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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description

Abbreviation	Description
SSN	National Insurance Supervisory Authority
SSN Resolution No. 35.615/2011	Resolution No. 35.615 of the National Insurance Supervisory Authority (SSN) of 11 February 2011, amended by Article 4 of SSN Resolution No. 35.794/2011 and Articles 1 and 2 of SSN Resolution No. 38.284/2014
SSN Resolution No. 35.794/2011	Resolution No. 35.794 of the National Insurance Supervisory Authority (SSN) of 19 May 2011
SSN Resolution No. 38.284/2014	Resolution No. 38.284 of the National Insurance Supervisory Authority (SSN) of 21 March 2014

PANEL EXHIBITS CITED IN THIS REPORT

Panel Exhibit(s)	Description
ARG-22	OECD Report, *Addressing Base Erosion and Profit Shifting* (2013)
ARG-25	Financial Action Task Force (FATF) Recommendations, International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (February 2012)
ARG-27	Resolution No. 35.615 of the National Insurance Supervisory Authority (SSN) of 11 February 2011, as amended by Article 4 of SSN Resolution No. 35.794/2011 and Articles 1 and 2 of SSN Resolution No. 38.284/2014
ARG-31 / PAN-71	Communication "A" No. 4940 of the Central Bank of the Argentine Republic of 12 May 2009
ARG-32	Law No. 25.246 of 5 May 2000 on Concealment and Laundering of Money of Criminal Origin
ARG-33 / PAN-62	General Resolution No. 7 of the General Justice Inspectorate (IGJ) of 25 August 2005, as modified by General Resolution No. 1/2014 of the General Justice Inspectorate (IGJ) of 8 April 2014
ARG-35 / PAN-3	Decree No. 589 of the Federal Administration of Public Revenue (AFIP) of 27 May 2013
ARG-37 / PAN-3	General Resolution No. 3.576 of the Federal Administration of Public Revenue (AFIP) of 27 December 2013
ARG-41	Global Forum on Transparency and Exchange of Information, *Tax Co-operation 2009: Towards a Level Playing Field* (OECD, 2009)
ARG-42 / PAN-4	Law No. 20.628 on Gains Tax of 29 December 1973
ARG-43 / PAN-34	Law No. 19.550 on Commercial Companies of 3 April 1972
ARG-45 / PAN-9	Law No. 11.683, consolidated text of 1978, and amendments thereto, approved by Decree No. 821/1998 of 13 July 1998, published in the *Official Journal of the Argentine Republic* on 20 July 1998
ARG-47	Resolution No. 38.284 of the National Insurance Supervisory Authority (SSN) of 21 March 2014
ARG-48 / PAN-40	Resolution No. 35.794 of the National Insurance Supervisory Authority (SSN) of 19 May 2011
ARG-50 / PAN-58	Rules of the National Securities Commission, New Text 2013 (Title XI), approved by General Resolution No. 622
ARG-69 / PAN-67	Communication "A" No. 4662 of the Central Bank of the Argentine Republic of 11 May 2007
ARG-70 / PAN-68	Communication "A" No. 4692 of the Central Bank of the Argentine Republic of 31 July 2007
ARG-135	Resolution No. 38.708 of the National Insurance Supervisory Authority (SSN) of 6 November 2014, and Annex thereto (General Regulation for Insurance Activities)
PAN-7	Notarized sworn statement of 14 March 2014 prepared by a legal expert on banking matters
PAN-36	Resolution No. 35.615 of the National Insurance Supervisory Authority (SSN) of 11 February 2011, as amended by Article 4 of SSN Resolution No. 35.794/2011
PAN-72	Communication "B" No. 7953 of the Central Bank of the Argentine Republic of 15 August 2003

Short Title	Full Case Title and Citation
EC – Countervailing Measures on DRAM Chips	Panel Report,

Short Title	Full Case Title and Citation
US – Gambling	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Sert,*

