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should be on the relevant aspects of the measure itself, rather than on how, for example, the measure affects the conditions of competition in the relevant market.

Indeed, in order for a panel properly to conduct its assessment under Article XIV of the GATS, it should be clear from the panel's analysis that, with respect to each individual measure, the aspects of the measure addressed are the same as those that gave rise to its earlier finding of inconsistency. This is because a respondent may not justify the inconsistency of a measure by basing its defence on aspects of that measure different from those that were found by the panel to be inconsistent with a provision of the GATS. At the same time, the mere fact that a panel does not repeat, in its Article XIV analysis, the entirety of its discussion of the measure from its inconsistency analysis does not, in itself, mean that that panel erred and based its assessment of the measure's justification under Article XIV on different aspects of the measure. Nor does such a conclusion necessarleasu9(a)7 (s)icat dasu9(is)7 ((d)-4.we f)9.catocluasu m

> measures 1, 2, 3, 4, 7 and 8 because Decree No. 589/2013 is an inherent part of them."[15]

11. Similarly, the Panel in held that prior findings by the Appellate Body under Article XX of the GATT 1994 are relevant for the assessment of arbitrary or unjustifiable discrimination under the chapeau of Article XIV of the GATS:

> "In this regard, we recall that the Appellate Body has clarified, in the context of Article XX of the GATT 1994, that the nature and quality of the discrimination to be examined under the chapeau of this provision is different from that found to be inconsistent with the substantive obligations. More particularly, the Appellate Body has explained that '[a]nalyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination.' In

> community or nation.' The Panel further found that the definition of the term 'order', read in conjunction with footnote 5 of the GATS, 'suggests that 'public order' refers to the preservation of the fundamental interests of a society, as reflected in public policy and law.' The Panel then referred to Congressional reports and testimony establishing that 'the government of the United States consider[s] [that the Wire Act, the Travel Act, and the IGBA] were adopted to address concerns such as those pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling.' On this basis, the Panel found that the three federal statutes are 'measures that are designed to 'protect public morals' and/or 'to maintain public order' within the meaning of Article XIV(a)'."[19]

15. The Appellate Body in stated that the Panel had properly applied footnote 5 to Article XIV(a), which states "that [t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society", since:

> "Having defined 'public order' to include the standard in footnote 5, and then applied that definition to the facts before it to conclude that the measures 'are designed to 'protect public morals' and/or 'to maintain public order'', the Panel was not required, in addition, to make a separate, explicit determination that the standard of footnote 5 had been met."[20]

16. The Panel in noted the Appellate Body's finding that panels are not required to make a separate explicit determination on whether the standard in footnote 5 has been met. However, given that the parties had structured their arguments based on footnote 5, the Panel considered it appropriate to base its finding on the standard set out in that footnote:

> "The Appellate Body has found that the definition of public order 'include[s] the standard in footnote 5' and has clarified that panels are not required 'to make a separate, explicit determination that the standard of footnote 5 ha[s] been met'. In the dispute before us, both parties have structured their arguments based on the standard in footnote 5. Therefore, while we agree that an explicit examination under this standard may not be necessary in all circumstances, we find it appropriate to follow this structure in our assessment below. Hence, we begin by considering whether the European Union has demonstrated that security of energy supply is a fundamental interest of society and turn, as appropriate, to consider whether it has demonstrated that foreign control of TSOs poses a genuine and sufficiently serious threat to this interest."[21]

1.4.3 "Necessary"

17. The Appellate Body in observed that the standard of 'necessity' is an objective standard:

> "We note, at the outset, that the standard of 'necessity' provided for in the general exceptions provision is an standard. To be sure, a Member's characterization of a measure's objectives and of the effectiveness of its regulatory approach—as evidenced, for example, by texts of statutes, legislative history, and pronouncements of government agencies or officials—will be relevant in determining whether the measure is, objectively, 'necessary'. A panel is not bound by these characterizations, however, and may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. In any event, a panel must, on the basis of the evidence in the record, independently and objectively assess the 'necessity' of the measure before it."[22]

18. The Appellate Body in observed that the assessment of the standard of 'necessity' was carried out through a process of 'weighing and balancing a series of factors':

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[19] Appellate Body Report, , para. 296.
[20] Appellate Body Report, , para. 298.
[21] Panel Report, , para. 7.1144.
[22] Appellate Body Report, , para. 304.

