ARGENTINA – MEASURES RELATING TO TRADE IN GOODS AND SERVICES

(WT/DS453)

THIRD PARTY WRITTEN SUBMISSION

OF THE UNITED STATES

June 4, 2014

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I. INTRODUCTION

1. The United States makes this third party submission to address certain systemic and interpretive issues in this dispute. In the sections that follow, we address issues relating to the scope of the *General Agreement on Trade in Services* (GATS) under Article I.1, the interpretation of "like services and service suppliers" under Articles II.1 and XVII, and the interpretation of the prudential exception under Article 2(a) of the Annex on Financial Services. The United States may address additional issues in the U.S. oral statement at the third-party session of the Panel's first substantive meeting with the parties.

II. INTERPRETATIVE QUESTIONS RELATING TO THE SCOPE OF THE GATS

2. Article I of the GATS is entitled "Scope and Definition", and states, in paragraph 1, that "[t]his Agreement applies to measures by Members affecting trade in services". Paragraphs 2 and 3 then define the modes of service supply and the types of services (any service in any sector except services supplied in the exercise of governmental authority) that constitute the whole of "trade in services" as covered by the GATS. Thus, three elements must be demonstrated for a measure to fall within the scope of the GATS: (1) a "service" that is not supplied in the exercise of governmental authority; (2) "trade" in that service through one of the four modes described in Article I.2; and (3) the measure at issue "affects" trade in that service. The term "affect" has been and should be interpreted broadly in the context of Article I.1 of the GATS, similar to its interpretation in Article III of the GATT, to include any measure that has "an effect on" trade in services.[1] Given the language of Article I.1, the Appellate Body in *EC – Bananas III* found that "there is nothing at all in these provisions to suggest a limited scope of application for the GATS."[2]

3. Argentina argues that Panama has failed to establish a *prima facie* case that the challenged measures fall within the scope of the GATS under Article I.1 because Panama has not

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[1] *EC – Bananas III (AB)*, para. 220.

[2] *EC – Bananas III (AB)*, para. 220.

demonstrated that the services in question are in fact provided under one of the four modes of supply.[3] While Argentina acknowledges that the Appellate Body has interpreted Article I.1 broadly with respect to measures "affecting trade in services", Argentina asserts that there is no precedent for a WTO Member to challenge a measure under the GATS based on its theoretical effect on potential service suppliers, much less potential service suppliers from Members other than the complaining party.[4]

4. In the U.S. view, Argentina's argument that Panama must identify actual services and service suppliers in or to the Argentine market being affected by the challenged measures would import requirements into Article I.1 that are not there. The Article defines the scope of the GATS in terms of measures "affecting trade", rather than actual services and service suppliers. The disciplines echo this broad applicability. To take an example, Article XVII of the GATS applies "in respect of all measures affecting the supply of services" without regard as to whether the complaining Member is actually engaged in trade, or seeking to engage in trade, in the Member applying the measure. It calls instead for a consideration of whether a measure "modifies the conditions of competition in favour of services and service suppliers of the Member compared to like services and services suppliers *of any other Member*."[5] Thus, the centerpiece of the analysis is the conditions of competition, and not the effects on actual services suppliers.

5. It is instructive that, in analyzing the national treatment obligation under Article III:4 of GATT 1994, the Appellate Body found:

> The analysis of whether imported products are accorded less favourable treatment requires a careful examination "grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'", including of the implications of the measure for the conditions of competition between imported and like domestic products. This analysis need not be based on empirical evidence as to the actual

[3] Argentina's First Written Submission, para. 143.

[4] Argentina's First Written Submission, para. 143-145.

[5] Emphasis added.

> effects of the measure at issue in the internal market of the Member concerned. Of course, nothing precludes a panel from taking such evidence of actual effects into account.[6]

6. Panels have similarly focused on the measures, rather than the actual supply of services, in determining "likeness" under the GATS.[7] The error in Argentina's approach can be seen from the fact that it would make actual supply of services an initial requirement, rather than one element of evidence. In fact, if the GATS applied only where suppliers were actually supplying or attempting to supply services, the very worst barriers – those so severe as to discourage even attempted supply of services -- would be exempt from the disciplines. Thus, the Panel should reject the view that a Member may challenge measures under GATS only when there is evidence that its suppliers are actually trading, or attempting to trade, in services with the Member in question.