WORLD TRADE ORGANIZATION
APPELLATE BODY

Argentina – Measures Relating to Trade in
Goods and Services

Panama, Appellant/Appellee
Argentina, Other Appellant/Appellee

Australia, Third Participant
Brazil, Third Participant
China, Third Participant
Ecuador, Third Participant
European Union, Third Participant
Guatemala, Third Participant
Honduras, Third Participant
India, Third Participant
Oman, Third Participant
Saudi Arabia, Third Participant
Singapore, Third Participant
United States, Third Participant

AB-2015-8

Appellate Body Division:

Chang, Presiding Member
Bhatia, Member
Zhang, Member

1 INTRODUCTION

1.1. Panama and Argentina each appeals certain issues of law and legal interpretations developed in the Panel Report, Argentina – Measures Relating to Trade in Goods and Services[1] (Panel Report). The Panel was established on 25 June 2013 to consider a complaint by Panama[2] with respect to certain financial, taxation, foreig n exchange, and registration measures adopted by Argentina, each distinguishing between "countri es cooperating for tax transparency purposes" (cooperative countries) and "countries not cooperating for tax transparency purposes" (non-cooperative countries) in accordance with Decree No. 589/2013[3] of Argentina's Federal Administration of Public Revenue (AFIP). In particular, Panama challenged the following eight measures[4]:

> Measure 1: An irrebuttable presumption that payments made by Argentine consumers to creditors located in non-cooperative countries in certain transactions represent a net gain of 100% for the purpose of determining the tax base for gains tax, applied pursuant to Article 93(c) of the Gains Tax Law[5] (withholding tax on payments of interest or remuneration);
>
> Measure 2: A rebuttable presumption of unjustifi ed increase in wealth applicable to any entry of funds – for the benefit of Argentine taxpayers – from non-cooperative countries in the context of an ex officio determination of the taxable subject matter by the AFIP for the non-coo the taTw [(exoP for .400.38 36)-6 Tc .5912 Tw [(94dompl)t

Measure 4: The allocation of expenditure for transactions between Argentine taxpayers and persons of non-cooperative countries to the fiscal years in which payment for the transactions actually takes place for the purpose of determining the tax base for gains tax, applied pursuant to the last paragraph of Article 18 of the Gains Tax Law (rule on the allocation of expenditure);

Measure 5: Certain requirements that service suppliers of non-cooperative countries must meet in order to gain access to Argentina's reinsurance services market, applied pursuant to SSN Resolution No. 35.615/2011[7] domestic services and service suppliers.[15] With respect to measure 5, Panama further claimed that this measure is inconsistent with Articles XVI:1 and XVI:2(a) of the GATS because Argentina restricts the number of foreign service suppliers and accords them treatment less favourable than that specified in its Schedule of Commitments.[16]

1.3. With respect to Argentina's obligations under the General Agreement on Tariffs and Trade 1994 (GATT 1994), Panama claimed that measures 2 and 3 are inconsistent with Article I:1 of the GATT 1994 because an advantage, favour, privilege, or immunity granted to products from cooperative countries is not accorded to like products from non-cooperative countries.[17] Panama also claimed that measure 3 is inconsistent with Article III:4 of the GATT 1994 because it places products imported from non-cooperative countries in a less favourable position than that of like domestic products.[18] Alternatively to its claim under Article III:4, Panama claimed that measure 3 is inconsistent with Article XI:1 of the GATT 1994 because this measure establishes limiting conditions on the import/export of products from/to non-cooperative countries.[19]

1.4. Argentina requested that the Panel reject Panama's claims in their entirety.[20] In the alternative, in the event that the Panel were to find that these measures are inconsistent with the GATS provisions cited by Panama, Argentina invoked: Article XIV(c) of the GATS with respect to measures 1, 2, 3, 4, 7, and 8[21]; Article XIV(d) of the GATS with respect to measures 2, 3, and 4[22]; and paragraph 2(a) of the GATS Annex on Financial Services with respect to measures 5 and 6.[23] Moreover, in the event that the Panel were to find that Argentina acted inconsistently with Articles I:1, III:4, and XI:1 of the GATT 1994 with respect to the measures in question, Argentina argued that these measures are justified pursuant to Article XX(d) of the GATT 1994.[24] Argentina maintained that the measures at issue are defensive tax measures that are in line with the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum), and that they serve to protect Argentina's tax base by preventing tax evasion, tax avoidance, and fraud.[25] Argentina further contended that these measures serve to prevent concealment and laundering of money of criminal origin, that they are in line with the framework of the Financial Action Task Force (FATF)[26], and that they serve to protect investors and the soundness of the Argentine financial system.[27]

