meet national policy objectives and trade liberalisation.
48. Nevertheless, the European Union has some reservations with the manner in which the Panel has approached the analysis under "less favourable treatment" in this case while relying on the object and purpose expressed in the preamble of the GATS. The panel considered that the regulatory framework in which suppliers operate may be taken into account when determining whether a measure provides "less favourable treatment" provided that these aspects affect the conditions of competition.³² To the extent that this means that, as Panama argues, a Member that imposes a discriminatory measure to neutralise a competitive advantage because of the regulatory framework in which the supplier operates would not be acting in a manner inconsistent with the obligation to provide "treatment no less favourable",³³ the European Union would object to such test.
49. In the opinion of the European Union, such a test is too short and pays insufficient attention to the reasons for neutralising a competitive advantage and thus to the objectives of the regulatory distinction. This test seems to accept that a discriminatory measure that addresses *any* competitive advantage resulting from the regulatory framework in the country of origin would not be providing "less favourable treatment". The source of the competitive advantage could be the regulatory framework that prevents access to information by tax authorities, but

³¹ Panel Report, *Argentina – Financial Services*, para. 7.233.

³² Panel Report, *Argentina – Financial Services*, paras. 7.232, 7.235, 7.493 and 7.494.

³³ Panama's Appellant Submission, para. 2.4.

- could also be regulations that set high educational requirements for access to the profession, or laws that set low minimum wages. In the European Union's view, it is impermissible that WTO Members may neutralise all possible sources for competitive advantage by means of discriminatory measures.
50. If a panel were to examine the regulatory framework in the country where the supplier operates as part of the "no less favourable treatment test", it should rather apply an approach similar to that the Appellate Body set out for Article 2.1 of the TBT Agreement. To recall, in *US – Clove Cigarettes*, the Appellate Body stated that, in order to determine whether there is less favourable treatment, it must be determined "whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like domestic products" and whether this "detrimental impact ... stems exclusively from a legitimate regulatory distinction".³⁴ In other words, a panel ought to examine whether the regulatory measure modifies the conditions of competition in the regulating Member to the detriment of services or service suppliers and whether this detrimental impact stems exclusively from a distinction based on a permissible policy objective. Yet, the Appellate Body in *EC – Seal Products* rejected such a test under Articles I:1 and III:4 of the GATT 1994.³⁵ The European Union considers it inappropriate to now develop an alternative test under Articles II:1 and XVII of the GATS that would accept the neutralisation of a competitive advantage without even looking at the objectives of such neutralisation.
51. In any event, in the opinion of the European Union, respecting the balance between the right to regulate and liberalisation in the interpretation and application of the term "treatment no less favourable" requires a panel to establish whether the measure 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. A panel should thus do more than merely establish that the conditions of competition are modified. It must also establish a genuine relationship between the measure and the detrimental impact on services or suppliers of a certain origin.
52. The European Union stresses that the latter does not mean that exceptions are read into the obligations,³⁶ or that a "disguised attempt [is made] to introduce the aims and effects test" in the non-discrimination obligations in the GATS.³⁷ Rather, to determine whether there is "treatment less favourable", a panel must establish whether the modification of the conditions of competition is genuinely the consequence of the regulatory measures or may be due to another factor. That "other factor" explaining the detrimental impact on services or suppliers of a certain origin may be the inherent disadvantage of being foreign, which is a factor that Members are not required to compensate,³⁸ or the existing situation in the

³⁴ Appellate Body Report, *US – Clove Cigarettes*, para. 182.

³⁵ Appellate Body Report, *EC – Seal Products*, para. 5.125.

³⁶ See Panel Report, *Argentina – Financial Services*, paras. 3.60-3.66.

³⁷ Panama's Appellant Submission, para. 3.43.