III. INTERPRETATIVE QUESTIONS RELATING TO "TREATMENT NO LESS FAVOURABLE" UNDER ARTICLES II:1 AND XVII OF THE GATS

7. Articles II.1 and XVII of the GATS require WTO Members to apply MFN treatment and national treatment, respectively, to "like services and service suppliers". In the context of a national treatment analysis, Article XVII.3 states that treatment will be considered less favorable if it modifies the conditions of competition in favor of domestic services or service suppliers compared to like foreign services or service suppliers. As such, the GATS applies where "like services and service suppliers" are in a competitive relationship, which therefore should be the starting point for an analysis of "likeness". Such an analysis should be made on a case-by-case basis, taking into account both the particular services and service suppliers at issue. This is consistent with the panel's approach in *China – EPS*[8], and with the approach taken in past

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[6] *Thailand – Cigarettes (Philippines) (AB)*, para. 129.

[7] See, e.g., *China – Publications and Audiovisuals (Panel)*, paras. 7.1284-7.1285.

[8] *China – EPS (Panel)*, paras. 7.700-7.702.

reports by panels and the Appellate Body analyzing like products in the GATT 1994 and TBT contexts.[9]

A. Establishing a Prima Facie Case: Differentiation Based Exclusively on Origin

8. Relying on the Appellate Body's reasoning in *China – Publications and Audiovisual Products*, Panama asserts that where a measure applies to certain services and/or service suppliers only *because of their origin*, and when there are or may be suppliers that are "the same in all material respects except for origin," it must be assumed that there is likeness between the services or service suppliers affected by the measure and domestic or other foreign services or service suppliers not affected by the measure.[10]

9. The panel in *China – Publications and Audiovisual Products* found:

> 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".[11]

10. Consistent with these findings, the United States considers that there is a difference between treatment based on origin alone, and treatment based on origin-neutral factors related to services or service suppliers of a particular Member or Members. For example, if a Member simply bans cross-border construction services supplied from certain WTO Members in its regulations, this differential treatment could be said to be based exclusively on origin, and the

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[9] See, e.g., *EC – Asbestos (AB)*, paras 99; *Philippines – Distilled Spirits (AB)*, para. 119; and *US – Clove Cigarettes*, para. 111.

[10] Panama's First Written Submission, para. 4.17, quoting *China – Publications and Audiovisual Products (Panel)*, para. 7.975.

[11] *China – Publications and Audiovisual Products* (Panel), para. 7.975.

reasoning in *China – Publications and Audiovisual Products* would support a finding that the services are like. However, if a country determines that it will only allow construction service suppliers with experience using a particular type of material, and that material is only found in specific countries, this would not be differential treatment based *exclusively* on origin. In this circumstance a panel would need to continue the analysis to determine whether the service suppliers at issue were in fact like, based on an analysis of their competitive relationship, as described above.

11. Therefore, to demonstrate "likeness" using the reasoning in *China – Publications and Audiovisual Products*, a complaining party would need to show that origin was the sole factor in determining application of differential treatment. The United States takes no position as to whether Panama has made such a showing in this dispute.

B. Identifying "Like" Services and Service Suppliers

12. Related to its assertion that Article I.1 limits the scope of the GATS to services actually supplied to a WTO Member, Argentina also argues that a complaining party must specifically identify its own like service suppliers to demonstrate less favorable treatment. In support of this assertion, Argentina cites panel and Appellate Body reports containing findings based on a comparison between the services or products from the complaining party and those of other Members.

13. As stated above, in the U.S. view, although the treatment of the complaining Member's actual services and service suppliers may provide evidence relevant to the existence of "less favorable" treatment analysis, it is not necessary to identify specific services or service suppliers. Rather, a panel may refer to the classes of services and service suppliers covered by the challenged measure to evaluate whether the measure accords differential treatment to domestic services or service suppliers as compared to like foreign services and service suppliers. This is particularly so in the case of alleged *de jure* discrimination, as Panama alleges here.