1.5. The Panel Report was circulated to Members of the World Trade Organization (WTO) on 30 September 2015. With respect to Panama's claims under the GATS, the Panel found that:

a. the GATS is applicable to all eight measures because there is trade in services, and the eight measures at issue are measures affecting trade in services within the meaning of Article I:1 of the GATS[28];

b. all eight measures are inconsistent with Article II:1 of the GATS because they do not accord, immediately and unconditionally, to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like services and service suppliers of cooperative countries[29];

c. measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS because they accord to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like Argentine services and service suppliers,

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[15] Panel Report, para. 3.1.b-d.
[16] Panel Report, para. 3.1.e.
[17] Panel Report, para. 3.1.b-c.
[18] Panel Report, para. 3.1.c.
[19] Panel Report, para. 3.1.c.
[20] Panel Report, para. 3.3.
[21] Panel Report, para. 7.526.
[22] Panel Report, para. 7.765.
[23] Panel Report, para. 7.781.
[24] Panel Report, para. 7.1070.
[25] Panel Report, paras. 7.527 and 7.534.
[26] Panel Report, para. 7.534.
[27] Panel Report, paras. 7.786 and 7.789.
[28] Panel Report, para. 8.2.a.
[29] Panel Report, para. 8.2.b.

in the relevant services and modes of supply in which Argentina has undertaken specific commitments[30];

d.

Oman, and Saudi Arabia each notified its intention to appear at the oral hearing as a third participant.[46]

    iv. whether the Panel erred in its interpretation and application of the term "treatment no less favourable" (raised by Panama);

c. with respect to the Panel's application of Article XIV(c) of the GATS to measures 1, 2, 3, 4, 7, and 8:

    i. whether the Panel erred by failing to focus its analysis on the relevant aspects of the measures that gave rise to the findings that these measures are inconsistent with Article II:1 of the GATS (raised by Panama);

    ii. whether the Panel erred in finding that these measures are designed to secure compliance with the relevant Argentine laws or regulations (raised by Panama); and

    iii. whether the Panel erred in finding that these measures are "necessary" to secure compliance with the relevant Argentine laws or regulations (raised by Panama); and

d.

or (ii) initiate with Argentina the negotiations necessary for concluding such an agreement and/or convention.[58]

expenditure and profits shall be allocated to the fiscal year in which they accrue (accrual rule).[95] However, pursuant to measure 4, expenditure for transactions between an Argentine taxpayer and a person of a non-cooperative country must be allocated to the fiscal year in which payment for the transaction has been executed (payment received rule).[96] This allocation of expenditure does not necessarily occur in the same fiscal year as that in which the payment obligation accrues.[97]

5.16. While the expenditure incurred may be deducted from the taxpayer's tax base under both the accrual rule and the payment received rule, these rules differ with respect to the time at which such expenditure may be allocated and deducted, i.e. the time at which the expenditure has been accrued (accrual rule), on the one hand, or the time at which the payment has been executed (payment received rule), on the other hand.[98]

financing offences in accordance with the criteria defined by the FATF (in the case of branches, such proof relates to the parent company).[104]

5.21. With respect to the first requirement above, if a foreign supplier of reinsurance services operating via supply mode 1 or 3 does not prove that it has been incorporated and registered in a cooperative country, points 18 and 20(f), as amended, provide that such supplier must prove that it is subject to the control and supervision of a body (i) that fulfils functions similar to those of the N0(Inuance sSuervi-8.76iityand s(i)-6.ie Wwthe whmratndumaf tudedfooperatirnand sexchang of tn oremtirnaas 6.8(ibeen is)-6.

cooperative countries.[113]

Communication "A" No. 4662[121], it must obtain prior authorization from the Argentine Central Bank, irrespective of compliance with the relevant requirements in Argentine legislation. This is not the case for repatriation of direct investment by natural or legal persons residing, incorporated, or domiciled in a cooperative country, which, in principle, need not obtain prior authorization from the Argentine Central Bank so long as they comply with the requirements laid down in Argentine law.[122]

5.10 The measures challenged by Panama

5.27. The table below sets out the eight specific measures at issue in this dispute and the claims raised by the parties on appeal with respect to each measure.