³⁸ See Footnote 10 to Article XVII of the GATS ("Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive

market, where depending on the structure of the market suppliers with a big or small market share or a more or less developed operating structure feel the effect of the measure more intensely.³⁹ For instance, when a WTO Member imposes a public service requirement on telecommunications operators in its territory, and there is one large foreign operator that has 90 % of the market with a network that spans the entire territory and ten smaller operators that have the remaining 10%, this public service requirement may impact the large foreign operator more than the smaller ones. However, the detrimental impact on this foreign operator may not necessarily be due to origin, but rather to the market structure that exists on the moment the measure is introduced.

3. Previous Appellate Body jurisprudence

53. This approach is consistent with previous Appellate Body jurisprudence. Under the MFN obligation in Article I of the GATT 1994 and Article II of the GATS, WTO Members have the obligation to accord any more favourable treatment given to any country "immediately and unconditionally" to other WTO Members. In 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. Appellate Body jurisprudence relating to trade in goods has clarified that the requirement in Article I of the GATT 1994 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.⁴⁰ The same applies to Articles II:1 and XVII:1 of the GATS. 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.
54. Nonetheless, a finding that the measure at issue modifies the conditions of competition further 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*".⁴¹ 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

disadvantages which result from the foreign character of the relevant services or service suppliers.")

³⁹ Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96.

⁴⁰ See Appellate Body Report, *EC – Seal Products*, para. 5.88.

⁴¹ Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96 (emphasis added).

- 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".⁴²
55. Moreover, according to the Appellate Body, when determining whether the measure at issue modifies the conditions of competition, a panel must examine the "design, structure, and *expected* operation" of that measure.⁴³ Indeed, in making an assessment under non-discrimination obligations in WTO law, the focus of the analysis is on the impact of a measure on competitive opportunities for like imported products, rather than the actual trade effects of a measure.
56. The same analysis applies in case of other prohibitions to discriminate such as contained in Articles II:1 and XVII of the GATS: there must be a genuine relationship between the measure and the impact on the competitive relationship between the like services and/or suppliers. In order to make such determination, the "design, structure, and expected operation" of the measure must be examined. The genuine relationship must thus be established not necessarily in light of the present situation in the market, but rather with regard to the *expected* operation of the measures in the market in the future. In other words, the present situation in the market, e.g. reflected in the current market structure of service suppliers, should not solely be determinative for establishing the genuine relationship between the measure and the impact on the competitive conditions. The Panel must also take into account the expected operation in the future, giving due regard to the fact that market shares may change independent of the measure.

C. Article XIV(c) of the GATS: "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement"

57. When assessing the compatibility of Members' measures with WTO law, the last step a panel must undertake is whether a measure that was found to violate an obligation may nevertheless be justified under an exception. This step can only be undertaken as far as general exception provisions are applicable to the relevant agreement. Through the combined application and interpretation of obligations and exceptions, the panel will establish a balance between the right to regulate in order to meet national policy objectives, on the one hand, and the objective of promoting economic growth through trade liberalisation, on the other hand.
58. The Panel in this dispute recalled that the Appellate Body indicated that the examination of a measure under Article XIV of the GATS requires, by analogy to Article XX of the GATT 1994, a "two-tier analysis".⁴⁴ While the Panel concluded that the measures that were found to violate GATS obligations fell within the scope of sub-paragraph (c) of Article XIV and thus were provisionally justified,

⁴² Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134

⁴³ Appellate Body, *EC – Seal Products*, para. 5.95 and footnote 1019 (original emphasis).

⁴⁴ Panel Report, *Argentina – Financial Services*, para. 7.586, referring to Appellate Body Report, *US – Gambling*, para. 292, Appellate body Report, *US – Shrimp*, para. 147 and Appellate Body Report, *US – Gasoline*, pp. 20-21 and 25.

meeting the test in the "first tier",⁴⁵ the measures failed the test in the "second tier" since their application constituted arbitrary and unjustifiable discrimination within the meaning of the chapeau of Article XIV of the GATS.⁴⁶

59. Panama appeals the Panel's findings under the first tier of the Article XIV analysis, namely that measures 1, 2, 3, 4, 7 and 8 were provisionally justified under sub-paragraph (c) of Article XIV of the GATS. More in particular, Panama claims that the Panel (i) failed to examine the differences in treatment that gave rise to the inconsistency of these measures with Article II:1 of the GATS; (ii) focused on the objectives of the laws and not on the securing of compliance with the laws themselves;⁴⁷ (iii) erred when assessing the design of the measures;⁴⁸ and (iv) erred in finding these measures were necessary.
60. Given that the European Union does not take a position on the facts of this case, it addresses below only the first two appeal issues, pertaining to the legal test under Article XIV(c) of the GATS.