> because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case."[27]
>
> We note, in addition, that the Panel based its requirement of consultations, in part, on 'the existence of [a] specific market access commitment [in the United States' GATS Schedule] with respect to cross-border trade of gambling and betting services'. We do not see how the existence of a specific commitment in a Member's Schedule affects the 'necessity' of a measure in terms of the protection of public morals or the maintenance of public order. For this reason as well, the Panel erred in relying on consultations as an alternative measure reasonably available to the United States."[28]

1.4.4 Burden of proof

22. The Appellate Body in clarified that the burden of proof on the party invoking Article XIV(a) is to establish a facie case that the measure at issue is "necessary":

> "It is well-established that a responding party invoking an affirmative defence bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked defence. In the context of Article XIV(a), this means that the responding party must show that its measure is 'necessary' to achieve objectives relating to public morals or public order. In our view, however, it is not the responding party's burden to show, in the first instance, that there are reasonably available alternatives to achieve its objectives. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden.
>
> Rather, it is for a responding party to make a case that its measure is 'necessary' by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be 'weighed and balanced' in a given case. The responding party may, in so doing, point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is 'necessary'. If the panel concludes that the respondent has made a case that the challenged measure is 'necessary'Ragt on oe fieas

Agreement'. The list refers to laws and regulations for the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts; the protection of the privacy of individuals in relation to the processing and dissemination of personal data; and the protection of confidentiality of individual records and accounts; and safety. Accordingly, laws and regulations other than those that fall

1.5.4 "not inconsistent with the provisions" of the GATS

32. In

35. In the same dispute, the Appellate Body also compared the analysis to be undertaken under, respectively, each of the two elements required to justify a measure under Article XIV(c) (see paragraph 25 above). After setting out its understanding of the phrase "to secure compliance" (see paragraph 34 above), the Appellate Body turned to the second element, namely the requirement to demonstrate "necessity" and explained:

> "The second element entails a more in-depth, holistic analysis of the relationship between the inconsistent measure and the relevant laws or regulations. In particular, this element entails an assessment of whether, in the light of all relevant factors in the 'necessity' analysis, this relationship is sufficiently proximate, such that the measure can be deemed to be 'necessary' to secure compliance with such laws or regulations."[45]

36. Finally, the Appellate Body explained the relationship between those two elements for purposes of a panel's analysis:

> "We see these two elements as conceptually distinct, yet related, aspects of the overall inquiry to be undertaken into whether a respondent has established that the measure at issue is 'necessary to secure compliance with laws or regulations' under Article XIV(c) of the GATS. We do not see the content of these two elements of the analysis as entirely separate. Nor do we see the structure of each analysis as one that must follow a rigid path. Rather, the analyses of these two elements may overlap in the sense that some considerations may be relevant to both elements of the Article XIV(c) defence. The way in which a panel organizes its examination of these elements in scrutinizing a defence in any given dispute will be influenced by the measures and laws or regulations at issue, as well as by the way in which the parties present their respective arguments."[46]

1.5.6 "necessary"

1.5.6.1 General

37. In , the Panel referred to previous Appellate Body reports which defined the standard of "necessity" under Article XIV of the GATS and Article XX of the GATT 1994, and stated:

> "The Panel will therefore assess whether measures 1, 2, 3, 4, 7 and 8 are 'necessary' within the meaning of Article XIV(c) of the GATS, being guided by these comments of the Appellate Body. The Panel will take into account (a) the importance of the objective pursued; (b) the measure's contribution to that objective; and (c) the trade-restrictiveness of measures 1, 2, 3, 4, 7 and 8. We shall then turn to examine whether it is feasible to make a comparison between measures 1, 2, 3, 4, 7 and 8 and possible alternatives."[47]

1.5.6.2 Importance of the objective pursued

38. In , the Panel concluded that "the protection of its tax system and the fight against harmful tax practices and money laundering are objectives, interests or value of utmost importance for Argentina."[48] The Panel observed:

> "In any country, tax collection is an indispensable source of revenue to ensure the functioning of the State and the various government services to citizens. Protection of the national tax base guarantees the viability of a country's public finances and, by extension, its economy and financial system. The risks posed by harmful tax

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[45] Appellate Body Report, , para. 6.204.
[46] Appellate Body Report, , para. 6.205.
[47] Panel Report, , para. 661. The Panel referred to Appellate Body Reports, , para. 304 and , paras. 5.169 and 5.214. See Panel Report, , paras. 7.558 to 7.660.
[48] Panel Report, , para. 7.682.

practices[49] are even more important for developing countries because they deprive their public finances of financial resources vital to promoting their economic development and implementing their domestic policies. Lastly, there can be no doubt that combating money laundering, which fits in with the fight against drug trafficking and terrorism, is a priority for the international community and thus also for Argentina."[50]

1.5.6.3 Contribution to achieving the objectives pursued

39. In , the Appellate Body addressed the dis9t3a(In)5 (dd)cc 30 Td( )7(dd).