Measure	Description	Claims and defences on appeal
1	Withholding tax on payments of interest or remuneration	- Article II:1 of the GATS - Article XIV(c) of the GATS
2	Presumption of unjustified increase in wealth	- Article II:1 of the GATS - Article XVII of the GATS - Article XIV(c) of the GATS
3	Transaction valuation based on transfer pricing	- Article II:1 of the GATS - Article XVII of the GATS - Article XIV(c) of the GATS
4		

5.11 International instruments relevant to Argentina's defence

5.28. In the event that the Panel were to find the measures at issue to be inconsistent with the provisions of the GATS cited by Panama, Argentina invoked Article XIV(c) thereof and paragraph 2(a) of the GATS Annex on Financial Services to justify these measures.[123] Argentina invoked the exception in Article XIV(c) of the GATS to justify measures 1, 2, 3, 4, 7, and 8[124], maintaining that these measures are "necessary to secure compliance" with Argentina's tax laws or regulations within the meaning of Article XIV(c), including the "prevention of deceptive and fraudulent practices" under subparagraph (i) commonly associated with transactions with non-cooperative countries.[125] Specifically, Argentina stated before the Panel that its measures were taken to counter harmful tax practices, such as tax evasion, tax avoidance, fraud, concealment and laundering of money of criminal origin, and terrorist financing.[126] Argentina invoked paragraph 2(a) of the GATS Annex on Financial Services to justify measures 5 and 6[127], maintaining that these measures had been taken for prudential reasons, including the protection of financial consumers and investors from the distortions, manipulations, and abusive situations arising out of a lack of an effective exchange of information, as well as the preservation of the

6 ANALYSIS OF THE APPELLATE BODY

6.1 Article II:1 and Article XVII of the GATS – "Likeness"

6.1. Argentina appeals the Panel's findings that the services and service suppliers at issue are "like" under both Article II:1 and Article XVII of the GATS. With respect to Article II:1, Argentina requests us to reverse the Panel's finding that services and service suppliers located in non-cooperative countries are "like" services and service suppliers located in cooperative countries[133], and, consequently, to reverse the Panel's conclusion that measures 1-8 are inconsistent with Article II:1 of the GATS.[134] With respect to Article XVII, Argentina requests us to reverse the Panel's finding that services and service suppliers located in non-cooperative countries are "like" services and service suppliers of Argentine origin[135], and, consequently, to modify the legal basis for the Panel's conclusion that measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS.[136]

6.1.1 The Panel's findings under Article II:1 of the GATS

6.2. Before the Panel, Panama alleged that all eight measures at issue are inconsistent with Article II:1 of the GATS. Panama argued that the measures provide for a distinction based exclusively on the origin of the service supplier, and that, therefore, there was no need for a casuistic demonstration that the services and/or service suppliers are "like", and that "likeness" could be presumed.[137] The Panel began its analysis of whether the services and service suppliers of cooperative countries and non-cooperative countries are "like" by reviewing the interpretation by previous panels of the phrase "like services and service suppliers" in Articles II:1 and XVII:1 of the GATS. In particular, the Panel referred to the following statement of the panel in *China – Publications and Audiovisual Products*:

> 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.