1. Examination of the differences in treatment that gave rise to the inconsistency of these measures

61. The Appellate Body has not interpreted Article XIV(c) of the GATS until now. Yet, the GATT 1994 contains a somewhat similar – but not identical – provision in Article XX(d). The Appellate Body has stressed, in respect to Article XX(d) of the GATT 1994, that:

[...] when Article XX(d) is invoked to justify an inconsistency with Article III:4, what must be shown to be "necessary" is the treatment giving rise to the finding of less favourable treatment. Thus, when less favourable treatment is found based on differences in the regulation of imports and of like domestic products, the analysis of an Article XX(d) defence should focus on whether those regulatory differences are "necessary" to secure compliance with "laws or regulations" that are not GATT-inconsistent.⁴⁹

62. The Appellate Body later confirmed that:

[t]he aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994.⁵⁰

63. Hence, what should be analysed under sub-paragraph (c) of Article XIV of the GATS is whether the aspects of the measures that have given rise to the findings of inconsistency with an obligation in the GATS – rather than the measure in general – meet the requirements of that sub-paragraph.

⁴⁵ Panel Report, *Argentina – Financial Services*, para. 7.740.

⁴⁶ Panel Report, *Argentina – Financial Services*, para. 7.762.

⁴⁷ This appeal claim applies only to measures 1, 2, 3, 4, and 7, and not to measure 8.

⁴⁸ This appeal claim applies only to measures 1, 2, 3, 4, and 8, and not to measure 7.

⁴⁹ Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177, referring to GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.27 (footnote omitted).

⁵⁰ Appellate Body Report, *EC – Seal Products*, para. 5.185.

64. The Panel in this case confirmed that it would apply this analysis, noting:

Our analysis of measures 1, 2[,] 3, 4, 7 and 8 under Article XIV(c) of the GATS will therefore focus on the aspects of the measures that have given rise to the findings of inconsistency with Article II:1 of the GATS, particularly those aspects concerning the design and operation of measures 1, 2, 3, 4, 7 and 8 pursuant to Decree no. 589/2013.⁵¹

65. The European Union does not take final position on how the Panel has applied this legal standard to the facts of this case. However, the European Union notes that the "enforced" measure concerned a measure that pertains to the collection of taxes while avoiding tax evasion. In that case, the European Union believes that the responding Member should demonstrate that the differential treatment of services and suppliers depending on the country of origin (the aspect of the measure found to be WTO-inconsistent) ensures tax collection and avoids tax evasion by means of transactions with those specific countries.

2. Overlap of the objectives of the laws and regulations, on the one hand, and the laws and regulations themselves, on the other hand, with which compliance is ensured

66. Turning to the specific conditions of sub-paragraph (c) of Article XIV of the GATS, the European Union recalls that the Appellate Body has also found – again in respect of Article XX(d) of the GATT 1994 – 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.⁵²
67. The same structure of analysis applies to Article XIV(c) of the GATS.⁵³ Therefore, in order to assess the measures at issue under 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; and, (ii) they are *necessary* to secure compliance.
68. With regard to the first element, the panel in *US – Shrimp (Thailand)* has specified – in relation to Article XX(d) – that the respondent invoking this exception, must (i) identify the laws and regulations with which the challenged measure is intended to secure compliance; (ii) prove that those laws and regulations are not in themselves inconsistent with WTO law; and (iii) provide that the measure challenged is designed to secure compliance with those laws or regulations.⁵⁴
69. Panama appeals the Panel's application of this first element in the test under Article XIV(c) of the GATS, arguing that the Panel's analysis was focused on the

⁵¹ Panel Report, *Argentina – Financial Services*, para. 7.588.