C. Analyzing "Likeness" of Services and Service Suppliers

14. The issue before the panel in this dispute with respect to likeness is whether the regulatory framework in a service supplier's home jurisdiction can render two services or service suppliers not "like" for purposes of Article I.1 or XVII of the GATS. In the U.S. view, this may be the case if the regulations in question affect the supply of the service in the relevant market.

15. To take an example, Members may apply different regulations to different types of financial entity, and limit the types of services that each such entity may supply. It may be the case that one Member allows supply of a particular financial service by a type of entity that does not exist under a second Member's regulatory regime. If there were a WTO dispute regarding the second Member's treatment of the first Member's distinct type of entity, it might be the case that the second Member's regulatory system recognized no type of entity "like" the first Member's entity. The panel would need to consider the possibility that there were accordingly no like services for comparison purposes.

16. Even if the two services were in direct competition and could be considered like, however, the United States considers that the difference in regulatory treatment of the two suppliers may nonetheless render the two service suppliers unlike. As the panel in *China – EPS* stated, the fact that two or more service suppliers provide the same service may give rise to a presumption that the service suppliers themselves are also "like". But this presumption may be overcome if the responding party demonstrates that the service suppliers are not like, despite the likeness of the services provided.

17. Given a difference in regulatory treatment by their home country authorities, it may be that a Member complained against views the two suppliers as unlike and accords differential treatment on that basis. Where such a difference in regulation affects the service suppliers *as service suppliers*, in that the regulations affect how they supply the service, a panel may find that those service suppliers are not like for purposes of Articles II.1 and XVII of the GATS. Other factors may also affect the likeness of service suppliers, such as their size or relevant experience.

18. In this dispute, Argentina argues that service suppliers should not be considered like domestic or other foreign service suppliers if they operate in countries with different regulatory

regimes with respect to transparency and information sharing because this affects Argentina's ability to determine the appropriate tax rate for services being supplied from these countries. In the U.S. view, this argument entails showing that this difference in regulatory regime affects the supply of the service such that the foreign service suppliers can no longer be considered like domestic service suppliers or service suppliers operating under more transparent regulatory regimes. The United States takes no position on whether the facts indicate such differences in this dispute.

IV. THE PRUDENTIAL EXCEPTION

19. Argentina also invokes Article 2(a) of the GATS Annex on Financial Services (the "prudential exception") as a defense to Panama's claims that Argentina maintains certain restrictions on access to its reinsurance and capital markets.

20. The prudential exception provides that:

> Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

21. It is well-recognized by WTO Members that the prudential exception preserves the broad discretion of national authorities to protect the financial system[12], and includes measures directed at individual financial institutions or cross-border financial services suppliers and measures to promote systemic stability.[13] The exception has not been defined or interpreted through any dispute settlement mechanism under the WTO.

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[12] In discussions on financial services, WTO Members recognized the broad scope of the prudential exception and chose not to limit expressly the measures Members may take for prudential reasons. *See* Council for Trade in Services, Special Session, 'Report of the Meeting Held on 3-6 December 2001' (S/CSS/M/13, 26 February 2002) paras. 267, 268, 271, 272, and 275.

[13] Although Argentina's submission at times refers to "precautionary *or* prudential" measures, it is the U.S. view that the term "prudential measures" includes "precautionary measures".

22. The last sentence of the prudential exception is designed to prevent abuse and requires only that any such measure is taken for prudential reasons. By its terms, and unlike other provisions in GATS and GATT, the exception establishes no other standard or qualification on a Member's ability to take measures for prudential reasons, such as requiring a "rational" relationship between the measure and the prudential reason, or a showing that the measure is "reasonable" or "necessary" to achieve a purpose.

23. WTO Members, including the U.S., have relied on this broad understanding of the prudential exception in establishing their financial services commitments at the WTO[14], and in incorporating the same language in their bilateral and multilateral trade and investment agreements.

[14] *See, e.g.*, Council for Trade in Services, Special Session, 'Report of the Meeting Held on 3-6 December 2001' (S/CSS/M/13, 26 February 2002), para. 267.