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."[141]

6.5. The Panel explained that it would take as a starting point the competitive relationship between services and service suppliers of non-cooperative countries, on the one hand, and services and service suppliers of cooperative countries, on the other hand. The Panel noted that the distinction between non-cooperative countries and cooperative countries was reflected in each of the eight measures at issue by virtue of the provisions of Decree No. 589/2013.[142] The Panel then noted that the parties disagreed as to whether the presumption of likeness based on origin that had been applied by panels under the GATT 1994 could also be applied under the GATS. The Panel considered that, in order to apply this presumption under the GATS, it should first examine "whether the difference in treatment between cooperative and non-cooperative countries is due to origin".[143] If it concluded that this difference "is not due exclusively to origin", it would continue its analysis by examining "whether there is also another factor or 'other factors' linked to the difference in treatment between services and service suppliers of non-cooperative countries and services and service suppliers of cooperative countries".[144] The Panel reasoned:

> [T]he mere fact that differential treatment is accorded depending on whether or not a country is included in a list is closely linked to origin. This implies that any service supplier based in Panama – or in any other country considered by the Argentine authorities to be a cooperative country – is subject to the same treatment because it is based in that country. We therefore consider that the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is due to origin. However, even though the origin rule is applied in the form of a list of cooperative countries, it is not origin *per se* which determines that certain countries are on the list and others not, but the regulatory framework inextricably linked to such origin. This raises a doubt as to whether the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is based *exclusively* on origin, as asserted by Panama, or whether there is also some "other factor" explaining the difference in treatment, as we shall consider below.[145]

6.6. The Panel stated that, given that there were doubts regarding the existence of "other factors", it would consider whether there were such other factors relevant to the examination of the likeness of the services and service suppliers in this dispute.[146] In particular, the Panel considered the possibility of Argentina having access to tax information on foreign suppliers as an "other factor" in this dispute and set out to assess whether this had an impact on the competitive relationship of the services and service suppliers concerned.[147] The Panel further held that it was for Argentina to prove that this "other factor" affects the competitive relationship between services

> Accordingly, having concluded that the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is due to origin, we consider that Panama has proved that services and service suppliers of cooperative and non-cooperative countries are like by reason of origin.[151]

6.8. On that basis, the Panel found that, for purposes of Panama's claims under Article II:1 of the GATS, the services and service suppliers of cooperative countries are "like" the services and service suppliers of non-cooperative countries.[152]

6.1.2 The Panel's findings under Article XVII of the GATS

6.9. With respect to Article XVII of the GATS, Panama alleged that measures 2, 3, and 4 are inconsistent with Article XVII because they accord services and service suppliers of non-cooperative countries treatment less favourable than that accorded by Argentina to its domestic like services and service suppliers. Argentina did not present specific arguments in relation to Article XVII, but referred to its arguments presented under Article II:1 of the GATS.[153]

6.10. Having found that Argentina has assumed specific commitments in the sectors and modes of supply cited by Panama in respect of measures 2, 3, and 4[154], and that these measures affect the supply of services, the Panel turned to consider whether the relevant services and service suppliers of non-cooperative countries are like Argentine services and service suppliers. In that respect, the Panel noted that both Argentina and Panama had indicated that their arguments on "likeness" developed under Article II:1 were also relevant under Article XVII of the GATS.

6.11. At the outset of its analysis, the Panel recalled its conclusion under Article II:1 that the services and service suppliers of cooperative countries are like the services and service suppliers of non-cooperative countries.[155] The Panel further noted that, while under Article II:1 the services and service suppliers being compared are those of cooperative and non-cooperative countries, in the case of Article XVII, the appropriate comparison for determining "likeness" must be made between Argentine services and service suppliers, on the one hand, and services and service suppliers of non-cooperative countries, on the other hand.[156]

6.12. The Panel then noted that the treatment provided for in the relevant measures is the same for transactions between Argentine taxpayers and Argentine service suppliers as it is for transactions between Argentine taxpayers and service suppliers in cooperative countries[157], and that Argentina had agreed that Argentine services and service suppliers are comparable to services and service suppliers of cooperative countries.[158] The Panel then referred back to its finding under Article II:1 that services and service suppliers of cooperative countries are like those of non-cooperative countries, and held that this finding could be transposed to Article XVII. On this basis, the Panel concluded that Argentine services and service suppliers are "like" the services and service suppliers of non-cooperative countries for purposes of the analysis under Article XVII of the GATS.[159]