⁵² Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

⁵³ 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).

⁵⁴ Panel Report, *US – Shrimp (Thailand)*, para. 7.174, cited in Panel Report, *Colombia – Ports of Entry*, para. 7.514 and in Panel Report, *Argentina – Financial Services*, para. 7.595.

attainment of the objectives of the laws and not on the securing of compliance with the laws themselves. Panama refers to the findings of the GATT panel in *EEC – Parts and Components*, which found that Article XX(d) of the GATT 1994 is limited to measures that secure compliance with specific obligations of laws and regulations, and stressed that the exception in that sub-paragraph may not be used to circumvent the conditions set for other exceptions in the GATT 1994. That GATT panel noted that:

[...] If the qualification "to secure compliance with laws and regulations" is interpreted to mean "to ensure the attainment of the objectives of the laws and regulations", the function of Article XX(d) would be substantially broader. Whenever the objective of a law consistent with the General Agreement cannot be attained by enforcing the obligations under that law, the imposition of further obligations inconsistent with the General Agreement could then be justified under Article XX(d) on the grounds that this secures compliance with the objectives of that law. This cannot, in the view of the Panel, be the purpose of Article XX(d): Each of the exceptions in the General Agreement – such as Articles VI, XII or XIX – recognizes the legitimacy of a policy objective but at the same time sets out conditions as to the obligations which may be imposed to secure the attainment of that objective. These conditions would no longer be effective if it were possible to justify under Article XX(d) the enforcement of obligations that may not be imposed consistently with these exceptions on the grounds that the objective recognized to be legitimate by the exception cannot be attained within the framework of the conditions set out in the exception.⁵⁵

70. Panama argues that the same reasoning should apply to Article XIV(c) of the GATS, noting that "Article XIV contains a limited set of exceptions" and that the "justification of GATS-inconsistent measures under these exceptions is subject to strict conditions".⁵⁶
71. In this respect, the European Union considers, *first*, that the existing exceptions in Article XIV of the GATS should be read in an evolutionary and non-restrictive manner, on the basis of customary rules for interpretation of international agreements, while accommodating for developments in societal concerns and for policy objectives that the negotiating parties of the GATT 1994 or the GATS may not have been aware of at the time. Similar to what would happen when the exceptions are interpreted such as to enable circumvention of conditions attached to these exceptions, an interpretation of the exception provisions that is blind to evolutions in what constitute a permissible policy objective would upset the balance between the right to regulate and trade liberalisation.
72. The European Union notes that the Appellate Body has always been aware of this need for an evolutionary interpretation of the exceptions, "in line with principle of

⁵⁵ GATT Panel Report, *EEC – Parts and Components*, para. 5.17.

⁵⁶ Panama's Appellant Submission, para. 5.18.

effectiveness in treaty interpretation".⁵⁷ For instance, in *US – Shrimp*, the Appellate Body interpreted the term "exhaustible natural resources" in Article XX(b) of the GATT 1994, noting:

From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary". It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.

[...]

Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. Moreover, two adopted GATT 1947 panel reports previously found fish to be an "exhaustible natural resource" within the meaning of Article XX(g). We hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether living or non-living, may fall within Article XX(g).⁵⁸

73. Therefore, the European Union disagrees with Panama when it argues that "only the objectives expressly envisaged by the exceptions of the GATS – and agreed upon by multilateral consensus as doing so – may justify violations of GATS obligations",⁵⁹ as far as it would prevent making an evolutionary interpretation of the exceptions, taking into account new policy objectives that are not expressly mentioned.⁶⁰ The European Union considers that if a measure drawing a distinction between services or suppliers from a certain origin is found to violate a non-discrimination obligation in the GATS but nevertheless pursues an objective that would not be "expressly envisaged" by the exceptions of the GATS, the panel must examine whether an evolutionary interpretation of the existing exceptions permits the justification of the measure.
74. In the opinion of the European Union, this need was implicitly acknowledged by the Appellate Body in *EC – Seal Products*. In that dispute, the Appellate Body rejected the European Union's argument that the failure to consider whether, in case of *de facto* discrimination, the detrimental impact on goods of certain origin

⁵⁷ Appellate Body Report, *US – Shrimp*, para. 131, referring to Appellate Body Reports: *United States – Gasoline*, p. 23; *Japan – Taxes on Alcoholic Beverages*, p. 12; and *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, p. 16.