6.1.3 Claims and arguments on appeal

6.13. With respect to the Panel's finding of "likeness" under Article II:1 of the GATS, Argentina alleges that the Panel erred in its interpretation of Article II:1 in finding that services and service suppliers may be considered "like" when a measure provides for differential treatment "exclusively on the basis of origin".[160] Moreover, Argentina raises, as an independent basis on which we should reverse the Panel's finding of inconsistency with Article II:1, the claim that the Panel erred by

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[151] Panel Report, para. 7.185.
[152] Panel Report, para. 7.186.
[153] Panel Report, para. 7.444.
[154] Panel Report, para. 7.470.
[155] Panel Report, para. 7.482 (referring to Panel Report, paras. 7.185-7.186).
[156] Panel Report, para. 7.483.
[157]

making a *prima facie* case of "likeness" under Article II:1 of the GATS for Panama in the absence of evidence and legal argument presented by Panama.[161]

6.14. Alternatively, in the event that we consider that a presumption of likeness is warranted when a measure provides for differential treatment "exclusively on the basis of origin", Argentina alleges that the Panel erred in finding that the services and service suppliers at issue are "like" in the absence of a finding that the measures at issue provide for differential treatment "exclusively on the basis of origin".[162] In that event, Argentina further alleges, first, that the Panel erred in placing the burden on Argentina to demonstrate that the services and service suppliers at issue were *not* "like", rather than holding Panama to its burden of establishing that the services and service suppliers at issue are "like"[163]; and, second, that the Panel acted inconsistently with Article 11 of the DSU in finding that the services and service suppliers at issue are "like" under Article II:1 of the GATS. In the event that we find that the Panel failed to undertake an objective

favourable", we note that Article II:3 refers to "advantages".[178] An "advantage" is "[t]he fact or state of being in a better position with respect to another".[179] Being in a better position as compared to another is closely related to the concept of competition. This suggests that, also in the context of Article II of the GATS, the determination of "likeness" of services and service suppliers must focus on the competitive relationship of the services and service suppliers at issue. We note that, similarly, with regard to Articles I:1 and III:4 of the GATT 1994, the Appellate Body has held that, notwithstanding their textual differences, both of these provisions are concerned with "prohibiting discriminatory measures" and ensuring "equality of competitive opportunities" between products that are in a competitive relationship.[180]

6.25. Thus, we consider that the concept of "likeness" of services and service suppliers under Articles II:1 and XVII:1 of the GATS is concerned with the competitive relationship of services and service suppliers. This is consonant with the Appellate Body's understanding of "likeness" in the ambit of trade in goods. In EC – Asbestos, the Appellate Body held that the word "like" in Article III:4 of the GATT 1994 is to be interpreted as applying to products that are in a competitive relationship, and that therefore a determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.[181] As the Appellate Body noted, "[i]f there is – or could be – no competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic production."[182]

6.26. Further, in the context of trade in goods, the Appellate Body noted that there is a spectrum of degrees of "competitiveness" or "substitutability" of products in the marketplace.[183] The assessment of such a competitive relationship requires a market-based analysis. The Appellate Body also stated that not all products that are in some competitive relationship are "like products", and that it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word "like" falls.[184] In our view, the same is true with respect to "like services and service suppliers", and, thus, the likeness of services and service suppliers can only be determined on a case-by-case basis, taking into account the specific circumstances of the particular case.

6.27. We note that what is being compared for "likeness" is different in the context of trade in goods and trade in services. Articles II:1 and XVII:1 of the GATS refer to "like services and service suppliers". In contrast, Articles I:1, III:2, and III:4 of the GATT 1994, for instance, refer to "like products", but they do not include a reference to "like producers". The term "service supplier" is defined in Article XXVIII(g) of the GATS as "any person that supplies a service". With respect to the "supply of a service", Article XXVIII(b) stipulates that it "includes the production, distribution, marketing, sale and delivery of a service". Accordingly, this term covers a broad array of service-related activities. The word "service" is not defined in the GATS itself.[185]

6.28. Next, we consider the reference to "services and service suppliers". We note that the panel in EC – Bananas III addressed this reference and held that "to the extent that entities provide

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[178] We note that, similarly, Article I:1 of the GATT 1994 also refers to "any advantage".

[179]

Article XVII:1 of the GATS. We recall that the Appellate Body has clarified that the term "like" must be interpreted in the light of its context and the object and purpose of the agreement in which the relevant provision appears.[195] As we have set out above, we consider that the analysis of "likeness" serves the same purpose in the context of both trade in goods and trade in services, namely, to determine whether the products or services and service suppliers, respectively, are in a competitive relationship with each other. Thus, to the extent that the criteria for assessing "likeness" traditionally employed as analytical tools in the context of trade in goods are relevant for assessing the competitive relationship of services and service suppliers, these criteria may be employed also in assessing "likeness" in the context of trade in services, provided that they are adapted as appropriate to account for the specific characteristics of trade in services. In particular, we note that Articles II:1 and XVII:1 of the GATS refer to likeness of "services and service suppliers", and, accordingly, these criteria may be applied both in regard to the service and in regard to the service supplier in a holistic analysis as indicated above.

6.32. For example, the characteristics of services and service suppliers or consumers' preferences in respect of services and service suppliers may be relevant for determining "likeness" under the GATS. We note that, in this vein, the panel in EC – Bananas III considered the "nature and the characteristics"[196] of the service transactions at issue, which may be seen as an adaptation of the original criterion in Border Tax Adjustments – namely, properties, nature and quality. Furthermore, with respect to the criterion of tariff classification, the classification and description of services under, for instance, the UN Central Product Classification (CPC) could be relevant.[197] The panel in China – Electronic Payment Services undertook another such adaptation in considering evidence that the service suppliers at issue "describe[d] their business scope in very similar terms", and that this suggested that "these suppliers compete[d] with each other in the same business sector".[198] This may be seen as adaptations of the criteria of "properties, nature and quality", "end-use", and/or "consumer preferences". As in the context of trade in goods, however, we equally consider that the criteria for analysing "likeness" of services and service suppliers are simply analytical tools to assist in the task of examining the relevant evidence, and that they are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of services and service suppliers as "like".[199]

6.33. We further note that different modes of supply as defined in Article I:2 exist only in trade in services under the GATS, and not in trade in goods under the GATT 1994, and, accordingly, the analysis of "likeness" of services and service suppliers may require additional considerations of whether or how this aid rctq686(n)16411.1(l)omil45 .00.4(lie)6.8(r)4.5(s)5.ah oon686(n)(n686(c)82.8(o)82.)6.5(Tc .0709 Tw [(s)5r) above, or whether a complainant may establish " likeness" by demonstrating that the measure at issue makes a distinction between services and service suppliers based exclusively on origin (we refer below to the latter as the "presumption approach").

suppliers may render more complex the analysis of whether or not a distinction is based exclusively on origin, in particular, due to the role that domestic regulation may play in shaping, for example, the characteristics of services and service suppliers and consumers' preferences.

6.40. In addition, we note the principles for determining origin set out in Article XXVIII of the GATS. The definitions of the various terms set out in Article XXVIII(f), (g), and (k) through (n) of the GATS provide an indication of the possible complexities of determining origin and whether a distinction is based exclusively on origin in the context of trade in services.[208] An additional layer of complexity stems from the existence of different modes of supply and their implications for the determination of the origin of services and service suppliers.

6.41. While these complexities do not, as a matter of principle, render the presumption approach inapplicable in the context of trade in services, the scope of this presumption is more limited than in trade in goods. Whether and to what extent such complexities have an impact on the determination of whether a distinction is based exclusively on origin in a particular case will depend on the nature, configuration, and operation of the measure at issue and the particular claims raised.

6.42. Regarding the burden of proof in establishing "likeness" relying on the presumption approach, we note that, in keeping with the general rule that the burden of proof rests upon the party that asserts the affirmative of a particular claim[209], the complainant bears the burden of making a *prima facie* case that a measure draws a distinction between services and service suppliers based exclusively on origin. In this regard, a panel is required to assess objectively the evidence and arguments forming the basis of such a contention.

6.43. If a panel finds that the complainant has failed to make a *prima facie* case that a measure provides for differential treatment based exclusively on origin, then the panel must engage in an analysis of "likeness" of services and service suppliers on the basis of the relevant criteria adapted to trade in services, as addressed above, before it may proceed to the analysis of less favourable treatment.