⁵⁸ Appellate Body Report, *US – Shrimp*, paras. 130-131 (footnotes omitted).

⁵⁹ Panama's Appellant Submission, para. 3.53.

⁶⁰ Note that the Appellate Body has also stressed the need for an evolutionary interpretation of obligations in respect of the interpretation of WTO Members' GATS specific commitments (see Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 396-397, referring to Appellate Body Report, *US – Shrimp*, paras. 129-130).

stems exclusively from a legitimate regulatory distinction, would result in divergent outcomes under the TBT Agreement, which has an open list of legitimate objectives, and the GATT 1994, which has a closed list. The Appellate Body noted that:

[...] under the TBT Agreement, the balance between the desire to avoid creating unnecessary obstacles to international trade under the fifth recital, and the recognition of Members' right to regulate under the sixth recital, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.⁶¹

75. In that dispute, the Appellate Body had not seen any concrete examples of a legitimate objective that could factor into an analysis under Article 2.1 of the TBT Agreement, but would not fall within the scope of Article XX of the GATT 1994.⁶² It can only be correct to state that the balance between the right to regulate and liberalisation in the TBT Agreement "is not, in principle, different from the balance set out in the GATT 1994", if the policy objectives that may be invoked in the TBT Agreement are also covered by the general exceptions in the GATT 1994.
76. *Second*, the European Union stresses that such evolutionary and non-restrictive interpretation, accommodating in the existing sub-paragraphs – including Article XIV(c) of the GATS – for other policy objectives not expressly mentioned, does not mean that the conditions attached to the exceptions are read out of the text of Article XX(d) of the GATT 1994 or XIV(c) of the GATS and thus "would no longer be effective".⁶³
77. The European Union agrees with Panama that sub-paragraph (c) of Article XIV should not be interpreted such as to enable circumvention of conditions attached to the exceptions in the GATS. Such would upset the balance between the right to regulate in order to meet national policy objectives, on the one hand, and the objective of promoting economic growth through trade liberalisation, on the other hand. The WTO Members have indeed agreed through the GATS "to exercise [their] rights in conformity with WTO rules".⁶⁴ The Appellate Body has observed that:

[...] WTO Members' regulatory requirements may be WTO consistent in one of two ways. First, they may simply not contravene any WTO obligation. Secondly, even if they contravene a WTO obligation, they may be justified under an applicable exception. The reference to "a manner consistent with the WTO Agreement" seems to us to encompass both types of WTO-consistency.⁶⁵

⁶¹ Appellate Body Report, *EC – Seal Products*, para. 5.127.

⁶² See Appellate Body Report, *US – Gambling*, para. 5.128.

⁶³ GATT Panel Report, *EEC – Parts and Components*, para. 5.17.

⁶⁴ Panel Report, *China – Rare Earths*, para. 7.270, cited by Panama in Panama's Appellant Submission, para. 3.51.

⁶⁵ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 223.