6.44. In contrast, if a complainant succeeds in making a *prima facie* case that a measure draws a distinction between services and service suppliers based exclusively on origin, and this is not rebutted by the respondent, the services and service suppliers at issue may be presumed to be "like", and a panel may proceed with the analysis of less favourable treatment without the need to assess the competitive relationship of the services and service suppliers at issue based on the relevant criteria as adapted to trade in services.

6.45. Once a complainant has made a *prima facie* case that a measure draws a distinction between services and service suppliers based exclusively on origin, the respondent may rebut this by demonstrating that origin is indeed not the exclusive basis for the distinction drawn by the measure between the services and service suppliers at issue. Alternatively, or in addition, a respondent may seek to rebut the *prima facie* case based on the presumption approach by introducing arguments and evidence relating to the criteria for determining "likeness" adapted to trade in services, as explained above, demonstrating that a certain factor affects the relevant criteria for establishing "likeness", and that it therefore has an impact on the competitive relationship between the services and service suppliers. In the event of a successful rebuttal based on either option above, a panel cannot proceed to a finding of "likeness" on the basis of such a presumption. Rather, it must engage in an analysis of "likeness" considering the relevant criteria in order to determine whether the services and service suppliers at issue are "like" before proceeding to an analysis of less favourable treatment.

6.1.6 Argentina's claims on appeal

6.46. With respect to Article II:1 of the GATS, Argentina requests us to reverse the Panel's finding that services and service suppliers located in non-cooperative countries are "like" services and

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[208] See Article XXVIII of the GATS defining, *inter alia*, the terms "service of another Member", "service supplier", "natural person of another Member", "juridical person", and "juridical person of another Member".

[209] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 335.

service suppliers located in cooperative countries[210] and, consequently, to reverse the Panel's conclusion that measures 1-8 are inconsistent with Article II:1 of the GATS.

6.52. We are not persuaded by Argentina's contention that the relevance of criteria associated with service suppliers in the determination of "likeness" in trade in services[221] compels the conclusion that the presumption approach cannot be applied in trade in services. We have found non-cooperative countries inherent in the eight measures at issue is based *exclusively* on origin, or "whether there is also some 'other factor' explaining the difference in treatment".[225]

6.57. Furthermore, the Panel considered that the possibility for Argentina to have access to tax information could be taken into account in the Panel's "likeness" analysis, "provided that it is reflected in the competitive relationship between services and service suppliers of cooperative and non-cooperative countries".[226] The Panel stated that it was for Argentina to prove 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".[227]

6.58. Ultimately, the Panel considered that the factual situation in the present case made it

6.62. We note Panama's additional argument that the possibility of Argentina having access to tax information on foreign suppliers was merely the "reason" underlying the distinction drawn on the basis of origin. Panama contends that there will always be a reason why Members differentiate in their laws or regulations between services and service suppliers of different origin.[233] Panama further argues that the existence of policy rationales underlying origin-based distinctions does not alter the fact that the measures on their face differentiate exclusively on the basis of origin.[234]

6.63. Assuming *arguendo* that, as Panama suggests, Panama indeed made a *prima facie* case that the distinction between cooperative and non-cooperative countries in the measures at issue is based exclusively on origin, we consider that, because Argentina had introduced arguments and evidence in order to demonstrate that the possibility of access to tax information had an impact on the competitive relationship, the Panel would have been required to assess whether Argentina had thus successfully rebutted such *prima facie* case based on the presumption approach. In this respect, we note that Argentina had presented to the Panel arguments and evidence in support of its contention that the possibility of access to tax information affected the criteria for establishing or that countered Panama's *prima facie* showing of "likeness", it was for Argentina to establish what those "other factors" were, and how they would undermine Panama's showing of "likeness".[241]

6.67. We have addressed above the allocation of the burden of proof under the presumption approach. In the light of our previous finding that the Panel erred in its "likeness" analysis, we consider it unnecessary to address separately Argentina's claim regarding the burden of proof.

6.68. Argentina further claims that the Panel committed legal error by making a *prima facie* case