78. Hence, a measure may be consistent with WTO law even if it violates a specific obligation, provided it meets the conditions under an applicable exception, including the exception in Article XIV(c) of the GATS.
79. When relying on Article XIV(c), the responding Member still needs to (i) identify the laws and regulations with which the challenged measure is intended to secure compliance; (ii) prove that those laws and regulations are not in themselves inconsistent with WTO law; and (iii) provide that the measure challenged is designed to secure compliance with those laws or regulations.
80. Furthermore, the responding Member must also show that the measure is "necessary" under Article XIV(c), demonstrating that there are no less trade restrictive alternative measures reasonably available, which make an equivalent contribution to the objective pursued.⁶⁶ 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.⁶⁷
81. Finally, the responding Member must demonstrate that the measure meets the conditions of the chapeau of Article XIV(c) of the GATS.
82. *Third*, the European Union notes in respect of Panama's argument that the Panel's analysis was focused on the attainment of the objectives of the laws and not on the securing of compliance with the laws themselves, that the objective of a measure and the measure itself may sometimes be difficult to disentangle. For instance, if the measure, which the WTO-inconsistent measure seeks to secure compliance with, is one that provides for tax collection, the objective of that measure would seem to be the full collection of taxes while avoiding tax evasion. The measure providing for tax collection and the objective of full collection and avoiding evasion appear to coincide largely.
83. At the same time, the European Union agrees with Argentina that a "coincidence between the objectives of the relevant measures and its enforcement mechanisms" is not "dispositive" for finding that the conditions of Article XIV(c) are met.⁶⁸ Such "coincidence" would seem to be rather common. Rather, what a responding Member must identify under Article XIV(c) of the GATS are the specific obligations with which the enforcement measures secure compliance.⁶⁹ It is not sufficient to merely refer to the overall objectives of a law or regulation.

D. Paragraph 2(a) of the GATS Annex on Financial Services: "prudential exception"

84. The final issue that is subject of appeal in this dispute is the Panel's interpretation of the scope of the prudential exception in Paragraph 2(a) of the GATS Annex on Financial Services.

⁶⁶ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178.

⁶⁷ Appellate Body Report, *US – Gambling*, para. 307.

⁶⁸ Argentina's Appellee Submission, para. 79.

⁶⁹ Panel Report, *US – Gambling*, para. 6.538.

85. The European Union agrees with the Panel's findings – when defining the scope of the prudential exception – that "WTO members should have sufficient freedom to define the prudential reasons that underpin their measures, in accordance with their own scales of values"⁷⁰ and that the expression "prudential reasons" "refers to those 'causes' or 'reasons' that motivate financial sector regulators to act to prevent a risk, injury or danger that does not necessarily have to be imminent".⁷¹
86. Panama argues that the panel did "not give meaning to the title of prudential exception",⁷² which reads "Domestic Regulation". According to Panama, this reference in the title "delimits the scope of this provision" and "defines the type of measures that may be covered by [it]".⁷³
87. Panama draws a distinction between "domestic regulations" and "market access" barriers in the GATS.⁷⁴ The first type of measures would be addressed predominantly in Article VI of the GATS, whereas the second type of measures would be dealt with in Article XVI of the GATS.⁷⁵ The implication of Panama's argument is that measures that would fall within the scope of one of the six types of prohibited market access limitations, listed in Article XVI:2 of the GATS, could not be justified under the prudential exception because they would not be "domestic regulations".⁷⁶
88. The European Union disagrees with this interpretation. It does not consider that there are certain violations of obligations in the GATS that could not be justified under the prudential exception (provided the conditions of the exception are met). The European Union recalls that the first sentence of Paragraph 2(a) of the GATS Annex on Financial Services provides that measures for prudential reasons can be taken by WTO Members "notwithstanding *any other provisions* of the Agreement". In the opinion of the European Union, this means that also measures that violate Article XVI (and thus qualify as market access limitations) may potentially be justified under the prudential exception. Therefore, the European Union agrees with Argentina that the drafters of the GATS established no limitation on the types of measures covered by the exception other than the prudential rationale that leads to their adoption.⁷⁷

IV. CONCLUSIONS

89. The European Union considers that this case raises important systemic issues. The European Union requests the Appellate Body to carefully review the scope of the claims in light of the observations made in this submission.

⁷⁰ Panel Report, *Argentina – Financial Services*, para. 7.871.

⁷¹ Panel Report, *Argentina – Financial Services*, para. 7.879.

⁷² Panama's Appellant Submission, para. 6.16.

⁷³ Panama's Appellant Submission, para. 6.17.

⁷⁴ Panama's Appellant Submission, para. 6.27.

⁷⁵ *Ibid.*

⁷⁶ Panama's Appellant Submission, para. 6.28.

⁷⁷ Argentina's Appellee Submission, para. 153.

